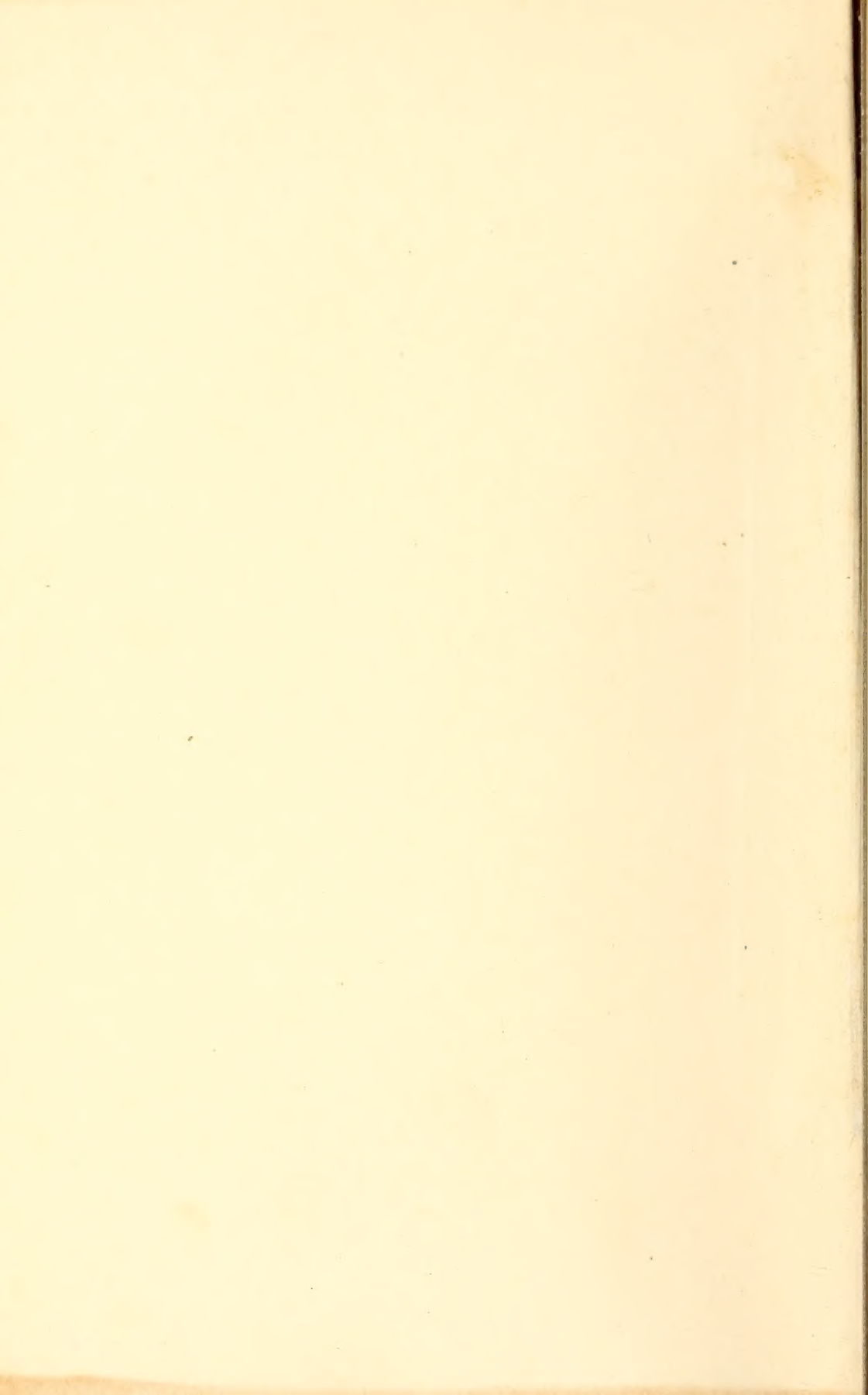


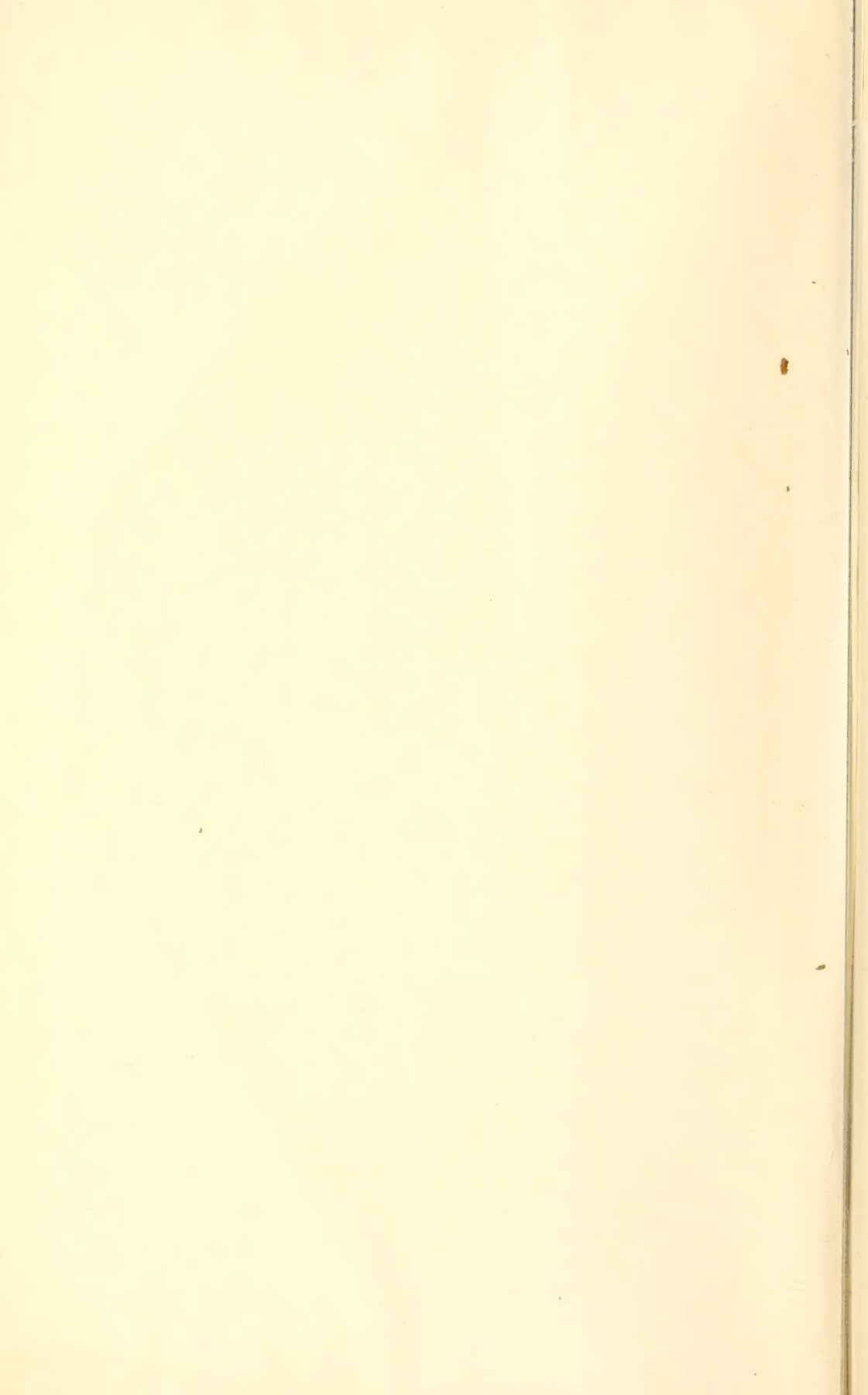


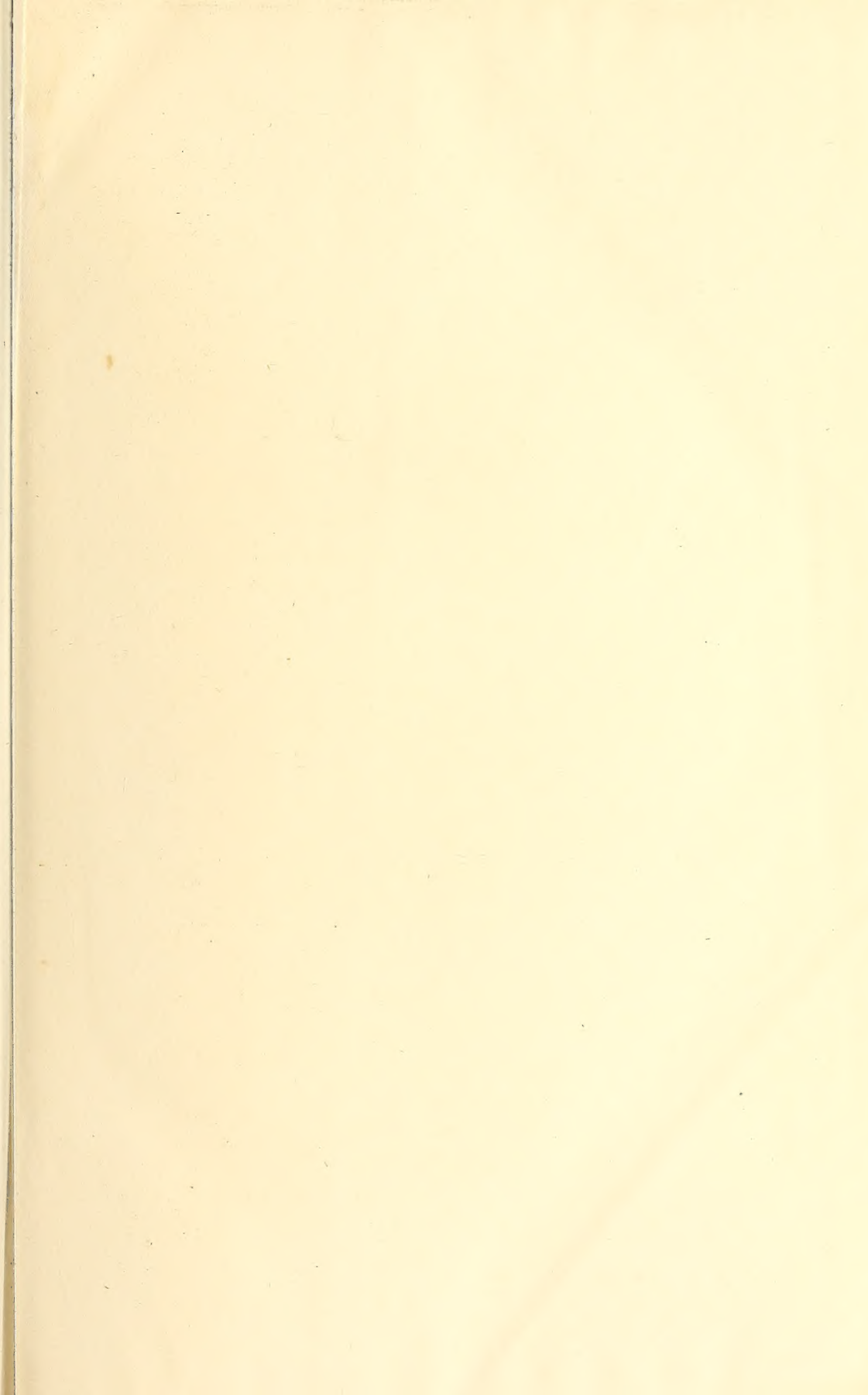
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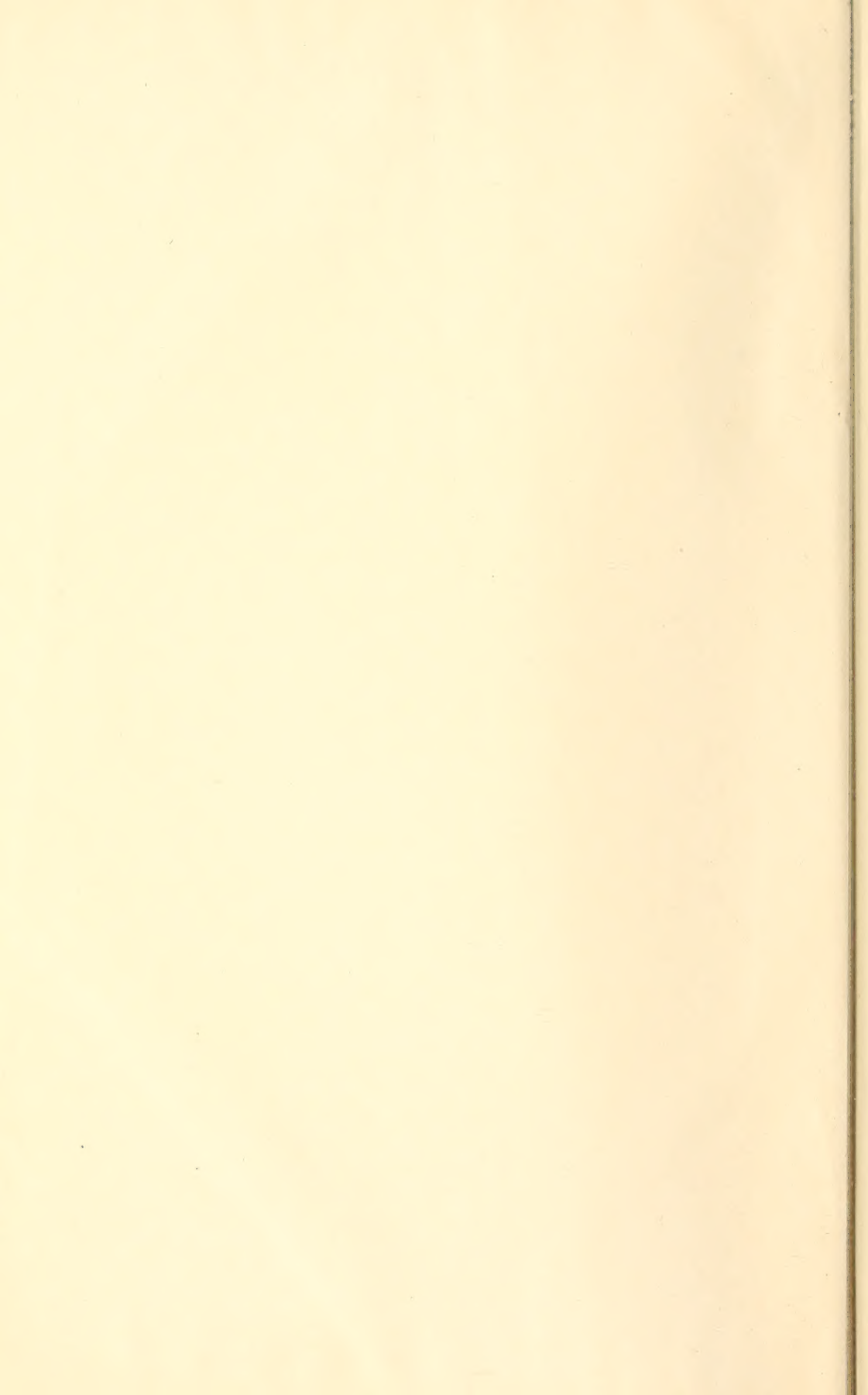




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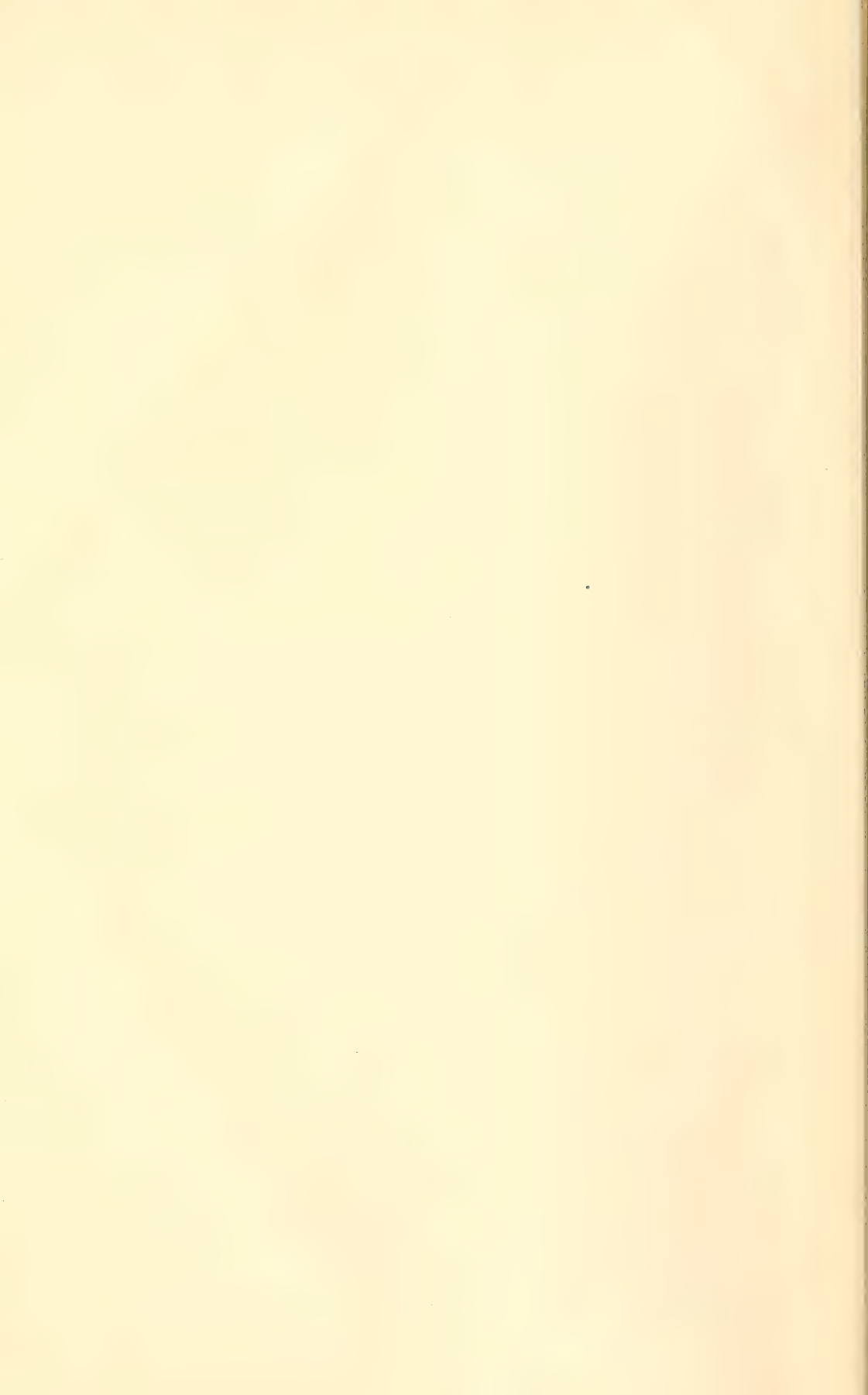
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THE
AMERICAN AND ENGLISH
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COUPONS.

By A. S. H. BRISTOW.

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I. DEFINITION. — A coupon is one of the interest certificates attached to transferable bonds and of which there are usually as many as there are payments to be made; so called because it is cut off when it is presented for payment, the word being derived from the French *couper*, to cut.¹

Not a Bill of Credit. — Coupons, or the bonds with which they are connected, though intended for circulation from hand to hand as a marketable commodity, are not bills of credit within the meaning of the prohibition contained in the first clause of the tenth section of the first article of the Constitution of the United States.²

Coupon Bonds. — Coupon bonds are negotiable bonds with coupons attached for each instalment of interest.³

A Coupon Note is a promissory note with coupons attached.⁴

II. FORM AND EXECUTION — 1. **In General.** — It has been said that it is entirely immaterial in what words coupons are expressed, provided they indicate by whom they are due and the amount and time of payment.⁵ Thus they may be issued in the form of promissory notes,⁶ bills of exchange,⁷ checks,⁸ or interest warrants.⁹

2. **Signature** — **Printed Facsimile of Maker's Autograph.** — It has been held that coupons may be signed by a printed facsimile of the maker's autograph, adopted by the maker for that purpose, though not expressly authorized by statute.¹⁰

Immaterial Variance of Signatures on Bond and Coupon. — It has been held also that if the bonds to which coupons are annexed are properly signed and sealed by the officers of the county issuing them, it is no defense to an action on the coupons that they are signed by only one of such county officers.¹¹

1. **Coupons Defined.** — Worcester's Dict.; Howard *v.* Bates County, 43 Fed. Rep. 276; McKenzie *v.* Montreal, etc., R. Co., 27 U. C. C. P. 224; Williams *v.* Moody, 95 Ga. 8.

Coupons are written contracts for the payment of a definite sum of money on a given day. Aurora City *v.* West, 7 Wall. (U. S.) 82; Cromwell *v.* Sac County, 94 U. S. 362.

2. **Coupons Not Bills of Credit.** — McCoy *v.* Washington County, 3 Wall. Jr. (C. C.) 389.

3. **Coupon Bond Defined.** — Benwell *v.* Newark, 55 N. J. Eq. 260.

4. **Coupon Note Defined.** — Williams *v.* Moody, 95 Ga. 8.

5. **Wording of Coupons Immaterial as General Rule.** — 2 Daniel on Negotiable Instruments, § 1493.

Discussions of the form and execution of coupon bonds and coupon notes will be found in such titles as MUNICIPAL SECURITIES; RAILROAD SECURITIES; and STATES.

6. **Coupon in Form of Promissory Note.** — Thus, in Thomson *v.* Lee County, 3 Wall. (U. S.) 327, the coupons were in the following language: "promises to pay to the bearer at the Continental Bank, in the city of New York, forty dollars interest on bond No. 1."

7. **Coupon in Form of Bill of Exchange.** — Queensbury *v.* Culver, 19 Wall. (U. S.) 83; Nashville *v.* First Nat. Bank, 1 Baxt. (Tenn.) 402; Nashville *v.* Potomac Ins. Co., 2 Baxt. (Tenn.) 296.

In Moran *v.* Miami County, 2 Black (U. S.) 722, the coupon read as follows: "The treasurer of said county will pay the legal holder hereof one hundred dollars on the first day of September, 1857, on presentation hereof, being for interest due on the obligation of said county, No. 16, given to the Peru and Indianapolis Railroad Company."

Where No Drawee Is Named. — In Mercer County *v.* Hubbard, 45 Ill. 140, the coupon was in the following form: "Six per cent. stock, Mercer county, state of Illinois, railroad bond No. 20. Pay the bearer sixty dollars on first day of July, 1863, interest to that date. John Cowden, chairman of board of supervisors of Mercer county."

8. **Coupon in Form of Check.** — In Arents *v.* Com., 18 Gratt. (Va.) 750, the coupon was in the following language: "Duncan, Sherman & Co., of New York, will pay the bearer thirty dollars, the half-yearly interest on the Wheeling bond 269, due 1 January, 1867."

9. **Interest Warrant.** — In Woods *v.* Lawrence County, 1 Black (U. S.) 386, the form was as follows: "County of Lawrence. Warrant No. 37. For thirty dollars. Being for six months' interest on bond No. —, payable on the first day of January, A. D. 1873, at the office of the Pennsylvania Railroad Company in the city of Philadelphia."

10. **Printed Facsimile of Maker's Autograph Sufficient.** — Pennington *v.* Baehr, 48 Cal. 565. See also McKee *v.* Vernon County, 3 Dill (U. S.) 210.

11. **Immaterial Variance of Signatures on Bond and Coupon.** — Thayer *v.* Montgomery County, 3 Dill (U. S.) 389.

Variant Signature Authorized in Bond. — In Phelps *v.* Lewiston, 15 Blatchf. (U. S.) 131, it was held that where commissioners have power to issue coupons accompanying bonds, the statement in the bonds that they have caused one of their number to sign the coupons is equivalent to a signing of the bonds by all of them.

Also in Blair *v.* Cuming County, 111 U. S. 363, it was held that where bonds purport on their face to be issued by the board of county

3. Seal. — Municipal bonds and coupons must be executed in the manner provided by statute, and accordingly, where the statute provided that the bonds should be under the hands and seals of commissioners, and neither the bonds nor the coupons were sealed, although the wording of the bonds showed that a seal was contemplated, it was held, in a suit upon the coupons, that the bonds and coupons were void.¹

4. Payee. — Great lack of harmony prevails among the authorities as to the validity of a coupon in which no payee is designated. In several decisions it has been held that if, in a coupon, no one is designated as payee, it will not constitute a valid, separate, and independent contract, and therefore cannot be made the ground of an action.² But a different rule is recognized by other authorities.³

5. Place of Payment. — The power of a municipal corporation to make any contract does not depend upon the place of performance, but upon its scope and object. It is, therefore, the prevailing rule that such a corporation may specify in its bonds and coupons some particular banking house outside of the state as the place of payment.⁴ But in *Illinois* it has been held that a county has no power, apart from statute, to issue bonds and coupons payable at any other place than at the county treasury.⁵

III. NEGOTIABILITY — 1. Bonds with Coupons Attached. — Coupons attached as interest warrants to state, municipal, or other corporation bonds, for the payment of money, as well as the bond to which they are attached, when they are payable to order and are indorsed in blank, or are made payable to the bearer, are transferable by delivery, and are subject to the same rules and regulations, so far as respects the rights and title of the holder, as negotiable bills of exchange and promissory notes.⁶

commissioners on behalf of the precinct, and are signed by the chairman of the board and attested by its clerk, who is also the clerk of the county, and are sealed with the seal of the county, and the coupons are signed by such clerk, and the bonds refer to the coupons as annexed, the bonds and coupons are issued by the county commissioners.

For a complete discussion of the question of signing bonds and coupons by counties and municipal corporations, generally, see the title MUNICIPAL SECURITIES.

1. Sealing of Bond and Coupons. — *Avery v. Springport*, 14 Blatchf. (U. S.) 272.

2. View that Coupons Are Invalid Without Payee Named. — *Enthoven v. Hoyle*, 13 C. B. 392, 76 E. C. L. 392; *Crosby v. New London*, etc., R. Co., 26 Conn. 121; *Jackson v. York*, etc., R. Co., 48 Me. 147; *Everston v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9; *Wright v. Ohio*, etc., R. Co., 1 Disney (Ohio) 465.

3. View that Coupons Not Naming Payee Are Valid. — *Woods v. Lawrence County*, 1 Black (U. S.) 386; *McCoy v. Washington County*, 3 Wall. Jr. (C. C.) 381; *Johnson v. Stark County*, 24 Ill. 75; *Smith v. Clark County*, 54 Mo. 58.

4. Municipal Bonds and Coupons Made Payable Outside of State. — *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Lynde v. Winnebago County*, 16 Wall. (U. S.) 13; *Lexington v. Butler*, 14 Wall. (U. S.) 289; *Evansville*, etc., R. Co. v. *Evansville*, 15 Ind. 413. See also *Connecticut Mut. L. Ins. Co. v. Cleveland*, etc., R. Co., 41 Barb. (N. Y.) 9. See further on this question the title MUNICIPAL SECURITIES.

5. Prettyman v. Tazewell County, 19 Ill.

406, 71 Am. Dec. 230; *People v. Tazewell County*, 22 Ill. 151.

But in *Johnson v. Stark County*, 24 Ill. 75, it was held that the fact that a coupon is made payable in New York or elsewhere than at the treasury of the county issuing it will not invalidate it, but that the objectionable words will be regarded as surplusage.

6. Negotiability of Bonds with Coupons Attached — United States. — *Durant v. Iowa County*, 1 Woolw. (U. S.) 72; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Meyer v. Muscatine*, 1 Wall. (U. S.) 384; *Murray v. Lardner*, 2 Wall. (U. S.) 110; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Marshall County v. Schenck*, 5 Wall. (U. S.) 772; *Aurora City v. West*, 7 Wall. (U. S.) 82; *Lexington v. Butler*, 14 Wall. (U. S.) 282; *White v. Vermont*, etc., R. Co., 21 How. (U. S.) 575; *Marion County v. Clark*, 94 U. S. 279; *Morgan v. U. S.*, 113 U. S. 491; *Moran v. Miami County*, 2 Black (U. S.) 722.

Alabama. — *Blackman v. Lehman*, 63 Ala. 547, 35 Am. Rep. 57; *State v. Cobb*, 64 Ala. 128; *Reid v. Mobile Bank*, 70 Ala. 210; *Kansas City*, etc., R. Co. v. *Cobb*, 100 Ala. 228.

Connecticut. — *Savings Soc. v. New London*, 29 Conn. 174.

Florida. — *Internal Imp. Fund v. Lewis*, 34 Fla. 424, 43 Am. St. Rep. 209.

Illinois. — *Johnson v. Stark County*, 24 Ill. 75.

Indiana. — *Junction R. Co. v. Cleneay*, 13 Ind. 161.

Iowa. — *Clapp v. Cedar County*, 5 Iowa 15, 68 Am. Dec. 678.

Bond Executed by Individual. — And it has been held that this rule applies to coupon bonds executed by individuals as well as corporations.¹ But some doubt has been expressed on this point.²

Necessity of Negotiable Words. — To be negotiable, the bond must contain negotiable words.³

Bona Fides of Holder. — A party taking negotiable coupon bonds before due, for valuable consideration, without knowledge of any defect of title, and in good faith, holds them by a valid title. Suspicion of defect of title, or knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transaction, will not defeat his title. That result can be produced only by bad faith on his part.⁴

Effect of Overdue Coupons Attached to Bonds. — Thus overdue and unpaid coupons attached to a negotiable bond the principal of which is not due do not render the bond and subsequently maturing coupons dishonored paper so as to subject them, in the hands of a purchaser for value, to defenses good against the original holder.⁵

Louisiana. — *Planters' Consol. Assoc. v. Avegno*, 28 La. Ann. 552.

Maryland. — *Com. v. State*, 32 Md. 501.

Massachusetts. — *Chapin v. Vermont, etc., R. Co.*, 8 Gray (Mass.) 575; *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491; *Hinckley v. Union Pac. R. Co.*, 129 Mass. 52, 37 Am. Rep. 297.

Mississippi. — *Craig v. Vicksburg*, 31 Miss. 216.

Missouri. — *Ringling v. Kohn*, 4 Mo. App. 63; *Lafayette Sav. Bank v. St. Louis Stoneware Co.*, 4 Mo. App. 276; *Barrett v. County Ct.*, 44 Mo. 197.

New Jersey. — *Morris Canal, etc., Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423; *Elizabeth v. Force*, 29 N. J. Eq. 587.

New York. — *Evertsen v. National Bank*, 4 Hun (N. Y.) 695, 66 N. Y. 15; *Rome Bank v. Rome*, 19 N. Y. 24, 75 Am. Dec. 272; *Connecticut Mut. L. Ins. Co. v. Cleveland, etc., R. Co.*, 41 Barb. (N. Y.) 9; *Dinsmore v. Duncan*, 57 N. Y. 573, 15 Am. Rep. 534; *Seybel v. National Currency Bank*, 54 N. Y. 288, 13 Am. Rep. 583.

North Carolina. — *Weith v. Wilmington*, 68 N. Car. 24.

Pennsylvania. — *Beaver County v. Armstrong*, 44 Pa. St. 63; *Bunting v. Camden, etc., R. Co.*, 81 Pa. St. 254; *Gibson v. Lenhart*, 101 Pa. St. 522; *Mason v. Frick*, 105 Pa. St. 162, 51 Am. Rep. 191.

Rhode Island. — *National Exch. Bank v. Hartford, etc., R. Co.*, 8 R. I. 379, 5 Am. Rep. 582, 91 Am. Dec. 237.

South Carolina. — *Langston v. South Carolina R. Co.*, 2 S. Car. 248.

Texas. — *San Antonio v. Lane*, 32 Tex. 405; *Texas Banking, etc., Co. v. Turnley*, 61 Tex. 368.

Vermont. — *North Bennington First Nat. Bank v. Mount Tabor*, 52 Vt. 87.

Virginia. — *Arents v. Com.*, 18 Gratt. (Va.) 773.

Wisconsin. — *Clark v. Janesville*, 10 Wis. 136; *Mills v. Jefferson*, 20 Wis. 50.

See also *In re Imperial Land Co.*, L. R. 11 Eq. 478. Compare *Lang v. Smyth*, 7 Bing. 284, 20 E. C. L. 130; *Clarke v. Janesville*, 1 Biss. (U. S.) 98; *Diamond v. Lawrence County*, 37

Pa. St. 353, 78 Am. Dec. 429; *Myers v. York, etc., R. Co.*, 43 Me. 239; *Jackson v. York, etc., R. Co.*, 48 Me. 147; *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374.

For discussions more in detail on the question of the negotiability of coupon bonds, see the titles MUNICIPAL SECURITIES; RAILROAD SECURITIES; STATES.

1. Negotiability of Coupon Bonds Executed by Individuals. — *Matter of Leland*, 6 Ben. (U. S.) 175.

2. Daniel on Negotiable Instruments, § 1487.

3. Necessity of Negotiable Words in Bond. — *Atchison v. Butcher*, 3 Kan. 104.

4. Bona Fides of Holder of Coupon Bonds in General. — *Murray v. Lardner*, 2 Wall. (U. S.) 110; *Indiana, etc., R. Co. v. Sprague*, 103 U. S. 763; *Morton v. New Orleans, etc., R. Co.*, 79 Ala. 611; *State v. Cobb*, 64 Ala. 127.

The Burden of Proof of bad faith in the holder of coupon bonds payable to bearer, it has been said, lies on the person who assails the right claimed by such holder. *Murray v. Lardner*, 2 Wall. (U. S.) 110.

But it has been held that where coupon bonds were originally negotiated between the parties in violation of good faith, as where the original obligees were aware that proceedings were pending to annul the authority for the issuance of the bonds, the burden of proof is upon a subsequent holder of coupons detached therefrom to show that he was a purchaser in good faith and for value. *Bailey v. Lansing*, 13 Blatchf. (U. S.) 424. See also *Hinckley v. Merchants' Nat. Bank*, 131 Mass. 149.

5. Effect of Overdue Coupons Attached to Bonds. — *Cromwell v. Sac County*, 96 U. S. 51; *Indiana, etc., R. Co. v. Sprague*, 103 U. S. 756; *Rouede v. Jersey City*, 18 Fed. Rep. 719; *Preble v. Portage County*, 8 Biss. (U. S.) 358; *Morton v. New Orleans, etc., R. Co.*, 79 Ala. 591; *State v. Cobb*, 64 Ala. 127.

In *Cromwell v. Sac County*, 96 U. S. 51, it was held that the simple fact that an installment of interest is overdue and unpaid, disconnected from other facts, is not sufficient to affect the position of one taking the bonds and subsequent coupons before their maturity for value as a *bona fide* purchaser. "The interest

A Circumstance Bearing on Question of Good Faith of Transferee. — But it seems that, while not conclusive of the fact of dishonor, the presence of such unpaid coupons is a material circumstance bearing on the question whether the purchaser acquired them in good faith and without notice.¹

2. Convertible Coupon Bonds. — Coupon bonds containing words of negotiability sometimes contain a clause providing that the bonds may be registered and made payable by transfer only on the books of the corporation issuing them, and are known as convertible coupon bonds.²

Negotiability Before Registry. — But the mere fact that such a provision is contained in the bond does not make it non-negotiable.³

Right of Registry — Negotiability when Registered. — This provision, however, is a promise which entitles the holder of the bond at any time to have it changed from that character and converted into a registered bond transferable only upon the books of the company;⁴ and the holder may enforce this right by an action for specific performance.⁵

The Usual Process of Converting a coupon bond to a registered bond is to present the bond, cut off and surrender the coupons to the debtor, have the name of the creditor entered on a proper book kept by the debtor, and a proper indorsement made on the bond itself, showing its registration, thus reducing it as nearly as possible to the form and shape of an original registered bond.⁶

stipulated," said Mr. Justice Field in this case, "was a mere incident of the debt. The holder of the bond had his option to insist upon its payment when due, or to allow it to run until the maturity of the bond — that is, until the principal was payable." And he further said: "To hold otherwise would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore, in many instances, prevented a punctual payment of every instalment of interest on them as it matured; and similar causes may be expected to prevent a punctual payment of interest in many cases hereafter. To hold that a failure to meet the interest as it matures renders them, though they may have years to run, and all subsequent coupons dishonored paper, subject to all defenses good against the original holders, would greatly impair the currency and credit of such securities, and correspondingly diminish their value."

The doctrine of this case was approved in *Indiana, etc., R. Co. v. Sprague*, 103 U. S. 756, where it was held that the presence of two unpaid coupons overdue upon bonds, the principal of which was not due, would not of itself be sufficient evidence of the dishonor of the paper to which they were attached. The court, in *distinguishing* the case from *Parsons v. Jackson*, 99 U. S. 434, said: "In *Parsons v. Jackson*, 99 U. S. 434, the bonds of the railroad company which were the subject of controversy had never been issued, but had been stolen from its office. They were made payable either in New Orleans, New York, or London, as the president of the company might, by his indorsement on the bonds, determine. They did not contain his indorsement designating the place of payment; they

were offered in the New York market and sold for a very small consideration. Coupons for several years, due and unpaid, were attached to them. The court held that all these circumstances affected the purchaser with notice of the invalidity of the bonds. It is true the court said that the presence of the past-due and unpaid coupons was of itself an evidence of dishonor sufficient to put the purchaser on inquiry. But the case did not turn on this circumstance alone. There were other significant indications of the invalidity of the bonds, and the opinion must be restricted to the case before the court."

In *Minnesota* it has been held that if it appears upon the face of the bonds that the interest for several years was overdue and unpaid, this is a circumstance of suspicion sufficient to put the party on his guard, and the bonds are dishonored on their face; and the rule is the same though the coupons were payable only on presentation to a particular person. *St. Paul First Nat. Bank v. Scott County*, 14 Minn. 77.

1. *Morton v. New Orleans, etc., R. Co.*, 79 Ala. 592.

2. **Convertible Coupon Bonds Described.** — *Savannah, etc., R. Co. v. Lancaster*, 62 Ala. 563; *Reid v. Mobile Bank*, 70 Ala. 210.

3. **Negotiability of Convertible Coupon Bonds Before Registry.** — *Savannah, etc., R. Co. v. Lancaster*, 62 Ala. 563; *Reid v. Mobile Bank*, 70 Ala. 210.

4. **Negotiability of Convertible Coupon Bonds After Registry.** — *Savannah, etc., R. Co. v. Lancaster*, 62 Ala. 563; *Benwell v. Newark*, 55 N. J. Eq. 260.

Registered *Virginia Coupon Consols*, whether treated as bonds or as promissory notes, are rendered negotiable only by indorsement. *Taliaferro v. Baltimore First Nat. Bank*, 71 Md. 200.

5. *Benwell v. Newark*, 55 N. J. Eq. 260.

6. *Benwell v. Newark*, 55 N. J. Eq. 260.

3. **Notes with Coupons Attached.** — Also notes with coupons attached have been held to be negotiable instruments.¹

4. **Guaranty Collateral to Coupon.** — A guaranty of "the payment of the interest upon the within bond," as specified in the interest coupons thereto attached, is not negotiable in itself and does not partake of the negotiability of the bond and coupons with which it is connected.²

5. **Detached Coupons** — *a.* **IN GENERAL.** — Coupons containing negotiable words, when detached from the bonds to which they refer, pass by delivery and possess the essential attributes of commercial paper.³ They then cease to be incidents of the bonds, and become, in fact, independent claims;⁴ and they do not lose their negotiable character if for any cause the bond is paid or canceled before maturity.⁵

Coupons Referring to Bonds Specified by Their Numbers. — And the mere fact that coupons are declared to be for interest upon bonds specified by their numbers

1. **Negotiability of Notes with Coupons Attached.** — *De Hass v. Roberts*, 59 Fed. Rep. 833; *Dewing v. Crueger*, 7 Wash. 590.

2. **Negotiability of Guaranty Collateral to Coupon.** — *Eastern Township Bank v. St. Johnsbury, etc.*, R. Co., 40 Fed. Rep. 423.

3. **Negotiability of Detached Coupons** — *United States*. — *Gilbough v. Norfolk, etc.*, R. Co., 1 Hughes (U. S.) 410; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83; *Durant v. Iowa County*, 1 Woolw. (U. S.) 69; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Kennard v. Cass County*, 3 Dill. (U. S.) 147; *Hollingsworth v. Detroit*, 3 McLean (U. S.) 472; *Aurora City v. West*, 7 Wall. (U. S.) 105; *Kenosha v. Lamson*, 9 Wall. (U. S.) 477; *Miller v. Berlin*, 13 Blatchf. (U. S.) 245; *Cooper v. Thompson*, 13 Blatchf. (U. S.) 434; *Lexington v. Butler*, 14 Wall. (U. S.) 282; *North Bennington First Nat. Bank v. Bennington*, 16 Blatchf. (U. S.) 53; *Queensbury v. Culver*, 19 Wall. (U. S.) 83; *Clark v. Iowa City*, 20 Wall. (U. S.) 583; *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Ketchum v. Duncan*, 96 U. S. 659; *Roberts v. Bolles*, 101 U. S. 122; *Hartman v. Greenhow*, 102 U. S. 672.

Alabama. — *Kansas City, etc.*, R. Co. v. Cobb, 100 Ala. 228, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 938.

Connecticut. — *New London City Nat. Bank v. Ware River R. Co.*, 41 Conn. 542.

Florida. — *Internal Imp. Fund v. Lewis*, 34 Fla. 427, 43 Am. St. Rep. 209, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 432.

Illinois. — *Eagle v. Kohn*, 84 Ill. 292.

Indiana. — *Junction R. Co. v. Cleneay*, 13 Ind. 161; *Jeffersonville v. Patterson*, 26 Ind. 15, 89 Am. Dec. 448; *Cicero v. Clifford*, 53 Ind. 191.

Iowa. — *Ring v. Johnson County*, 6 Iowa 265.

Kansas. — *Atchison v. Butcher*, 3 Kan. 104.

Kentucky. — *Maddox v. Graham*, 2 Metc. (Ky.) 56.

Maryland. — *Com. v. State*, 32 Md. 501; *Chesapeake, etc., Canal Co. v. Blair*, 45 Md. 102.

Massachusetts. — *Com. v. Emigrant Industrial Sav. Bank*, 98 Mass. 12, 93 Am. Dec. 126; *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491; *Haven v. Grand Junction R., etc., Co.*, 109 Mass. 88.

Minnesota. — *Welsh v. First Div. St. Paul, etc.*, R. Co., 25 Minn. 324.

New York. — *Evertson v. National Bank*, 4 Hun (N. Y.) 692, 23 Am. Rep. 9, 66 N. Y. 14; *Bailey v. Buchanan County*, 54 N. Y. Super. Ct. 237; *Brainerd v. New York, etc., R. Co.*, 25 N. Y. 496; *Connecticut Mut. L. Ins. Co. v. Cleveland, etc., R. Co.*, 41 Barb. (N. Y.) 9.

North Carolina. — *Burroughs v. Richmond County*, 65 N. Car. 234.

Pennsylvania. — *Beaver County v. Armstrong*, 44 Pa. St. 63; *North Pennsylvania R. Co. v. Adams*, 54 Pa. St. 97, 93 Am. Dec. 677.

Rhode Island. — *National Exch. Bank v. Hartford, etc., R. Co.*, 8 R. I. 375, 91 Am. Dec. 237, 5 Am. Rep. 582.

South Carolina. — *Langston v. South Carolina R. Co.*, 2 S. Car. 249; *Hand v. Savannah, etc., R. Co.*, 17 S. Car. 219.

Tennessee. — *Nashville v. First Nat. Bank*, 1 Baxt. (Tenn.) 402; *Nashville v. Potomac Ins. Co.*, 2 Baxt. (Tenn.) 296.

Texas. — *San Antonio v. Lane*, 32 Tex. 405.

Vermont. — *Sewall v. Brainerd*, 38 Vt. 364; *Miller v. Rutland, etc., R. Co.*, 40 Vt. 399, 94 Am. Dec. 474; *North Bennington First Nat. Bank v. Mount Tabor*, 52 Vt. 87.

Virginia. — *Arents v. Com.*, 18 Gratt. (Va.) 750.

Wisconsin. — *Clark v. Janesville*, 10 Wis. 136.

But see *Rose v. Bridgeport*, 17 Conn. 243; *Geddes v. Toronto Street Ry. Co.*, 14 U. P. C. P. 513.

Thus a coupon in this form, detached from a mortgage bond of a railroad corporation, namely: "Interest warrant No. 12. On the first day of July, 1856, the X. Railroad Co. will pay to bearer thirty dollars for interest on its bond No. 342. J. S., treasurer," is negotiable by mere delivery and may be enforced against the corporation by a *bona fide* holder who has no interest in and is not able to produce the original bond. *Haven v. Grand Junction R., etc., Co.*, 109 Mass. 88.

4. **Detached Coupon an Independent Claim.** — *McCoy v. Washington County*, 3 Wall. Jr. (C. C.) 381; *Clark v. Iowa City*, 20 Wall. (U. S.) 583; *Internal Imp. Fund v. Lewis*, 34 Fla. 424, 43 Am. St. Rep. 209; *Com. v. State*, 32 Md. 501; *Burroughs v. Richmond County*, 65 N. Car. 234; *Beaver County v. Armstrong*, 44 Pa. St. 63; *National Exch. Bank v. Hartford, etc., R. Co.*, 8 R. I. 375, 5 Am. Rep. 582, 91 Am. Dec. 237.

5. *Clark v. Iowa City*, 20 Wall. (U. S.) 583.

does not destroy their negotiability when separated from the bond, or impair the title of one purchasing from another without production of the bond.¹

b. NECESSITY OF NEGOTIABLE WORDS.—According to some of the authorities it is held that if the coupon is neither payable to order nor to bearer, nor contains any words of similar import showing that it was the intention of the maker that it should have currency as an independent negotiable paper, it is not negotiable, and this though the bond from which it has been severed itself contained negotiable words.² But according to other authorities, coupons are to be taken in connection with the bonds to which they are annexed, and though not themselves in the form of negotiable instruments, will be so regarded where words of negotiability are contained in the bonds.³

c. COUPONS NOT PAYABLE UNCONDITIONALLY.—In order that a coupon may operate strictly as commercial paper, it must be payable absolutely and at all events.⁴

1. *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9.

2. *View that Negotiable Words Are Necessary to Render Coupon Negotiable.*—*Crosby v. New London, etc.*, R. Co., 26 Conn. 121; *Myers v. York, etc.*, R. Co., 43 Me. 232; *Jackson v. York, etc.*, R. Co., 48 Me. 147; *Augusta Bank v. Augusta*, 49 Me. 507; *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9; *Wright v. Ohio, etc.*, R. Co., 1 Disney (Ohio) 465.

In *Jackson v. York, etc.*, R. Co., 48 Me. 147, where the coupons read: "Coupon No. 1. Bond No. 60. On the first day of May, 1852, the York and Cumberland Railroad Company will pay nine dollars, on this coupon, in Portland," signed by the treasurer of the company, it was held that without some statutory provision no action can be maintained in the name of an assignee upon interest coupons which contain no negotiable words nor language from which it can be inferred that it was the design of the corporation issuing them to treat them as negotiable paper, or as creating an obligation distinct from and independent of the bonds to which they were severally attached when the bonds were issued. The court said: "Whether paper is negotiable or not is a question of law, to be determined from the paper itself, by fixed and well-settled rules."

In *Virginia* it is made essential by statute to the negotiability of notes that they be payable at a bank. But it has been held in this state that bonds and coupons containing the usual words of negotiability are negotiable though they do not conform to this requirement. *Arents v. Com.*, 18 Gratt. (Va.) 750.

Proof of Custom as to Negotiability Inadmissible.—It has been held that whether paper is negotiable or not is a question of law to be determined from the paper itself by fixed and well-established rules, and hence proof of a custom as to the negotiability of a coupon is inadmissible. *Jackson v. York, etc.*, R. Co., 48 Me. 147; *Augusta Bank v. Augusta*, 49 Me. 507.

In *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9, the court said: "There is no usage or custom proved that would give these warrants a negotiable character, even if custom and usage so recent as one applicable to these

instruments would be could change their legal effect."

3. *View that Negotiable Words Are Not Essential to Negotiability.*—*McCoy v. Washington County*, 3 Wall. Jr. (C. C.) 381; *Johnson v. Stark County*, 24 Ill. 75; *Smith v. Clark County*, 54 Mo. 58. See also *Woods v. Lawrence County*, 1 Black (U. S.) 386; *National Exch. Bank v. Hartford, etc.*, R. Co., 8 R. I. 375, 5 Am. Rep. 582, 91 Am. Dec. 237; *Mills v. Jefferson*, 20 Wis. 50.

In *McCoy v. Washington County*, 3 Wall. Jr. (C. C.) 381, the coupons were as follows: "Washington County Bonds. Warrants for thirty dollars interest on bond No. 108, payable in the city of New York, on the 15th of May, 1857." *Grier, J.*, in this case said: "The obligation to pay the interest is to be found in the bond, not in the coupon. They are not in words an instrument in writing of a commercial nature, and having their negotiability by virtue of the law merchant. In terms these warrants are not made payable to any particular person or his order, or even to bearer. They partake of the nature of the peculiar instrument to which they are attached. They are intended by the parties to be evidence of debt in the hands of the holder, and proof of payment when in possession of the debtor. They pass by delivery, and by the contract of the parties and the usage of the country are sufficient evidence of a debt to the holder as against the obligors in the bond. They are of modern invention, and should have the effect intended by the parties and be governed by the usage of the country, and not by sharp rules of law applicable to instruments of a different nature. The possession of them is therefore *prima facie* evidence that the holder of them is holder of the bond (or was so at least when they were cut off), and as such entitled to receive the interest."

In *Smith v. Clark County*, 54 Mo. 58, the coupons were in the following form: "State of Missouri. Bond No. 51. \$35. The county of Clark will pay thirty-five dollars on this coupon the first day of January, 1867, at the treasury of said county."

4. *Coupons Not Payable Unconditionally.*—*U. S. Mortgage Co. v. Sperry*, 138 U. S. 313; *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 6 Am. St. Rep. 397.

Coupon Payable out of Particular Funds. — Thus, where a coupon was signed by the guardian of an estate, who contracted that he and his estate were to be exempt from the principal debt and interest thereon, it was held that, the ward not being personally liable, the coupon was in effect payable out of particular funds, and hence was not strictly a commercial security.¹

Coupon Rendered Non-negotiable by Mortgage Conditions. — Also, if detached coupons, though containing negotiable words on their face, refer to bonds to which they were attached when issued, and the bonds referred to conditions in the mortgages given to secure them, to the effect that the time of payment of principal and interest might be changed and postponed from time to time at the option of a majority of the holders of a series of bonds issued simultaneously with those from which the coupons were taken, the coupons are not negotiable.²

d. RIGHTS OF HOLDER — (1) *In General.* — The holder for value and before maturity of a coupon indorsed in blank or payable to bearer is as effectually shielded from the defense of prior equity between the original parties, if unknown to him at the time of the transfer, as the holder of any other class of negotiable instruments.³

(2) *Overdue Coupons* — **When Coupons Become Due.** — Aside from the question of days of grace, a coupon becomes due and payable upon the day fixed by the terms of the bond and coupon for the payment of the interest represented by the coupon.⁴

Whether Entitled to Days of Grace. — There is some conflict among the authorities as to whether negotiable interest coupons are entitled to the benefit of the days of grace allowable on bills and notes payable at a given day or on time. In *New York* the rule has been laid down that such instruments are entitled to days of grace, and hence a purchaser after the expiration of the time of payment specified, and before the expiration of the days of grace, is a purchaser before maturity.⁵ But in other jurisdictions this doctrine is not

1. **Coupon Payable out of Particular Funds.** — *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313.

2. **Coupon Rendered Non-negotiable by Mortgage Conditions.** — *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 6 Am. St. Rep. 397.

3. **Rights of Bona Fide Holders of Coupons in General.** — *Bailey v. Lansing*, 13 Blatchf. (U. S.) 424.

In *U. S. Bank v. Macalester*, 9 Pa. St. 475, it was held that the holder of coupons payable to bearer may maintain an action thereon against the party bound to pay such coupons or use them as a set-off against him, there being no proof that they were unlawfully obtained.

Transfer Without Valuable Consideration from a Bona Fide Holder for Value. — In *Dudley v. Lake County*, 80 Fed. Rep. 672, it was held that a person holding coupons by delivery and by written assignments becomes the legal holder of such coupons and entitled to maintain an action upon them, whether he had actually paid the former owners any consideration for them or not, if such former owners were *bona fide* holders for value.

4. **When Coupons Become Due** — **In General.** — *Arents v. Com.*, 18 Gratt. (Va.) 750.

5. **View that Coupons Are Entitled to Days of Grace.** — *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9. See also *Cooper v. Thompson*, 13 Blatchf. (U. S.) 434.

In *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9, the court said: "It does not seem to have been doubted that, being a promissory note, although something more, it was

within the rule allowing days of grace to commercial instruments of that character. If the coupons were not, for the purposes of days of grace, as well as for other purposes, promissory notes, but were payable at a day certain without grace, then, at the time of the purchase by the plaintiff, they were overdue, and the holder conveyed no better title to the plaintiff than he had himself. *Chester v. Dorr*, 41 N. Y. 279. It is probably true that they are regarded and treated as well by promisor as promisee as payable at the day, and paid as if, in terms, payable without grace; but this cannot destroy the character or change the legal effect of the instruments, the interpretation of which is for the courts. It is only as negotiable commercial paper that the plaintiff, as a *bona fide* purchaser, could acquire a good title to the coupons from one having no title thereto; and he can only acquire such title by a purchase under the same circumstances that would give him a title to other commercial paper; and if there were no days of grace for the payment of these coupons they could not be transferred so as to give a good title."

Contract Construed as Disallowing Grace. — Where a coupon bond provided that "it is hereby expressly agreed by said company with each and any holder of this bond that in the case of the nonpayment of any interest coupon hereto attached, if such default shall continue for six months after maturity and demand of payment, the principal of this bond shall become immediately due," it was held

sustained.¹ In *New York* now by statute "every negotiable instrument is payable at the time fixed therein without grace."²

Assignee After Maturity Takes Subject to Equities. — A party acquiring a coupon after it has become due and thus dishonored takes it subject to the same equities and defenses which would have been available against the previous holder.³

Coupon Unaffected by Equities Growing out of Other Coupons. — But though a coupon may be purchased after maturity, it will not be affected by equities growing out of other coupons. Thus, payments made on invalid coupons cannot be set off against other valid coupons issued by the same party in the hands of a *bona fide* purchaser, though he purchased them after maturity from the person to whom such payments were made.⁴

Coupons Negotiable though Overdue. — Coupons detached from bonds and payable to bearer, though overdue, are still negotiable instruments.⁵

(3) *Stolen Coupons.* — Negotiable coupons being transferable by delivery although detached from the bonds, the rule of *caveat emptor* does not apply, and a purchaser in good faith, before maturity, from one who has stolen them, acquires a valid title.⁶ But if the coupons are not negotiable, or if they have been purchased after maturity, the purchaser acquires no better title than the thief could give.⁷

that the six months of default was not to be tacked on to the expiration of the period of grace, but was to be computed from the day of payment named in the coupons. *Alabama, etc., Mfg. Co. v. Robinson*, 56 Fed. Rep. 690.

1. View that Coupons Are Not Entitled to Days of Grace. — *Arents v. Com.*, 18 Gratt. (Va.) 773.

Under Statute in Massachusetts it has been held that interest coupons are not entitled to grace. *Chaffee v. Middlesex R. Co.*, 146 Mass. 235. The court in this case said: "Although we are confined to a consideration of the construction to be given our statutes, we do not wish to imply that, either by usage or the general law merchant, days of grace should be allowed either on the bonds or the coupons. We are not satisfied with the decision in *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9. * * * The reasons why days of grace were originally allowed on foreign bills of exchange payable at sight or at a future day certain have little application to bonds with coupons issued by a corporation to obtain money, which usually have a long time to run, and are commonly bought and held as an investment."

2. Days of Grace Abolished. — *New York Laws of 1897, c. 612, § 145.* The same rule prevails by statute in several states.

3. Assignee Takes Overdue Coupons Subject to Equities. — *Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416; *McKim v. King*, 58 Md. 502, 42 Am. Rep. 340; *Martin v. Bank*, 94 Tenn. 176.

Canceled Coupons Transferred After Maturity and Without Valuable Consideration. — Where coupons which were virtually canceled were transferred after maturity and without valuable consideration, it was held that the transferee, not being a *bona fide* purchaser, was not entitled to a recovery thereon. *Chicago, etc., R. Co. v. Turner*, 79 Mich. 133.

4. Coupon Unaffected by Equities Growing out of Other Coupons. — *Granniss v. Cherokee Tp.*, 47 Fed. Rep. 427.

Effect of Invalidity of Bond. — But a coupon may be affected by the original invalidity of

the bond. *Bissell v. Spring Valley Tp.*, 124 U. S. 225; *Granniss v. Cherokee Tp.*, 47 Fed. Rep. 427; *McClure v. Oxford Tp.*, 94 U. S. 429.

But for a complete discussion of this question see the titles MUNICIPAL SECURITIES; RAILROAD SECURITIES.

5. Overdue Coupons Negotiable. — *Thompson v. Perrine*, 106 U. S. 589; *Grand Rapids, etc., R. Co. v. Sanders*, 54 How. Pr. (N. Y. Supreme Ct.) 214.

6. Valid Title to Stolen Coupons in Bona Fide Purchaser. — *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491; *Evertson v. National Bank*, 66 N. Y. 14, 23 Am. Rep. 9; *Arents v. Com.*, 18 Gratt. (Va.) 773. See also *Murray v. Lardner*, 2 Wall. (U. S.) 110.

The bonds of a railroad company, payable to bearer, with interest coupons attached, were stolen from the state of Virginia, which held them in exchange for bonds of the state delivered to the railroad company. They were sold for value to certain bankers who had no knowledge of the theft, nor were there any circumstances attending their purchase tending to put the bankers on inquiry, except that they purchased of a stranger and eight coupons were overdue. The bankers were held entitled to recover against the company except as to the overdue coupons. *Gilbough v. Norfolk, etc., R. Co.*, 1 Hughes (U. S.) 410.

Also, it has been held that an action for the conversion of interest coupons of United States bonds cannot be maintained by the owner, from whom they have been stolen, against a person who has received them as an agent for exchange, in good faith and without gross negligence, from a party to the theft, and has transferred them by delivery and paid the proceeds to his employer, without benefit to himself, and without any demand or notice from the plaintiff. *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491.

7. McKim v. King, 58 Md. 502, 42 Am. Rep. 340; *Hinckley v. Merchants' Nat. Bank*, 131 Mass. 147; *Evertson v. National Bank*, 66 N. Y.

(4) *Effect of Lis Pendens.* — Purchasers of negotiable securities are not chargeable with constructive notice of the pendency of a suit affecting the title or validity of the securities. Accordingly, although a suit be pending at the time of the issuance of bonds to prevent their issuance, the subsequent purchaser in open market is not affected by notice arising from *lis pendens* of which he has no actual notice, and may recover the amount of the coupons attached to said bond.¹ And it has been held that the ownership of coupons by a prior holder under such circumstances as would protect that holder against any defense by the party issuing them, as where he is without knowledge of any irregularity in the issuance, entitles a subsequent purchaser to recover, even if he, when afterwards purchasing for himself, had actual knowledge of the pendency of a suit to contest the validity of the securities.² But it has been said that if the last purchaser and each intermediate party from the first delivery of the bonds and coupons had notice of such suit or other infirmity, no recovery can be had.³

(5) *Interest on Overdue Coupons.* — Coupons being written instruments for the payment of money, and passing from hand to hand like other negotiable instruments, it is apparent on general principles that they should draw interest if they are not paid when due.⁴

14, 23 Am. Rep. 9; *Arents v. Com.*, 18 Gratt. (Va.) 773.

In an action of replevin for interest coupons, payable to bearer, where it appeared that the bonds, to which the coupons were then attached, were before maturity stolen from the plaintiff; that after maturity they were bought by a person named, in good faith, and passed through the hands of several persons named until they came into the possession of the defendant; and that all these persons were purchasers in good faith and for value, it was held that there was no presumption that the thief had negotiated the coupons before maturity, and that the plaintiff was entitled to judgment. *Hinckley v. Merchants' Nat. Bank*, 131 Mass. 147.

1. **Purchasers Not Chargeable with Constructive Notice of Lis Pendens.** — *Warren County v. Marcy*, 97 U. S. 96; *Phelps v. Lewiston*, 15 Blatchf. (U. S.) 131; *Cass County v. Gillett*, 100 U. S. 585.

2. *Scotland County v. Hill*, 132 U. S. 107.

3. *Scotland County v. Hill*, 132 U. S. 107.

In *Bailey v. Lansing*, 13 Blatchf. (U. S.) 424, it was held that where coupon bonds were originally negotiated between the parties in violation of good faith, they being aware that proceedings were pending to annul the authority for the issuance of the bonds, the burden was upon a subsequent holder of coupons detached therefrom to show that he was a purchaser of the coupons in good faith and for value.

4. **Interest on Overdue Coupons** — *United States.* — *Lexington v. Union Nat. Bank*, (Mass. 1897) 9 Am. & Eng. R. Cas. N. S. 321; *Aurora City v. West*, 7 Wall. (U. S.) 105; *Thomson v. Lee County*, 3 Wall. (U. S.) 332; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Kenosha v. Lamson*, 9 Wall. (U. S.) 477; *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Clark v. Iowa City*, 20 Wall. (U. S.) 583; *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Pana v. Bowler*, 107 U. S. 520; *Scotland County v. Hill*, 132 U. S. 117; *Genoa v. Woodruff*, 92 U. S. 502; *Amy v. Dubuque*, 98 U. S. 471; *Walnut v. Wade*, 103 U. S. 695;

Cromwell v. Sac County, 96 U. S. 51; *Koshkonong v. Burton*, 104 U. S. 668; *Phelps v. Lewiston*, 15 Blatchf. (U. S.) 131; *Hollingsworth v. Detroit*, 3 McLean (U. S.) 472; *Cairo v. Zane*, 149 U. S. 122.

Florida. — *Internal Imp. Fund v. Lewis*, 34 Fla. 424, 43 Am. St. Rep. 209; *Jefferson County v. Hawkins*, 23 Fla. 223.

Indiana. — *Jeffersonville v. Patterson*, 25 Ind. 15, 89 Am. Dec. 448.

Louisiana. — *Forstall v. Louisiana Planters' Consol. Assoc.*, 34 La. Ann. 770.

Maryland. — *Com. v. State*, 32 Md. 501.

Minnesota. — *Welsh v. First Div. St. Paul, etc.*, R. Co., 25 Minn. 320.

Mississippi. — *Lexington v. Union Nat. Bank*, (Miss. 1897) 22 So. Rep. 291.

New Hampshire. — *Ashuelot R. Co. v. Elliot*, 57 N. H. 397.

New York. — *Connecticut Mut. L. Ins. Co. v. Cleveland, etc.*, R. Co., 41 Barb. (N. Y.) 9, 26 How. Pr. (N. Y.) 225; *Beattys v. Solon*, 64 Hun (N. Y.) 120; *Stanton v. Taylor*, (Supreme Ct.) 19 N. Y. Supp. 43.

North Carolina. — *Burroughs v. Richmond County*, 65 N. Car. 234; *McLendon v. Anson County*, 71 N. Car. 38.

Pennsylvania. — *Beaver County v. Armstrong*, 44 Pa. St. 63; *North Pennsylvania R. Co. v. Adams*, 54 Pa. St. 94, 93 Am. Dec. 677; *Philadelphia, etc.*, R. Co. v. Smith, 105 Pa. St. 195; *Philadelphia, etc.*, R. Co. v. Knight, 124 Pa. St. 58; *Philadelphia, etc.*, R. Co. v. Fidelity Ins., etc., Co., 105 Pa. St. 216.

Rhode Island. — *National Exch. Bank v. Hartford, etc.*, R. Co., 8 R. I. 375, 5 Am. Rep. 582, 91 Am. Dec. 237.

South Carolina. — *Langston v. South Carolina R. Co.*, 2 S. Car. 248.

Tennessee. — *Nashville v. First Nat. Bank*, 1 Baxt. (Tenn.) 402.

Texas. — *San Antonio v. Lane*, 32 Tex. 405. *Virginia.* — *Arents v. Com.*, 18 Gratt. (Va.) 776; *Gibert v. Washington City, etc.*, R. Co., 33 Gratt. (Va.) 586.

Wisconsin. — *Pruyn v. Milwaukee*, 18 Wis. 367; *Mills v. Jefferson*, 20 Wis. 50.

When Coupons Are Not Negotiated. — But in *New York* it has been held that past-due interest coupons, until negotiated or used in some manner independent of the bonds, and while they remain in the hands of the holder of the bonds, whether attached or detached, are mere incidents thereto, having no other or greater effect than the stipulation for the payment of interest contained in the bond, and allowance of interest thereon will not be made, since it will amount to an award of compound interest.¹

Rate of Interest. — Where no rate of interest is expressed in the coupon itself, it bears the legal rate of interest at the time of its maturity,² and agreements as to such interest are subject to the usury laws of the different states.³

See also *Burton v. Koshkonong*, 4 Fed. Rep. 373; *Davis v. Yuba County*, 75 Cal. 452; *Compare Union Trust Co. v. Missouri, etc., R. Co.*, 7 Ry. & Corp. L. J. 485; *Desrosiers v. Montreal, etc., R. Co.*, 28 L. C. Jur. 1, 6 Leg. N. 388; *Jones v. Municipality of Albert*, 21 New Bruns. 200.

See further on this question the title INTEREST.

Attached Coupons — Illinois. — In Illinois it is well settled that coupons attached to bonds draw interest after maturity. *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313; *Cairo v. Zane*, 149 U. S. 122; *Humphreys v. Morton*, 100 Ill. 592; *Harper v. Ely*, 70 Ill. 581; *Drury v. Wolfe*, 134 Ill. 294.

Interest on Coupons Detached from Notes. — It has been held that the payment of interest on overdue instalments of interest, evidenced by separate notes for interest on the principal notes, does not constitute usury, and that interest is recoverable upon coupons after their maturity which were given at the time of the accrual of a debt for the annual interest accruing thereon. They being promissory notes, it is regarded as just that if not paid when due, they should draw interest by way of damages for detention of the money. *Ginn v. New England Mortg. Security Co.*, 92 Ala. 138; *Stickney v. Moore*, 108 Ala. 590, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 439. And this though the suit is brought in equity. *Stickney v. Moore*, 108 Ala. 590.

Under Statute in Idaho, forbidding the agreement to pay compound interest, except in one case only, to wit, when interest is past due a party may in writing agree to pay interest on such overdue interest, it has been held that coupon notes given for the interest on the notes attached thereto which by their terms drew interest from the maturity thereof, providing as they did for interest upon interest not then due, are usurious, and no recovery can be had thereon. *Vermont L. & T. Co. v. Hoffman*, (Idaho 1897) 49 Pac. Rep. 314. See the title USURY.

Coupons of Indian War Bonds — Liability of State. — In *Molineux v. State*, 109 Cal. 378, it was held that the state is not liable to pay interest upon matured coupons for Indian war bonds issued under the Act of 1851, where it appeared that the state had not given its consent thereto.

Where Coupon Is Payable out of Particular Funds. — In *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313, it was held that where a coupon was signed by a guardian who had contracted that he and his estate were to be exempt from the principal debt and interest thereon, the ward

not being personally liable, the coupon was in effect payable out of particular funds, and not absolutely and at all events, as in the case of commercial paper, and hence did not bear interest after maturity.

1. Interest on Overdue Coupons Not Negotiated. — *Williamsburgh Sav. Bank v. Solon*, 136 N. Y. 465; *Beattys v. Solon*, 136 N. Y. 662; *Armfield v. Solon*, 136 N. Y. 663; *Stanton v. Taylor*, 136 N. Y. 664; *Chapman v. Taylor*, 136 N. Y. 663. See also *Bailey v. Buchanan County*, 115 N. Y. 297.

2. Rate of Interest in Absence of Agreement. — *Cromwell v. Sac County*, 96 U. S. 51; *Jefferson County v. Hawkins*, 23 Fla. 223; *Benneson v. Savage*, 130 Ill. 352; *Spencer v. Pierce*, 5 R. I. 63; *Langston v. South Carolina R. Co.*, 2 S. Car. 248.

What Law Governs. — Where coupons, as well as the bonds, are silent as to the rate of interest after maturity, and are made payable in *New York*, the rate of interest established by law in that state is to be allowed on the coupons after their maturity. *Scotland County v. Hill*, 132 U. S. 107; *Pana v. Bowler*, 107 U. S. 529; *Gray v. State*, 72 Ind. 567. See also *Cairo v. Zane*, 149 U. S. 122.

But in *Huey v. Macon County*, 35 Fed. Rep. 481, it was held that in an action brought in Missouri on a coupon payable in *New York* no distinction was to be made between it and one payable in Missouri, as to the rate of interest, where the rate of interest in *New York* was not proven. See also *Fauntleroy v. Hannibal*, 5 Dill. (U. S.) 219.

3. Usurious Stipulations. — *Holbrook v. Sims*, 39 Minn. 122. See further on this question the title USURY.

Coupons Attached to Notes. — In *Wortman v. Vorhies*, 14 Wash. 152, it was held that where the principal note contained a provision for interest at the rate of nine per cent., and the interest thus reserved was represented by coupon notes attached thereto, each of which contained this provision: "This note bears interest at two (2) per cent. per month after maturity," and the principal note contained this stipulation: "This note shall bear interest at the rate of one per cent. per month after maturity," it was held proper to allow interest on the principal sum at the rate of one per cent. per month after the date of maturity, and also interest at the rate of two per cent. per month on the coupon notes from the date of maturity, under 1 Hill's Code, § 2796, providing that "any rate of interest agreed upon by parties to a contract, specifying the same in writing, shall be valid and legal." See also *Cloud v. Rivoid*, 6 Wash. 555.

(6) *Exchange*. — It has been said that exchange should be recoverable upon coupons under circumstances which would warrant its recovery on any other species of commercial paper.¹

c. DILIGENCE REQUIRED OF HOLDER — (1) *In General*. — The degree of diligence required of the holder of a coupon is to be ascertained by reference to the relations of the parties liable for its payment.²

(2) *Presentment for Payment as Prerequisite to Recovery* — *Against Maker*. — Thus it is unnecessary that formal presentment and protest of a coupon payable on a day certain should be made before suit can be maintained against the maker, and this though the coupon is in the form of an order or draft.³

Specification of Place of Payment. — And even where a place of payment is specified, presentation for payment at that place or elsewhere is not a condition precedent to a suit against the maker.⁴

Against Guarantor. — But it has been held that, to charge a guarantor, presentment should be made within a reasonable time after the coupon becomes due and payable, so as to save the liability of the guarantor in case of any injury resulting from delay.⁵

Against Indorser. — It has been intimated, moreover, that to charge an indorser

in *Nebraska* it has been held that interest when stipulated for may be allowed on coupon interest notes after their maturity, when the amount of interest on both the coupon and the note evidencing the principal debt does not exceed the maximum legal rate of interest on the principal sum. *Lewis Invest. Co. v. Boyd*, 48 Neb. 604; *Murtagh v. Thompson*, 28 Neb. 358; *Mathews v. Toogood*, 23 Neb. 536, 8 Am. St. Rep. 131.

But where the interest provided for in the principal note is the maximum rate allowed by law and is represented by the coupon notes, providing that interest shall be allowed thereon after maturity at the maximum rate, no interest will be allowed on such coupons. *Richardson v. Campbell*, 27 Neb. 644.

1. *Recovery of Exchange on Coupons*. — 2 *Daniel on Negotiable Instruments*, § 1513; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175, holding that municipal bonds with coupons payable to bearer having by universal usage and consent all the qualities of commercial paper, a party recovering on the coupons is entitled to the amount of them, with interest and exchange at the place where, by their terms, they were made payable. See also *Jeffersonville v. Patterson*, 26 Ind. 16, 89 Am. Dec. 448. See the title EXCHANGE AND RE-EXCHANGE.

2. *Diligence of Holder in General*. — *Arents v. Com.*, 18 Gratt. (Va.) 773.

3. *Presentment Unnecessary to Charge Maker*. — *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St. 62; *Nashville v. First Nat. Bank*, 1 Baxt. (Tenn.) 402; *Nashville v. Potomac Ins. Co.*, 2 Baxt. (Tenn.) 296.

It has been held to be no defense to the foreclosure of a mortgage securing a note having interest coupons attached, that the coupons were not presented at the bank where they were made payable, when they were presented at the defendant's residence in the same manner as a prior coupon which had been paid by him without question, and he had no funds to meet them at the bank where they were made payable. *Tatum v. Ray*, 69 Fed. Rep. 682.

Where Bonds Stipulate that Coupons Are Payable on Presentation. — Where bonds payable to bearer contained the following provision in

relation to the payment of interest, viz.: "With interest at the rate of ten per cent. per annum, payable semi-annually on the first days of January and July in each year, on presentation of the respective coupons hereto attached, both principal and interest being payable at the financial office of said company in the city of New York," it was held that under this form of bond the coupons might be sued without previous presentation for payment. *Warner v. Rising Fawn Iron Co.*, 3 Woods (U. S.) 514.

Presentment Within Reasonable Time. — It was intimated, however, in *Arents v. Com.*, 18 Gratt. (Va.) 773, that while presentment on the day specified was not necessary to charge the maker, presentment within a reasonable time might be necessary in a case where money was deposited with the drawee to meet the coupons, and delay would occasion injury, as, for instance, if the drawee should become insolvent.

Presentment of Coupons Detached from County Bonds for Allowance. — It has been held that where a court of county commissioners in Alabama, pursuant to statute, subscribed for stock in a railroad company, and issued the bonds of the county in payment therefor, the holder of them or the coupons thereto attached is not required to present them when due to that court for allowance, before commencing suit to enforce their payment; and this though, by the code of that state, it was provided that the court of county commissioners must audit all claims against their respective counties, and that no suit could be brought against a county until the claim or demand had been presented. *Greene County v. Daniel*, 102 U. S. 192. See also *Davis v. Yuba County*, 75 Cal. 452. But for a complete discussion of this question see the title MUNICIPAL SECURITIES.

4. *Presentment Unnecessary where Place of Payment Specified*. — *Walnut v. Wade*, 103 U. S. 683; *Smith v. Tallapoosa County*, 2 Woods (U. S.) 574; *Langston v. South Carolina R. Co.*, 2 S. Car. 248. See also *Jeffersonville v. Patterson*, 26 Ind. 16, 89 Am. Dec. 448; *Potomac Mfg. Co. v. Evans*, 84 Va. 717.

5. *Presentment Necessary to Charge Guarantor*. — *Arents v. Com.*, 18 Gratt. (Va.) 750.

of a coupon, it should be presented on the day of maturity.¹

(3) *Presentment as Prerequisite to Recovery of Interest.* — From the weight of authority it may be stated as a general rule that the failure to present coupons for payment does not prevent the running of interest thereon, and this though the coupon is payable at a particular place.²

Coupon Payable "on Presentation and Demand" by Terms of Bond. — But it has been held that where the coupon is payable "on presentation and demand" by the terms of the bond in connection with which it was issued, it can bear interest only from the date of its maturity and after payment has been demanded and unjustly refused.³

Readiness of Maker to Pay as Defense. — If the maker of the coupon shows that he had money ready to pay the coupon at the time when and place where it was payable, this will be a defense to the claim for interest.⁴ To make available a defense of readiness to pay the coupon at the time when and place where it was payable, such readiness must be alleged, and inasmuch as such a plea is affirmative it casts the burden of proof upon the defendant.⁵

IV. COUPONS SECURED BY MORTGAGE. — Where a bond with coupons attached is secured by a mortgage, the coupons are part of the mortgage debt, and when detached from the bond and transferred by delivery, the holder, upon a foreclosure of the mortgage, is entitled to share in the distribution *pro rata*

1. Presentment Necessary to Charge Indorser. — 2 Daniel on Negotiable Instruments, § 1503. See also *Bonner v. New Orleans*, 2 Woods (U. S.) 136.

It has been held that the transferrer of coupons cannot be held liable after the municipal bonds with which they were issued have been declared invalid by the courts, if the transferee could have, by reasonable diligence, collected the interest. *Figge v. Hill*, 61 Iowa 430.

Coupons Attached to Bonds. — The indorser of a negotiable state bond whose liability has been fixed by demand of payment of the bond at maturity, protest for nonpayment, and notice, is thereby rendered liable for the unpaid coupons then attached to the bond, with interest thereon, without a separate presentment for payment of the several coupons as they fell due, protest for nonpayment, and notice. *Lane v. East Tennessee, etc., R. Co.*, 13 Lea (Tenn.) 547.

Hour of Serving Notice. — In *Bonner v. New Orleans*, 2 Woods (U. S.) 135, it was held that, to charge an indorser, the certificate of the notary need not show that notice of demand and nonpayment was served on the indorser during business hours of the day after demand. If notice was served at any time during that day, it is sufficient.

2. Presentment for Payment Unnecessary for Recovery of Interest on Overdue Coupons. — *United States.* — *Huey v. Macon County*, 35 Fed. Rep. 481; *Walnut v. Wade*, 103 U. S. 683; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Aurora City v. West*, 7 Wall. (U. S.) 82; *Genoa v. Woodruff*, 92 U. S. 502; *Ohio v. Frank*, 103 U. S. 697.

Illinois. — *Humphreys v. Morton*, 100 Ill. 592.

North Carolina. — *McLendon v. Anson County*, 71 N. Car. 38.

Pennsylvania. — *North Pennsylvania R. Co. v. Adams*, 54 Pa. St. 97, 93 Am. Dec. 677.

South Carolina. — *Langston v. South Carolina R. Co.*, 2 S. Car. 248.

See also *Com. v. State*, 32 Md. 501; *Burroughs v. Richmond County*, 65 N. Car. 234; *San Antonio v. Lane*, 32 Tex. 405; *Mills v. Jefferson*, 20 Wis. 50. Compare *Johnson v. Stark County*, 24 Ill. 75; *Pekin v. Reynolds*, 31 Ill. 531, 83 Am. Dec. 244; *Chicago v. People*, 56 Ill. 327; *Whitaker v. Hartford, etc., R. Co.*, 8 R. I. 47, 86 Am. Dec. 614, 5 Am. Rep. 547.

Where Coupon Is Lost. — In *Fitchett v. North Pennsylvania R. Co.*, 5 Phila. (Pa.) 132, it was held that the holder of lost railroad coupons tendering indemnity is entitled to recover with interest from the date of demand. The court in this case said: "And as the plaintiff in this case made up for the want of presentment, which had become impossible, by the tender of an indemnity which is conceded to have been sufficient, it was as much the duty of the defendant to pay as if the instrument itself had been presented."

3. Corcoran v. Chesapeake, etc., Canal Co., 1 MacArthur (D. C.) 365. Compare *Warner v. Rising Fawn Iron Co.*, 3 Woods (U. S.) 514.

4. Readiness of Maker to Pay as Defense. — *Walnut v. Wade*, 103 U. S. 683; *North Pennsylvania R. Co. v. Adams*, 54 Pa. St. 94, 93 Am. Dec. 677; *Nashville v. First Nat. Bank*, 1 Baxt. (Tenn.) 402.

Under Statute in Indiana providing that in any action or defense founded on a bill or note, or other contract, for the payment of money at a particular place, it shall not be necessary to aver or prove a demand at the place, but the opposite party may show a readiness to pay such demand at the proper place, it has been held that want of funds at the place of payment was a legal excuse for want of presentment, and that interest on the coupon might be recorded from the date of maturity. *Jeffersonville v. Patterson*, 26 Ind. 15, 89 Am. Dec. 448.

5. Burden of Proof on Maker as to Readiness to Pay. — *North Pennsylvania R. Co. v. Adams*, 54 Pa. St. 94, 93 Am. Dec. 677.

with the holders of the remainder of the debt.¹ But while the coupons are entitled to be paid out of the proceeds of the mortgage, they have no equity superior to that of the bond from which they were taken, and the coupon holder is entitled to no priority over the holder of the bond in a final distribution of the proceeds of the whole mortgage property.²

Order of Payment of Coupons. — All coupon holders are on the same level, and the mortgage secures no priority to the coupons past due nor to those first due.³

Coupon Paid by Third Person under Agreement with Obligor that It Is to Be Treated as Unpaid.

As against bondholders who have presented their coupons for payment and not for sale, and who had the right to assume that they were paid and extinguished, a person who advances money to take them up under an undisclosed agreement with the company that the coupons should be delivered to him uncanceled as security for his advances, is not entitled to an equal priority in the lien or the proceeds of the mortgage by which the coupons are secured.⁴

1. Coupon Holder Entitled to Pro Rata Distribution of Proceeds of Mortgage Securing Bond and Coupon. — *Champion v. Hartford Invest. Co.*, 45 Kan. 103; *Haven v. Grand Junction R.*, etc., Co., 109 Mass. 88; *Union Trust Co. v. Monticello*, etc., R. Co., 63 N. Y. 314; *Beaver County v. Armstrong*, 44 Pa. St. 63; *Miller v. Rutland*, etc., R. Co., 40 Vt. 399, 94 Am. Dec. 414; *Gibert v. Washington City*, etc., R. Co., 33 Gratt. (Va.) 586.

2. *Sewall v. Brainerd*, 38 Vt. 364; *Miller v. Rutland*, etc., R. Co., 40 Vt. 399, 94 Am. Dec. 414.

In *Ketchum v. Duncan*, 96 U. S. 659, Strong, J., said: "The mortgage was given as a security for the principal of the bonds as well as the interest, with no priority to either. The coupons are mere representatives of the claim for interest. The obligation of the debtor evidenced by them cannot be higher, nor entitled to greater privileges, than it would be had the bonds in their body undertaken the payment of interest. Cutting them from the several bonds of which they were a part, and transferring them to other holders, can give them no increased equities, so far as we can perceive. Had they been assigned with a guaranty of payment, it may well be they would be entitled to payment before the assignors could claim the fund. Then they might have an equity to prior payment, growing out of the guaranty. But there was no such undertaking of the assignors in this case."

A railroad company issued bonds, with coupons for interest attached, which were guaranteed by the state, and, to secure the payment thereof, gave to the state a statutory lien on all the franchises, rights, and property of the company. The company afterwards failed to pay the coupons, and became insolvent, and before the bonds became due the statutory lien or mortgage was foreclosed in an action by the state, and all the rights, franchises, and property of the company were sold. It was held that the holders of the coupons past due at the time of the sale were not entitled to priority of payment over the owners of the principal debt, which was not then due, but that such proceeds were distributable *pari passu* between the holders of the coupons past due and the owners of the bonds. *State v. Spartanburg*, etc., R. Co., 8 S. Car. 129.

Provision in Mortgage for Pro Rata Distribution. — In *Dunham v. Cincinnati*, etc., R. Co., 1

Wall. (U. S.) 254, it was held that a decree of the Circuit Court which gives precedence to the past-due coupons over the principal of the bonds is erroneous where the terms of the mortgage are that in case of default in the payment of interest or principal, and a sale to coerce the same, all bonds and the interest accrued thereon shall be equally due and payable and entitled to a *pro rata* dividend of the proceeds of said sale or other proceeding.

Coupon Issued in Satisfaction of Judgment. — Upon the same principle as laid down in the text it has been held that where bonds and coupons are issued in satisfaction of a judgment they evidence the same indebtedness that the judgment represented, and the holder of each coupon is, in legal effect, an assignee of the debt *pro tanto*, and is entitled to invoke every presumption and every estoppel in support of his claim, which the judgment creditor could have called to his aid if he had brought action upon the judgment. *Lake County v. Platt*, 79 Fed. Rep. 567.

3. *Ketchum v. Duncan*, 96 U. S. 659; *Sewall v. Brainerd*, 38 Vt. 364.

4. *Wood v. Guarantee Trust*, etc., Co., 128 U. S. 476; *Farmers' L. & T. Co. v. Iowa Water Co.*, 78 Fed. Rep. 881; *Pearce v. Bryant Coal Co.*, 121 Ill. 590; *Com. v. State*, 32 Md. 501; *Cameron v. Tome*, 64 Md. 507, 24 Am. & Eng. R. Cas. 203; *Union Trust Co. v. Monticello*, etc., R. Co., 63 N. Y. 311; *Fidelity Ins.*, etc., Co. v. *West Pennsylvania*, etc., Connecting R. Co., 138 Pa. St. 494, 21 Am. St. Rep. 911; *Martin v. Bank*, 94 Tenn. 176, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 441. Compare *Miller v. Rutland*, etc., R. Co., 40 Vt. 399, 94 Am. Dec. 414.

In *Fidelity Ins.*, etc., Co. v. *West Pennsylvania*, etc., Connecting R. Co. 138 Pa. St. 505, 21 Am. St. Rep. 911, the court said: "It [the maker of the coupon] could not diminish the value of such securities as were pledged, by a private arrangement that coupons paid in accordance with their terms should be treated as unpaid, and that parties advancing the money with which to pay them should be treated as original holders and be allowed to share in the proceeds of the mortgaged property equally with the holders of the bonds. The bondholders are the only parties who could make such an arrangement, and they have not been consulted."

But in *Ketchum v. Duncan*, 96 U. S. 659, it

But as against the corporation that issued the bonds, the coupons so delivered up are valid securities in the hands of the holder, and the mortgage upon the corporate property given to pay the bonds may be enforced for his benefit ¹

Funding of Coupons Not Destructive of Mortgage Lien. — Where a railroad company, being unable to pay the interest on its bonds, gave to the holders of certain interest coupons the coupon bonds of the company for the amount of said interest, it was held that this was not a novation, but was a change of the evidence of the debt which could not destroy the lien that had been given for its security.²

was held that where a corporation which had previously paid its coupons at its own office directed the holders to take the coupons to a bank where they would receive payment, and the holders there received the amounts due on the coupons and left them in possession of the bank, they might properly presume that the company was not paying the coupons; that inasmuch as the holders of the coupons received from the corporation no checks upon the bank they must have known that the bank had no vouchers for its payments unless the coupons continued in force after the bank received them, and hence it was regarded as a fair presumption that when they delivered the possession they assented to a transfer of ownership. Mr. Justice Strong, delivering the opinion of the court, said: "It is within common knowledge that interest coupons, alike those that are not due and those that are due, are passed from hand to hand, the receiver paying the amount they call for, without any intention on his part to extinguish them, and without any belief in the other party that they are extinguished by the transaction. In such a case the holder intends to transfer his title, not to extinguish the debt. In multitudes of cases coupons are transferred by persons who are not the owners of the bonds from which they have been detached. To hold that in all these cases the coupons are paid and extinguished, and not transferred or assigned, unless there was something more to show an assent of the person parting with the possession that they should remain alive and be available in the hands of the person to whom they were delivered, would, we think, be inconsistent with the common understanding of business men."

In *Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, the court, in commenting on this case, said: "That case clearly settles the proposition that in such a matter as this the question as between payment and purchase is one of fact rather than of law, to be settled by the evidence, largely presumptive generally, in the case. It is a question of the intention of the parties."

Action Against Party Transferring Paid Coupons with Warranty that They Are Unpaid. — In *South Covington, etc., R. Co. v. Gest*, 34 Fed. Rep. 628, 36 Fed. Rep. 307, it was held that where certain coupons detached from bonds secured by a mortgage were paid by the corporation issuing them, with money advanced by the largest stockholder, who transferred them to a third party, who in turn transferred them to another party with the warrant that they were unpaid and were under the lien of the mortgage, the last transferrer was liable in damages to the purchaser for a breach of the warranty.

1. *Union Trust Co. v. Monticello, etc., R. Co.*, 63 N. Y. 311; *Fidelity Ins., etc., Co. v. West Pennsylvania, etc., Connecting R. Co.*, 138 Pa. St. 494, 21 Am. St. Rep. 911.

Interest coupons due on mortgage bonds were detached and presented for payment. The corporation being out of funds, they were paid at its office with money voluntarily supplied for the purpose by D. K., who was president and a director of the corporation, and its creditor to a large amount, upon an understanding between him and the corporation that they were not extinguished as against it, but were to be held by him in place of the persons who presented them. These persons had no intention of assigning them to any one, and supposed that they were paid and extinguished by the corporation in regular course of business. The transaction was designed to maintain the credit of the corporation and protect D. K. as its creditor, but not to enable it to sell any of its bonds or coupons. The belief, however, thereby created, that it was able to pay, and did pay, these coupons at maturity, was held and acted on by another corporation in subsequent purchases of the bonds from individual holders of them; but these purchases were made at or below the par value of the bonds and accrued interest, and were not made till between eight and nine years afterwards, and then with a view to acquire title to lands which constituted the mortgaged security, and which this corporation had voted to buy. It was held that, after a judicial sale of the lands upon foreclosure of the mortgage, D. K. was not estopped to maintain a claim for the amount of the coupons paid by him, with interest from the date of payment, against a surplus of the proceeds of the sale remaining after full satisfaction of the claims of all the other creditors. *Haven v. Grand Junction R., etc., Co.*, 109 Mass. 88.

2. **Funding of Coupons Not Destructive of Mortgage Lien.** — *Gibert v. Washington City, etc., R. Co.*, 33 Gratt. (Va.) 586. The court in this case said: "According to all the decisions there must be the clearest proof of an intention on the part of those who took the funded interest bonds to release the lien of the mortgages. They cannot be deprived of the benefit of their liens by simply accepting another security for the same debt. The acceptance by them of the funded interest bonds in place of the coupons, even if they were surrendered, was not an extinguishment of the debt. It was but the acceptance of another security for the same debt. It cannot, therefore, be considered as a novation of the contract, or an extinguishment and discharge of the debt evidenced by the coupons; the debt remains the

V. ENFORCEMENT OF COUPONS — 1. Independent Right of Action. — A negotiable coupon, being governed by the rules pertaining to commercial paper in general, may support a separate and independent action.¹ But it has been held that an interest warrant which does not import a promise, but is a mere acknowledgment of indebtedness for interest on the bond itself, cannot be made the ground of an action.²

Production of Bond Not a Prerequisite. — Coupons are drawn and executed in a form and mode for the very purpose of separating them from the bond and thereby dispensing with the necessity of its production at the time of the accruing of each instalment of interest, and at the same time furnishing complete evidence of the payment of the interest to the makers of the obligation; and hence suit may be brought on coupons without a production of the bond.³

Effect of Stipulations in Bond. — But it has been maintained that a detached coupon, though having many of the incidents of commercial paper, is still subject to the covenants contained in the bond.⁴

Effect of Mortgage Conditions. — The enforcement of a coupon may also be affected by mortgage conditions. Thus it has been held, in a suit to establish the lien of certain holders of bonds and coupons secured by mortgage, that where the coupons, by the terms of the security given, were made payable out of certain net revenues after the satisfaction of other claims, it was necessary to allege and prove the existence of such a fund before there could be any recovery.⁵

Effect of Cancellation of Bond Before Maturity. — Coupons do not lose their validity.

same, but the security for its payment only is changed." See also *Com. v. Chesapeake, etc., Canal Co.*, 35 Md. 1.

1. Enforcement of Coupon as Independent Security. — *Clark v. Iowa City*, 20 Wall. (U. S.) 583.

2. Interest Warrants Not Importing a Promise No Ground for Independent Action. — *Crosby v. New London, etc., R. Co.*, 26 Conn. 121; *Jackson v. York, etc., R. Co.*, 48 Me. 147.

Thus an interest warrant as follows: "Interest warrant. Mortgage and convertible bond. For thirty dollars, being half-yearly interest on bond No. 30 of the N. L. W. and P. R. Co., payable on the first day of February, 1856. J. D., treasurer," was held to be a mere acknowledgment of indebtedness for interest on the bond itself, and could not be the ground of an independent action. *Crosby v. New London, etc., R. Co.*, 26 Conn. 121.

But see conflicting decisions *supra*, *Negotiability — Detached Coupons — Necessity of Negotiable Words*.

3. Production of Bond Not a Prerequisite to Suit — United States. — *Knox County v. Aspinwall*, 21 How. (U. S.) 539; *Kennard v. Cass County*, 3 Dill. (U. S.) 147; 1 Cent. L. J. 35; *Thomson v. Lee County*, 3 Wall. (U. S.) 327; *Walnut v. Wade*, 103 U. S. 695.

Indiana. — *Cicero v. Clifford*, 53 Ind. 191.

Massachusetts. — *Haven v. Grand Junction R., etc., Co.*, 100 Mass. 88.

Minnesota. — *Welsh v. First Div. St. Paul, etc., R. Co.*, 25 Minn. 320.

New York. — *Bailey v. Buchanan County*, 115 N. Y. 297; *Williamsburgh Sav. Bank v. Soion*, 136 N. Y. 481.

Pennsylvania. — *Beaver County v. Armstrong*, 44 Pa. St. 63.

Rhode Island. — *National Exch. Bank v.*

Hartford, etc., R. Co., 8 R. I. 375, 5 Am. Rep. 582, 91 Am. Dec. 237.

Tennessee. — *Nashville v. Potomac Ins. Co.*, 2 Baxt. (Tenn.) 296.

Vermont. — *North Bennington First Nat. Bank v. Mount Tabor*, 52 Vt. 87.

4. Effect on Coupon of Stipulations in Bond. — *Corcoran v. Chesapeake, etc., Canal Co.*, 1 MacArthur (D. C.) 358; *State v. Spartanburg, etc., R. Co.*, 8 S. Car. 129.

5. Effect of Mortgage Conditions. — *Corcoran v. Chesapeake, etc., Canal Co.*, 1 MacArthur (D. C.) 358.

Right of Action at Law Unaffected by Prohibition Against Foreclosure. — But where the holders of bonds secured by a mortgage were, by the terms of the mortgage, forbidden from proceeding at law or in equity to foreclose it or to procure a sale of the property independently of the trustee, it was held that the right to bring an action at law to recover on overdue interest coupons was not affected although the mortgage provided that a foreclosure might be had on default in the payment of the coupon. *Lyon v. New York, etc., R. Co.*, 14 Daly (N. Y.) 489.

No Action at Law Prior to Foreclosure Proceedings. — Under a statute of *New Jersey* providing that "in all cases where a bond and mortgage has been given for the same debt, all proceedings to collect said debt shall be first to foreclose the mortgage, and if the sale of the mortgage premises shall not produce a sum sufficient to satisfy the claim, then it shall be lawful to sue on the bond for the deficiency," it has been held that the interest is a part of the debt due on the bond and secured by the mortgage, and a suit on the interest coupons is a proceeding to collect the debt before foreclosure, in contravention of the

nor their ability to support separate actions, if, for any cause, the bonds are canceled or paid before maturity.¹

Bond Not Extinguished by Falling Due by Mortgage Condition Before Stipulated Time of Payment. — Also it has been held that when, under conditions contained in the mortgage securing a coupon bond, the bond falls due before the time fixed for payment according to the terms of the bond, but is not paid at the time, transferred coupons for interest to accrue subsequently will be unaffected by the bond becoming due, and will support an action by the holder for their amounts, the rate allowed by law for damages for default in payment of the principal being the same as the rate agreed on for interest.²

2. Jurisdiction of Federal Courts. — The right of a holder of a detached coupon payable to bearer to sue thereon in the United States courts is not dependent upon the citizenship of any antecedent holder.³ But attached interest coupons cannot be sued upon in the federal courts where the municipal bonds to which they are attached under the seal of the corporation are made payable to a railroad company in the same state, since, by statute, the bonds themselves cannot, under such circumstances, be sued in the federal courts, and the coupons contain no obligation in themselves, but refer to the bonds for their vitality.⁴

Amount Sued On as Determining Jurisdiction. — And it has been held that the question whether the amount sued on is sufficient to confer jurisdiction is to be determined by the aggregate amount of the coupons.⁵

3. Judgment as Bar. — Where a second suit upon coupons is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented or determined in the first action.⁶ But when the second suit is on the bonds themselves or other coupons, though between the same parties, the judgment in the former action operates as an estoppel only as to the point

provisions of the statute. *Holmes v. Seashore Electric R. Co.* 57 N. J. L. 16.

1. Effect of Cancellation of Bond on Coupon. — *Clark v. Iowa City*, 20 Wall. (U. S.) 583; *National Exch. Bank v. Hartford, etc., R. Co.*, 8 R. I. 375, 5 Am. Rep. 582, 91 Am. Dec. 237.

In *Internal Imp. Fund v. Lewis*, 34 Fla. 424, 43 Am. St. Rep. 209, it was held that a *bona fide* holder of a detached coupon can recover thereon where he became such holder *bona fide* without notice that the principal bonds had been taken up or canceled.

2. Welsh v. First Div. St. Paul, etc., R. Co., 25 Minn. 314.

Coupon Maturing Subsequent to Default, Attached to Principal Note. — But in a suit to foreclose a mortgage securing a promissory note and coupon interest notes, it has been held that the plaintiff is not entitled to judgment for the interest notes not due, although the note in terms provides that, in case of default in payment of any interest when due, the principal note and interest coupons shall mature and become payable at once at the option of the holder. *Cloud v. Rivord*, 6 Wash. 555. The court in this case said: "Inasmuch as the coupon notes, not due, simply represent the computed interest up to the time when the principal note would become matured by time, it is very evident that the consideration for such notes failed when judgment was obtained for the principal, and plaintiff would under no principle of law or ethics be allowed to recover both the use of the money and the

money which represented its use, and the court very properly refused this demand."

3. Suits in Federal Courts. — *Cooper v. Thompson*, 13 Blatchf. (U. S.) 434; *Pettit v. Hope*, 18 Blatchf. (U. S.) 180; *McCoy v. Washington County*, 3 Wall. Jr. (C. C.) 381; *Rich v. Seneca Falls*, 19 Blatchf. (U. S.) 558; *Thompson v. Perrine*, 106 U. S. 589.

In *Thompson v. Perrine*, 106 U. S. 589, it was held that the holder of a coupon payable to bearer was not an assignee within the meaning of the provision in the Act of March 3, 1875, c. 137, as follows: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange."

4. Clarke v. Janesville, 1 Biss. (U. S.) 98.

5. Smith v. Clark County, 54 Mo. 58.

6. Judgment a Bar to Another Suit on the Same Cause of Action. — Thus in an action to enforce the collection of bonds or coupons issued in payment of a judgment entered by default against a county, it was held that the judgment conclusively estopped the corporation from making the defense that the indebtedness evidenced by the judgment was in excess of the amount which the corporation had the power to create under the limitations of the constitution of the state in which it was incorporated. *Lake County v. Platt*, 79 Fed. Rep. 567.

or question actually litigated and determined, and not as to other matters which might have been litigated and determined.¹

4. Statute of Limitations. — Suit upon a coupon is not barred by the statute of limitations, unless the lapse of time is sufficient to bar also a suit upon the bond,² but the statute begins to run against detached coupons from their respective maturities, and not from the maturity of the bond.³

COURSE. (See the title BOUNDARIES, vol. 4, p. 784.) — “Course” is defined as motion commenced with reference to its direction; line of progress; direction.

Course is the ground or path traversed; as a race course; roadway; track-way; route; passage.⁴

1. *Cromwell v. Sac County*, 94 U. S. 351; *Butterfield v. Ontario*, 44 Fed. Rep. 171.

Where in an action upon certain coupons detached from bonds it appeared in evidence that the indebtedness of the corporation issuing the bonds at the time exceeded the constitutional limitation of five per cent., but it was adjudged that the recitals in the bonds estopped the defendant from showing that fact against the plaintiff, it was held in a subsequent action between the same parties on the bonds themselves and the other coupons cut from them, that a judgment in the former suit was no bar to the subsequent action, where in addition to the facts proven in the first action it appeared that the plaintiff had no knowledge of the invalidity of the securities at the time he acquired them. *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610.

But where in the former action certain coupons were adjudged to be void instruments because the bonds to which they were attached were void, having never been executed by the corporation by whom they purported to have been issued, the plaintiff in a subsequent action against the municipality to recover on other coupons detached from the same bonds will be concluded thereby. *Bissell v. Spring Valley Tp.*, 124 U. S. 225.

Pendency of Action as Bar. — In *Welsh v. First Div. St. Paul, etc., R. Co.*, 25 Minn. 314, it was held that the pendency of an action brought by the trustees of a mortgage given to secure certain bonds and coupons, to foreclose the same, is no bar to another action at law brought by the holder of a portion of the coupons.

2. Statute of Limitations. — *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Kenosha v. Lamson*, 9 Wall. (U. S.) 477; *Roeding v. Porter*, (Cal. 1884) 2 Pac. Rep. 888; *Meyer v. Porter*, 65 Cal. 67.

In *Lexington v. Butler*, 14 Wall. (U. S.) 296, Clifford, J., said: “The coupon, if in the usual form, is but a repetition of the contract in respect to the interest, for the period of time therein mentioned, which the bond makes upon the same subject, being given for interest thereafter to become due upon the bond, which interest is parcel of the bond, and partakes of its nature, and is not barred by lapse of time except for the same period as would bar a suit on the bond to which it was attached.”

3. *Clark v. Iowa City*, 20 Wall. (U. S.) 583. See also *Amy v. Dubuque*, 98 U. S. 470; *Koshkonong v. Burton*, 104 U. S. 668.

In *Clark v. Iowa City*, 20 Wall. (U. S.) 587, the court said: “The counsel for the plaintiff cites the case of *Kenosha v. Lamson* [9 Wall. (U. S.) 477], and the case of *Lexington v. Butler* [14 Wall. (U. S.) 282], as conclusive against the bar of the statute. There are expressions in the opinions of the court in those cases which, detached from the context, would seem to justify this conclusion. But the whole purport of the decisions in those cases was to the effect that the coupons, being given for interest on the bonds, partook of their nature, and were equally high as security, and therefore the statute could only run against them when it would run against instruments of the dignity of the bonds. In other words, the decisions only established the doctrine that the coupons so far partook of the nature of the bonds that, as the latter were specialties, so were they specialties also, and not mere simple contracts.”

4. *Bayha v. Taylor*, 36 Mo. App. 442. A statute provided for the construction of public sewers “along the principal *courses* of drainage;” the second section of the statute provided that a district sewer should connect with the public sewer or other district sewer or with “the natural *course* of drainage.” It was contended that the word *course* in the phrase “along the principal *courses* of drainage,” and in the phrase, “natural *course* of drainage,” had the same meaning. The court refused to give the statute this construction, holding that as used in the first section the term had the first meaning given in the text, and as used in the second section, the second meaning; and that the phrase “natural *course* of drainage,” as used in the second section, meant the natural road or passage for drainage.

Vessels. (See the title NAVIGATION.) — In *The Britannia*, 153 U. S. 143, it was held that a vessel which voluntarily becomes motionless cannot properly be said to keep her *course*. The court said: “It is argued that the words ‘shall keep her *course*’ do not mean that she shall maintain her speed, and English cases are cited to the effect that the rule does not imply that the vessel shall maintain the same speed. If this is all that is meant in the cases cited, and we so read them, we have no reason to disagree with them, and they do not in the slightest degree impugn our reasoning. But if the contention is, and if those cases must be understood as holding, that a vessel, whose duty it is to keep her *course*, complies with that duty by reversing her engines and ceas-

Course is the stated and orderly method of proceeding; usual manner.¹

ing to move at all, we are unable to concur in such a view. It is inconsistent with both the words and the sense of the rule. A vessel which voluntarily becomes motionless cannot properly be said to keep her *course*." But see the dissenting opinion of Mr. Justice Brown, p. 148. And see *The Beryl*, 9 Prob. Div. 137, where it is said: "It was suggested to us today that 'keep her *course*' meant keeping her *course* at the same pace at which she was going before she was called upon to obey this rule. But keeping her *course* means that she is to keep on the same direction as before; it has nothing to do with the question of speed."

* * * The Abeona was bound to get out of the way of the *Beryl*; the moment that rule applied to the Abeona, art. 22 applied to the *Beryl*, namely, to keep her *course*. * * * The Abeona did everything that was wrong; and then the question arises, Did the *Beryl* break any of the rules? She kept her *course*, and when she saw that the Abeona was not doing her duty she whistled. * * * Seeing the Abeona was still keeping on, she whistled again and slackened her speed. The first question upon that is this: Were the circumstances such then that there was risk of collision? The vessels were at a distance of from a quarter to half a mile. At that time the officer of the *Beryl* slackened his speed."

Course of River Distinguished from Current. — In *Atty.-Gen. v. Paterson*, etc., R. Co., 9 N. J. Eq. 550, the court said: "The *course* of the river is a line parallel with its banks. The current of the stream will vary from the general *course* of the river, depending upon a variety of circumstances. Short bends in the river will drive the current diagonally from one bank to the opposite bank. Exposure to the winds on one side, and the protection afforded by high banks on the other, will produce the same effect. The character of the bed of the river must necessarily greatly affect its current. The map exhibited in this case illustrates this. The channel of the river, its current, and its general *course* are all in different directions; and if the map is to be relied on it shows conclusively that no draw could be constructed at right angles with any two of them."

1. Webster's Dict.

Course of Business. — See DUE; ORDINARY; TRADE; USUAL; and see the titles BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 282, 310; FRAUDULENT SALES AND CONVEYANCES.

Same — Innkeeper. (See also the title INNS AND INNKEEPERS.) — In *Harris v. Boggs*, 5 Blackf. (Ind.) 490, it is said: "The twelfth section of the act regulating distress for rent (Rev. Stat. 1838, p. 472) exempts from distress, amongst other things, property deposited with a tavern keeper in the usual *course* of business. Upon the construction of that statute depends the sufficiency of the replication. By a deposit with a tavern keeper in the usual *course* of business, we understand a deposit of goods with him by a guest, for safekeeping. In the *course* of an innkeeper's business no other deposit of goods is usually, if ever, made with him."

Same — Conveyances in Course of Trade. — Car-

riages belonging to a circus, and used for carrying the band and performers in a street parade, are not carriages "used solely for the conveyance of any goods or burden in the *course* of trade" so as to exempt them from a duty on carriages under an act making such an exception. *Speak v. Powell*, L. R. 9 Exch. 25.

Same — Retail Merchant. — For a retail merchant in a small country town to sell his entire stock to one or more persons, is out of his usual and ordinary *course* of business, within the meaning of that portion of section 35 of the Bankrupt Act of 1867, by which it is enacted, that if one insolvent or in contemplation of insolvency makes a sale not in the usual and ordinary *course* of his business, that fact shall be *prima facie* evidence of fraud. *Walbrun v. Babbitt*, 16 Wall. (U. S.) 577. See the title INSOLVENCY AND BANKRUPTCY.

Due Course of Law. (See the titles CONSTITUTIONAL LAW, vol. 6, p. 962; DUE PROCESS OF LAW.) — "Due *course* of law" is synonymous with due process of law. *Kansas Pac. R. Co. v. Dunmeyer*, 19 Kan. 539; *Adler v. Whitbeck*, 44 Ohio St. 569.

A discharge from the prison rules fraudulently obtained by one imprisoned under an insolvent act is a discharge by due *course* of law within the terms of a bond given by him not to depart from the prison rules or bounds till he should be discharged in due *course* of law or should pay the debt for which he was imprisoned. *Simms v. Slacum*, 3 Cranch (U. S.) 300.

In an action of covenant on a warranty to recover back purchase money, an allegation that the plaintiff was "ousted and dispossessed of the premises by due *course* of law" was held not to be sustained by proof of a constructive eviction by the purchase by the plaintiff of a paramount title hostilely asserted by the party holding it. The court said: "The words 'by due *course* of law' are synonymous with 'due process of law' or 'law of the land,' and the general definition thereof is 'law in its regular course of administration through courts of justice;' and while not always necessarily confined to judicial proceedings (as, for instance, the collection of taxes is held to be within the phrase 'by due process of law'), yet these words have such a signification when used to designate the kind of an eviction or ouster from real estate by which a party is dispossessed, as to preclude thereunder proof of a constructive eviction." *Kansas Pac. R. Co. v. Dunmeyer*, 19 Kan. 539.

Course of an Action. — In a statute providing that when, "in the *course* of any civil action or proceeding whatever," it is made to appear to the court that the defendant is in the military service of the United States or of the state, the action or proceeding shall be stricken from the calendar, *course* signifies "progressive action in a suit or proceeding not yet determined," and the act is not applicable where the rights of the defendant have been fixed by final judgment before his enlistment. *Williams v. Elv*, 14 Wis. 236.

Course of the Trial. — "After an issue of fact is joined in a criminal case, every step there-

Course is what is termed in higher institutions of learning "curriculum," and the original meaning of that is "race ground."¹

COURT-HOUSE. (See also the titles COURTS, *post*; COUNTY SEAT, *ante*; COUNTY COMMISSIONERS, *ante*; PUBLIC BUILDINGS.) — A court-house is a building occupied and appropriated for the holding of courts.²

after taken for the purpose of a determination of that issue in the court where the cause is pending, up to and including the verdict upon such issue, must be regarded as a step or proceeding 'arising during the *course* of the trial,' within an act regulating motions for new trials. The misconduct of a juror between the time when sworn and examined on his *voir dire*, and the rendering of the verdict, is within the above expression, and is ground for a motion for a new trial. *People v. Turner*, 39 Cal. 371. See generally the titles NEW TRIAL; TRIAL, in the ENCYC. OF PL. AND PR.

1. *Iron City Commercial College v. Kerr*, 3 Brews. (Pa.) 196, in which case it was held that a receipt for tuition fees entitling the student to all the privileges of the *course* of study, at an educational institution, did not confine his right to demand instruction to the term at which he was entered, but permitted it within any reasonable time thereafter. The court said: "To confine the term 'all the privileges of the *course*' to those belonging to it before it had commenced, would not be warranted either by the meaning of the word, or the spirit of the contract as explained by the circular. *Course* is what is termed in higher institutions of learning 'curriculum,' and the original meaning of that is 'race ground.' Surely the permitted times of entry on the race are a part of the privileges of the *course*."

2. *Harris v. State*, 72 Miss. 960, *quoting* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 446. And in that case it was held that the term was to be so understood in a provision that where there was no *court-house* in a county, or the same was undergoing repair, the board of supervisors should provide and designate a suitable building; and in a further provision, that the clerks of the circuit and chancery courts should keep their offices at the county *court-house*.

Judicial Sale. (See also the titles JUDICIAL SALE; SHERIFFS' SALES; TAX SALES.) — Where the "door of the *court-house*" is named in a deed of trust as the place at which the sale of the property, when sold, must be held, the provision is sufficiently complied with by a sale at the door of a building temporarily occupied

and appropriated for the holding of the courts, while the *court-house* proper was undergoing repairs. The court said: "The object of such deeds * * * is to secure a sale at a public place; and when a *court-house* is mentioned, it is obviously designed to designate the building where courts are held, and where the people attending such courts are supposed to congregate." *Hambright v. Brockman*, 59 Mo. 52.

Similar are the decisions in reference to judicial sales required by statute in some of the states to be held at the *court-house* door. Such sales made at the door of a church, at the time occupied by the courts, because the *court-house* was occupied by troops of the United States, are not invalid. "The obvious meaning of the execution law is to require sales at the door of the building occupied and used as a *court-house*." *Kane v. McCown*, 55 Mo. 181.

Same — Destruction by Fire. — And where the provision was that the sale should be "at the north door of the *court-house*," the sale might properly be held at the north door of a building occupied as a *court-house*, the *court-house* proper having been burned down. *Alden v. Goldie*, 82 Ill. 581. See also *Wilhelm v. Schmidt*, 84 Ill. 183; *Chandler v. White*, 84 Ill. 435. Or where the destruction of the *court-house* by fire was partial only, the sale might take place at the ruins of the north door, or at the place where the north door had stood. *Waller v. Arnold*, 71 Ill. 350. In this case it was also said that if the old *court-house* were entirely demolished, and a new one erected, a sale at the north door of the new edifice would be valid.

Where the *court-house* had been burned down, and the courts were held in a school-house, on private property, and the clerk's office was in a rented room in another building, the sheriff, on sale day, went to the site of the burned *court-house*, and, the sun being hot, adjourned the sale to a grove a hundred and fifty yards distant, on county ground, and there conducted it. The sales were held to be valid, the statute having been substantially complied with. *Longworthy v. Featherstone*, 65 Ga. 165.

COURTS.

BY ROBERT M. BEATTIE.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the references given in 5 *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, p. 342.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ADMIRALTY JURISDICTION*, vol. 1, p. 645; *ARBITRATION AND AWARD*, vol. 2, p. 532; *ATTORNEY AND CLIENT*, vol. 3, p. 278; *CLERKS OF COURTS*, vol. 6, p. 132; *CONSTITUTIONAL LAW*, vol. 6, p. 882; *CONSULS*, vol. 7, p. 6; *CONTEMPT*, vol. 7, p. 25; *COUNTY COMMISSIONERS*, vol. 7, p. 975; *DEPUTY; EQUITY; GRAND JURY; INSOLVENCY AND BANKRUPTCY; INTERPRETER; JUDGE; JUDGMENTS AND DECREES; JURISDICTION; JURY AND JURY TRIAL; JUSTICE OF THE PEACE; MILITARY LAW; PRIVATE INTERNATIONAL LAW; PUBLIC OFFICERS; QUESTIONS OF LAW AND FACT; RECORD; REFEREES AND REFERENCES; RELIGIOUS SOCIETIES; RES JUDICATA; SHERIFFS, MARSHALS, AND CONSTABLES; STARE DECISIS; STENOGRAPHERS; SUNDAY; SURROGATES' AND PROBATE COURTS; TERM; TERRITORIES; UNITED STATES COMMISSIONERS; UNITED STATES COURTS; VERDICT.*

I. SCOPE OF TITLE. — It is the design of this article to treat only in a general way of the structure and nature of courts; and while several of the main divisions into which a more extensive work on the subject itself would naturally fall are outlined and briefly treated, such as Adjudications, Judges, Jurisdiction, and others, their full consideration will be found under separate articles elsewhere in this work.

II. DEFINITION. — A court has been defined as a place where justice is judicially administered.¹ This definition, however, is too narrow, and a court may be defined as a body in the government, organized for the public administration of justice at the time and place prescribed by law.²

Judge and Jury. — A court is an incorporeal being, which requires for its existence the presence of the judge.³ The words "judge" and "court" are frequently used as convertible terms.⁴ But strictly speaking this is a misuse

1. *Coke's Definition.* — Coke on Litt. 58; 3 Bl. Com. 23.

2. Sternberg v. State, 48 Neb. 312, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 447; Hobart v. Hobart, 45 Iowa 503.

Coke's Definition Criticised. — In this latter case it is said: "Blackstone, adopting Coke's definition, says, 'A court is a place where justice is judicially administered.' 3 Bl. Com. 23. But this definition obviously wants fullness; it is limited to the place of a court in its expression. In addition to the place, there must be the presence of the officers constituting the court, the judge or judges certainly, and probably the clerk authorized to record the action of the court; time must be regarded, too, for the officers of a court must be present at the place and at the time appointed by law in order to constitute a court. To give existence to a court, then, its officers and the time and place of holding it must be such as are prescribed by law." For a similar criticism, see Levey v. Bigelow, 6 Ind. App. 677.

Other Definitions. — A court has been defined to be that body in the government to which the public administration of justice is delegated. Tissier v. Rhein, 130 Ill. 110.

The court consists of persons officially assembled, under authority of law, at the appropriate time and place, for the administration of justice. *In re Allison*, 13 Colo. 528, 16 Am. St. Rep. 224.

In *State v. Judges*, 32 La. Ann. 1261, it is said: "A court is an incorporeal, political being, which requires for its existence the presence of the judges, or of a competent number of them, and a clerk or prothonotary, at the time during which and at the place where it is by law authorized to be held, and the performance of some public act indicative of a design to perform the functions of a court. According to Lord Coke, a court is a place where justice is judicially administered. Co. Litt. 58a. The judges, when duly convened, are also called the court."

In *Lawyers' Tax Cases*, 8 Heisk. (Tenn.) 650, it is said: "Bouvier defines a court to be 'an incorporeal, political being, which requires for its existence the presence of the judges or a competent number of them, and a clerk or prothonotary, at the time during which and at the place where it is by law authorized to be held, and the performance of some public act indicative of a design to perform the functions of a court. In another sense, the judges, clerk or prothonotary, counselors and ministerial officers are said to constitute the court.'"

A court is an official assembly, legally met together for the transaction of judicial business; a judge or judges sitting for the hearing or trial of causes. Webster's Dict., quoted in *Shoultz v. McPheeters*, 79 Ind. 376.

A court is a tribunal established for the public administration of justice, and composed of one or more judges, who sit for that purpose at fixed times and places, attended by proper officers. *Mason v. Woerner*, 18 Mo. 570.

A court is defined to consist of persons officially assembled at a time and place appointed by law for the administration of justice. *White County v. Gwin*, 136 Ind. 562.

Parties. — In *Union Colony v. Elliott*, 5 Colo. 381, it is said: "Blackstone says that 'a court is defined to be a place where justice is judicially administered.' * * * In every court there must be at least three constituent parts: the actor, reus, and judex; the actor, or plaintiff, who complains of an injury done; the reus, or defendant, who is called upon to make satisfaction for it; and the judex, or judicial power which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to be done, to ascertain and by its officers to apply the remedy. 3 Bl. Com. 24-25. Another author says: No one can properly resort to a court of justice until his right is disputed, so there must be a complainant and some one to complain against. 1 Wait's Pr. 32." See also *People v. New York*, 25 Wend. (N. Y.) 63.

Right of Foreign Power to Establish Courts Here. — In *Glass v. The Sloop Betsey*, 3 Dall. (U. S.) 6, it was held that no foreign power could, of right, institute or erect any court of judicature within the jurisdiction of the United States, except such as were warranted by treaties, and that consequently the admiralty jurisdiction exercised in the United States by French consuls was not of right. See the title *CONSULS*, ante, p. 6.

3. Presence of Judge. — Bacon's Abr., title Courts; *Davis v. Delaware Tp.*, 41 N. J. L. 56. A court can have no existence without a judge. *Mason v. Woerner*, 18 Mo. 570; *Hobart v. Hobart*, 45 Iowa 503; *Levey v. Bigelow*, 6 Ind. App. 677; *Matter of Terrill*, 52 Kan. 29, 39 Am. St. Rep. 327.

4. Michigan Cent. R. Co. v. Northern Indiana R. Co., 3 Ind. 245; *Pressley v. Lamb*, 105 Ind. 186.

"Judge" and "Court" Used Interchangeably. — In *Brewster v. Ludekins*, 19 Cal. 170, it is said: "The first objection to the insolvent proceedings offered in evidence and ruled out is, that the District Court, before which the proceedings were taken, had no jurisdiction, in this, that the petition is addressed to 'the court, not to the judge.' This exception is entirely too technical. The District Court has jurisdiction of the matter, and the judge constitutes the court; and as this is not a chamber proceeding, it is difficult to see why this address is not sufficient. Indeed, the words 'judge' and 'court' are in this and other places used as convertible terms."

of the words, as a judge alone does not constitute a court.¹ The term "court" may be construed to include a jury as well as judges and a clerk, or as used in contradistinction from a jury, according to the connection and object of its use.²

In *Dyckman v. McDonald*, 5 How. Pr. (N. Y. Supreme Ct.) 121, the court construed the word "court," as used in a rule, as equivalent to "judge."

Same—Acknowledgment of Deed.—In *McClure v. McClurg*, 53 Mo. 173, it was held that an acknowledgment of a deed by a sheriff, certified to by the clerk of the court, and stated by him to be entered of record in the records of said court, was not invalid because stated to be taken before the judge, the court saying that it was evident that the clerk used "judge" and "court" as synonymous terms.

Undertaking on Appeal.—In *Von Schmidt v. Widber*, 99 Cal. 512, the respondent moved to dismiss an appeal for the want of an undertaking, upon the ground that an order dispensing with an undertaking could not be made unless by the court, whereas the order in this case was made by a judge and not by the court. It appeared that the order was an order made by a judge in the court-room while holding court, and filed by the clerk, although not entered in the minutes of the court, and it was held to be an order of the court.

1. Not Synonymous with "Judge."—A statute provided that a master's report when returned to the court should be subject to exceptions for such time as the court might allow. It was held that the word "court," as used in this section, did not mean "judge." *Stewart v. Crane*, 87 Ga. 330.

In *In re Choate*, 18 Civ. Pro. Rep. (N. Y. Oyer & T. Ct.) 186, it is said: "This becomes entirely clear when we free our minds from the popular notion that the judge is the court. He is a constituent part of the organization, but he is not the court. Nor is the court-room the court, nor the jury-room, nor the petit jury. The court is the totality of the constituent parts. It consists of the entire judicial organization for the trial of causes, and it is immediately present whenever and wherever—from the opening to the adjournment of the sitting—these constituent parts are actually performing the functions devolving upon them by law." See also *People v. Barrett*, 18 Civ. Pro. Rep. (N. Y.) 230, *affirmed* 121 N. Y. 678.

The judge alone does not constitute a court. *Ex p. Gardner*, 22 Nev. 280. In this case the court said: "Burrill defines the term thus: 'A court may be more particularly described as an organized body with defined powers, meeting at certain times and places for the hearing and decision of causes and other matters brought before it, and aided in this, its proper business, by its proper officers, viz., attorneys and counsel to present and manage the business, clerks to record and attest its acts and decisions, and ministerial officers to execute its commands and secure due order in its proceedings.' Proceedings at another time and place, or in another manner, than that specified by law, though in the personal presence and under the direction of a judge, are *coram non judge*, and void."

In *Salm Kyrburg v. Posnanski*, 13 Q. B. Div. 222, it is said: "The case of a single judge sitting in court is included under the term 'court,' and 'judge' can only mean a judge sitting in chambers."

Absent Judges.—In *Johnson v. Lewis*, 1 Rich. Eq. (S. Car.) 390, it was held that the judges present constitute the court, and that the opinion of an absent judge would not be taken into consideration to show a division of opinion in the court.

Temporary Absence of Judge.—A temporary absence from the bench of one of the judges, there being a regular quorum in attendance, does not break up the session or invalidate the proceedings. *Tuttle v. People*, 36 N. Y. 431.

Change of Judges.—A change of judges after verdict and before final decree does not change the court; for all judicial purposes it remains the same. *Hedrick v. Hedrick*, 28 Ind. 291.

Single Judge.—In *Gray v. Bastedo*, 46 N. J. L. 455, it was held that a single judge might hold a court where there are several judges, and that it is not necessary that all should sit, or a quorum.

A Judge in Vacation is not the court, but the term "court" may be interpreted to mean a judge in vacation where it is necessary to effect the intention of the legislature. Thus in *Columbus v. Hydraulic Woollen Mills Co.*, 33 Ind. 436, it was held that the term "court" included a judge in vacation, where power to grant restraining orders without notice in cases of emergency was granted to the court.

In *Greenwood v. Bradford*, 128 Mass. 296, it was held that a statute authorizing the court, upon overruling a motion for a new trial, to enter judgment as for a former time, conferred no authority upon a judge in vacation to enter judgment where the case has not been continued *nisi*. *Gray, C. J.*, said: "The court, as used in the statutes, means the court held, whether by one or by more judges, at a term established by law."

Court or a Judge.—This phrase has been construed as used in English rules of court to mean the court sitting in banc, or a judge at chambers. *Freeason v. Loe*, 26 W. R. 138; *Baker v. Oakes*, 2 Q. B. Div. 175; *Clover v. Adams*, 6 Q. B. Div. 624; *Dallow v. Garrold*, 54 L. J. Q. B. 76; *In re B—*, (1892) 1 Ch. 463.

2. Gold v. Vermont Cent. R. Co., 19 Vt. 478.

Jury.—In *Goddard v. State*, 2 Yerg. (Tenn.) 104, it is said: "My opinion is, that taking the two clauses together, which is necessary in forming a correct estimate of the import of the latter, the term 'court' in the latter clause will be found not to be used by the legislature in its more limited and restricted sense, and designating the justices of the court only, a part of the tribunal; but in its more general and more enlarged sense of court, comprehending within its purport both the justices and jury, both being component parts of the tribunal or court by its constitution. So the circuit court in like manner means the judge of the court, or in its more enlarged sense

Clerk. — The office of clerk or the presence of that official when such office exists is not necessary to the existence of the court.¹

Time and Place. — Both time and place are essential constituents of the organization of a court; that is to say, in order to constitute a court, the officer must be present at the time and place appointed by law.²

Term. — The word "court" is frequently used in the sense of term or session of court.³

both the judge and the jury, according to the context or [clause] of the subject-matter in reference to which it is used." See also *Mascall v. Drainage Dist.*, 122 Ill. 623.

1. **Clerk.** (See the title **CLERKS OF COURTS**, vol. 6, p. 132.) — In *Mealing v. Pace*, 14 Ga. 629, Lumpkin, J., said: "But fortunately, for ourselves as well as the country, we do not feel called on to decide this question. In the view we have taken of the matter it can be satisfactorily disposed of otherwise. Our opinion is that the exception itself is based upon a false assumption, and that is that the office of clerk is necessary to the existence of the court. While we hold that he is a very proper officer, to keep regular and fair minutes of all the proceedings of the court of which he is clerk — as he is required to do by the 34th section of the Judiciary Act of 1799 (Cobb 573) — still we are quite clear that the court can live and move and have its being without him. It can keep its own minutes by entering them itself and signing them, as is now done, and make its own adjournment from day to day, or for a longer time, to suit its own and the public convenience, without a clerk. Nor is there anything in our statutes which is repugnant to this conclusion. There are some things, perhaps, which the clerk alone can perform; but as to adjournments, he has neither part nor lot in the matter." See also *Von Schmidt v. Widber*, 99 Cal. 512; *Niles v. Edwards*, 95 Cal. 47; *Levey v. Bigelow*, 6 Ind. App. 682.

It has been intimated, however, that the presence of the clerk is essential. *Hobart v. Hobart*, 45 Iowa 503.

The court, as defined in section 4, Parliamentary Elections (Returning Officers) Act 1875 (38 and 39 Vict., c. 84), does not exclusively mean the judge, but includes also the registrar, or other proper officer, in daily attendance, whose duty it is to bring the matter before the judge. *Reg. v. Bloomsbury County Ct.*, 55 L. J. Q. B. 443, 17 Q. B. Div. 788, 54 L. T. 616. And in this case it was held that an application to the registrar was sufficient, though the statute provided that such applications should be made to the court.

Functions of Court. — "To perform the functions of a court the presence of the officers constituting the court is necessary, and they must be present at the time and place appointed by law." *Matter of Terrill*, 52 Kan. 29, 39 Am. St. Rep. 327, in which case it was held that a clerk could not exercise judicial functions in the absence of the judge.

2. **Time and Place.** (See also the titles **JURISDICTION**; **TERM**.) — *Hobart v. Hobart*, 45 Iowa 503; *Columbus v. Hydraulic Woollen Mills Co.*, 33 Ind. 436; *Greenwood v. Bradford*, 128 Mass. 296; *King v. King*, 1 P. & W. (Pa.) 19; *Clark v. Com.*, 29 Pa. St. 135.

The place of meeting is an important ele-

ment of a court. *In re Allison*, 13 Colo. 525, 16 Am. St. Rep. 224.

In *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 65, it is said: "The common law defines a court to be a 'place where justice is judicially administered,' and therefore to constitute a court there must be a place appointed by law for the administration of justice, and some person authorized by law to administer justice at that place must be there for that purpose. Then, but not otherwise, there is a court, and the judicial power of the state may be there exercised by the judge or person authorized to hold it; and if the law prescribed no time for holding the court, the judge might lawfully hold it when and as often as he chose."

Time is an essential ingredient. *Wightman v. Karsner*, 20 Ala. 451.

In *Brumley v. State*, 20 Ark. 78, it is said: "The meeting together of the judge and officers of court at the place but not at the time fixed by law for holding the court was not a court under our constitution and laws, but was a mere collection of officers, whose acts must be regarded as *coram non jure* and void." See also *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54.

3. As, for example, where a clerk is allowed mileage for attending any court. *Erwin v. U. S.*, 37 Fed. Rep. 476.

For an instance of the use of "court" in the sense of "term," see *Oshoga v. State*, 3 Pin. (Wis.) 68.

But in *Michigan Cent. R. Co. v. Northern Indiana R. Co.*, 3 Ind. 245, the court refused to read the word "court" as the equivalent of "term."

Constable's Fees. — A statute provided for a constable's fees for each day's actual attendance on the sitting of a court. It was held that the constable was only entitled to fees when the court was actually sitting. The court said: "A court is defined by Bacon (Bac. Abr., tit. Court, A) to be 'an incorporeal political being, which requires for its existence the presence of its judges, or a competent number of them, and a clerk or prothonotary, at or during which, and at a place where it is by law authorized to be held, and the performance of some public act indicative of the design to perform the functions of a court. According to the definition of Lord Coke, it is 'a place where justice is judicially administered.' The relator seems to have accepted this latter definition, but with altogether too much emphasis upon 'the place where.' He regards the judicial presence as not indispensable to its constitution, so long as there be a constable there. This, probably, was not Lord Coke's meaning. The one hundred and eighty-fourth section of the act authorizes the judge to designate a constable to attend the sittings of the court, to preserve order therein. Such appointment is authority to the officer to

Instances. — In the notes will be found cases in which it has been determined whether various bodies and officers fall within the term "courts." ¹

III. ORGANIZATION AND COMPONENT PARTS — The Judge. — A court is composed of a judge,² or judges, present and presiding, and subordinate officers. Courts of law usually have a jury to determine questions of fact.

attend the judge at the place where his court is held, at such times as the judge shall, by general rule or by special order, appoint for a session of the court. For such attendance the legislature intended that he should receive the prescribed compensation. But it must be attendance upon the court when sitting for the performance of its judicial functions. The casual presence of the judge at the court-room, to direct or overlook his clerk, is not such sitting as the statute contemplates. It refers to open public sessions for the transaction of business, in which an exercise of the constable's duty of 'preserving order' may possibly be requisite, in aid of the court." *Lewis v. Hoboken*, 42 N. J. L. 379.

1. Board of County Commissioners. (See also the title *COUNTY COMMISSIONERS*, vol. 7, p. 975; and see *ENCYC. OF PLEADING AND PRACTICE*, title *REMOVAL OF CAUSES*.) — In *Fuller v. Colfax County*, 4 McCrary (U. S.) 535, 14 Fed. Rep. 179, it was held that a board of county commissioners is not a court within the meaning of the removal acts of Congress. To the same effect, see *Brumfield v. Douglas County*, 2 Nev. 65.

Although boards of county commissioners exercise functions judicial in their nature in the allowance and rejection of claims against the county, such boards are not courts in the constitutional sense, or within the generally recognized acceptance of the term. *Stenberg v. State*, 48 Neb. 299. See the title *COUNTY COMMISSIONERS*, vol. 7, p. 975.

Commission. — In *Shurbun v. Hooper*, 40 Mich. 504, it was held that a court was a permanent organization for the administration of justice, and not a special tribunal for a particular exigency, such, for instance, as commissioners on the estate of deceased persons. See *Streeter v. Paton*, 7 Mich. 347.

A treaty between the United States and Spain required that the United States should investigate certain claims of Spanish subjects; in accordance with this Congress directed a territorial or district judge to receive, examine, and judge all such claims, and report his decision to the secretary of the treasury. It was held that this commission did not constitute a court. *U. S. v. Ferreira*, 13 How. (U. S.) 40.

Master Commissioner. — In *Shultz v. McPheeters*, 79 Ind. 375, a master commissioner was held not to be a court; and it was held that judicial duties which courts only could exercise could not be conferred upon him.

Master in Chancery Not a Court. — See *Lambton v. Parkinson*, 35 W. R. 545.

Referee. — The hearing before a referee is not a hearing in open court. *Hobart v. Hobart*, 45 Iowa 503. See the title *REFEREES AND REFERENCES*.

Mayor. — A statute provided that the mayor should have original jurisdiction of all offenses against the laws of the state committed within the limits of the city. It was held that while

the mayor was sitting for the examination of an offender against the laws of the state, the tribunal was a court. *Malone v. Murphy*, 2 Kan. 260.

Justices of the Peace. — Justices of the peace, while engaged in the performance of their public duties as judicial officers, are courts. *Tissier v. Rhein*, 130 Ill. 110. See the title *JUSTICES OF THE PEACE*.

Attendance upon Court. (See *ATTENDANCE*, vol. 3, p. 372; and the titles *IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS*; *JURY AND JURY TRIAL*; *WITNESSES*.) — The parties to a suit and their witnesses are for the sake of public justice protected from arrest in coming to, and attending upon, and returning from court. The term "court" within the meaning of this rule cannot be extended to the taking of depositions before a notary public in one state to be used in a suit pending in another. *Greer v. Young*, 120 Ill. 189.

Court-Martial. — In *People v. Van Allen*, 55 N. Y. 31, a court martial was held a court within a provision of the state constitution that in any trial in any court whatever the party accused should be allowed to appear and defend in person and with counsel as in civil actions. The court said: "It has all the elements of a court. It has judges to hear the evidence, and determine the facts, and apply the law. It has parties, prosecutor and defendant. It has pleadings and a formal trial, renders judgment and issues process to enforce it. In short, it does everything within the sphere of its jurisdiction which any judicial tribunal can do to administer justice." See the title *MILITARY LAW*.

Proper Court. — In *Wells v. Clarkson*, 5 Mont. 343, it is said that by proper court is meant not merely a duly constituted tribunal, but one having authority over the subject-matter of the particular case in question.

Examining Court. — See *EXAMINING COURT*.

Leave of Court. — See *LEAVE*.

2. Judges. — See generally the title *JUDGE*.

In England the judges are appointed by the Crown. In the United States the federal judges are appointed by the President, by and with the advice and consent of the senate. In many of the states the judges of the state courts are elected by the people, in others by the legislature, but in some they are appointed by the governor.

Commission. — A person elected to the office of judge cannot be legally qualified, by taking the oath required by law, until he has received his commission. *Magruder v. Tuck*, 25 Md. 217. But where a person had been appointed judge under an act which was declared to be unconstitutional and void, his official acts were held, nevertheless, to be valid until the commission was declared void. *Taylor v. Skrine*, 2 Treadw. (S. Car.) 696.

Opinion of Judge Absent at Time of Trial. — The chancellors present at the hearing and

Disqualification. — The judge must have no interest in the result of the trial; otherwise he is incompetent to sit in the cause.¹ But he is not incompetent

decision of a cause constitute the court, and an absent chancellor's opinion will not be taken into consideration for the purpose of showing a division in the court. *Johnson v. Lewis*, 1 Rich. Eq. (S. Car.) 390. See also *State v. Jefferson*, 66 N. Car. 309.

But the Casual and Temporary Absence of One of the Judges of a court from the seat assigned him neither breaks up the court nor impairs the validity of its proceedings. *Tuttle v. People*, 36 N. Y. 431.

Court Equally Divided in Opinion — Minnesota. — Where two judges of the district court in Hennepin county, Minnesota, sit together in the hearing of a cause, and there is a division of opinion, the opinion of the judge senior in office is the opinion of the court. *Fletcher v. Hahn*, (Minn. 1894) 59 N. W. Rep. 315.

Where Certain Number Required to Act — How Presence Shown. — Where nine, or a majority of magistrates, are required by law to make a particular order or decree, it is not necessary that the particular order, entry, or decree should have incorporated in it a statement to that effect. It is sufficient if the record shows that on the day the order or entry was made the requisite number of justices was present. *McCullough v. Moore*, 9 Yerg. (Tenn.) 305.

A Change of Judges After Verdict and Before Final Decree does not change the court; for all judicial purposes the court remains the same. Such succeeding judge may render a final decree of divorce and allow alimony to the wife, without hearing any evidence, where answers by the jury to special interrogatories show the amount of the husband's property. *Hedrick v. Hedrick*, 28 Ind. 291. See also *Gallagher v. Maclean*, 6 Pa. Dist. Rep. 315.

Conditional Resignation. — A decree signed by a judge after he has tendered a conditional resignation, but before its acceptance, is valid. *Northrop v. Gregory*, 2 Abb. (U. S.) 503.

The Adjournment of a Court for Refreshment does not suspend its functions as a court, and its authority over the officers of the court, parties, counsel, and jurors, continues through the period of such adjournment. *Barrett v. State*, 1 Wis. 175.

Judges and Commissioners Distinguished. — A statute passed in pursuance of a treaty stipulation to receive and adjust claims, authorizing certain judges to do so on *ex parte* applications, and to transmit the evidence and the decision to the executive department, does not create a court or judicial tribunal; but the judges act as commissioners, and their decisions are not appealable. *U. S. v. Ferreira*, 13 How. (U. S.) 40. See also *Jecker v. Montgomery*, 13 How. (U. S.) 498; *Porte v. U. S.*, Dev. Ct. of Cl. 59; *In re Pacific R. Commission*, 26 Am. L. Reg. N. S. 621; *Fulmer v. Colfax County*, 14 Fed. Rep. 177.

As to Substitute and Special Judges, see the title JUDGE.

1. Disqualification from Interest — Alabama. — *Ellis v. Smith*, 42 Ala. 349.

Arkansas. — *Foreman v. Marianna*, 43 Ark. 324.

California. — *White's Estate*, 37 Cal. 190;

People v. Mahoney, 18 Cal. 180; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *McCauley v. Weller*, 12 Cal. 500.

Iowa. — *Foreman v. Hunter*, 59 Iowa 550; *Dively v. Cedar Falls*, 21 Iowa 565.

Kentucky. — *Turner v. Com.*, 2 Metc. (Ky.) 619.

Louisiana. — *Rhea's Succession*, 31 La. Ann. 323; *State v. Judge*, 33 La. Ann. 1293.

Massachusetts. — *Bacon*, Appellant, 7 Gray (Mass.) 391; *Cottle*, Appellant, 5 Pick. (Mass.) 483; *Com. v. McLane*, 4 Gray (Mass.) 427; *Pearce v. Atwood*, 13 Mass. 324; *Clark v. Lamb*, 2 Allen (Mass.) 396.

Michigan. — *Stockwell v. Township Board*, 22 Mich. 341.

Minnesota. — *Cooper v. Brewster*, 1 Minn. 94.

Missouri. — *Bowman's Case*, 67 Mo. 146.

New Hampshire. — *New Boston's Petition*, 49 N. H. 328; *Bedell v. Bailey*, 58 N. H. 62.

New Jersey. — *Peck v. Freeholders*, 20 N. J. L. 457.

New York. — *Fry v. Bennett*, 28 N. Y. 324; *Matter of Hancock*, 91 N. Y. 284; *Paddock v. Wells*, 2 Barb. Ch. (N. Y.) 331; *Van Arsdale v. King*, 152 N. Y. 69; *Matter of Ryers*, 72 N. Y. 1, 28 Am. Rep. 88.

Texas. — *Davis v. State*, 44 Tex. 523; *Roundtree v. Gilroy*, 57 Tex. 176; *Childress v. Grim*, 57 Tex. 56; *King v. Sapp*, 66 Tex. 519.

Vermont. — *State v. Blair*, 53 Vt. 24.

West Virginia. — *Findley v. Smith*, 42 W. Va. 299.

For a Full Discussion of this topic, see the title JUDGE.

Pecuniary Interest. — A judge having any pecuniary interest in a case on trial is thereby incapacitated for sitting in the cause. *Ochus v. Sheldon*, 12 Fla. 138; *Internal Imp. Fund v. Bailey*, 10 Fla. 213; *Knight v. Hardeman*, 17 Ga. 253; *Buckingham v. Davis*, 9 Md. 324; *Pearce v. Atwood*, 13 Mass. 340; *Com. v. Ryan*, 5 Mass. 90; *Hill v. Wells*, 6 Pick. (Mass.) 109; *Stockwell v. Township Board*, 22 Mich. 341; *Bank of North America v. Fitzsimmons*, 2 Binn. (Pa.) 454. See *King v. Sapp*, 66 Tex. 519. See the title JUDGE.

The court, in *Bennett v. State*, 4 Tex. App. 72, held that a judge is not disqualified by reason of the fact that upon conviction of the defendant he would receive a statutory fee.

Interest from Relationship. — Where a judge is related to the parties he is disqualified to sit in the case. *Giil v. State*, 61 Ala. 169; *De La Guerra v. Burton*, 23 Cal. 592; *People v. De La Guerra*, 24 Cal. 73; *Bayard v. McLane*, 3 Harr. (Del.) 139; *Kelly v. Hockett*, 10 Ind. 299; *Sanborn v. Fellows*, 22 N. H. 473; *Perkins v. George*, 45 N. H. 453; *New York, etc., R. Co. v. Schuyler*, 28 How. Pr. (N. Y. Supreme Ct.) 187.

But he is not disqualified if the relative has no personal interest in the matter. *Underhill v. Dennis*, 9 Paige (N. Y.) 202; *January v. State*, (Tex. Crim. App. 1896) 38 S. W. Rep. 179; *Patton v. Collier*, (Tex. Civ. App. 1896) 38 S. W. Rep. 53.

For a Full Discussion of this question, see the title JUDGE.

as to matters purely formal in their character.¹ And it is doubtful whether interest will disqualify in a case in which no other judge can try and determine the cause.²

Personal Liability for Judicial Acts. — No action lies against a judge or magistrate for an erroneous judicial opinion or act in a case of which he has jurisdiction.³

Subordinate Officers. — The officers of a court subordinate to the judge⁴ are a recording officer, variously known as clerk, prothonotary, or registrar;⁵ attor-

Relation to Both the Parties in Equal Degree. — A judgment is not void because the judge was related in equal degree to both the parties, especially when neither objected, and there has been five years' acquiescence. *Gill v. State*, 61 Ala. 169; *Beall v. Sinquefield*, 73 Ga. 48; *Russell v. Belcher*, 76 Me. 501; *Matter of Dodge, etc., Mfg. Co.*, 77 N. Y. 101, 33 Am. Rep. 579.

Interest from Having Acted as Counsel — *California*. — *Johnston v. Brown*, 115 Cal. 694.

Georgia. — *McMillan v. Nichols*, 62 Ga. 36.

Louisiana. — *Stewart v. Mix*, 30 La. Ann. 1036; *Nugent v. Stark*, 34 La. Ann. 628.

Nebraska. — *State v. Gurney*, 17 Neb. 523.

New Hampshire. — *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114.

New York. — *Carrington v. Andrews*, 12 Abb. Pr. (Delaware County Ct.) 348; *Darling v. Pierce*, 15 Hun (N. Y.) 543; *Wigand v. Dejonge*, 8 Abb. N. Cas. (N. Y. Supreme Ct.) 260; *People v. Weiant*, 30 Hun (N. Y.) 475.

Texas. — *Houston, etc., R. Co. v. Ryan*, 44 Tex. 426; *Slaven v. Wheeler*, 58 Tex. 23; *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604.

Wisconsin. — *Morgan v. Hammett*, 23 Wis. 30.

For a Full Treatment of this matter, see the title JUDGE.

1. Merely Formal Matters. — *Heydenfeldt v. Towns*, 27 Ala. 423; *Kean v. Lathrop*, 58 Ga. 355; *Cock v. State*, 8 Tex. App. 659; *Findley v. Smith*, 42 W. Va. 299; *Schaeffner's Appeal*, 41 Wis. 261. See the title JUDGE.

Mere formal acts necessary to enable the case to be brought before a proper tribunal for adjudication, an interested judge may do; but that is the extent of his power. *Cooley Const. Lim.* 511; *Richardson v. Boston*, 1 Curt. (U. S.) 250; *Washington Ins. Co. v. Price*, *Hopk. (N. Y.)* 1; *Buckingham v. Davis*, 9 Md. 324; *Heydenfeldt v. Towns*, 27 Ala. 423.

2. When No Other Judge Can Act. — *Heydenfeldt v. Towns*, 27 Ala. 423; *Theilussion v. Rendlesham*, 7 H. L. Cas. 429; *Matter of Leefe*, 2 Barb. Ch. (N. Y.) 39. See the title JUDGE.

3. Personal Liability — *England*. — *Mostyn v. Fabrigas*, 1 Cowp. 172; *Fray v. Blackburn*, 3 B. & S. 576, 113 E. C. L. 576; *Ward v. Freeman*, 2 Ir. C. L. R. 460; *Taafe v. Downes*, 3 Moo. P. C. 36, note; *Kemp v. Neville*, 10 C. B. N. S. 523, 100 E. C. L. 523; *Houlden v. Smith*, 14 Q. B. 841, 68 E. C. L. 841.

Alabama. — *Hamilton v. Williams*, 26 Ala. 527.

Connecticut. — *Ambler v. Church*, 1 Root (Conn.) 211; *Phelps v. Sill*, 1 Day (Conn.) 315; *Tracy v. Williams*, 4 Conn. 113, 10 Am. Dec. 102.

Delaware. — *Bailey v. Wiggins*, 5 Harr. (Del.) 462, 60 Am. Dec. 650.

Georgia. — *Upshaw v. Oliver, Dudley* (Ga.) 241; *Gault v. Wallis*, 53 Ga. 675.

Kentucky. — *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 70.

Louisiana. — *Maguire v. Hughes*, 13 La. Ann. 281.

Maine. — *Morrison v. McDonald*, 21 Me. 550.

Massachusetts. — *Way v. Townsend*, 4 Allen (Mass.) 114.

Missouri. — *Wood v. Ruland*, 10 Mo. 143; *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 131; *Lenox v. Grant*, 8 Mo. 254.

New Hampshire. — *Evans v. Foster*, 1 N. H. 374; *Burnham v. Stevens*, 33 N. H. 247.

New Jersey. — *Little v. Moore*, 4 N. J. L. 82, 7 Am. Dec. 574.

New York. — *Moor v. Ames*, 3 Cai. (N. Y.) 170; *Yates v. Lansing*, 5 Johns. (N. Y.) 282, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150; *Tompkins v. Sands*, 8 Wend. (N. Y.) 462, 24 Am. Dec. 46.

Pennsylvania. — *Ross v. Rittenhouse*, 2 Dall. (Pa.) 160.

South Carolina. — *Brodie v. Rutledge*, 2 Bay (S. Car.) 69; *Young v. Herbert*, 2 Nott & M. (S. Car.) 172, note *a*; *Reid v. Hood*, 2 Nott & M. (S. Car.) 168, 10 Am. Dec. 582; *Lining v. Bentham*, 2 Bay (S. Car.) 1.

Wisconsin. — *Carter v. Dow*, 16 Wis. 298.

But he is liable for errors committed in the arbitrary, corrupt, and malicious exercise of an assumed judicial authority, without regard to the question of his jurisdiction. *Cope v. Ramsey*, 2 Heisk. (Tenn.) 197.

If a ministerial duty is annexed to a judicial office, and the officer executes that duty wrongfully, whether by mistake or fraud, he is answerable to the party injured in a suit at law. *Taylor v. Doremus*, 16 N. J. L. 473. See also *Stewart v. Cooley*, 23 Minn. 347, 23 Am. Rep. 690; *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 131; *Beaurain v. Scott*, 3 Campb. 388; *Houlden v. Smith*, 14 Q. B. 841, 68 E. C. L. 841, 14 Jur. 598, 19 L. J. Q. B. 170.

For a Full Treatment see the title JUDGE.

4. Court Officers Generally. — It is a power which essentially belongs to every court to superintend the conduct of its officers, and to see by what authority they act. *King of Spain v. Oliver*, 2 Wash. (U. S.) 429.

The Resignation of the Judge does not arrest ministerial proceedings of subordinate officers of the court, who may continue to exercise their legal duties until his successor be appointed. *Maskell v. Horner*, 10 La. Ann. 641.

5. Clerk of Court. — The clerk of the court is an officer who keeps its minutes, or records its proceedings, and has the custody of its records and seal.

The clerk is sometimes called the prothonotary. He takes charge of the moneys depos-

neys, counselors, solicitors, or barristers;¹ and ministerial officers, as sheriffs, constables, bailiffs,² criers and tipstaves,³ stenographers,⁴ and interpreters.⁵

IV. INHERENT POWERS — 1. **Generally.** — Every regularly constituted court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction,⁶ and to prevent

ited in court, and certifies to the correctness of transcripts from the court records. The clerk is a ministerial officer who acts under the direction of the court; he is, therefore, not liable for executing an order of the court, though the order may be bad. He is liable for taking insufficient security, if he acts negligently. *Brock v. Hopkins*, 5 Neb. 231. See also *Graydon v. Thomas*, 3 Oregon 250. See the title **CLERKS OF COURTS**, vol. 6, p. 132.

Assistant Clerk—Appointment of. — In *White v. Hughes County*, (S. Dak. 1896) 67 N. W. Rep. 855, the question arose as to the liability of the county for pay of an assistant clerk appointed by the circuit judge. The court held that "undoubtedly a court of general jurisdiction has inherent power to provide the necessary means of conducting its business with convenience and reasonable dispatch;" and further, that Comp. Laws, § 1438, clearly empowered the court to appoint the assistant. The county was therefore held liable. See the title **CLERKS OF COURTS**, vol. 6, p. 132.

1. **Attorney.** — See the title **ATTORNEY AND CLIENT**, vol. 3, p. 278.

2. **Sheriff.** — See the title **SHERIFFS, MARSHALS, AND CONSTABLES**.

In the event of the disqualification of the sheriff and coroner, the district court, in *California*, has power to appoint an elisor, and though such authority was not conferred by statute, the court, by virtue of its original jurisdiction, has power to appoint a special officer to execute its process. *Wilson v. Roach*, 4 Cal. 362.

3. **Crier—Tipstaff.** — In *Pennsylvania* the duties of the court crier and tipstaff are to open court, to keep the court-room, judges' room, law library, and jury rooms cleaned, heated, lighted, etc. The court, and not the county commissioners or sheriff, is empowered to appoint these officers, and to enforce performance of their duties. The crier is allowed a fee of one dollar for each attorney admitted to the court, and, it seems, may demand the right to cry the sheriffs' sales and receive the fees allowed by law for such services. *In re Court Officers*, 3 Pa. Dist. Rep. 196. See also *Mercer County v. Patterson*, 2 Rawle (Pa.) 106.

4. **Stenographer.** — *State v. Murphy*, 125 Mo. 464; *State v. Wofford*, 126 Mo. 435. See the title **STENOGRAPHERS**.

5. **Interpreters.** — *People v. Young*, 108 Cal. 8; *People v. Adams*, 89 Hun (N. Y.) 284. See the title **INTERPRETERS**.

6. **General Rule as to Powers.** — *Mitcheson v. Foster*, 3 Metc. (Ky.) 324; *Red River, etc., R. Co. v. Sture*, 32 Minn. 95; *Merchants' Nat. Bank v. Greenhood*, 16 Mont. 395; *McLorinan v. Ryno*, 49 N. J. L. 603; *Opinion of Supreme Ct.*, 3 R. I. 299; *State v. Fleming*, 7 Humph. (Tenn.) 152, 46 Am. Dec. 73; *Matter of Supreme Ct. Janitor*, 35 Wis. 410.

Courts are bound to vindicate and maintain the sanctity of their proceedings before they

consider the merits of cases. *Denton v. Erwin*, 5 La. Ann. 18.

Records. — Every court is the exclusive judge of its own records, and is competent to make them speak the truth touching its own proceedings. *Davis v. Jones*, 3 Head (Tenn.) 603. See the title **RECORD**.

Judicial and Legislative Departments. — Under the constitution the judicial department is distinct from the legislative department; and the legislature has no power to interfere with the administration of justice. A resolution that a criminal, or class of criminals, shall be discharged by the court, is therefore an unwarranted assumption of power on the part of the legislature, and void. *State v. Fleming*, 7 Humph. (Tenn.) 152, 46 Am. Dec. 73. See also *Willis v. Elam*, 28 La. Ann. 857; *Labadie v. Dean*, 47 Tex. 90. Neither has the legislature power to direct the judiciary in the interpretation of acts of assembly previously passed, or to require it to change an interpretation already put upon them. Such mandate is unconstitutional and void. *Reiser v. William Tell Sav. Fund Assoc.*, 39 Pa. St. 137. See the title **CONSTITUTIONAL LAW**, vol. 6, p. 882.

Proceedings Judicial, Not Executive. — Where any power is conferred upon a court of justice to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of the court may be regarded as judicial, irrespective of the original nature of the power. In general, whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceeding upon such application must be regarded as judicial, not as executive. *Matter of Cooper*, 22 N. Y. 67, 11 Abb. Pr. (N. Y.) 301.

To Enforce Its Judgments and Mandates. — *Hines v. Rawson*, 40 Ga. 356, 2 Am. Rep. 581; *Wickes v. Dresser*, 4 Abb. Pr. (N. Y. Supreme Ct.) 93, 13 How. Pr. (N. Y.) 331.

It is an implied power of the court of appeals to enforce its own judgments and mandates, and to hold its officers to a proper accountability for any default or malfeasance in the execution of its process, and it is peculiarly within its power to enforce a penalty against a sheriff for violation of his legal duty in the execution of final process upon one of its judgments, as in failing to return such execution within thirty days after the return day. *Mitcheson v. Foster*, 3 Metc. (Ky.) 324.

To Replace Lost Records. — *Red River, etc., R. Co. v. Sture*, 32 Minn. 95.

Every court of justice, of necessity, has the power whilst the papers of a cause are *in fieri*, to supply a loss occasioned either by accident or design, before or after judgment. *Dozier v. Joyce*, 8 Port. (Ala.) 303; *Lothrop v. Page*, 26 Me. 119; *Com. v. Goddard*, 13 Mass. 458; *Red River, etc., R. Co. v. Sture*, 32 Minn. 95; *State v. Lethé*, 9 La. Ann. 182; *Ashe v.*

any abuse of its process.¹

Effect of Want of Authority. — On the other hand, the orders of a court acting without authority are nullities, and may be inquired into, and impeached, in all other courts before which such orders are brought and relied upon by a party claiming a right or benefit thereunder.²

Inferior Courts. — And no power is to be held as granted to inferior courts by implication, except such only as may be necessary to enable them to exercise their granted powers.³

Rule of Construction as to Powers Generally. — And where a power is not expressly conferred, nor necessarily inherent in a court, it cannot be justified by an inference of law.⁴

2. Rules of Court. — Every court of record has an inherent power, irrespective of statute, to make rules for the transaction and regulation of its business. Otherwise the dispatch of public business by the courts without interminable delays would be impossible.⁵

Streator, 8 Jones L. (53 N. Car.) 256. See the title RECORD.

To Appoint Necessary Assistants for Care of Its Rooms. — Matter of Supreme Ct. Janitor, 35 Wis. 410. See the title CONSTITUTIONAL LAW, vol. 6, p. 882.

To Appoint Attorneys. — The court possesses an inherent power to appoint one of its attorneys to conduct a prosecution, when necessary to prevent a failure of justice. *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370. See the title ATTORNEY AND CLIENT, vol. 3, p. 278.

To Disbar Attorneys. — *State v. Rightor*, 49 La. Ann. 1015. See the title ATTORNEY AND CLIENT, vol. 3, p. 278.

To Preserve Order. — By the common law, every court, while engaged in the discharge of its lawful functions, has the authority to preserve order, decency, and silence in its presence, and may apprehend and punish the offender without examination or proof; but if the offense be committed out of court, the party is entitled to notice and a hearing in his defense. *People v. Turner*, 1 Cal. 152; *Redman v. State*, 28 Ind. 205.

Contempt of Court. — See the title CONTEMPT, vol. 7, p. 25.

To Judge of Its Own Jurisdiction. — *Prima facie* every court has the power to judge of its own jurisdiction; and where a party pleads to the jurisdiction, the decision, even of an inferior court, in favor of its jurisdiction, is generally as conclusive on the parties, as judgment on a matter confessedly within its jurisdiction. The only exception is where want of jurisdiction appears on the face of the proceedings. *State v. Scott*, 1 Bailey L. (S. Car.) 294.

To Suspend Operation of Its Rules. — *Southern Pac. Co. v. Johnson*, 69 Fed. Rep. 559, 29 U. S. App. 201. See also *Florida v. Charlotte Harbor Phosphate Co.*, 70 Fed. Rep. 883, 30 U. S. App. 535.

A court may suspend the operation of its rules in any case where the purposes of justice so require. *Pickett v. Wallace*, 54 Cal. 147. See the title RULES OF COURT, in the ENCYC. OF PLEADING AND PRACTICE.

To Change Its Calendar. — *Merchants' Nat. Bank v. Greenhood*, 16 Mont. 395. See the title CALENDARS AND TRIAL DOCKETS, 3 ENCYC. OF PLEADING AND PRACTICE 501.

Cannot Decide Questions Not Ripe for Judgment. — *Pearson v. Yongue*, 25 S. Car. 162.

1. *Morgan v. Halladay*, 38 N. Y. Super. Ct. 117; *Hopton v. Swan*, 50 Miss. 545.

Every court having jurisdiction to hear and determine civil causes has control over its processes in a summary manner, and without the intervention of a jury. *Loomis v. Lane*, 29 Pa. St. 242, 72 Am. Dec. 625.

2. **Court Acting Without Authority.** — *Wightman v. Karsner*, 20 Ala. 446; *Austin v. Searing*, 16 N. Y. 112, 69 Am. Dec. 665. See the title JURISDICTION.

3. **Inferior Courts.** — *School Inspectors v. State*, 20 Ill. 525; *Thompson v. Cox*, 8 Jones L. (53 N. Car.) 311; *Beebe v. Scheidt*, 13 Ohio St. 406; *Pringle v. Carter*, 1 Hill L. (S. Car.) 53; *Paine v. Ely*, 1 D. Chip. (Vt.) 37. See also the title STATUTES.

4. *Keitler v. State*, 4 Greene (Iowa) 291.

5. **Power to Make Rules.** — "Every court of record has an inherent power to make rules for the transaction of its business, provided they are not contradictory to the laws of the land. Without this power it would be impossible for courts of justice to dispatch the public business. Delays would be interminable, and delay not infrequently is the object of one of the parties. Every court, therefore, must have stated rules to go by, and they are the properest judges of their own rules of practice." *Snyder v. Bauchman*, 8 S. & R. (Pa.) 336.

England. — *Robinson v. Biand*, 1 W. Bl. 264.

United States. — *Fullerton v. U. S. Bank*, 1 Pet. (U. S.) 604; *Seymour v. Phillips*, etc., Constr. Co., 7 Biss. (U. S.) 460; *Neff v. Pennoyer*, 3 Sawy. (U. S.) 335; *Matter of The Steam Propeller Epsilon*, 6 Ben. (U. S.) 378.

California. — *People v. Tock Chew*, 6 Cal. 636; *Boyd's Estate*, 25 Cal. 511.

Georgia. — *De Lorne v. Pease*, 19 Ga. 220; *U. S. v. Mays*, 1 Idaho 763.

Illinois. — *Holloway v. Freeman*, 22 Ill. 197; *Fisher v. National Bank of Commerce*, 73 Ill. 34; *Angel v. Plume*, etc., Mfg. Co., 73 Ill. 412; *Hinckley v. Dean*, 104 Ill. 630.

Indiana. — *Thompson v. Pershing*, 86 Ind. 303; *Vail v. McKernan*, 21 Ind. 421; *Redman v. State*, 28 Ind. 205; *Ollam v. Shaw*, 27 Ind. 388; *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172; *Coffin v. McClure*, 23 Ind. 356; *Shoecraft v. Cain*, 23 Ind. 169; *Lynch v. State*, 9 Ind. 541.

Kentucky. — *Kennedy v. Cunningham*, 2 Metc. (Ky.) 538.

Must Not Conflict with Law of the Land. — Such rules, however, must not conflict with the constitution or the law of the land.¹

Louisiana. — Walker v. Ducros, 18 La. Ann. 703.

Maine. — Fox v. Conway F. Ins. Co., 53 Me. 107; Sellars v. Carpenter, 27 Me. 497.

Maryland. — Quinn v. Brooke, 22 Md. 288; Gambrill v. Parker, 31 Md. 1; Gist v. Drakely, 2 Gill (Md.) 330, 41 Am. Dec. 426.

Michigan. — Wyandotte Rolling Mills Co. v. Robinson, 34 Mich. 428.

Missouri. — Brooks v. Boswell, 34 Mo. 474; Risher v. Thomas, 2 Mo. 98.

New Hampshire. — Hill v. Barney, 18 N. H. 607; Bell v. Betton, 18 N. H. 43.

New Jersey. — Ogden v. Robertson, 15 N. J. L. 124; Ferguson v. Kays, 21 N. J. L. 431.

New York. — Havemeyer v. Ingersoll, 12 Abb. Pr. N. S. (N. Y. Supreme Ct.) 301.

Pennsylvania. — Barry v. Randolph, 3 Binn. (Pa.) 277; Dubois v. Turner, 4 Yeates (Pa.) 361; Vanatta v. Anderson, 3 Binn. (Pa.) 417; Harres v. Com., 35 Pa. St. 416; Towamencin Road, 10 Pa. St. 195; Gannon v. Fritz, 79 Pa. St. 303; Boas v. Nagle, 3 S. & R. (Pa.) 253.

Tennessee. — Stadler v. Hertz, 13 Lea (Tenn.) 315.

Texas. — Texas Land Co. v. Williams, 48 Tex. 602; Haley v. Davidson, 48 Tex. 615.

Vermont. — Jones v. Spear, 21 Vt. 426.

Where a Law Is Imperfect in Its Details, but not to such an extent as to render it impossible to execute it, the imperfections in its detail may be supplied by rules of court. Cochran v. Loring, 17 Ohio 409.

Rule Authorizing Clerk to Open and File Depositions. — The Revised Statutes of *Illinois*, c. 51, § 32, provide that "it shall not be lawful for any party litigant or the clerk of the court into which any deposition may be returned * * * to break the seal of the same, either in term time or in vacation, unless * * * by the order of the court duly entered of record." It was held that a rule of court empowering the clerk to open and file depositions was an order within this provision. Gage v. Eddy, 167 Ill. 102.

Depositions — Equity Case. — In *Pennsylvania* it is held that a rule of the Common Pleas providing that, in all equity cases at issue on bill and answer, the testimony shall be taken by depositions, is violative of the equity rules adopted by the Supreme Court on January 15, 1804, and is invalid. Chester Traction Co. v. Philadelphia, etc., R. Co., 180 Pa. St. 432; Union R. Co. v. Philadelphia, etc., R. Co., 180 Pa. St. 435.

Rule as to Suits in Ejectment — Georgia. — The 25th rule of the Superior Courts in *Georgia* in force prior to June 25, 1879, providing that no party should be permitted to defend in ejectment without admitting that he was in possession of the premises in dispute at the time of the commencement of the action, was, in the month above mentioned, so amended by the judges in convention as to render it applicable to the statutory actions of complaint for land. It was within the power of the judges thus to amend the rule, and, as amended, it is still in force, not having been changed by the convention of 1893. Snipes v. Parker, 98 Ga. 522.

Change of Venue. — A circuit court in *Indiana* may make a rule fixing a time within which a motion for a change of venue must be filed. Anglemyer v. Blackburn, 16 Ind. App. 352.

A State Law Prescribing Rules of Practice is not effective in federal courts unless such rules are adopted by the latter. Davenport v. Lord, 9 Wall. (U. S.) 409.

Rules Limiting Argument of Counsel. — The establishment and enforcement of rules limiting the argument of counsel to a certain time are matters resting in the sound discretion of the court, and unless it should appear that injustice has thereby been done they form no ground of appeal. People v. Tock Chew, 6 Cal. 636; Lynch v. State, 9 Ind. 541. But the court cannot prohibit an argument in a criminal case. Lynch v. State, 9 Ind. 541. See the title ARGUMENTS OF COUNSEL, 2 ENCYC. OF PL. AND PR. 701 *et seq.*

Construction of Rules — Must Be Reasonable. — Rules of court must receive a reasonable construction, to answer the end for which they were adopted, and must not, by a literal interpretation, be extended to cases not within the object of them. Ferguson v. Kays, 21 N. J. L. 431. See also Squires v. Millett, 31 Iowa 169; Tindal v. Tindal, 1 S. Car. 111.

Special Rules. — The court may make special rules in any particular case, although the effect may be to exempt such case from the operation of the ordinary rules of court. Deming v. Foster, 42 N. H. 165.

Evidence to Prove Rules. — It is held that the record in which rules of court are entered is the only competent evidence to prove their existence. Roby v. Title Guarantee, etc., Co., 166 Ill. 336.

1. Rules Must Not Conflict with Law of the Land. — Campbell v. Shivers, 1 Arizona 161; People v. McClellan, 31 Cal. 101; Rozier v. Williams, 92 Ill. 187; Angel v. Plume, etc., Mfg. Co., 73 Ill. 412; Fisher v. National Bank of Commerce, 73 Ill. 34; State v. Fifth Circuit Judges, 37 La. Ann. 596; State v. Gideon, 119 Mo. 98, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 450; Hinchly v. Machine, 15 N. J. L. 476; Gormley v. McGlynn, 84 N. Y. 284; Atlantic Express Co. v. Wilmington, etc., R. Co., 111 N. Car. 463, 32 Am. St. Rep. 805, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 450; Suckley v. Rochford, 12 Gratt. (Va.) 60.

Depriving Party of Statutory Right. — A rule of court is void so far as it operates to deprive a party of a statutory right. People v. McClellan, 31 Cal. 101.

Restricting Discretion of Courts. — It is not competent for the judges of the superior courts to make a rule restricting the discretion of the courts in matters as to which that discretion is unlimited at common law. De Lorme v. Pease, 19 Ga. 220.

Maritime Liens. — Liens of the same class and of equal merit should share equally, and these rights may not be displaced by a mere rule of court. Saylor v. Taylor, 77 Fed. Rep. 476. In this case the court said: "By virtue of this section [section 918, Revised Statutes] the courts may make rules of practice, but they cannot create rules of law. They cannot

Adoption of Record Within Reasonable Time — Must Not Be Retroactive. — They should be adopted of record within a reasonable time,¹ and should not be retrospective in their terms.²

Courts May Rescind Their Rules, or may, in establishing them, reserve the exercise of discretion for particular cases; but a rule made without such qualification must be applied to all cases that fall within it, until it is rescinded.³

Construction — Courts of Original Jurisdiction. — In general, the construction of its own rules by a court of original jurisdiction is conclusive; and it is only where wrong is manifest that this discretion will be interfered with or invaded by an appellate court.⁴

V. ADJUDICATIONS AND THEIR EFFECT. — No deliberate decision should be reversed by the same court where it has been generally accepted as the law, or wherever a reversal of it would be likely to disturb any right of property, or derange any general commercial custom.⁵ But if a decision is clearly incor-

divest or displace rights or liens which owe their existence, not to its process, but to the general maritime law. Rights acquired under the statutes of the United States or under the general maritime law which these courts are created to administer are rules of property, and it is beyond the potency of judicial power to alter them or take them away by rules of practice." The court also quotes the following from the opinion of Mr. Justice Clifford in *Ward v. Chamberlain*, 2 Black (U. S.) 437: "It cannot for a moment be admitted that any rule adopted by this court, merely as such, can enlarge, diminish, or vary the operation and effect of mesne or final process upon the property of the debtor in respect to the matter under consideration. * * * The lien of judgments is a rule of property, which is beyond the power of this court to establish."

1. They need not be spread in full upon the record, but should be filed within a reasonable time in the clerk's office. *State v. Ensley*, 10 Iowa 149; *Owens v. Ramstead*, 22 Ill. 161; *Mix v. Chandler*, 44 Ill. 174. See the title RULES OF COURT, in the ENCYC. OF PLEADING AND PRACTICE.

As to United States Courts, see *U. S. v. Stevenson*, 1 Abb. (U. S.) 495. And see the title UNITED STATES COURTS.

2. *Dewey v. Humphrey*, 5 Pick. (Mass.) 187; *Owens v. Ramstead*, 22 Ill. 161.

Retrospective Rule. — A rule of court retrospective in its terms and operating as an act of limitation is void. *Reist v. Heilbrenner*, 11 S. & R. (Pa.) 131; *Burlington, etc., R. Co. v. Marchand*, 5 Iowa 468.

3. **Must Apply to All Alike Until Rescinded.** — *Trishel v. McGill*, 28 Ill. App 68; *Walker v. Ducros*, 18 La. Ann. 703; *Ogden v. Robertson*, 15 N. J. L. 124.

In *Massachusetts* a rule of the Court of Common Pleas provided that a plea in abatement "may be filed at any time during the first four days of the return term, and not afterwards." A plea in abatement, in consequence of misinformation from a judge of the Court of Common Pleas, was not offered until the fifth day of the term, and was then, by leave of the judge, filed as of the fourth day. The Supreme Court, in reversing this action of the lower court, said: "But a rule of the court thus authorized and made has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed

with to suit the circumstances of any particular case. In the case before us, the plea was allowed to be filed on the fifth day of the term, although the rule allows but four days for that purpose. The circumstances were such as would justify that order of the court, if it had had power to pass it; but we are satisfied that no one judge of the Court of Common Pleas or of this court has authority to dispense with rules deliberately made and promulgated, on account of the hardship of any particular case, any more than he would have authority to dispense with any requisition of the legislature itself. The courts may rescind or repeal their rules, without doubt, or, in establishing them, may reserve the exercise of discretion for particular cases; but the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it." *Thompson v. Hatch*, 3 Pick. (Mass.) 512. See also *Tripp v. Brownell*, 2 Gray (Mass.) 402; *Hanson v. McCue*, 43 Cal. 178; *Wall v. Wall*, 2 Har. & G. (Md.) 79; *Hughes v. Jackson*, 12 Md. 450; *Coyote Gold, etc., Min. Co. v. Ruble*, 9 Oregon 121. Compare *Southern Pac. Co. v. Johnson*, 69 Fed. Rep. 559, 29 U. S. App. 201; *Sheldon v. Risedorph*, 23 Minn. 518.

In *New Hampshire* it was held that a court may make special rules in any particular case, although the effect may be to exempt such case from the ordinary rules of court. *Deming v. Foster*, 42 N. H. 165. See also *Pickett v. Wallace*, 54 Cal. 147; *U. S. v. Breitling*, 20 How. (U. S.) 252.

4. *Gannon v. Fritz*, 79 Pa. St. 303; *Dailey v. Green*, 15 Pa. St. 118. See also *State v. Smith*, 44 Mo. 112.

5. **Adjudications — Reversals.** — *Aud v. Magruder*, 10 Cal. 282; *Harrow v. Myers*, 29 Ind. 469; *Dugan v. Hollins*, 13 Md. 149; *Hollinshead v. Von Glahn*, 4 Minn. 190; *Greenbaum v. Stein*, 2 Daly (N. Y.) 223; *Reed v. Ownby*, 44 Mo. 204; *Linn v. Minor*, 4 Nev. 462.

A rule or principle of law, once fully recognized by the supreme court, should not be overruled unless it is palpably wrong or has been changed by legislative enactment. *Lemp v. Hastings*, 4 Greene (Iowa) 448.

A Single Decision, Made Without Notice of a Statute, and which in fact sets a statute aside, cannot be invoked as authority. *Duff v. Fisher*, 15 Cal. 375.

Dictum. — In courts organized under the Volume VIII.

rect, and no injurious results will be likely to flow from a reversal, and

common law, no opinion can be relied on as a binding authority unless the case called for its expression. Its weight of reason must depend on what it contains. *Carroll v. Carroll*, 16 How. (U. S.) 275.

Effect of Equal Division of Court. — The judgment of the court, when the members are equally divided, is not obligatory as a precedent. *Morse v. Goold*, 11 N. Y. 281, 62 Am. Dec. 103.

Language of Decision. — The rule is well settled that the language of an opinion must be held as referring to the particular case decided. *People v. Winkler*, 9 Cal. 234; *East Tennessee, etc., R. Co. v. Mahoney*, 89 Tenn. 311; *Sanders v. Logue*, 88 Tenn. 355. See also *Cæsar v. Capell*, 83 Fed. Rep. 403.

Rule of Property. — There are some questions in law the final settlement of which is vastly more important than how they are settled, and among these are rules of property, long recognized and acted upon, and under which rights have vested. However much the court, as now constituted, may differ from the decisions of its predecessors upon such questions, it will not overrule them. *Rockhill v. Nelson*, 24 Ind. 422; *Ewing v. Ewing*, 24 Ind. 468; *Emerson v. Atwater*, 7 Mich. 12; *Pittellkow v. Milwaukee*, 94 Wis. 651.

In *Reichert v. McClure*, 23 Ill. 516, the court held that when a decision involving the title to real estate (and the construction of a statute) has been solemnly announced by a court of last resort, and has become a rule of property, it will only be overruled for the most cogent reasons, and upon the strongest conviction of its incorrectness. See also *Glenn v. Jamison*, 48 S. Car. 316.

Former Decisions of Same Court. — An opinion of the supreme court is the law of the case in which it is pronounced, when brought up in subsequent cases, or on a second trial or appeal. *Stein v. Ashby*, 30 Ala. 363; *Pearson v. Darrington*, 32 Ala. 227; *Huffman v. State*, 30 Ala. 532; *Pickens v. Oliver*, 32 Ala. 626; *Thomason v. Dill*, 34 Ala. 175; *Bryant v. Boothe*, 35 Ala. 269; *Matthews v. Sands*, 29 Ala. 136; *Miller v. Jones*, 29 Ala. 174; *Dewey v. Gray*, 2 Cal. 374; *Clary v. Hoagland*, 6 Cal. 685; *Gray v. Gray*, 34 Ga. 499; *Vick v. Hibbs*, (Ky. 1897) 38 S. W. Rep. 711; *Bane v. Wick*, 6 Ohio St. 13; *Stacy v. Vermont, etc., R. Co.*, 32 Vt. 551; *Parker v. Pomeroy*, 2 Wis. 112.

And this rule applies not only to questions of law arising in the case, but to questions of jurisdiction. Otherwise, by the interposition of a new judge, the law which has been settled by the majority of the court for years might be changed, and a new rule introduced. Cases which have been brought to the court on *certiorari* or writs of error, and determined, might be reopened, and rights which have grown up under them be disturbed. *Clary v. Hoagland*, 6 Cal. 685.

While the Maxim, Stare Decisis, Is Not Imperative (*Kneeland v. Milwaukee*, 15 Wis. 454), the rule should not be departed from except on the fullest conviction that the law has been settled wrong. *Sydnor v. Gascoigne*, 11 Tex. 449; *Field v. Goldsby*, 28 Ala. 218; *Matheson v. Hearin*, 29 Ala. 210; *Hihn v. Courtis*, 31

Cal. 398; *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159; *Wilson v. Beckwith*, (Mo. 1897) 41 S. W. Rep. 985; *Fisher v. Horicon, etc., Co.*, 10 Wis. 351.

It is not contrary to the maxim *stare decisis* to overrule a decision which is without precedent, and plainly in error, and which has existed only four years. *Callender v. Keystone Mut. L. Ins. Co.*, 23 Pa. St. 471.

See Further the title STARE DECISIS.

Effect of Decisions of Courts of Other States. — The decisions of the courts of another state are persuasive, but not conclusive as to the construction of the statutes of that state, where those statutes, but not the decisions, are put in evidence. *Nelson v. Goree*, 34 Ala. 565.

A court is not bound to follow adjudications by courts of other states (other than those of the federal courts, on questions arising under the constitution and laws of the federal government) any further than they appear warranted by the fundamental principles of common law. *Caldwell v. Gale*, 11 Mich. 77.

English Decisions, made subsequent to the period of our separation from the British empire, though entitled to great respect, are not to be received as absolute authority in this country. *Koontz v. Nabb*, 16 Md. 549.

Effect upon State Courts of Federal Court Adjudications. — In cases not arising upon the construction of the constitution and laws of the United States, the decisions of the Supreme Court of the United States are not authority binding on a state court. *Towle v. Forney*, 14 N. Y. 423; *Lebanon Bank v. Mangan*, 28 Pa. St. 452. On the other hand, the United States Supreme Court will follow the decision of a state court sustaining the constitutionality of a state statute. *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440; *Central Trust Co. v. Valley R. Co.*, 37 Ohio L. J. 210, 1 Ohio Dec. Fed. 354, 79 Fed. Rep. 195; *Henry v. Pittsburgh Clay Mfg. Co.*, 80 Fed. Rep. 485; *Thompson v. Searcy County*, 57 Fed. Rep. 1037. See also *Humboldt First Nat. Bank v. Glass*, 79 Fed. Rep. 706; *Central Trust Co. v. Citizens' St. R. Co.*, 82 Fed. Rep. 1; *Burgess v. Seligman*, 107 U. S. 20; *Lewis v. Monson*, 151 U. S. 545. But "it is the settled law of the federal courts, that where a contract or obligation has been entered into before there has been any judicial construction of a state statute by the courts of the state, a subsequent judicial construction of the statute by the state courts is not binding on the federal courts." *Hammond, Circuit J., in Cæsar v. Capell*, 83 Fed. Rep. 427.

In *Deans v. McLendon*, 30 Miss. 343, the Supreme Court held that in the construction of domestic statutes, however great the deference due to an express decision on the point by the Supreme Court of the United States, the Mississippi Supreme Court is not bound, and will not yield its well-matured and clear convictions to the opinions of that tribunal. See also *Congaree Constr. Co. v. Columbia Tp.*, (S. Car. 1897) 27 S. E. Rep. 570; *Chapman v. Wellington First Nat. Bank*, 37 Ohio L. J. 354, 56 Ohio St. 310.

In *Lytle v. State*, 17 Ark. 608, the Supreme

especially if it is injurious and unjust in its operation, it is the imperative duty of the court to reverse it.¹

Written Opinions. — In some states written opinions need not be prepared when the court deems them unnecessary.²

VI. JURISDICTION. — Where each branch of the judicial department has its functions assigned by the constitution, it is beyond the control of either of the other departments of the government, as far as its powers and jurisdiction are concerned.³

Where Two Courts Have Concurrent Jurisdiction over the same subject-matter, the court in which the case is first commenced is entitled to retain it.⁴ But this rule does not apply if the litigation in the first court be ended;⁵ nor where the powers of such court are too limited to grant the relief to which the parties are entitled;⁶ nor as to different departments of the same court.⁷

Consent of Parties cannot confer jurisdiction in a matter which is excluded by law.⁸

Court of Arkansas held that the decision of the Supreme Court of the United States on a case brought before it from a state court will be held to be the binding law of the case. See also *Trustees v. Cuppett*, 52 Ohio St. 567.

1. *Linn v. Minor*, 4 Nev. 462; *Wilson v. Leary*, 120 N. Car. 90; *Simpkins v. White*, (W. Va. 1897) 27 S. E. Rep. 361. See also the title *STARE DECISIS*.

2. **Written Opinions.** — In *Kansas* an opinion will not be prepared and filed in a cause where the Court of Appeals deems it unnecessary to do so. *Metzler v. Wenzel*, (Kan. App. 1897) 49 Pac. Rep. 750. So also, in reference to opinions by the Supreme Court, *Anderson v. Connecticut Mut. L. Ins. Co.*, 55 Kan. 81.

3. *Parsons v. Tuolumne County Water Co.*, 5 Cal. 43, 63 Am. Dec. 76; *Com. v. Allegheny County*, 37 Pa. St. 237. See the title *CONSTITUTIONAL LAW*, vol. 6, p. 1053.

4. **Concurrent Jurisdiction** — *United States*. — *Buck v. Colbath*, 3 Wall. (U. S.) 334.

Illinois. — *Mason v. Piggott*, 11 Ill. 85; *McNab v. Heald*, 41 Ill. 327.

Maryland. — *Withers v. Denmead*, 22 Md. 135.

Massachusetts. — *Stearns v. Stearns*, 16 Mass. 171; *Bemis v. Stearns*, 16 Mass. 203.

Ohio. — *Ex p. Bushnell*, 8 Ohio St. 599.

North Carolina. — *State v. Yarbrough*, 1 Hawks (8 N. Car.) 78.

Tennessee. — *Thompson v. Hill*, 3 Yerg. (Tenn.) 167.

See also *Smith v. M'Iver*, 9 Wheat. (U. S.) 532; *The Ship Robert Fulton*, 1 Paine (U. S.) 621; *Haines v. Carpenter*, 1 Woods (U. S.) 262; *Ward v. Todd*, 103 U. S. 327; *In re Chetwood*, 165 U. S. 443; *Eaton v. Patterson*, 2 Stew. & P. (Ala.) 9; *Troy Fertilizer Co. v. Prestwood*, (Ala. 1897) 22 So. Rep. 262; *Louden Irrigating Canal Co. v. Handy Ditch Co.*, 22 Colo. 102; *Lancashire Ins. Co. v. Corbett*, 62 Ill. App. 236; *State v. Chinault*, 55 Kan. 326; *Conover v. New York*, 25 Barb. (N. Y.) 513, 5 Abb. Pr. (N. Y.) 393; *Chapin v. James*, 11 R. I. 86, 23 Am. Rep. 412; *Clepper v. State*, 4 Tex. 242; *Kenedy v. Jarvis*, (Tex. 1886) 1 S. W. Rep. 191; *Hall v. Dana*, 2 Aik. (Vt.) 381; *Henry v. Tupper*, 27 Vt. 518; *Bellows Falls Bank v. Rutland, etc.*, R. Co., 28 Vt. 470; *Callahan v. Consumers' Ice, etc.*, R. Co., 13 Ohio Cir. Ct. Rep. 479, 7 Ohio Cir. Dec. 349; *Merritt v. American Steel Barge Co.*, 49 U. S. App. 85, 79 Fed. Rep. 228.

Neither of two antagonistic judgments rendered by courts of concurrent jurisdiction is necessarily void. *Sharon v. Sharon*, 79 Cal. 633.

In Federal and State Courts. — This rule obtains in federal courts as to cases pending in state courts. *Gates v. Bucki*, 12 U. S. App. 69, 53 Fed. Rep. 969; *State Trust Co. v. National Land Imp., etc., Co.*, 72 Fed. Rep. 575. See also *Zimmerman v. So Relle*, 49 U. S. App. 387, 80 Fed. Rep. 417.

When Action Begun in Both Courts Same Day. — In *Gamble v. San Diego*, 79 Fed. Rep. 487, it was held that where two separate suits for the same relief are instituted in a federal court and a state court on the same day, the federal court will withhold a ruling upon a motion to dismiss the suit and suspend further proceedings therein with leave to the parties to introduce proof as to which suit was filed first.

5. *McPike v. Wells*, 54 Miss. 136.

6. *Dwyer v. Garlough*, 31 Ohio St. 158.

7. *Brown v. Campbell*, 110 Cal. 644; *McDowell v. Kurtz*, 77 Fed. Rep. 206.

8. **Consent of Parties** — *Alabama*. — *Little v. Fitts*, 33 Ala. 343; *Whorton v. Moragne*, 62 Ala. 201.

Connecticut. — *Andrews v. Wheaton*, 23 Conn. 112.

Illinois. — *Foley v. People*, 1 Ill. 57; *Fleischman v. Walker*, 91 Ill. 318; *Randolph County v. Ralls*, 18 Ill. 29; *Bureau County v. Thompson*, 39 Ill. 566.

Iowa. — *Cerro Gordo County v. Wright County*, 59 Iowa 485.

Kentucky. — *Banks v. Fowler*, 3 Litt. (Ky.) 332; *Lindsey v. McClelland*, 1 Bibb (Ky.) 263; *Ormsby v. Lynch*, Litt. Sel. Cas. (Ky.) 303; *Brown v. M'Kee*, 1 J. J. Marsh. (Ky.) 476.

Louisiana. — *Riggs v. Bell*, 39 La. Ann. 1030; *State v. Judge*, 21 La. Ann. 258.

Massachusetts. — *Carlisle v. Weston*, 21 Pick. (Mass.) 535; *Osgood v. Thurston*, 23 Pick. (Mass.) 110.

Michigan. — *MacLean v. Speed*, 52 Mich. 257.

Nebraska. — *Brondberg v. Babbott*, 14 Neb. 517.

New Jersey. — *Collins v. Keller*, 58 N. J. L. 429.

South Carolina. — *Bent v. Graves*, 3 McCord L. (S. Car.) 280; *Simpson v. M'Million*, 1 Nott & M. (S. Car.) 192; *Wells v. Reynolds*, 1 Treadw. (S. Car.) 478.

VII. TERMS OF COURT.—A court term is a definite and fixed period, prescribed by law for the administration of judicial duties, within which the business of the term should be transacted.¹ But terms may be extended to a

Tennessee.—*M'Henry v. Wallen*, 2 Verg. (Tenn.) 441.

Wisconsin.—*Hager v. Falk*, 82 Wis. 644.

Compare Shissler v. People, 93 Ill. 472; *American F. Ins. Co. v. Pappe*, (Okla. 1896) 43 Pac. Rep. 1085. See also *Matter of Campbell*, 88 Hun (N. Y.) 374; *International Trust Co. v. Keokuk Electric St. R. Co.*, 90 Iowa 90. And see the title JURISDICTION.

The consent of parties cannot give jurisdiction to the Supreme Court where the law does not give it. *Kelsey v. Forsyth*, 21 How. (U. S.) 85; *Ballance v. Forsyth*, 21 How. (U. S.) 389; *The Lucy*, 8 Wall. (U. S.) 307. See also *Williams's Estate*, 62 Mo. App. 339.

Where terms of court are, under the law, fixed at stated periods, and the court fails to convene at the time so fixed, and by reason thereof the court is not legally in session, the parties to an action cannot, by agreement, confer jurisdiction upon the court to render a judgment binding upon the parties. *American F. Ins. Co. v. Pappe*, (Okla. 1896) 43 Pac. Rep. 1085.

When Consent May Confer Jurisdiction.—Consent may give a court jurisdiction of parties to an action, but not of the subject-matter. *Harrison v. Rowan*, Pet. (C. C.) 489; *Brady v. Richardson*, 18 Ind. 1; *Cleveland v. Welsh*, 4 Mass. 593; *Clyde, etc., Plank Road Co. v. Parker*, 52 Barb. (N. Y.) 323; *Perry v. Erie Transfer Co.* (C. Pl.) 23 N. Y. Supp. 878; *Campbell v. Cowden*, *Wright* (Ohio) 484; *Overstreet v. Brown*, 4 McCord L. (S. Car.) 79; *Walker v. Rogan*, 1 Wis. 597; *Hills v. Miles*, 13 Wis. 625. *Compare Indianapolis, etc., R. Co. v. Renner*, 17 Ind. 135. See the title JURISDICTION.

1. Term of Court Defined.—*Burr. L. Dict.*, tit. Terms of Court; 3 Bl. Com. 275; *Horton v. Miller*, 38 Pa. St. 270; *Ex p. Lilly*, 7 S. Car. 372; *Garlick v. Dunn*, 42 Ala. 404; *Carroll v. Com.*, 84 Pa. St. 107.

The term of a court is the time prescribed for holding it, and not the time the court sits transacting business. Though the judge is not present on the day fixed by law for the commencement of a term, it is nevertheless the first day of the term. *Bush v. Doy*, 1 Kan. 86; *Downey v. Smith*, 13 Ill. 671. *Compare Brunswick First Nat. Bank v. Lime Rock F. & M. Ins. Co.*, 56 Me. 424.

A term of court does not expire because the judges did not appear before noon, and neither the sheriff nor clerk adjourned the court to the next day, when the judges met later in the same day, and adjourned then. *People v. Sanchez*, 24 Cal. 17. See also *People v. Sullivan*, 115 N. Y. 185.

Time and Place of Sitting — Elements of Jurisdiction.—In *Garlick v. Dunn*, 42 Ala. 404, it was held that when a time is prescribed by law within which a court shall be held, it is essential to the validity of the court that its jurisdiction should be exercised within the time prescribed; and if it transacts business at another and different time, its acts done within that time are absolutely void.

In *Ex p. Branch*, 63 Ala. 383, it is said: "A

term and a place of sitting have been so long by the General Assembly appointed for every court of record, whether of superior or inferior jurisdiction, that involuntarily we regard them as elements of jurisdiction, and that rightfully judicial functions, unless it is otherwise expressly provided, can be exercised only when the court is in actual session at the appointed time and place. * * * When the law prescribes the time and place, time and place are as essential elements of jurisdiction as subject-matter and parties. *Cullum v. Casey*, 1 Ala. 351; *Wightman v. Karsner*, 20 Ala. 446; *Garlick v. Dunn*, 42 Ala. 404." *Quoted in Jackson v. State*, 102 Ala. 76.

If a court is held at a time or place unauthorized by law, all its judgments and proceedings of such term are without warrant of law, and void. *Brumley v. State*, 20 Ark. 77; *Williams v. Reutzel*, 60 Ark. 155; *Galusha v. Butterfield*, 3 Ill. 227.

An Indictment found by a grand jury at a term of court held at a time unauthorized by law is a nullity, and so are all the proceedings thereon. *Davis v. State*, 46 Ala. 80.

Judge of Probate — Maine.—In *White v. Riggs*, 27 Me. 114, it was held that a judge of probate has no power to hold a court for the hearing of a particular case at any other time or place than those fixed by law, or under the provisions of *Maine Rev. Stat.*, c. 105, § 8, and any decree passed in such case is void.

In What Building or Room.—If the court is held at the county-seat, it is not essential that it be held in the court-house if there be reason for the change. *Jordan v. People*, 19 Colo. 417; *Smith v. Jones*, 23 La. Ann. 43. See *Williams v. Reutzel*, 60 Ark. 155.

Where, from special emergency, steps are taken in a cause before a special judge while another cause is on trial, rendering it necessary to occupy a room in the court-house other than the court-room, and in so doing no legal or constitutional right of the accused is infringed, and it is manifest that no substantial injury has been done, error is not available if it exists. *Reed v. State*, (Ind. 1897) 46 N. E. Rep. 135.

Alabama — Seat of Government.—Although section 3, art. 6, of the Constitution of Alabama provides that "the Supreme Court shall be held at the seat of government, but if that shall become dangerous from any cause, it may adjourn to a different place," in impeachment proceedings of a circuit court judge the judges of the Supreme Court may, in order to facilitate the hearing of the case, and to subserve the convenience and necessities of the witnesses, and in accordance with an agreement of the respondent and the state, take the evidence and hear arguments of counsel at a place other than the seat of government. *State v. Tally*, 102 Ala. 25.

Judicial Cognizance of Counties and Cities.—In *Woods v. McCay*, 144 Ind. 316, an act creating a superior court for certain designated counties provided that "the superior court shall hold its sessions for each respective county in the town or city other than the

period of time outside of their proper limits, by adjournment, though the fixed term is not thereby enlarged. And a court once regularly convened continues

county-seat for each respective county containing four thousand or more inhabitants according to the return of the census taken under and by the authority of the United States in the year 1890." The act was assailed on the ground that it left uncertain and undetermined the particular place where the court was to be held; but the court ruled that it would take judicial cognizance that there were only two counties in the district that had a city or town outside of the county-seat with such a population, and what these cities were, and therefore the act located the places for holding the court as much as if it had referred to them by name.

Texas Statute — Regular Terms. — The terms of the court prescribed by the act of the Texas legislature creating a court at Texarkana are, within the meaning of the constitution, regular terms of the court, and cannot be held away from the county-seat. *Whitener v. Belknap*, 89 Tex. 273.

Indiana — Circuit Court. — In *White County v. Gwin*, 136 Ind. 562, it is held that, although there is no statute fixing the place for holding the White Circuit Court, yet, as it had been the universal custom to hold it at the county-seat, under an interpretation of the statutes that imperatively required the court to be so held, this long acquiescence in such a construction is equal to positive law requiring the court to be so held.

Transferring Case from One Place of Session to Another. — Under the provisions of section 3093 of the *Virginia* Code, the court of appeals has the right, when sitting at one of its places of session, to transfer to such place any case pending at any one of its other places of session. *Lillienfeld v. Com.*, 92 Va. 878. See also *Gibert v. Washington City*, etc., R. Co., 33 Gratt. (Va.) 586.

Special Terms — Alabama — Circuit Court. — In Alabama it is not essential to the validity of an order for a special term of the circuit court that it should be entered upon the minutes of the term which was being held when the order was made. The order is that of the judge, and not of the court, and it has no place on the minutes because it happens to have been made during a term. It should be entered upon the minutes of the special term. *Daughdrill v. State*, (Ala. 1897) 21 So. Rep. 378.

Georgia — Superior Court. — The Georgia Act of September 21, 1887, authorizing judges of the superior courts to call special terms to grant corporate charters, is not unconstitutional, either as being a special law, or as infringing the constitutional requirement of uniformity in the jurisdiction, powers, proceedings and practice of courts. *Branch v. Augusta Glass Works*, 95 Ga. 573. See the titles CONSTITUTIONAL LAW, vol. 6, p. 882; STATUTES.

Kansas — Twenty-third Judicial District. — Chapter 107, Kansas Laws of 1895, fixing terms of court in all the counties of the twenty-third judicial district, repeals by implication section 20, c. 118, Laws of 1889, and is a substitute for the earlier enactment. *State v. Countryman*, 57 Kan. 815.

Louisiana — District Court. — In Louisiana district judges may order special jury terms, at which both civil and criminal cases can be tried. *State v. Scott*, 48 La. Ann. 293.

Minnesota — District Court. — In *Flanagan v. Borg*, 64 Minn. 394, it was held that the judge or judges of the district court have no authority under the statutes to provide by a standing order for the holding, year after year, of terms of court for the trial of issues of fact. They have authority to appoint special terms for that purpose, but not regular terms.

Missouri — Circuit Court. — In *State v. Stratton*, 136 Mo. 423, it is held that an act of the legislature providing for holding additional terms of the circuit court at a designated place in the county is not objectionable as being special legislation. See also the title STATUTES.

New Mexico — District Court. — Section 543 of the Compiled Laws of New Mexico of 1884 provides that "the terms of the district courts shall be held in the several counties of this territory, beginning at the times hereinafter fixed, and continuing until adjourned by order of the court." Section 552 provides that "when special terms are held they shall not conflict with the regular term in any other county in the same judicial district." It was held that the proceedings at special terms were not invalid by reason of the fact that the term was continued beyond the time fixed for a regular term. *Gonzales v. Cunningham*, 164 U. S. 612.

New York — Supreme Court. — The power given to the Appellate Division under section 2, art. 6, of the New York Constitution of 1894, to fix the times and places for holding special and trial terms, is not in conflict with the power given the governor by section 234 of the Code of Civil Procedure, as amended in 1895, to appoint, when in his judgment the public interest so requires, one or more extraordinary special or trial terms. *People v. Young*, 18 N. Y. App. Div. 162.

The provision of section 232 of the New York Code of Civil Procedure, which required the justices of the Appellate Division in each department to designate trial terms before the first day of December, 1895, was directory merely, and the observance of the day was not essential to the jurisdiction to perform the act. And it seems that the fact that under the constitution the jurisdiction of the Appellate Division of the court was not complete until the first day of January, 1896, did not exclude the power of the justices appointed to that court to assemble after their appointment and before that day, and designate the trial terms and assign justices thereto. And it seems further that the irregularity, if any, in the designation of trial terms by the justices of the Appellate Division before the first day of January, 1896, arising from the fact that they did not constitute a court until that day, was curable by redesignation on that day. *People v. Youngs*, 151 N. Y. 210.

Duration. — When a term of court is set by statute to begin on a certain Monday and to continue for a specified number of weeks, it embraces the Sunday of each week, unless

open till actually adjourned.¹ Courts are bound to know judicially when their terms are held by public law.² Parties also are bound to take notice of the sitting of the court, the terms of which, whether regular or special, are fixed by statute.³

VIII. SYSTEMS AND CLASSES OF COURTS — 1. In General. — A detailed treatment of the system of English courts is not within the scope of this work, and would be of little or no practical value. Elsewhere in this work will be found an enumeration of the courts of the United States, and a treatment of the nature, organization, powers, jurisdiction, etc., of the same.⁴ All questions pertaining to the system of state courts which are of consequence, and not adverted to in this article, fall appropriately under other titles in this work to which reference is here made.⁵ Courts may be arranged under certain general classes depending upon the extent and character of their jurisdiction, the principles upon which they administer justice, or the forms of procedure. Among these classes are the following: (1) courts of record, and courts not of record; (2) civil and criminal courts; (3) inferior, superior, supreme and appellate courts; (4) courts of law and courts of equity; (5) courts of general jurisdiction, and courts of limited or special jurisdiction; (6) provisional courts; (7) courts martial. The general nature of these tribunals will be treated in order.

2. Courts of Record, and Courts Not of Record. — A Court of Record is a judicial, organized tribunal, having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the common law. Its acts or proceedings are enrolled or recorded; and what is contained in the record cannot be called in question, except by a writ of error from a higher court.

Courts Not of Record are courts of inferior dignity and limited power, whose proceedings are not recorded.⁶

sooner adjourned, and the term expires by limitation at midnight of that day. *Taylor v. Ervin*, 119 N. Car. 274.

For Other Instances of Construction of Special Statutes concerning terms of court, see: *Brooks v. Mutual Loan, etc., Co.*, 95 Ga. 178 (justices' court in cities of certain population); *Toler v. Com.*, 94 Ky. 529 (special terms of circuit court); *Richie v. Peiper*, (Ky. 1896) 35 S. W. Rep. 279 (county court for Jefferson county); *McNeill v. McDuffie*, 119 N. Car. 336 (superior court in Cumberland county); *Wilson v. State*, (Tex. Crim. App. 1897) 38 S. W. Rep. 624 (district court in forty-sixth judicial district); *Ex p. Murphy*, 27 Tex. App. 492 (district court of Kansas county); *Graves v. State*, 6 Tex. App. 228 (district court in twenty-second district); *State v. Shanley*, 38 W. Va. 516 (special terms of circuit court); *Chadron Bank v. Anderson*, (Wyoming 1897) 48 Pac. Rep. 197 (district court.)

Adjourned Terms. — A court held by adjournment is not a new term, but a continuance of the former term. *Com. v. Justices*, 5 Mass. 435. See also *People v. Sullivan*, 115 N. Y. 185. An adjourned term is to be deemed a part of the regular term; and every step may be taken at it, which might have been taken at the regular term. *Smith v. Smith*, 17 Ind. 75.

An order of court directing an adjourned term is not defective, and the adjourned term is not illegal, simply because the order does not specify the manner in which public notice of such term is to be given. *Conrad v. Johnson*, 20 Ind. 421. See the title ADJOURNMENTS, ENCYC. OF PLEADING AND PRACTICE.

1. *People v. Central City Bank*, 53 Barb. (N. Y.) 412; *Labadie v. Dean*, 47 Tex. 90.

2. *Foster v. Frost*, 4 Dev. L. (15 N. Car.) 427. Courts take judicial notice of the terms of other courts of the same state. *Ex p. Vincent*, 43 Ala. 402.

3. *Butcher v. Brand*, 6 Iowa 235; *Sharp v. Pike*, 5 B. Mon. (Ky.) 155.

The original notice need not specify when the term is to commence. Notice to appear at the "next term" refers to the next term after service of the notice. *Butcher v. Brand*, 6 Iowa 235.

A special term is not necessarily invalidated if the clerk partially fails in giving notice of its call. *State v. Claude*, 35 La. Ann. 71. In this case the judge performed every duty imposed upon him with reference to calling the special term, but the clerk, while substantially complying with the requirement of notice by publication in the newspaper, neglected to post the notice on the door of the court-house. It was held that under the circumstances the term was not invalidated.

4. See the titles ADMIRALTY JURISDICTION, vol. 1, p. 645; TERRITORIES; UNITED STATES COMMISSIONERS; UNITED STATES COURTS; and generally the table of cross-references, *supra*.

5. See the titles in the table of cross-references, *supra*.

6. **Courts of Record.** — *Bouvier's Law Dict.*; *Gladhill, Petitioner*, 8 Met. (Mass.) 171. "A court of record is one whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony, which rolls are called the records of the court, and are of

3. Civil and Criminal Courts. — Civil courts are those established to redress private wrongs. Criminal courts are those which administer the criminal laws and redress public wrongs.¹

4. Inferior, Superior, Supreme, and Appellate Courts. — Inferior Courts are those which are of very restricted jurisdiction and whose judgments and decrees can be reviewed by the higher tribunals.²

Superior Courts are those of intermediate jurisdiction between the inferior and supreme courts; also those of controlling as distinguished from those of subordinate jurisdiction.³

such high and supereminent authority that their truth is not to be called in question; for it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no, else there would be no end of disputes. Every court of record has authority to fine and imprison for contempt of its authority; while, on the other hand, the very erection of a new jurisdiction, with power of fine or imprisonment, makes it instantly a court of record. But the common-law courts, not of record, are of inferior dignity, and in a less proper sense the king's courts; and these are not, as a general rule, intrusted by the law with any power to fine or imprison the subjects of the realm. And in these the proceedings not being enrolled or recorded, as well their existence as the truth of the matters therein contained shall, if disputed, be tried and determined by a jury." 3 Stephen's Commentaries, 269; 2 Black. Com. 24. Co. Litt. 117b, 260a. See essay of Wilber L. Stonex, 31 Cent. L. J. 86, entitled "Courts of Record, and Courts Not of Record."

A writ of error lies to correct an error in the proceedings of a court of record. 3 Blackstone's Com. 407.

In *Woodman v. Somerset County*, 37 Me 29, and in *Mooers v. Kennebec, etc.*, R. Co., 58 Me. 279, it was decided that the courts of county commissioners in *Maine* were not courts of record.

New York. — In *Lester v. Redmond*, 6 Hill (N. Y.) 501, the marine court of the city of New York was held not to be a court of record for certain purposes. See also *Hutkoff v. Demorest*, 103 N. Y. 377.

The justices' court of the city of Albany is not a court of record. *Wheaton v. Fellows*, 23 Wend. (N. Y.) 375.

In *Alabama* the court of a justice of the peace was held to be not a court of record. *Ellis v. White*, 25 Ala. 540.

Massachusetts. — In *Smith v. Morrison*, 22 Pick. (Mass.) 430, it was held that Rev. Stat., c. 120, § 1, providing that all actions upon judgments rendered in any court, not being a court of record, shall be barred unless commenced within six years next after the causes of such action shall accrue, applies, as explained by Stat. 1839, c. 73, to an action upon the judgment of a justice of the peace.

In a *Pennsylvania* case it was said that courts of justices of the peace are not courts of record. *Snyder v. Wise*, 10 Pa. St. 157.

See the title JUSTICES OF THE PEACE.

In *Arkansas* it is held that the fact that a

court has a clerk and a seal raises the presumption, and is *prima facie* evidence, that it is a court of record. *Adamson v. Adamson*, 9 Ark. 26. But in *New York* it is held that this is not sufficient of itself. *Hutkoff v. Demorest*, 103 N. Y. 377.

In *California* the city criminal court of the city and county of San Francisco is a court of record, because it has a clerk and bailiff, and has power to fine and imprison, although it has no seal. *Ex p. Thistleton*, 52 Cal. 220.

In *Massachusetts* it was held that though a probate court is not technically a court of record, yet it should keep a record of all its orders and decrees, and should record or file all orders of notice and the return upon them; and where previous notice has been given, that fact should be recited in the decree. *Chase v. Hathaway*, 14 Mass. 222.

In *Ohio* it was held that the probate court is a court of record, competent to decide on its own jurisdiction, and to exercise it to a final judgment without setting forth the facts and evidence on which it is rendered, and that the records of such court, when made, import absolute verity. *Shroyer v. Richmond*, 16 Ohio St. 455.

1. See the title CRIMINAL LAW, *post*.

2. **Inferior Courts.** — *Nugent v. State*, 18 Ala. 521; *Bailey v. Winn*, 113 Mo. 159, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 453; *Beaudrias v. Hogan*, 16 N. Y. App. Div. 38. See *infra*, this section, *Courts of General, Limited, or Special Jurisdiction*.

Whenever a new right is created by statute, and the enforcement of such right is committed to a court, even of general original jurisdiction, such court, *quoad hoc*, is an inferior court, and must pursue the statute strictly. *Cohen v. Barrett*, 5 Cal. 195. See also *Julian v. Beal*, 34 Ind. 371; *Piggott v. Ramey*, 2 Ill. 145.

When statutory powers are conferred upon a court of inferior jurisdiction, and a mode of executing those powers is prescribed, the course pointed out must be substantially pursued or the acts and judgment of the court are *coram non jure* and void. *Mossman v. Forrest*, 27 Ind. 233; *Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52. See the title STATUTES.

Where the jurisdiction of an inferior court depends upon a fact which said court is required to ascertain and settle by its decision, such decision is conclusive. Nor is this principle limited to cases where the determination to be made is of a judicial character. *Evansville, etc., R. Co. v. Evansville*, 15 Ind. 395.

Must Follow Decisions of Appellate Courts. — *Julian v. Beal*, 34 Ind. 371; *Costello v. Syracuse, etc., R. Co.*, 65 Barb. (N. Y.) 92.

3. Bouv. Law Dict., title Court.

Superior Courts — Jurisdiction. — To constitute

Supreme Courts are those which possess the highest and controlling jurisdiction; also, in some states, a court of higher jurisdiction than the superior courts, though not the court of final resort.¹

Appellate Courts are those which take cognizance of causes removed from another court by appeal or writ of error.²

5. Courts of Law and Courts of Equity. — **Courts of Law** are those which administer justice according to the course of the common law.

Courts of Equity are those which administer justice according to the rules and principles of equity.³ The adoption of equitable principles by courts of law does not oust equity of its jurisdiction.⁴

6. Courts of General, Limited, or Special Jurisdiction. — **Courts of General Jurisdiction** are those which have a jurisdiction over causes various in their nature.

Courts of Limited Jurisdiction are those which have jurisdiction over a few specified matters only.⁵

The **Distinction** between courts of original and general jurisdiction over any particular subject, and courts of special and limited jurisdiction, is this: The former are competent by their constitution to decide upon their own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the jurisdictional facts and evidence upon which it is rendered. The records import absolute verity, and cannot be impugned by averment or proof to the contrary; there can be no judicial inspection behind the judgment, save by appellate power. The latter are so constituted that their judgments may be looked through for the facts and evidence necessary to sustain them; their decisions do not furnish evidence of themselves to show jurisdiction and its lawful exercise. Every requisite for either must appear upon the face of their proceedings, or they are nullities.⁶

a court a superior court as to any class of actions, within the common-law meaning of that term, its jurisdiction of such actions must be unconditional, so that the only thing requisite to enable the court to take cognizance of them is the acquisition of jurisdiction of the persons of the parties. *Simons v. De Bare*, 4 Bosw. (N. Y.) 547.

The jurisdiction of superior courts can be taken away only by express negative words of a statute, or by irresistible implication. *State v. Moore*, 19 Ala. 514; *Murfree v. Leeper*, 1 Overt. (Tenn.) 1; *Burgin v. Martin*, 3 Yeates (Pa.) 479; *Overseers of Poor v. Smith*, 2 S. & R. (Pa.) 363; *Com. v. M'Closkey*, 2 Rawle (Pa.) 369; *Com. v. White*, 8 Pick. (Mass.) 453; *Wright v. Marsh*, 2 Greene (Iowa) 94. Nothing is presumed to be out of its jurisdiction but that which specifically appears to be so. *Holmes v. Campbell*, 12 Minn. 221; *State v. Ledford*, 6 Ired. L. (28 N. Car.) 5; *Hopper v. Fisher*, 2 Head (Tenn.) 253; *Gray v. Larrimore*, 2 Abb. (U. S.) 542. See the title **STATUTES**.

1. Bouv. Law Dict., title Court.

Supreme Courts. — The supreme court has a general authority to supervise all inferior courts, and to award writs of certiorari, etc., to persons in whom the legislature vests power over persons or property. *Le Roy v. New York*, 20 Johns. (N. Y.) 430, 11 Am. Dec. 289. See also *Dubois v. Phillips*, 5 Johns. (N. Y.) 235.

The constitution invests the supreme court with a jurisdiction coextensive with the state, and the legislature has no power to limit this jurisdiction, or to prohibit the court from issuing its writs at any time to all parts of the

state. The court merely acquiesces in the division of the state into districts, as a convenient arrangement for business. *Com. v. Allegheny County*, 37 Pa. St. 237.

The correctness of a decision made by the supreme court in reversing a judgment and remanding a cause is not to be questioned by the court to which that cause is remanded. *Miller v. Jones*, 29 Ala. 174. The latter is bound by the mandate of the former, and may be enforced by peremptory writs to carry it into execution. *Wood v. Wheeler*, 9 Tex. 127; *Atty.-Gen. v. Lum*, 2 Wis. 507. See also *Re West Chicago Park Com'rs*, 29 Chicago Leg. N. 306.

2. Appellate Courts. — Bouv. Law Dict., title Court.

Where the Court Below Has Not Jurisdiction, none is conferred on the appellate court by appeal. *Gregory v. Williams*, 24 Ark. 177; *Thompson v. Colony*, 6 Vt. 91; *Richardson v. Denison*, 1 Aik. (Vt.) 210. See also *Breckenridge v. Johnson*, 57 Miss. 371.

United States Courts. — The appellate jurisdiction of the federal courts depends on the Constitution of the United States and the acts of Congress. Agreement of counsel will not confer such jurisdiction. *The Lucy*, 8 Wall. (U. S.) 307.

3. Bouv. Law Dict., title Court.

4. *Walker v. Cheever*, 35 N. H. 339.

5. Bouv. Law Dict. See *supra*, this section, *Inferior, Superior, Supreme, and Appellate Courts*.

6. **Courts of General and Courts of Limited Jurisdiction.** — *Grignon v. Astor*, 2 How. (U. S.) 319. See *supra*, this section, *Inferior, Superior, Supreme, and Appellate Courts*.

7. Provisional Courts. — Provisional courts are tribunals temporarily established by military authority in conquered countries. They are courts of record, and vested with all necessary authority for the administration of justice in such

It is the nature of the jurisdiction, not the territorial limits within which it may be exercised, that determines whether a court is of inferior or general jurisdiction. *State v. Burton*, 11 Wis. 50.

Although it is a general rule that a record of court imports absolute verity, and cannot be contradicted by parol evidence, yet this rule does not forbid the exercise of a revisory power, by a court of general jurisdiction, over its own records. *Mosseaux v. Brigham*, 19 Vt. 457. See also *Smith v. Engle*, 44 Iowa 265.

A court before which every question of civil right may be brought, either directly or indirectly, is a superior court of general jurisdiction. *Gillet v. Powell*, Spears Eq. (S. Car.) 142.

Presumptions in Favor of Jurisdiction. — Where the court has general jurisdiction, a want of jurisdiction will not be presumed against it. *Biggs v. Blue*, 5 McLean (U. S.) 148. On the other hand, the presumption of jurisdiction will not arise when the face of the record discloses the want of it. *Washington, etc., R. Co. v. Alexandria, etc., R. Co.*, 19 Gratt. (Va.) 592, 100 Am. Dec. 710. See, for a full treatment, the title JURISDICTION.

Courts of Limited Jurisdiction — Must Proceed in Mode Prescribed by Statute. — If a court of limited jurisdiction does not proceed according to the mode prescribed by the statute by which it is created, its acts are nullities. 3 Phill. Ev. 987; *Townshend v. Brooke*, 9 Gill (Md.) 90; *Brodess v. Thompson*, 2 Har. & G. (Md.) 120; *State v. Warren*, 28 Md. 338; *Snyder's Appeal*, 36 Pa. St. 166, 78 Am. Dec. 372.

Jurisdiction to Appear on the Record. — While, in courts of general jurisdiction, all the jurisdictional facts need not be set out in the complaint, courts of limited jurisdiction must not only act within the scope of jurisdiction, but it must appear on the face of the proceedings that they so acted, or their proceedings are *coram non judice* and void.

United States. — *Kempe v. Kennedy*, 5 Cranch (U. S.) 173, Pet. (C. C.) 36; *Turner v. Bank of North America*, 4 Dall. (U. S.) 11; *Walker v. Turner*, 9 Wheat. (U. S.) 541.

Alabama. — *Owen v. Jordan*, 27 Ala. 608; *State v. Ely*, 43 Ala. 568; *Pettus v. McClannahan*, 52 Ala. 55.

California. — *Doll v. Feller*, 16 Cal. 432; *Lowe v. Alexander*, 15 Cal. 296.

Delaware. — *Proctor v. State*, 5 Harr. (Del.) 387.

Illinois. — *Anderson v. Gray*, 134 Ill. 550, 23 Am. St. Rep. 606, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 453; *Chicago v. Rock Island R. Co.*, 20 Ill. 286.

Indiana. — *Hopper v. Lucas*, 86 Ind. 43; *State v. Gachenheimer*, 30 Ind. 63; *Ohio, etc., R. Co. v. Shultz*, 31 Ind. 150.

Kentucky. — *Martin v. McKinney*, Sneed (Ky.) 321.

Maryland. — *Wickes v. Caulk*, 5 Har. & J. (Md.) 36.

Massachusetts. — *Albee v. Ward*, 8 Mass. 86; *Williams v. Blunt*, 2 Mass. 213; *Smith v. Rice*, 11 Mass. 513; *Hunt v. Hapgood*, 4 Mass. 122.

Mississippi. — *Stockett v. Nicholson*, Walk. (Miss.) 75.

Missouri. — *State v. Metzger*, 26 Mo. 65; *Rohland v. St. Louis, etc., R. Co.*, 89 Mo. 180; *Cunningham v. Pacific R. Co.*, 61 Mo. 33.

New York. — *Powers v. People*, 4 Johns (N. Y.) 292; *Seaman v. Duryea*, 10 Barb. (N. Y.) 523; *Latham v. Edgerton*, 9 Cow. (N. Y.) 227; *Frees v. Ford*, 6 N. Y. 176.

South Carolina. — *McKenzie v. Ramsay*, 1 Bailey L. (S. Car.) 459; *Harvey v. Huggins*, 2 Bailey L. (S. Car.) 267.

Tennessee. — *Hamilton v. Burum*, 3 Yerg. (Tenn.) 355.

Vermont. — *Hendrick v. Cleaveland*, 2 Vt. 329; *Clapp v. Beardsley*, 1 Aik. (Vt.) 168; *Walbridge v. Hall*, 3 Vt. 114.

Virginia. — *Ballard v. Thomas*, 19 Gratt. (Va.) 14; *Devaughn v. Devaughn*, 19 Gratt. (Va.) 556; *Hill v. Pride*, 4 Call (Va.) 107.

The jurisdiction must be expressly alleged. *Gray v. Larrimore*, 2 Abb. (U. S.) 542; *Doll v. Feller*, 16 Cal. 432; *Lowe v. Alexander*, 15 Cal. 296; *Morrow v. Weed*, 4 Iowa 77, 66 Am. Dec. 122; *Kundolf v. Thalheimer*, 17 Barb. (N. Y.) 506; *Denning v. Corwin*, 11 Wend. (N. Y.) 647, *overruled* in *People v. Corlies*, 1 Sandf. (N. Y.) 228.

United States Courts. — The courts of the United States are of limited but not of inferior jurisdiction. Their proceedings, therefore, are not nullities, though their jurisdiction does not appear on the record. Until reversed, their proceedings are conclusive evidence between parties and privies; but if their jurisdiction does not appear of record, their proceedings are erroneous, and may be reversed. *Kempe v. Kennedy*, 5 Cranch (U. S.) 185; *Skillern v. May*, 6 Cranch (U. S.) 267; *M'Cormick v. Sullivant*, 10 Wheat. (U. S.) 199. See also *Reed v. Vaughan*, 15 Mo. 137, 55 Am. Dec. 133; *Wood v. Mann*, 1 Sumn. (U. S.) 578.

They can exercise no jurisdiction or powers not given by acts of Congress, either expressly or by necessary implication. *U. S. v. Tawan-ga-ca*, Hempst. (U. S.) 304; *U. S. v. Alberty*, Hempst. (U. S.) 444.

In *Gillet v. Powell*, Spear's Eq. (S. Car.) 142, it is held that the federal courts are courts of superior jurisdiction, and that their judgments are binding upon all other courts until reversed, though the grounds of their jurisdiction do not appear upon the proceedings.

Special Cases. — The term "special cases," in the *California* Constitution, includes no class of cases for which the courts of general jurisdiction have always supplied a remedy, and must therefore be confined to such new cases as are the creation of statutes, and the proceedings under which are unknown to the general framework of courts of common law and equity. *Parsons v. Tuolumne County Water Co.*, 5 Cal. 43, 63 Am. Dec. 76.

The Test of Inferiority may be solved by showing that the court is either placed under the supervisory or appellate control of other courts, or that the jurisdiction as to the subject-matter is limited or confined. *Bailey*

countries, under the constitution and laws. During the late civil war, it was within the constitutional authority of the President of the United States, as commander-in-chief, to establish provisional courts over such territory of the insurgents as had passed into the control of the national forces;¹ and upon their dissolution, Congress had the authority to provide for the transfer of pending causes to the United States Courts.²

8. Courts Martial. — Courts martial are military tribunals established for the purpose of trying military offenses committed by soldiers or sailors in the army or navy,³ and were intended originally to be a partial substitute for the court of chivalry of former times.⁴ For a full discussion of these courts reference is made to another title in this work.⁵

9. Civil and Ecclesiastical Courts—Their Relation. — Civil courts have no authority over ecclesiastical courts, save so far as rights of property or personal liberty are involved, and over these matters the ecclesiastical courts have no jurisdiction whatever.⁶

COURTS-MARTIAL. — See the title **MILITARY LAW**.

COURT-YARD. — See the titles **COURT-HOUSE**; **CURTILAGE**; **JUDICIAL SALES**; **SHERIFFS' SALES**.

COUSIN. (See also the titles **SUCCESSION**; **WILLS**.) — Any collateral relative, except brothers and sisters and their descendants, and the brothers and sisters of any ancestor.⁷ Anciently it was a term for any collateral relative.⁸ When used alone "cousin" means cousin-german, or first cousin; that is, one who has the same grandfather or grandmother.⁹ The children

v. Winn, 113 Mo. 159; *State v. Daniels*, 66 Mo. 201.

The **County Courts of Colorado** are courts of superior or general jurisdiction. So held with reference to the power of court to punish for contempt. *Terry v. Wright*, (Colo. App. 1896) 47 Pac. Rep. 905. See also the title **CONTEMPT**, vol. 7, p. 25.

The **County Courts of Illinois**, in the exercise of the common-law jurisdiction conferred upon them by statute, are entitled to the same presumption in favor of their jurisdiction as circuit courts. They are courts of record, and the practice in them is the same as in the circuit courts. They have the same power to pass upon their own jurisdiction, and to exercise it, without setting forth in their proceedings the facts upon which they determine that jurisdiction. *Anderson v. Gray*, 134 Ill. 550, 23 Am. St. Rep. 696.

1. Provisional Courts. — The *Grapeshot*, 9 Wall. (U. S.) 129; *Burke v. Tregre*, 22 La. Ann. 629; *Mechanics*, etc., *Bank v. Union Bank*, 22 Wall. (U. S.) 276. See also *Leitensdorfer v. Webb*, 20 How. (U. S.) 176; *Jecker v. Montgomery*, 13 How. (U. S.) 498, 18 How. (U. S.) 110; *Cross v. Harrison*, 16 How. (U. S.) 164; *U. S. v. Rice*, 4 Wheat. (U. S.) 246; *Texas v. White*, 7 Wall. (U. S.) 700; Executive Documents, 2d session 29th Congress, vol. 3, Document 19.

Jurisdiction, Powers, and Procedure of Provisional Courts. — See *Burke v. Tregre*, 22 La. Ann. 629; *Noland v. Sterling*, 21 La. Ann. 277.

2. The *Grapeshot*, 9 Wall. (U. S.) 129. See *Noland v. Sterling*, 21 La. Ann. 277.

3. Black's Law Dict.

4. *Ex p. Reed*, 100 U. S. 20.

5. See the title **MILITARY LAW**.

6. *Watson v. Garvin*, 54 Mo. 353. See the title **RELIGIOUS SOCIETIES**.

7. Wharton's Law Lexicon.

Wife of Cousin. — A testatrix gave a share of her residuary estate to her "cousin Harriet Cloak." She had no cousin of that name; but she had a married cousin Harriet Crane, whose maiden name was Cloak, and also a cousin T. Cloak, whose wife's name was Harriet. Extrinsic evidence was admitted to show which was meant; and it was held that *cousin* might be understood in a popular sense as the wife of a *cousin*. The share was accordingly awarded to Harriet, wife of T. Cloak. *Bowen, L. J.*, dissented. *Fry, L. J.*, admitted that *cousin* was a term of which the dominant idea was consanguinity, but said: "I think that, in popular language, the word does apply to persons who are not related by consanguinity. In the present case we must either reject the name of the legatee, or else give a secondary or tertiary signification to the word *cousin*. I think the latter the more correct course." *In re Taylor*, 34 Ch. Div. 255, 56 L. J. Ch. 173.

8. Litt., §§ 389, 660; Adams's Glossary.

9. First Cousins. — *In re Parker*, 15 Ch. Div. 528, 17 Ch. Div. 262, *Stoddart v. Nelson*, 6 De G. M. & G. 68; *Stevenson v. Abingdon*, 31 Beav. 305; *Burbey v. Burbey*, 6 L. T. 573.

Where a bequest is to *cousins* simply, in the absence of anything to explain the testator's meaning, first *cousins* only are entitled. *Stevenson v. Abingdon*, 31 Beav. 305.

In *Stoddart v. Nelson*, 6 De G. M. & G. 68, the lord chancellor (Lord Cranworth) said: "I think that if a testator says no more than that he gives to *cousins*, he must be taken to mean first *cousins*. That will be a practical construction, and one by which the parties entitled will be easily ascertained; it coincides, too, with ordinary experience, for when a person speaks of *cousins* he generally means

and grandchildren of a first cousin are first cousins once and twice removed, and so on. Second cousins are those, collaterally related, who have the same great-grandfather or great-grandmother, and so on; and the children and grandchildren of each bear the same relation to the other, once and twice removed.¹

first *cousins*, the children of an uncle or aunt."

A gift to "all my first *cousins*, or *cousins-german*," does not extend to a first *cousin* once removed, who is in fact a *cousin* in the second degree, though not called a second *cousin*, as being of the second class of persons to whom the appellation is given. *Sanderson v. Bayley*, 4 Myl. & C. 56.

A testator gave legacies to several persons by name, describing each of them as a *cousin*, and then gave the residue to all such of his *cousins* as should be living at his death, and to all the children of such of his said *cousins* as might have theretofore died, or might die in his lifetime. The persons described by name were all first *cousins*; and it was held that *cousins* in the residuary clause meant first *cousins*. *Caldecott v. Harrison*, 9 Sim. 457.

Extended to First Cousin Once Removed. — In *Wilks v. Bannister*, 30 Ch. Div. 512, a bequest to *cousins* was held to include first *cousins* once removed, and their children, it appearing from the will that the testator had used the term in that sense. Kay, J., said: "Those are the principal cases on the subject, and it appears from them that the construction of these words has not been uniform, but that the tendency of the later decisions has been to give them their strict meaning unless there be no person of the class — a fact which it seems to have been assumed the testator would know. * * * But a further indication is given in the codicil, by which the testator gave one hundred pounds to each of his *cousins*, Joseph Bannister and George Cole, in addition to any sum to which they 'may be entitled under my will.' Now Joseph Bannister and George Cole were first *cousins* once removed, and as the gift by the will was only to such first and second *cousins* as should survive the testator's wife and sister, the words 'may be entitled' probably referred to that contingency, and this affords a strong indication that the testator meant by the words 'second *cousins*' his first *cousins* once removed; and that, I think, is the true meaning of the words as used in this will."

1. Second Cousins. (See also SECOND COUSIN.) — A bequest to second *cousins* includes only those properly second *cousins* as defined in the text, and not all those who are in the degree of second *cousins*, viz., the sixth degree of consanguinity. It has been contended that it was a principle that the term was inclusive of all who were of this degree; but the contention was distinctly repudiated in *In re Parker*, 15 Ch. Div. 528, 28 W. R. 823. In this case the testator gave one-third of his property to his first *cousins*, and two-thirds to his second *cousins*. It was decided that "first *cousins*" meant *cousins-german*, and that first *cousins* once removed were not included in the term "second *cousins*." Sir George Jessel, M. R., who delivered the opinion of the court, said:

"The term 'second *cousins*' has a well-known, definite meaning; it means persons having the same great-grandfathers and great-grandmothers. The relationship is a perfectly well-known and perfectly well-settled relationship. There never was any doubt about its meaning suggested by anybody that I am aware of. Why should the meaning of it here be altered without a context? It is one of the first principles of construction that there should be no alteration in the proper sense of words without a context. Here there is no context."

There may be an exception, however, where at the time of making his will the testator had no second *cousins*, in which case he must have meant something else; and this meaning the court must determine. Upon this ground are explained some of the earlier cases set out below.

A testator gave the residue of his estate to A. and B. and his first and second *cousins*. At the time of making his will, and at his death, he had no second *cousins*, his only collateral relatives being a first *cousin*, three first *cousins* once removed, and a great-niece. The court held the intention of the testator to be, to give to relatives not more remote than second *cousins*, and accordingly divided the estate equally among the seven mentioned. *Mayott v. Mayott*, 2 Bro. C. C. 125.

In *Silcox v. Bell*, 1 Sim. & S. 301, it was decided that the great-grandchildren of uncles and aunts were not second *cousins*, but first *cousins* twice removed; but that they were, however, of the degree of relationship of second *cousins*, and entitled as such under a bequest. The latter part of this decision was disapproved by Jessel, M. R., in *In re Parker*, 15 Ch. Div. 528, 28 W. R. 823, 17 Ch. Div. 262.

Second Cousins — First Cousins Once Removed. — A testator bequeathed property among "my second *cousins*." The testator had no second *cousins*, either at the date of his will, or at his death, or any born afterwards. It was held that first *cousins* once removed were entitled. Chitty, J., said: "I do not understand that in that judgment, or in the judgment of the Court of Appeal, the case of *Slade v. Fooks*, 9 Sim. 386, decided by the Vice-Chancellor of England, has been overruled. In that case the gift was to the second *cousins*; and the vice-chancellor, in disposing of the case, said, in words which are applicable to the present case, that the testator had only two generations of persons in her contemplation, namely, those whom she called her second *cousins*, and the issue of such of them as were dead, and that it was very common for persons to call the children of their first *cousins* their second *cousins*. I agree with that latter observation. I think it is very common; and therefore, in my judgment, I have not to deal with a case in which the terms are strictly technical terms. I think the term 'second *cousins*' may, on a fair consideration of this will with reference to

COVENANT, ACTION OF. — See 5 ENCYC. OF PLEADING AND PRACTICE 342.

the facts as proved, be taken to denote *cousins* who are not exactly related according to the legal description in the degree of second *cousins*; and so I hold, and it follows from *Slade v. Fooks*, 9 Sim. 386, and rightly, that the persons who take under this will are the first *cousins* once removed." *In re Bonner*, 19 Ch. Div. 201.

Where the bequest was to the testatrix's second *cousins* of the name of S., and she had no second *cousins*, but had three first *cousins* once removed, two of whom survived, and the third had died leaving children, it was held that the two survivors and the children of the third took to the exclusion of the children of the survivors, who were of the degree of second *cousins*, on the ground that it was very common for people to call children of first *cousins* second *cousins*. *Slade v. Fooks*, 9 Sim. 386.

But, as a rule, a first *cousin* once removed is not entitled to share in a fund bequeathed to second *cousins*. "Those only who have either the same great-grandfather or the same great-grandmother are second cousins to each other." *Bridgnorth v. Collins*, 15 Sim. 541. *In re Parker*, 15 Ch. Div. 528, set out *supra*.

Under a bequest to the testator's first and second *cousins* and the children of his kinsman G. C., which children were his first *cousins* twice removed, all persons related in the degree of second *cousins* were admitted to take, in *Charge v. Goodyer*, 3 Russ. 140. See this case remarked on in *In re Parker*, 15 Ch. Div. 528, 28 W. R. 823.

Incest. (See also the title **INCEST**.) — The relation between uncle and niece is nearer than that between *cousins*; so held in a statute against incest. *State v. Brown*, 47 Ohio St. 102, where the court said: "The first count under consideration (No. 2 in the indictment) avers that the defendant and Rose Cramer, with whom he committed the sexual act, were uncle and niece, respectively, to each other, but does not aver in direct terms that that relationship is nearer than that between *cousins*, nor does it show whether they were related by blood or affinity. Is it necessary to aver in express terms that the kinship is nearer than that between first *cousins*, or will it suffice if the degree of it is averred, and it is one necessarily nearer than *cousins*? While the statute

(section 7019), in general terms, prohibits the sexual act between persons 'nearer of kin * * * than *cousins*,' it may well be doubted whether a general averment, in the words of the statute, would be definite enough to satisfy the rules of criminal pleading. It would remain uncertain which of the several degrees of kinship, nearer than that between *cousins*, was intended to be charged. Where, however, the precise degree of kinship is averred, all indefiniteness disappears. Nor is it for the jury to determine, in each particular case, whether the kinship between the parties to the act, be they father and daughter, brother and sister, or uncle and niece, is, or is not, nearer than that between *cousins*. This is matter of law determinable by fixed principles applicable alike to every case. The kinship being averred to be that of uncle and niece, it was unnecessary to aver in addition, that which was matter of law, that they were nearer of kin than *cousins*. The authorities in support of this principle are innumerable; one only will be referred to. Bishop says, quoting from Buller, J.: 'It is one of the first principles of pleading, that you have only occasion to state facts, which must be done for the purpose of informing the court whose duty it is to declare the law arising upon those facts, and apprise the opposite party of what is meant to be proved in order to give him an opportunity to answer or traverse it.' 1 Bishop Crim. Procedure, § 329. That the kinship between an uncle and his niece is nearer than that between *cousins*, within the meaning of this statute, is clear, notwithstanding that by the rules of the common law both were considered as standing in the same degree. The rule of the common law which accomplishes that result relates to the descent of property only; for, notwithstanding this rule of the common law, sexual commerce between uncle and niece in England is incestuous, while that between *cousins* is not. The law respecting incest, from the nature of the mischief to be prevented, necessarily regards the actual kinship of the parties as the predicate for its prohibitory enactments. *Griffith v. Reed*, 1 Hagg. Ecc. 195; *Woods v. Woods*, 2 Curt. Ecc. 516; *Story on Conflict of Laws*, §§ 114 and 208. And the kinship between an uncle and niece is double that between *cousins*."

COVENANTS.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *COVENANT*, vol. 5, *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, p. 342.
As to covenants to pay rent, and others incidental to contracts between landlords and tenants, see the title *LEASES*.

As to covenants to build and maintain fences, see the title FENCES.

As to the covenant to stand seized, see the titles DEEDS; TRUSTS AND TRUSTEES; and USES.

As to agreement to give deed with the "usual covenants," see the title VENDOR AND PURCHASER.

As to the validity of particular covenants, see the title ILLEGAL CONTRACTS.

As to the operation of covenants by way of estoppel, see the title ESTOPPEL.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles BONDS, vol. 4, p. 618; BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 2; CONTRACTS, vol. 7, p. 88; DAMS, post; DEEDS; EASEMENTS; FORECLOSURE OF MORTGAGES; INTERPRETATION AND CONSTRUCTION; MINES AND MINING; MORTGAGES; PARTY-WALLS; PRIVATE WAYS; PURCHASE-MONEY MORTGAGES; RAILROADS; STATIONS (RAILROADS); SURETYSHIP; WATERCOURSES.

I. INTRODUCTORY — 1. Definitions — a. COVENANTS GENERALLY — Covenant

Defined — General and Comprehensive Signification. — The word "covenant" is derived through the French from the Latin *convenire* whence *conventus*, which signifies a mutual agreement and accord upon conditions propounded and accepted by the parties concerned. "Covenant," then, in its most general and comprehensive signification is identical with contract or agreement.¹

Restricted Sense. — But in a more limited and technical sense, a covenant is not merely a contract but a contract in writing and under seal. In this sense the term is synonymous with deed or specialty.²

An Obligatory Covenant is one which imposes an obligation upon the covenantor.³

A Declaratory Covenant is one which serves to limit or direct uses.

Principal and Auxiliary Covenants. — Principal covenants are those which relate directly to the principal matter of the contract entered into between the parties. Auxiliary covenants are those which do not relate directly to the principal matter of the contract between the parties, but to something connected with it, and whose purpose is to aid or support the principal covenant.

Independent, Dependent, Concurrent, and Disjunctive or Alternative Covenants. — An independent covenant is one the necessity of whose performance is determined entirely by the requirements of the covenant itself, without regard to other covenants between the parties relative to the same subject-matter, or transactions, or series of transactions. A dependent covenant is one in which the obligation to perform it is made to depend upon the prior performance of another covenant by the party seeking enforcement. Concurrent covenants are those which are to be performed at the same time. An alternate or disjunctive covenant is one for the performance of one or more of several things at the election of the covenantor or covenantee as the case may be.⁴

1. A Covenant in Widest Sense a Contract. — 2 Bac. Abr. 500.

In *Riddle v. McKinney*, 67 Tex. 29, it was held that the word "covenant" used in the statute in question was not used in its limited technical sense of a promise evidenced by a sealed instrument, but in its wider signification of a contract in general.

2. Restricted Sense — An Agreement under Seal. — "A covenant may be defined to be an agreement between two or more parties, reduced to writing and executed by a sealing and delivery thereof, whereby some of the parties named therein engage, or one of them engages with the other or others, or some of them, therein also named, that some act hath or hath not already been done, or for the performance or nonperformance of some specified duty."

Kennedy, J., in *De Bolle v. Pennsylvania Ins. Co.*, 4 Whart. (Pa.) 68, 33 Am. Dec. 38.

A covenant is defined to be "the agreement or consent of two or more, by deed in writing, sealed and delivered; whereby either, or one of the parties, doth promise to the other, that something is done already, or shall be done afterwards. And he that makes the covenant is called the covenantor, and he to whom it is made, the covenantee." Shep. Touch. 160; *Kent v. Edmondston*, 4 Jones L. (49 N. Car.) 529.

3. For authorities for these various definitions consult Bouv. Law Dict.; Brown's Law Dict.; Burrill's Law Dict.; Sweet's Law Dict.; Anderson's Law Dict.

4. See the title CONTRACTS, vol. 7, 121, 124, 125.

Affirmative and Negative Covenants. — An affirmative covenant is one in which the covenantor declares that something has been already done or shall be done in the future. A negative covenant is one in which the covenantor obliges himself not to do or perform some act.

Executed and Executory Covenants. — An executed covenant is one which gives assurances in respect to things already done. An executory covenant is one which provides that something shall be done hereafter.

Joint Covenants are those by which several parties agree to do or perform a thing together, or in which several persons have a joint interest as covenantees. A covenant may be both joint and several at the same time as regards the covenantors, but not as regards the covenantees.¹

A Covenant Not to Sue is one by which a party who has a cause of action agrees not to sue the party liable to such action. These covenants are either perpetual or limited. The former operates as a release and may be pleaded as such, but the latter must be taken advantage of by action.²

A Covenant to Convey is one by which the covenantor undertakes upon certain conditions to convey to the covenantee the estate described in the covenant.

A Covenant to Stand Seized is a species of conveyance operating under the statute of uses by which a man seized of lands, covenants in consideration of blood or marriage that he will stand seized of the same to the use of his child, wife, or kinsman, for life, in tail or in fee.³

b. **COVENANTS IN DEEDS OF CONVEYANCE.** — The term "covenant," though used as descriptive of a contract under seal, is more commonly applied to those clauses of agreement contained in a conveyance of real property, whereby either party stipulates for the truth of certain facts, or binds himself to perform or give something to the other.⁴ It is in this sense that the term is used as the subject of this article. So considered, covenants may be classified and distinguished as follows:

A Real Covenant, or Covenant Running with the Land, is one where either the liability imposed by it, or the right to take advantage of it, exists by reason either of the ownership of an estate, or interest in real property, corporeal or incorporeal, or of an undertaking to grant such estate or interest.⁵

1. See the title **CONTRACTS**, vol. 7, p. 101.

2. See generally the title **RELEASE**.

3. 2 Black. Com. 338.

4. 2 Black. Com. 304; Burrill's Law Dict.

5. **Real Covenant Defined and Considered.** — A real covenant is "that whereby a man doth bind himself to pass a real thing, as lands or tenements, * * * or when it doth run in the realty so with the land that he that hath the one hath or is subject to the other." Shep. Touch., c. 7, p. 161.

"Covenants real are those which have for their object something annexed to or inherent in or connected with land or other real property." Cruise Real Prop., tit. 32, c. 26, § 23. See also Fitzherbert Nat. Brev. 145; 2 Bl. Com. 304. In Platt on Covenants 60-62, Cruise's definition is regarded as inadequate and that of Sheppard approved, and the latter has generally been adopted.

A real covenant must affect the nature, quality, value, or mode of enjoyment of real estate, independently of collateral circumstances. Congleton v. Pattison, 10 East 130.

It is not enough that a covenant should merely concern real estate in order to render it a real covenant. Thus a proviso in a deed that if the grantee should ever sell any of the property, it should be sold to the grantor at the original price, is, if a covenant at all, a purely

personal one by the grantee, and has no vitality after his death. Maynard v. Polhemus, 74 Cal. 141. So a covenant respecting a conveyance of the privilege of drawing water from a pond is not a covenant real. Wheelock v. Thayer, 16 Pick. (Mass.) 68.

It is almost superfluous to state that where the act covenanted for or against is that of one or more particular persons it cannot possibly be regarded as real covenant in the sense of binding any land, although during the period when it could be performed, it might, if so expressed, be a real covenant as regards the land benefited. Thus a covenant by a grantor of real estate for himself, his heirs and assigns, that he will not erect on an adjoining lot, owned by him, any building which shall be regarded as a nuisance, is a covenant to be performed or broken by him alone; and as no breach could possibly occur except during his ownership, when that is at an end the covenant expires, and never could bind the land. The words "his heirs and assigns" are in such a case mere surplusage. Clark v. Devoe, 124 N. Y. 120, 21 Am. St. Rep. 652.

In *England* the Conveyancing Act of 1881, 44 and 45 Vict. 41, provides, in effect, that every covenant or provision in a lease having reference to the subject-matter thereof shall run with the land, and also that all other covenants

A Personal Covenant or Covenant in Gross is a covenant which binds only the covenantor and his personal representatives in respect to assets and which can be taken advantage of only by the covenantee. Personal covenants may be distinguished into such as are transitive and intransitive: intransitive, when the duty of performing them is limited to the covenantor himself; transitive, when it passes to his representatives.¹

An Inherent Covenant is one which relates directly to the land itself or matter granted.

A Collateral Covenant is one which is entered into in connection with the grant of something, but which does not relate immediately to the thing granted; as to pay a sum of money in gross, that the lessor shall distrain for rent on some land other than that which is demised, to build a house on the land of some third person, or the like.

Covenants for Title are those covenants in a deed conveying land which are inserted for the purpose of securing to the grantee and covenantee the benefit of the title which the grantor and covenantor professes to convey.²

2. Origin and Purpose of Covenants for Title. — As the greater part of this article will be devoted to the consideration of covenants for title, it may not be improper to premise the discussion of the subject with a brief statement of their use and purpose and something of their origin and history.

The Rule Caveat Emptor. — The rule is well settled that in the absence of fraud, the purchaser of real property takes the title at his own risk, and if he has not taken the precaution to secure himself by covenants, he has no remedy for his money, though he be afterwards evicted by a paramount title or the land be burdened by incumbrances.³ Ordinarily, in the sale of lands, the possibility that the title may fail or be encumbered is a consideration which enters into the views of both contracting parties. If the purchaser decides to assume the risk, he accepts the deed without covenants and usually receives an equivalent in the diminution of the price. If, however, the purchaser does not wish to assume the risk, he will protect himself by covenants.

Origin and History of Covenants for Title. — Just when these covenants first came into use cannot now be precisely determined, but it is not unreasonable to suppose that they were introduced shortly after the condition arose which rendered them necessary. This condition was the introduction into common use of deeds operating under the statute of uses (27 Hen. VIII., c. 10) and the gradual disuse of common-law conveyances. Under common-law conveyance, the grantee was protected by the real warranty which was annexed to the grant of every feudal estate as an incident of tenure. But this warranty being of feudal origin was not annexed to deeds operating under the statute, consequently, in the use of such deeds it became necessary to devise some other means of protecting the grantee in the enjoyment of his estate, and hence covenants for title were introduced. They were not all devised at once, however, but seem to have been of gradual growth. Some of them in a brief and simple form may be found in conveyances executed during the reign of Elizabeth, but it was not until the time of the Protectorate that they were brought to their present perfected shape by Sir Orlando Bridgman, who, being a bar-

relating to land shall run with the land benefited. This is regarded as depriving real covenants of "any title to form a separate class." Hamilton on Covenants (preface).

Simple Contract Construed as Covenant in Equity. — Though, strictly, every covenant should be by instrument under seal, yet in equity a simple contract in regard to land which has been partly performed will be treated as a covenant, and run with the land as such. *Rome, etc., R. Co. v. Ontario Southern R. Co.*, 16 Hun (N. Y.) 445.

1. 2 Bac. Abr. 550; Bouv. Law Dict.

2. Bouv. Law Dict.

3. **Use and Purpose of Covenants for Title.** — *Andrus v. St. Louis Smelting, etc., Co.*, 130 U. S. 643; *Van Riswick v. Wallach*, 3 MacArthur (D. C.) 388; *Smoot v. Coffin*, 4 Mackey (D. C.) 407; *Botsford v. Wilson*, 75 Ill. 132; *Allen v. Pegram*, 16 Iowa 163; *Maney v. Porter*, 3 Humph. (Tenn.) 347; *Stipe v. Stipe*, 2 Head (Tenn.) 169. And see the title CONSIDERATION, vol. 6, p. 781; and also generally the title VENDOR AND PURCHASER.

rist of great loyalty, withdrew from the active practice of the law during the interregnum and devoted himself to conveyancing.¹

II. CREATION AND CONSTRUCTION — 1. Covenants in Deed and in Law — a. IN GENERAL. — Covenants, from the mode of their creation, may be divided for the purpose of investigation into two classes: covenants in deed and covenants in law.

Covenants in Deed, or, as they are sometimes called, express covenants, are those which are created by the express words of the parties to the deed, declaratory of their intention.

Covenants in Law, or implied covenants, are those which "the law infers or implies from the use of certain words having a known legal operation in the creation of an estate, so that after they have had their primary operation in creating the estate, the law gives them a secondary force by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created."²

b. COVENANTS IN DEED — (1) *Essentials to Their Creation and Operation.* — Resolved into their constituent elements, covenants in deed will be considered, first in respect to the various forms of words in which the promise or assurance may be couched, and second, in respect to the necessity of the execution of the instrument by the party to be bound thereby.

Covenants Dependent upon Validity of Deed. — That there should be a promise or assurance and that the promise or assurance should be under seal, is essential to the creation and operation of all covenants. But in respect to covenants for title, to pay rent, and the like, it is also necessary to their validity that the deed in which they are contained should be valid as a conveyance, for if the deed be void, all covenants of this sort which derive their life from the conveyance to which they are annexed, are void also.³

Collateral Covenants. — It is otherwise, however, in respect to collateral covenants. These may be valid and operative although the deed in which they are contained may be void as a conveyance.⁴

1. Gilpin, C. J., in *Potts v. Dowdall*, 3 Houst. (Del.) 369, 11 Am. Rep. 757; Rawle on Covenants, § 13.

2. *Williams v. Burrell*, 1 C. B. 429, 50 E. C. L. 429.

3. **Defective Deed — Dependent Covenants Void.** — Where a conveyance of land is void, so as no estate passes, all dependent covenants are void also; otherwise, of covenants which are independent. *Northcote v. Underhill*, 1 Salk. 199.

In *Soprani v. Skurro*, Yelv. 19, it was held that if the lessor does not sign the indenture of demise as well as the lessee, no interest passes and the covenants do not bind, for the reason that the covenants depend on the demise.

As to What Are Dependent Covenants, see *supra*, this title. See also the title **CONTRACTS**, vol. 7, p. 117 *et seq.*, especially p. 124, note.

Reformation of Deed Must Be Obtained Before Covenant Can Be Brought. — Where a deed purports to convey lands by a description so defective that it is for that reason void, no suit for breach of the covenant of seizin therein can be maintained without showing a mistake and also seeking a reformation of the instrument. *Gordon v. Goodman*, 98 Ind. 269.

When, in an action for breach of covenants in a deed, it appears by the complaint that by mutual mistake the conveyance was of lands not intended, and no reformation is demanded, and none has been requested, there can be no recovery, and the complaint is bad on demurrer. *Axtel v. Chase*, 83 Ind. 546.

Covenant may, however, be brought after the reformation of the deed. *Lane v. Fury*, 31 Ohio St. 574.

Deed Construed as a Will. — A covenant of warranty in a deed which is construed to be a will has no binding force. *Scott v. Scott*, 70 Pa. St. 244.

4. **Independent Covenants Not Void.** — If in a deed of sale with covenants, the sale appears on the face of the deed to be void, the covenants which are relative and dependent are void, but not those which are collateral and independent. Thus, where an officer sold on execution an equity of redemption, and in his deed to the purchaser covenanted that he had obeyed all the directions of law relative to such sales, it was held that even if the grant was void on the face of the deed, this covenant was binding, it being collateral to the grant. *Wade v. Merwin*, 11 Pick. (Mass.) 280.

A distinct covenant in a lease, whereby the tenant bound himself to pay the property tax, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by the Stat. 46 Geo. III., c. 65, § 115, will not avoid a separate covenant in the lease for payment of rent clear of all preliminary taxes, etc., generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray. *Gaskell v. King*, 11 East 165.

A grant of a rent-charge by a rector or vicar out of his benefice is void by Stat. 13 Eliz., c. 20. But if in such a deed of grant he also covenants

(2) *The Agreement or Assurance* — (a) *Form Immaterial* — Words of Creation. —

No particular word or form of words is necessary to the creation of a covenant in deed. Any words will be effectual for that purpose which show the intention of a party to be bound to the assurance of some condition or the performance or non-performance of some act.¹

personally to pay the said rent-charge or annuity, and give a warrant of attorney to confess judgment as a collateral security for payment of the annuity, the court will not order the deeds to be delivered up to be canceled. *Mouys v. Leake*, 8 T. R. 411.

As to What Are Independent Covenants, see *supra*, this title. See also the title *CONTRACTS*, vol. 7, p. 117 *et seq.*, especially pp. 121, 124.

1. Creation of Covenants — No Particular Form of Words Necessary. — 2 Bac. Abr. 552; 4 Cruise's Dig. 447; Sheph. Touch. 162; Buller's N. P. 156; Comyns's Dig., Covenants, A. 3; 1 Roll. Abr. 518.

England. — *Lant v. Norris*, 1 Burr. 290; *Wolveridge v. Steward*, 1 C. & M. 644, 3 M. & S. 561, 30 E. C. L. 312; *Hollis v. Carr*, 2 Mod. 86, 3 Swanst. 638; *Brookes v. Drysdale*, 3 C. P. Div. 52; *Iven v. Elwes*, 3 Drew. 25; *Rigby v. Great Western R. Co.*, 14 M. & W. 811; *Courtney v. Taylor*, 6 M. & G. 867, 46 E. C. L. 867; *Williams v. Burrell*, 1 C. B. 402, 50 E. C. L. 402; *Wood v. Copper Miners*, 7 C. B. 906, 62 E. C. L. 906; *Rashleigh v. South Eastern R. Co.*, 10 C. B. 632, 70 E. C. L. 632; *Great Northern R. Co. v. Harrison*, 12 C. B. 576, 74 E. C. L. 576.

United States. — *Hale v. Finch*, 104 U. S. 261. *Connecticut.* — *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Davis v. Lyman*, 6 Conn. 252; *Tomlinson v. Ousatonio Water Co.*, 44 Conn. 99; *Wright v. Tuttle*, 4 Day (Conn.) 313. *Delaware.* — *Randel v. Chesapeake*, etc., Canal Co., 1 Harr. (Del.) 151.

Kentucky. — *Marshall v. Craig*, 1 Bibb (Ky.) 379, 4 Am. Dec. 647; *Kendal v. Talbot*, 2 Bibb (Ky.) 614; *Yocum v. Barnes*, 8 B. Mon. (Ky.) 496.

Maine. — *Cole v. Lee*, 30 Me. 392.

Massachusetts. — *Savage v. Mason*, 3 Cush. (Mass.) 500; *Newcomb v. Presbrey*, 8 Met. (Mass.) 406; *Gardiner v. Corson*, 15 Mass. 504.

Michigan. — *Johnson v. Hollensworth*, 48 Mich. 140.

New Hampshire. — *Lovering v. Lovering*, 13 N. H. 513; *Fletcher v. Chamberlin*, 61 N. H. 475.

New York. — *Hallett v. Wylie*, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; *Bull v. Follett*, 5 Cow. (N. Y.) 170; *Frey v. Johnson*, 22 How. Pr. (N. Y. Supreme Ct.) 316; *Myers v. Burns*, 33 Barb. (N. Y.) 401.

North Carolina. — *Midgett v. Brooks*, 12 Ired. L. (34 N. Car.) 145, 55 Am. Dec. 405.

Pennsylvania. — *Campbell v. Shrum*, 3 Watts (Pa.) 60; *Taylor v. Preston*, 79 Pa. St. 436; *Trutt v. Spotts*, 87 Pa. St. 339.

Virginia. — *Harris v. Nicholas*, 5 Munf. (Va.) 483.

"There Is No Fixed or Essential Form for Any Covenant; a covenant is merely a promise under seal, and to ascertain what it is in legal import, we have only to see what the promisor has undertaken for; in other words, what is the legal interpretation of the language in

which the promise is expressed. In ordinary deeds of conveyance, several covenants are usually contained, and some of these are likely to be such as will run with the land, and some not. Each covenant may constitute a separate sentence, but they may all be blended in a single sentence as well, and a single promise may embody the substance of several covenants, and thus constitute an undertaking to protect against existing claims or defects, and also to give assurance for the future." *Per Cooley, J.*, in *Johnson v. Hollensworth*, 43 Mich. 140.

No Precise or Technical Language Is Required by law in which a covenant shall be worded. Any words which amount to or import an agreement being under seal are sufficient. *Midgett v. Brooks*, 12 Ired. L. (34 N. Car.) 145, 55 Am. Dec. 405.

A covenant may be created without using the word "covenant" in the clause containing the stipulation. *Kendal v. Talbot*, 2 Bibb (Ky.) 614.

Any words in a sealed instrument by which a party manifests an intention to become bound to another to do or not to do an act, either by himself or a third person, if the act be possible and not immoral or unlawful, will make a covenant, and the law will hold him to his undertaking, however inartificial the words may be which he has used. *Randel v. Chesapeake*, etc., Canal Co., 1 Harr. (Del.) 233.

The Participle "Being" Creating Covenant. — A covenant by a lessee "to repair and glaze the windows of the messuage and also the hedges, ditches, etc., the said farmhouse and buildings being previously put in repair and kept in repair by" the lessor, has been held to amount to a covenant by the lessor to put and keep in repair. *Cannock v. Jones*, 3 Exch. 233.

A lessee covenanted to put a house in repair before a certain date, "five thousand slates being found, allowed, and delivered by the lessor towards the repair;" and afterwards to keep it in repair during the term. The lessor assigned a breach for not keeping in repair after the date mentioned in the deed, and the lessee defended on the ground that the clause in respect to the slates to be found by the lessor was a condition precedent to the lessee's covenant to keep in repair. But it was held that the clause constituted a covenant on the part of the lessor to furnish the slates, and not a condition precedent, and judgment was given for the plaintiff. *Muckleston v. Thomas*, Willes 146. Compare *Thomas v. Cadwallader*, Willes 496.

A Proviso May Amount to a Covenant, or it may be merely a qualification of the preceding covenant. If a lessee for years covenants to repair, "provided always and it is agreed" that the lessor shall find timber, the word "agreed" operates as a covenant to find timber. If this word had been omitted, it would only have

Place of Insertion. — It is likewise immaterial in what part of the instrument the covenant is contained. Although the ordinary forms of deeds have a recognized place for the insertion of the various covenants, it is not essential to their validity that they should be thus orderly set forth, but they will be equally effective though inserted in the most inartificial manner.¹

(b) **Creation by Express Words** — *aa*, COVENANTS FOR TITLE — (*aa*) *In General.* — The covenants most usually created by express words in deeds of conveyance are those for assurance of title, the origin and purpose of which has already been discussed. These are expressed in various ways, sometimes set forth at great length and with much particularity but as often compressed within the compass of a single sentence.

The Usual Covenants for Title Employed in Deeds of Conveyance in the *United States*, are five in number, namely, of seizin;² of power to sell and convey; of freedom from incumbrances;³ for quiet enjoyment;⁴ and of general or special

operated as a qualification of the covenant by the lessee. *Holder v. Taylor*, 1 Roll. Abr. 518.

In *Sheph. Touch.*, p. 162, it is laid down that "there needs not formal and orderly words, as covenant, promise, and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words;" and the following instance is put: "If these words be inserted in a deed, amongst other covenants, 'that the lessee shall repair, provided always that the lessor shall allow timber,' or 'that the lessee shall scour ditches, provided always that the lessor do carry away the earth,' these are good covenants on both sides."

A Declaration that "I have in my hands a writing obligatory, and I will be ready at all times to redeliver the same writing obligatory to B.," is a covenant to do so. *Walker v. Walker*, 1 Roll. Abr. 519; 6 Viner's Abr. 379.

The Words, "It Is Declared and Agreed," create a covenant. *Montford v. Cadogan*, 19 Ves. Jr. 635.

Where a person by deed "declares" that he will do a thing, it amounts to a covenant by him to do it. *Richardson v. Jenkins*, 1 Drew. 477.

To Create a Covenant to Stand Seized, no technical words are required, but any words will create a covenant if it appears to have been the intention of the parties to use them for that purpose. *Jackson v. Swart*, 20 Johns. (N. Y.) 85. And see generally the title DEEDS.

1. See *infra*, this section, *Creation by Necessary Implication*.

Covenants for Title in Separate Instruments Valid. — Where land is sold and the vendor executes to the vendee an instrument with two covenants, one for a special warranty conveyance of the title, the other for reimbursement of the consideration with legal interest in the event of eviction by paramount title, and the vendor afterwards makes a deed for the land containing a warranty against himself and all persons claiming under him, the covenants in the first instrument and in the deed are not inconsistent and may both be enforced. *Jones v. Waggoner*, 7 J. J. Marsh. (Ky.) 144.

2. Covenant of Seizin. — A covenant in a deed of a "good right to sell and convey" does not imply a warranty of absolute title, but is only an assurance that the grantor has such possession of the premises as that he may execute a deed thereof. *Raymond v. Raymond*, 10 Cush. (Mass.) 134.

A warranty in the usual form against the grantor and his heirs is a covenant as well of seizin as for quiet enjoyment, not against the world, but against the grantor and his heirs. *Faries v. Smith*, 11 Rich. L. (S. Car.) 80.

Defective Covenant. — In *Day v. Brown*, 2 Ohio 345, the declaration contained two counts, one on a covenant of seizin, the other on a covenant of general warranty. The defendant craved oyer of the deed and demurred generally. Upon examination of the instrument, it was found that it was drawn upon a common printed blank in the usual form, with covenants of ownership and warranty, except in filling up the blanks. The covenant of ownership was as follows: "And the said D. B. and R. B., executors for heirs of G. B. deceased, do covenant, grant, and agree to and with the said M. D. that * * * the true and lawful owners of the premises," etc., the deed being blank where the asterisks are inserted. The covenant of warranty was that the grantor should warrant and defend the premises as executors are bound by law to do, etc. It was held that the first covenant was meaningless by reason of the failure to insert the name of the person seized, and the demurrer to it was sustained.

3. Covenant Against Incumbrances. — A covenant that the grantor is seized of an indefeasible estate of inheritance without any manner of condition to alter, change, determine, or defeat the same, is a covenant against incumbrances as well as a covenant of seizin. *Standard v. Eldridge*, 16 Johns. (N. Y.) 254.

4. Covenant for Quiet Enjoyment. — A deed for land after setting forth the parties, the description of the land, and the interest conveyed, continued as follows: "to have and to hold the above described piece or parcel of land free and clear from me, my heirs, executors, administrators and assigns, and from all other persons whatsoever unto the said," etc. It was held that this clause contained a covenant for quiet enjoyment. *Midgett v. Brooks*, 12 Ired. L. (34 N. Car.) 145, 55 Am. Dec. 405.

In a lease of a furnace and grist and saw mill, the lessor promised and agreed "to protect" the lessee, etc., "in the use and enjoyment" of the premises, and "to warrant and defend the premises to him and them against the claims or interruption or molestation of any person or persons whomsoever, so that the

warranty.¹ In *England* it is the practice to omit the covenant of warranty and to add a covenant of further assurance. This covenant has also been used in the United States.²

(bb) *Statutory Short Forms of Covenants.* — The absence of any recognized form for these various covenants which should combine terseness and simplicity with absolute legal accuracy of expression, has led to attempts by the legislature to supply the deficiency.

In England. — The first attempt of this sort was the English Act of 8 and 9 Vict., c. 119, passed in 1845, which defined the meaning and extent of the several covenants usually employed in deeds and gave a form for each, shorn of all inconvenient prolixity. But this Act, from some cause, failed to give satisfaction to the profession, and the forms of covenants prescribed in it were never used to any great extent. The "Conveyancing and Law of Property Act of 1881" has, however, been received with greater favor and seems likely to accomplish the purpose intended.³

In Canada and in the United States. — In Canada⁴ and in many of the states of

said lessee shall suffer no loss from any defect of title of the lessors to the premises." It was held that this was a covenant for quiet enjoyment and also of warranty. *Peters v. Grubb*, 21 Pa. St. 455.

These words in the habendum of a quitclaim deed from A to B: "to have and to hold the aforementioned premises to B, his heirs and assigns forever, so that neither I, the said A, nor my heirs, nor any other person claiming from or under me, shall or will, by any way or means, have, claim, or demand any right or title to the aforesaid premises," constitute a covenant of warranty or quiet enjoyment against all persons claiming under or from A. *Newcomb v. Presbrey*, 8 Met. (Mass.) 406.

1. Covenant of Warranty. — A deed which contains a covenant that the vendor has title to the land by a regular chain of transfer from the original vendee, and warrants against the claims of all persons whomsoever, is in legal effect a deed with general warranty. *Little v. Allen*, 56 Tex. 133.

The words in the habendum of a deed, "to have and to hold the said tract to the said grantee and to his heirs and assigns forever as a good and indefeasible estate in fee simple," do not create a covenant of warranty. *Wheeler v. Wayne County*, 132 Ill. 599.

Clause of Warranty Enforced as a Covenant. — In a conveyance in fee with clause of warranty, the grantee can bring covenant on the warranty. *Sheph. Touch.* 163; *Rudg v. Pincombe*, 1 Rolle 25. See also *Williamson v. Codrington*, 1 Ves. 511.

The action of covenant will lie upon the words of a deed, "will warrant and defend the premises to A B and his heirs forever." And this from necessity, as otherwise a vendee would be without a remedy in many cases; for the writ of *warrantia charta* is not in use in this state, nor are real actions, in which voucher is used. *Rickets v. Dickens*, 1 Murph. (5 N. Car.) 343, 4 Am. Dec. 555.

2. See *infra*, this title, *Effect and Breach of Covenants*.

The Usual Covenants in Conveyances in Fee. — As to what covenants may be demanded in deeds of conveyance in fee from those conveying in their own right, as well as those conveying in a fiduciary capacity, as trustees,

guardians, executors, mortgagees with powers of sale, and assignees of bankrupts, and also conveyances by ministerial grantors, as sheriffs, marshals, tax collectors, and the like, see the title *VENDOR AND PURCHASER*.

Leases. — As to what covenants for title are usually contained in leases of real property, see the title *LEASE*.

Mortgages. — As to what covenants are usually found in mortgages, and what covenants the mortgagee has a right to demand, see the title *MORTGAGES*.

Covenant Against Interference with Milldam. — A sold to B a water mill, and covenanted that the pond which supplied said mill with water should be and forever remain as it then was. It was held that as the vendor and others owned land over which the millpond spread, it should be construed that the vendor intended to covenant against his own interference and the interference of others with the dam as built, and pond, and not against acts of God or of the government. *Oldham v. Kennedy*, 3 Humph. (Tenn.) 260.

3. The Conveyancing Act, 1881, provides that covenants of title are implied where a statement is made of the character in which the party conveys, whether as "beneficial owner," "trustee," "mortgagee," or "mortgagor." In the case of a conveyance for valuable consideration other than a mortgage by a person who conveys and is expressed to convey as beneficial owner, a covenant is implied which includes the covenants for right to convey, quiet enjoyment, freedom from incumbrances, and for further assurances. But these "are not four separate and distinct covenants, but parts of one entire covenant" set forth in the act. *Lindley, L. J.*, in *David v. Sabin*, (1893) 1 Ch. 523. In this case the statute (44 and 45 Vict., c. 41, § 7, subs. 1) is quoted.

4. Statutory Short Forms of Covenants — Canada. — A covenant in a deed purporting to be made in pursuance of the act respecting short forms of conveyances, that the grantor "hath the right to convey the said land to the said party of the second part," omitting the words "notwithstanding any act of the covenantor," contained in column 1 of schedule 2 of the Act, cannot take effect as a covenant under the statute, but nevertheless binds the covenantor

the Union, statutes with a similar purpose have been passed.¹ Under some of these statutes, a general warranty of title has been made to include and imply all the usual covenants in deeds of conveyance in fee simple;² under others the same result has been reached by the mere introduction of the word "warrant" into the words of grant.³

bb. COVENANT TO PAY RENT. — A covenant to pay rent in a lease is created by the words of the *reddendum*, "rendering,"⁴ or "yielding and paying."⁵

(c) **Creation by Necessary Implication** — *aa. IN GENERAL.* — Although, as has already been stated, no particular form of words is necessary to make a covenant, yet, in order for the court to read one out of words which do not directly and of themselves create it, the inference that such was the intention of the parties must be strong. Thus, where provision is made in a deed for the doing of a certain thing, the court must be satisfied that the language does not merely show that the parties contemplated that the thing might be done,

according to its own words. *Brown v. O'Dwyer*, 35 U. C. Q. B. 354; *McKay v. McKay*, 31 U. C. C. P. 1.

1. **United States.** — See Pub. Gen. Laws of Maryland, art. 21, §§ 69-76; Code of Tennessee (M. & V.) 1884, § 2820; Code of Virginia, c. 108, §§ 2446-2454; Code of West Virginia, p. 641. See the statutes generally.

2. **General Warranty of Title Includes Other Covenants** — **Georgia.** — A general warranty of title against the claims of all persons includes in itself covenants of a right to sell and of quiet enjoyment and of freedom from incumbrances. Code of Georgia 1895, § 3614; *Burk v. Burk*, 64 Ga. 632.

Iowa. — Under § 2958 of the Code of Iowa (1897), it has been held that the use in a conveyance of the words, "I warrant the title against all persons whomsoever," was intended to include and imply all the usual covenants in a deed of conveyance in fee simple. *Funk v. Cresswell*, 5 Iowa 62; *Van Wagner v. Van Nostrand*, 19 Iowa 422.

In South Carolina, under the Act of 1795, a deed of general warranty has been interpreted to embrace all the covenants used in conveyances of land prior to that time, viz., that the vendor is seized in fee; that he has a right to convey; that the vendee shall quietly enjoy; and that the estate is free from all incumbrances; and also, it seems, for further assurances. *Jeter v. Glenn*, 9 Rich. L. (S. Car.) 374; *Lessly v. Bowie*, 37 S. Car. 193; *Evans v. McLucas*, 12 S. Car. 56.

3. **Significance of Word "Warrant."** — *Ind. Rev. Stat.* 1881, § 2927; *Kent v. Cantrall*, 44 Ind. 452; *Keiper v. Klein*, 51 Ind. 316; *Dehority v. Wright*, 101 Ind. 382; *Jackson v. Green*, 112 Ind. 341; *Worley v. Hineman*, 6 Ind. App. 240; *Mich. How. Stat.* 1882, § 5728; *Wash. (Ballinger's Code 1897)*, § 4519; *Wis. Rev. Stat. (San. & Ber. 1889)*, § 2208.

Where a Grantor, Instead of Simply Using the Word "Warrant" in a conveyance and leaving the statute to define what should be implied thereby, goes farther and sets out the particular thing or things which he will warrant against, he cannot be held to have intended other covenants than the one or ones set out. *Leddy v. Enos*, 6 Wash. 247.

4. **Covenant to Pay Rent Created by the Word "Rendering."** — "Rendering" rent free and

clear from all manner of taxes, charges, and impositions whatsoever, has been held to amount to a covenant to pay the rent free from all taxes, etc. *Giles v. Hooper*, Carth. 35.

5. **Covenant Created by the Words "Yielding and Paying."** — *Platt on Covenants*, c. 2; *Vyvyan v. Arthur*, 1 B. & C. 410, 8 E. C. L. 175; *Webb v. Russell*, 3 T. R. 402; *Iggulden v. May*, 9 Ves. Jr. 330; *Hellier v. Casbard*, 1 Sid. 266; *Newton v. Osborn*, Styles 387; *Porter v. Swetnam*, Styles 406; *Harper v. Burgh*, 2 Lev. 206; *Harper v. Bird*, 2 Jo. 102; *Van Rensselaer v. Smith*, 27 Barb. (N. Y.) 104; *Rover v. Ake*, 3 P. & W. (Pa.) 461; *Kimpton v. Walker*, 9 Vit. 191. But an assignment of a lease "subject to the payment of the rent and performance of the covenants in the lease" by the assignee, will not imply a covenant by the assignee to indemnify the assignor against the rent. *Wolveridge v. Steward*, 1 C. & M. 644.

A., being seized in fee of a mill and of certain lands, granted a lease of the latter for years, the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, and doing certain suits and services; and also doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises. The lessor afterwards devised the mill and the reversion of the demised premises to the same person. It was held that the reservation of the suit to the mill was in the nature of a rent, and that the implied covenant to render it, resulting from the *reddendum*, was a covenant that ran with the land as long as the ownership of the mill and the demised premises belonged to the same person, and consequently that the assignee of the lessor might take advantage of it. *Vyvyan v. Arthur*, 1 B. & C. 410, 8 E. C. L. 175.

Covenant Created by Words "To Be Paid." — In a deed conveying the right to use a certain process secured by letters patent, the reservation of a royalty "to be paid without any deduction whatsoever, on or before the twenty-first day after each successive quarter of a year from the date thereof," creates a covenant to pay the royalty on the dates mentioned. *Bower v. Hodges*, 13 C. B. 765, 76 E. C. L. 765.

but it must amount to a binding agreement upon one of them that the thing shall be done.¹

bb. FROM THE WORDS OF AN EXPRESS COVENANT. — From the words of an express covenant an additional or correlative covenant may be implied, if the language used shows that such a covenant was intended. Thus, when in an agreement under seal, something must be done by one party in order that the other may perform his covenant, a covenant by the former to do the thing will be implied.² So, if the performance of a thing is necessary to the performance of something else by the same party, which he has covenanted to do, a covenant to perform the first thing will be implied.³ But, though the doing of something by one party is necessary to the performance of a covenant by the other, yet, if it is apparent from the deed that the parties had the subject in mind, and that the first purposely withheld a promise in regard to it, a covenant by him cannot be implied.⁴

1. When Performance Is Contingent — No Covenant Implied. — *James v. Cochrane*, 7 Exch. 177; *Smith v. Harwich*, 2 C. B. N. S. 669, 89 E. C. L. 669; *King v. Accumulative L. Fund*, etc., Co., 3 C. B. N. S. 151, 91 E. C. L. 151; *Dunn v. Sayles*, 5 Q. B. 685, 48 E. C. L. 685; *Aspdin v. Austin*, 5 Q. B. 671, 48 E. C. L. 671; *Aulton v. Atkins*, 18 C. B. 249, 86 E. C. L. 249.

The plaintiff conveyed two pieces of land to a railway company, subject to the performance by them of certain agreements therein recited, being to the same effect as the covenants contained in the deed hereinafter stated, and one of the pieces of land was described as "a slip of land then being intended to be formed into a new course for the river Beult;" and by deed of even date the company covenanted with the plaintiff to make a new bridge over the intended new cut for the use of the plaintiff within three months after the permanent rails of the railway should be laid down; and after the same should be completed, to reconvey to the plaintiff the slip of land which should form the new course of the river so far as the same should have been diverted, and also to fill up and level the then existing course of the river so far as the same should have been diverted. It was held that there was no implied covenant to make a new cut and divert the stream. *Rashleigh v. South Eastern R. Co.*, 10 C. B. 612, 70 E. C. L. 612.

The plaintiffs leased a coal mine to the defendants at a minimum rent, to be increased in case there should be pits sunk on the estate, and the lessees covenanted to work the mine uninterruptedly, efficiently, and regularly, according to the usual or most improved practice. It was held that the lessee who worked the mine by out-stroke was not bound to sink pits, though that might be the most efficient way of working. *Wheatley v. Westminster Brymbo Coal Co.*, L. R. 9 Eq. 538. See also *Sharp v. Waterhouse*, 7 El. & Bl. 816, 90 E. C. L. 816; *James v. Cochrane*, 7 Exch. 170, 8 Exch. 556; *Borrowes v. Borrowes*, 6 Ir. R. Eq. 368.

2. Express Covenant by One Party Creating Implied Covenant by Other. — Where by deed it was agreed between A and B "that A shall give seven hundred and seventy-five pounds to B, for his lands, etc., the money to be paid before midsummer," it was held that the words amounted to a covenant by B to convey the lands. *Pordage v. Cole*, 1 Saund. 319*d*.

Where, by a contract under seal, executed by the plaintiff and the defendant, the latter covenants that, upon the payment of one thousand seven hundred dollars in the manner and at the times therein set forth, he will convey to the plaintiff certain real estate, excepting the wood and timber upon a specified part; and the plaintiff covenants that as part payment of the one thousand seven hundred dollars he will cut and carry the wood for the defendant to places and at prices fixed by the contract; there is an implied covenant on the part of the defendant to permit the plaintiff thus to cut and carry the wood. *French v. Bent*, 43 N. H. 448.

3. Express Covenant Creating Implied Covenant by Same Party. — Where in an agreement for the sale of a business the purchase-money is to be payable by instalments contingent on the amount of profits of the business, there is an implied covenant by the purchasers to carry it on. *Telegraph Despatch, etc., Co. v. McLean*, L. R. 8 Ch. 658.

An agreement by a lessee that he would at all times and seasons of burning lime supply the lessor and his tenants with lime at a certain price and for certain purposes, implies a covenant by the lessee to burn lime at all such seasons. *Shrewsbury v. Gould*, 2 B. & Ald. 487.

An agreement in a lease that the tenant should fold "his stock of sheep which he should keep on the demised premises" amounts to a covenant by the tenant to keep a flock of sheep on the premises. *Webb v. Plummer*, 2 B. & Ald. 746.

4. No Covenant Implied when Purposely Withheld. — A lease under seal, drawn technically in form, and with obvious attention to details, contained various covenants, some binding the parties mutually, some the lessor only, others the lessee. It contained a covenant on the part of the lessor to the effect that if the lessee should pay the rents and perform all the covenants on his part, the lessor "shall and will, at the end or expiration of the term," grant to the lessee a new lease for a further term specified, at a rent to be adjusted by appraisers, but not less than that for the first term. In an action to compel the lessee to accept a new lease it was held that this was a covenant on the part of the lessor only, from which no covenant on the part of the lessee to take a new lease could be implied; and that it

cc. FROM WORDS THAT IMPORT A CONDITION. — A covenant may sometimes be implied from words which at first view appear to operate rather as a condition subsequent,¹ and it is often difficult to determine from the words themselves whether the clause is to be construed as a condition or a covenant, since both may be created by the same words.²

Covenant and Condition Distinguished. — The chief point of distinction between them is that a breach of a condition subjects the estate to forfeiture, while a breach of a covenant is merely a ground for damages. Hence, when a forfeiture is provided as the remedy for a breach, the clause is always construed as a condition subsequent.³ Another difference is that a condition is always the creation of a grantor; a covenant may be made by either a grantor or grantee.

Intention Governs Construction. — But aside from these differences, there are no means for determining whether a provision is to be construed as a covenant or a condition, except by the application of the one rule that the deed is to be construed according to the manifest intention of the parties.⁴

was optional with him whether or not to take a new lease. *Bruce v. Fulton Nat. Bank*, 79 N. Y. 154, 35 Am. Rep. 505.

Qualification Distinguished from Covenant. — Where in a lease a covenant by the lessee not to assign without the lessor's consent, is followed by the clause, "such consent not being arbitrarily withheld," such clause does not constitute a covenant by the lessor, but only amounts to a qualification of the covenant by the lessee, which in the event of an arbitrary refusal would leave the lessee at liberty to assign without the lessor's consent. *Treloar v. Bigge*, L. R. 9 Exch. 151; *Sear v. House Property, etc., Soc.*, 16 Ch. Div. 387.

1. Covenant Created by Words Which Import a Condition. — 4 Cru. Dig., tit. 32; 1 Roll. Abr. 518; *Hoyt v. Kimball*, 49 N. H. 322; *Avery v. New York Cent., etc., R. Co.*, 106 N. Y. 142; *Post v. Weil*, 115 N. Y. 361, 12 Am. St. Rep. 809; *Clement v. Burtis*, 121 N. Y. 708, 31 N. Y. St. Rep. 902; *McKnight v. Kreutz*, 51 Pa. St. 232; *Paschall v. Passmore*, 15 Pa. St. 295; *Hartung v. Witte*, 59 Wis. 285.

Illustrations. — The words "subject to the condition that" will sometimes make a covenant and not a condition. *Skinner v. Shepard*, 130 Mass. 180.

The words, "provided always, and these presents are upon this express condition, etc.," in a lease, amount to a covenant. *Brookes v. Drysdale*, 3 C. P. Div. 52.

The following clause in a lease for years: "Said lessee doth agree to deliver up said premises, and all the buildings and repairs put on the said promises by him, on three months' notice, by said lessor paying him two hundred and fifty dollars," is not a condition or limitation, but a covenant. *Wheeler v. Dascomb*, 3 Cush. (Mass.) 285.

In *Graves v. Deterling*, 120 N. Y. 447, the parties introduced the clause in question by saying, "it is covenanted and agreed," and thus expressly called it a covenant. But the court held that this alone would not make it a covenant, as that which is termed a covenant may be in fact a condition and that which is termed a condition may be a covenant; but it has an important bearing upon the intention of the parties because technical terms in a conveyance are presumed to have been used with their accustomed meaning unless the circumstances and context indicate a different intent.

². *Parmalee v. Oswego, etc., R. Co.*, 6 N. Y. 80; *Hartung v. Witte*, 59 Wis. 285.

³. **Condition and Covenant Distinguished.** — *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 489; *Hartung v. Witte*, 59 Wis. 285. And see the title **CONDITIONS**, vol. 6, p. 503.

⁴. **Intention Governs Construction.** — "The distinctions on this subject," says Chancellor Kent, "are extremely subtle and artificial, and the construction of a deed as to its operation and effect will after all depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case." 4 Kent's Com. 132.

Provisions Held to Be Covenants and Not Conditions Subsequent. — Where the following clause was annexed to the habendum of a deed of bargain and sale, to wit: "Provided, nevertheless, and upon the following condition: that if the said grantor, A. D. W., shall survive the said grantee, P. H. W., he, the said grantor, shall have the right, at any time within eighteen months after the death of said grantee, to purchase back again all the right, title, and interest in said farm, 'Oaklands,' hereby conveyed, at a valuation to be then made by two disinterested persons, one of whom shall be selected by the legal representatives of the said grantee and the other selected by said grantor; and in case of disagreement the persons so selected may choose a third person," it was held to be a covenant, not a condition. *Woodruff v. Woodruff*, 44 N. J. Eq. 349.

In an agreement to let, in which there was no clause of re-entry, the following stipulation was held to be a covenant, and not a condition operating in defeasance of estate: "It is also hereby agreed and clearly understood, that in case the said A. W., or his heirs, executors, and assigns, should want any part of the said land to build, or otherwise, or cause to be built, then the said T. R., or his heirs, executors, or assigns, shall and will give up that part or parts of the said land as shall be requested by the said A. W., by his making an abatement in proportion to the rent charged, and also to pay for so much of the fence, at a fair valuation, as he shall have occasion from time to time to take away, by his giving or leaving six months' notice of what he intends

Construction as Covenants Preferred. — However, conditions subsequent, as they tend to destroy estates, are not favored in law, and are always strictly construed; and if it is reasonably doubtful whether a provision in a conveyance was intended as a condition subsequent or a covenant, the judicial inclination is always toward the latter construction.¹

Id. FROM A RECITAL IN THE DEED. — A recital in a deed may operate as a covenant where it appears to have been the intention of the parties that it should so operate.²

to do." *Doe v. Phillips*, 2 Bing. 18, 9 E. C. L. 296.

Restriction upon Use of Property Construed as a Covenant. — A deed for a tract of land contained the following clause: "It being expressly understood by the parties that the said tract or parcel of land is not to be put to any other use than that of a depot square, and that no business or improvements are to be put on the said tract but that which is immediately connected with the Western and Atlantic Railroad." It was held that these words were words of covenant and not of condition, and that the plaintiff's remedy for a breach thereof was an action thereon for damages, and not for a forfeiture of the estate for covenant broken. *Thornton v. Trammell*, 39 Ga. 202.

Even where the habendum clause of a deed contained the following stipulation, to wit: "Provided always and these presents are upon this express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public house of any kind," it was held that as the intention might be sought for in the other words of the instrument and by reference to the surrounding circumstances, said provision was simply a covenant running with the land for the benefit of the adjoining estate belonging to the grantor. *Post v. Weil*, 115 N. Y. 361, 12 Am. St. Rep. 809.

A provision in a deed that the conveyance is "upon the express condition" that the grantee, "his heirs or assigns," shall not "erect, place, or permit * * * upon the said premises * * * any building or erection, or carry on any business which shall or may cause or become a nuisance to others owning lands or contiguous thereto," does not create a condition subsequent; it is simply a covenant running with the land. *Clement v. Burtis*, 121 N. Y. 708, 31 N. Y. St. Rep. 902.

Maintaining Opening into Premises Conveyed. — The deed under consideration in *Avery v. New York Cent., etc., R. Co.*, 106 N. Y. 142, provided that it was "upon the express condition that the said railroad company * * * shall, at all times, maintain an opening into the premises hereby conveyed, opposite to the Exchange Hotel, so called, * * * for the convenient access of passengers and their baggage." The court held that the language used was for the benefit of the hotel property and was not meant to create a condition subsequent, but was intended to be an agreement or covenant running with the land providing for a right of way so as to enhance the value of the hotel property.

A Provision in a Coal Lease that the lessee "shall carry on the digging of said coal in

such a manner as to do no injury to the surface of said land, and not to spoil the coal itself, and in order to carry this condition into full effect, parties of the first part reserve the power and full right to themselves to send, from time to time, an expert into the coal-pit for the purpose of examining the manner in which said business is therein done, and to get his approval thereto," is not a condition, for breach of which the lessors may enter, but a covenant, for breach of which the lessee is liable in damages. *McKnight v. Kreutz*, 51 Pa. St. 232.

Provision for Maintenance of Fence Construed as a Covenant. — An agreement to maintain a fence between the lands granted and those of the grantor, is never construed as a condition but as a covenant. *Hartung v. Witte*, 59 Wis. 285, citing *Sedg. & Wait, Trial of Title*, § 213, and *distinguishing* *Emerson v. Simpson*, 43 N. H. 475, 82 Am. Dec. 168. See also *Countryman v. Deck*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 110; *Merrifield v. Cobleigh*, 4 Cush. (Mass.) 184. And see the title FENCES.

Provision in Deed Construed as a Condition Subsequent. — A grant of land to a railroad company to have and to hold the same so long as it should be used for the operation of a railroad, "provided nevertheless, and these presents are upon the express conditions, first, that the said party of the second part, his heirs or assigns, shall construct and complete said railroad on or before the first day of January, 1888, etc.," creates an estate upon condition subsequent and not a fee simple with covenant. *Reichenbach v. Washington Short Line R. Co.*, 10 Wash. 357.

1. Provisions Construed as Covenants Rather than Conditions. — 4 Kent's Com. 132.

Georgia. — *Thornton v. Trammell*, 39 Ga. 202.

Illinois. — *Conger v. Chicago, etc., R. Co.*, 15 Ill. 366; *Board of Education v. First Baptist Church*, 63 Ill. 204; *Gallaher v. Herbert*, 117 Ill. 160.

Iowa. — *Peden v. Chicago, etc., R. Co.*, 73 Iowa 328, 5 Am. St. Rep. 680.

Massachusetts. — *Wheeler v. Dascomb*, 3 Cush. (Mass.) 285.

New Hampshire. — *Chapin v. School Dist. No. 2*, 35 N. H. 445; *Hoyt v. Kimball*, 49 N. H. 322.

New Jersey. — *Woodruff v. Woodruff*, 44 N. J. Eq. 349.

New York. — *Graves v. Deterling*, 120 N. Y. 447.

Pennsylvania. — *Paschall v. Passmore*, 15 Pa. St. 295.

Wisconsin. — *Hartung v. Witte*, 59 Wis. 285. See also *Laberee v. Carleton*, 53 Me. 213.

2. By Recitals. — *Elphinstone on Deeds*, pp. 144, 415. See also *Whitehill v. Gotwall*, 3 P.

ee. BY RESERVATIONS FROM LAND DEMISED. — The reservation of a right out of the land demised creates a covenant by the lessee not to interfere with the lessor's enjoyment of the right so reserved.¹

ff. BY RESTRICTIONS UPON USE OF PROPERTY. — A restriction as to the use of property granted or demised raises by implication a covenant on the part of the grantee or lessee against the use of the property in that way.²

gg. BY DESCRIPTION OF LAND CONVEYED — (*aa*) *As Respects the Quantity of Land.* — Where a tract of land which is the subject of a conveyance is particularly described therein by metes and bounds, the additional statement that the tract contains a certain number of acres is to be considered as merely descriptive and does not create a covenant of quantity.³

& W. (Pa.) 313; and *supra*, this section, *Form Immaterial*, notes.

For a Full Treatment of the effect of recitals, see the title RECITALS.

1. Reservation from Land Demised. — By indenture, H. leased a house excepting two rooms and free passage to them. The lessee assigned to a third party, and the assignee disturbed the lessor in the passage of the house, and for this disturbance the lessor brought covenant. It was held that the action lay in the same manner as where the lessee agrees to let the lessor have a thing out of the demised premises, as a way, common, or other profit appendant; but if the disturbance had been in the rooms, no action of covenant would have lain, because they were excepted and so not demised. *Bush v. Cole*, Carth. 232, 12 Mod. 24; *Bush v. Calis*, 1 Show. 388; *Cole's Case*, 1 Salk. 196.

2. Restrictions upon Use of Property. — *Hodson v. Coppard*, 29 Beav. 4. See also *Seddon v. Senate*, 13 East 63; *Rigby v. Great Western R. Co.*, 14 M. & W. 811; and cases cited *supra*, this section, *From Words That Import a Condition*. And see generally, the title BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 2.

A covenant by a lessee that he will at all times during the term plough, sow, manure, and cultivate the demised premises (except the rabbit-warren and sheep-walk) in due course of husbandry, implies a covenant not to plough the rabbit-warren and sheep-walk, and an action of covenant lies against him if he does so. *St. Albans v. Ellis*, 16 East 352.

But the words, "to be used as cabinet ware-rooms," following the description of the premises in a lease for years, do not imply a covenant on the part of the lessee not to use the premises for any other purpose than as cabinet ware-rooms. *Brugman v. Noyes*, 6 Wis. 1.

And *a fortiori*, it is not a covenant to erect the buildings necessary for such purposes. *Mador's Appeal*, 129 Pa. St. 15.

3. Mention of Number of Acres in Description Does Not Create a Covenant — *Alabama.* — *Wright v. Wright*, 34 Ala. 194; *Rogers v. Peebles*, 72 Ala. 529.

Connecticut. — *Snow v. Chapman*, 1 Root (Conn.) 528.

Georgia. — *Beall v. Berkhalter*, 26 Ga. 564.

Maryland. — *Hall v. Mayhew*, 15 Md. 551.

Massachusetts. — *Powell v. Clark*, 5 Mass. 355, 4 Am. Dec. 67.

New Hampshire. — *Perkins v. Webster*, 2 N. H. 287.

New York. — *Mann v. Pearson*, 2 Johns. (N. Y.) 37; *Roat v. Puff*, 3 Barb. (N. Y.) 353.

North Carolina. — *Rickets v. Dickens*, 1 Murph. (5 N. Car.) 343, 4 Am. Dec. 555; *Powell v. Lyles*, 1 Murph. (5 N. Car.) 348; *Huntly v. Waddell*, 12 Ired. L. (34 N. Car.) 33; *McArthur v. Morris*, 84 N. Car. 495.

Pennsylvania. — *Whitehill v. Gotwalt*, 3 P. & W. (Pa.) 327; *Large v. Penn*, 6 S. & R. (Pa.) 488.

South Carolina. — *Jones v. Bauskett*, 2 Spears L. (S. Car.) 68; *Lorick v. Hawkins*, 1 Rich. L. (S. Car.) 417.

Virginia. — *Tucker v. Cocke*, 2 Rand. (Va.) 51.

Illustrations. — A conveyance of a particular tract of land, without a specification of quantity, does not bind the vendor to warrant a particular number of acres, if there has been no false representation, and no concealment of facts within his knowledge; although there may have been an expectation in both parties, founded on documents and other evidence known to both, that the number of acres is greater than it turns out to be, upon a subsequent survey. *Tucker v. Cocke*, 2 Rand. (Va.) 51.

Where the lands conveyed by a deed are described by their subdivisions and numbers in the United States surveys, including fractional parts of several sections, with the words added, "making in all five hundred and twenty-seven acres," followed by a designation of the boundary lines on each side, as indicated by the adjacent lands and the river, and the price paid is a gross sum; the words specifying the quantity are mere matter of description, and not a covenant warranting the quantity. *Rogers v. Peebles*, 72 Ala. 529.

Where a deed, after describing the premises intended to be conveyed, by metes and bounds, contained these words, "containing one hundred and ninety-five acres of land," and after excepting two pieces, one of fifty acres, and another of sixteen acres, added: "There being in the lot hereby conveyed one hundred and thirty-five acres, strict measure, the surplus, if any, not being hereby conveyed;" it was held that this was not a covenant that there were one hundred and thirty-five acres of the land described; and that the grantor was not liable in an action of covenant, upon its turning out that the quantity of land embraced within the boundaries was less than one hundred and thirty-five acres. Where land is conveyed by metes and bounds, and at the close of the description the number

When Quantity Is of the Essence of the Conveyance. — It is otherwise, however, where the deed is so framed as to make the enumeration of the acres granted of the essence of the conveyance, as where the boundaries can only be fixed by the quantity.¹

(bb) *As Respects Streets and Ways.* — The rule has sometimes been broadly stated that the description of land in a conveyance as being bounded on one or more sides by a street or way,² or a reference in aid of the description to a registered plan on which streets and ways are laid down,³ raises an implied covenant that such streets or ways exist. But this principle, if it is to be recognized at all, must be taken with considerable qualification, and when so limited, resolves itself into the doctrine of estoppel.⁴

of acres is stated, even if the description contains positive language as to quantity, it is to be regarded only as descriptive of the lot, and not as a covenant of quantity. *Roat v. Puff*, 3 Barb. (N. Y.) 353.

Other Descriptions Not Construed as Covenants. — Where a party in a written lease describes the property as "the premises known as the 'Bedford Salt Furnace Property,' together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same," there is no implied covenant on the part of the lessor that there are on said premises six salt wells of any particular productive capacity, or suitable for the purposes for which they are leased. *Clifton v. Montague*, 40 W. Va. 207.

In a deed of conveyance, a part of the land conveyed was described "as lying west and adjacent to the tract of land first above-mentioned." The clause quoted was held to be merely words of description, and not amounting to a covenant that the land did lie west of and adjacent to the land first mentioned. *Ferguson v. Dent*, 8 Mo. 667.

Where a deed, after the description of the property by metes and bounds and stating the contents, proceeded: "being part of fifty-eight acres and one hundred perches of land, late the property of W. of D. township aforesaid, deceased, which was decreed by an Orphans' Court of Y. county aforesaid, held, etc., unto M. W., * * *, and which J. W. and others, heirs of the said W. deceased, did by their deed of release grant and confirm unto the said M. W., and to his heirs and assigns forever," it was held that these words did not amount to a covenant by the grantor that W., his father, was seized of an indefeasible estate in fee simple, and that the said estate was vested in him; but amounted to no more than a recital, and a continuation of the description of the land intended to be granted, more especially when that deed contained a covenant of general warranty. *Whitehill v. Gotwalt*, 3 P. & W. (Pa.) 313.

1. When Quantity Is of the Essence of the Conveyance. — *Pecare v. Chouteau*, 13 Mo. 527. See also *Beall v. Berkhalter*, 26 Ga. 564; *Mendenhall v. Steckel*, 47 Md. 453, 28 Am. Rep. 481.

The defendant owned a tract of land which he had surveyed and the boundaries marked off by a furrow with stones set up at the corners. The plaintiff desired to purchase the tract, which was pointed out to him as being bounded by these monuments and warranted to contain one hundred and seventy-four acres, and he purchased the tract at so much per

acre, the land being described in the deed as the east one hundred and seventy-four acres of survey No. 2. The tract sold lapped over seventy-two varas upon another tract, and the same was recovered from the plaintiff by paramount title. In an action upon the covenants of warranty contained in the deed from defendant to plaintiff, it was held that the warranty applied to the tract as marked out and shown to the plaintiff, and that he might recover upon the warranty for the portion from which he was ejected. *Meade v. Jones*, (Tex. Civ. App. 1896) 35 S. W. Rep. 310. See also *Meade v. Warring*, (Tex. Civ. App. 1896) 35 S. W. Rep. 308.

In a deed conveying land, the descriptive part ascertained a whole tract, declared that part of it was claimed by G., and specified that the grantor "only conveys two hundred acres," that he did not convey the part claimed by G., but if it should be found that besides the part so claimed, there was more than two hundred acres, the grantee should have it; general warranty of the premises was added. It was found that G.'s claim covered all but one hundred and forty-two acres, and the grantee sued in covenant, alleging a warranty of two hundred acres, and a breach by reason of G.'s claim. It was held that a proper construction of the deed disclosed a stipulation that G.'s claim should not cover more of the tract than the excess over two hundred acres; that there was in effect a covenant warranting that quantity, and that the plaintiff was entitled to recover the value of fifty-eight acres. *Morris v. Owens*, 3 Strobb. L. (S. Car.) 199.

2. Implied Covenants — Reference in Description to Streets and Ways. — *Garstang v. Davenport*, 90 Iowa 359; *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 157.

3. Reference to Plan. — *Trutt v. Spotts*, 87 Pa. St. 339; *Transue v. Sell*, 105 Pa. St. 604; *Ferguson's Appeal*, 117 Pa. St. 426.

4. Estoppel the True Principle. — *Howe v. Alger*, 4 Allen (Mass.) 206, where Dewey, J., after discussing authorities, declared that the description of lands as bounded by streets or ways operates only by way of estoppel, and continued: "No difficulty exists in binding the grantor, by a proper covenant stipulating that there is such a street that shall always be kept open for travel, and for the use of the grantee. In the absence of some direct provision of that kind, the mere recital in the boundary, of a street as one of the abutments, should not operate further than an estoppel as to the grantor and those claiming under him, to deny the existence of such way or street, or in any manner interfering to obstruct the

The Doctrine of Estoppel Applied. — Thus, if the grantor owns the fee to the strip of land described as a street or way, he will be estopped by his deed from denying to the grantee the use of it as such, and may be sued in trespass for its obstruction.¹ But this is the full limit of the principle, for, if the grantor have no interest in the land so described, no liability is created by the description.² So if the street or way be a public one, he cannot be held to have covenanted that it will never be discontinued.³

Grantor Cannot Be Compelled to Open Street. — Even when the fee is in the grantor, the deed merely operates by estoppel to vest in the grantee a right of way, and the grantor cannot be compelled, at the suit of the grantee, to grade and make the strip into a street fit for travel,⁴ nor is the grantor liable merely because an existing way which is described as of a certain width is encroached upon at one point by a building, if the free passage of the grantee along such way is not obstructed thereby.⁵

(3) **Execution** — (a) **In General.** — The recognized distinction between a covenant and a simple contract is that the former is under seal. It follows, therefore, that a promise, in order to be binding as a covenant, must be under the seal of the party by whom it is to be performed.⁶

grantee in the use and enjoyment of the same." In this case, *Farnsworth v. Taylor*, 9 Gray (Mass.) 162, and *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 157, were commented on and explained.

1. Grantor Estopped from Denying Existence of Streets. — *Tufts v. Charlestown*, 2 Gray (Mass.) 271; *Rodgers v. Parker*, 9 Gray (Mass.) 445; *Farnsworth v. Taylor*, 9 Gray (Mass.) 162; *Baxter v. Arnold*, 114 Mass. 577; *Van O'Linda v. Lothrop*, 21 Pick. (Mass.) 292, 32 Am. Dec. 261. See also *In Matter of Lewis St.*, 2 Wend. (N. Y.) 473.

A deed described the property conveyed as bounded "on the southerly side of a proprietor's way, thence running westerly * * * to a stake by the side of said way." The grantor owned the land called "proprietor's way." It was held that the grantee had a right of way over said land and might maintain an action of tort for its obstruction. *Gaw v. Hughes*, 111 Mass. 296.

A conveyance of land by a deed bounding it on a private way not defined in the deed but shown upon a plan referred to therein and recorded in the registry of deeds, estops the grantor to deny the existence not only of that way, but of any connecting ways represented on the plan which will enable the grantee to reach public ways in any direction as far as the grantor's title extends. *Fox v. Union Sugar Refinery*, 109 Mass. 292.

A deed in which the land conveyed is bounded upon a private way estops the grantor and those claiming under him to deny the existence of the way for its entire length as then actually laid out or clearly indicated and described. *Tobey v. Taunton*, 119 Mass. 404. See also *Lewis v. Beattie*, 105 Mass. 410.

But if there be a way in fact existing which does not extend through the whole line of the land granted, the party shall be supposed to have had reference to such existing way as a boundary as far as it extends, and not to have contemplated a way coextensive with the land. *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 157.

2. Where the Grantor Has No Interest in the Way. — *Holt v. Sargent*, 15 Gray (Mass.) 97; *Howe v. Alger*, 4 Allen (Mass.) 206. See also

Fogarty v. Kemmell, 105 Mass. 264; *Brainard v. Boston, etc., R. Co.*, 12 Gray (Mass.) 407.

3. When the Way Is Public. — *King v. New York*, 102 N. Y. 171; *Bellinger v. Union Burial-Ground Soc.*, 10 Pa. St. 135.

4. Grantor Not Compellable to Open Street. — *Hennessey v. Old Colony, etc., R. Co.*, 101 Mass. 540, 100 Am. Dec. 127. See also *Durkin v. Cobleigh*, 156 Mass. 108, 32 Am. St. Rep. 436.

A deed of land bounded on "a street recently laid out and called A. street," conveying "the right to use said A. street, in common with said grantors * * * and all other persons to whom they may grant the same privilege, as a public road or highway," contains an implied covenant that a street has been laid out, but not that it has been constructed or used for travel. *Loring v. Otis*, 7 Gray (Mass.) 563.

When Grantor Covenants to Open Street. — But a boundary in a deed, by "a new way or street now staked out, and to be opened by the [grantor], thirty feet wide, extending from said M. street along on the northerly side of said lot hereby conveyed, westerly to land of L. S.," is a covenant that the way shall be opened as then staked out, as far as the land of L. S., although beyond the land granted; and if the deed is duly recorded, is binding to that extent on subsequent purchasers from the grantor. *Thomas v. Poole*, 7 Gray (Mass.) 83.

5. Clapp v. M'Neil, 4 Mass. 589.

6. Promise to be Enforced as a Covenant Must Be Under Seal. — *Willard v. Wood*, 4 Mackey (D. C.) 538; *Goodwin v. Gilbert*, 9 Mass. 510; *Martin v. Drinan*, 128 Mass. 515.

An action of covenant cannot be sustained for rent against a lessee, in a lease sealed and subscribed only by the lessors, although such lessee has actually entered into possession under the lease. Section No. 16, etc., *v. Spencer*, 7 Ohio, pt. ii. 149.

In *Hinsdale v. Humphrey*, 15 Conn. 431, a lessor brought an action of covenant broken against his lessee upon a lease executed by the lessor only. The defendant demurred to the declaration, and it was held that an action of covenant would not lie.

(b) **Acceptance of Deed Poll.**—A very singular exception to this principle has, however, been recognized by some of the older authorities, and has been adopted as law in *New York* and *New Jersey*. It is this: If an estate is conveyed by a deed *inter partes* containing covenants to be performed by the grantee, and the grantee accepts the estate, the deed, though only signed and sealed by the grantor, will be deemed the deed of both parties, and the grantee will be as effectually bound by the covenants as though he had executed the instrument.¹

The Principle upon Which This Exception Has Been Allowed is stated in a *New York* case to be that the grantee is estopped by his acceptance "from denying that the seal attached to the deed is his as well as that of the grantor, and hence, when sued upon his covenants, the proof of the deed and of his acceptance thereof and enjoyment of the estate conclusively establishes that he has covenanted as stated."²

Exception Not Recognized.—But this exception has been justly criticised as erroneous in principle, and will be found to be unsupported by the authority of any adjudged cases, except those rendered in the states above mentioned which have adopted it. It may safely be stated as the general rule, that mutual covenants cannot arise out of a deed poll.³

(4) **Limitation and Qualification of Covenants**—(a) **In General.**—A covenant in a deed of conveyance may be limited or qualified in three ways: (1) by a limitation in the covenant itself, (2) by its construction with reference to the subject matter of the conveyance, and (3) by another covenant in the same deed.

(b) **By a Limitation in the Covenant Itself.**—In respect to the first of these modes a covenant may be, and often is, restricted in its operation, by an inherent limitation, to certain persons or to certain things,⁴ or it may be limited with

1. Acceptance of Deed Poll Creates Covenant.—In Comyns's Dig., tit. Covenant, A. 1, it is said that if a lease be to A and B by indenture, and A seals a counterpart, and B agrees to the lease but does not seal, yet B may be charged for a covenant broken.

In Platt on Covenants 18, the author, after reviewing the cases and laying down the rule that the technical action of covenants cannot be maintained against the grantee of a deed poll because he has not sealed the deed, says with reference to this exception: "Perhaps, however, the doctrine has been too long sanctioned to be now reversed. At all events, it is an introduction of an equitable principle into a court of law; the acceptance of a deed being considered equivalent to an actual execution by the lessee."

New York.—*Countryman v. Deck*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 110; *Spaulding v. Hallenbeck*, 35 N. Y. 206; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124; *Avery v. New York Cent., etc., R. Co.*, 106 N. Y. 142, 121 N. Y. 31; *Fairchild v. Lynch*, 46 N. Y. Super. Ct. 1.

The acceptance of a conveyance containing a statement that the grantee is to pay off an incumbrance binds him as effectually as though the deed had been *inter partes* and had been executed by both the grantor and grantee. *Trotter v. Hughes*, 12 N. Y. 75, 62 Am. Dec. 137.

New Jersey.—*Finley v. Simpson*, 22 N. J. L. 311, 53 Am. Dec. 252; *Huyler v. Atwood*, 26 N. J. Eq. 504, affirmed 28 N. J. Eq. 275; *Hagerty v. Lee*, 54 N. J. L. 580.

Missouri.—In *Poage v. Wabash, etc., R. Co.*, 24 Mo. App. 199, a deed to a railroad company contained the following provision: "It is hereby agreed that said railway company shall build and maintain a good and lawful fence. * * * and also maintain the present ditch, etc." In an action to recover damages for a failure to maintain and keep the ditch in repair, the court evaded the question as to the character of obligation imposed by this provision, by saying: "The stipulation to maintain the ditch is the expressed consideration and condition on which the conveyance was made; and as between the original parties to the deed an action for a breach of this compact would certainly lie. The form of the declaration in such action would be so akin to that for a breach of a covenant that the difference is so technical as to show, under our system of practice, that there is no substantial difference in the quality of the obligation."

2. Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556.

3. The Exception Criticised.—See the opinion of Chief Justice Gibson, in *Maule v. Weaver*, 7 Pa. St. 329. See also *Hinsdale v. Humphrey*, 15 Conn. 431.

4. Limitation of Covenant.—*Smith v. Eigerman*, 5 Ind. App. 269. A covenant in a deed of land that the grantor will warrant the land against all persons claiming under him does not estop him from setting up a title subsequently acquired by him by purchase or otherwise. *Comstock v. Smith*, 13 Pick. (Mass.) 116, 23 Am. Dec. 670.

Limitations upon Covenants to Be Construed

respect to the time of its operation.¹

Exception of Mortgage. — It is also not unusual for the covenant against incumbrances to be qualified by the exception from it of a mortgage or other incumbrance.²

(c) **By the Subject Matter of the Conveyance** — *aa. STATEMENT OF THE RULE.* — Though the dependent covenants in a deed of conveyance may be absolute in form, yet they are to be construed with reference to the subject-matter of the deed. Their office being merely to defend that which has been granted, they are (with the qualification made in the succeeding paragraph) only coextensive with the grant, and can have no wider scope or effect than the conveyance to which they are annexed.

bb. COVENANTS RESTRICTED TO THE LAND CONVEYED. — (*aa*) *In General.* — This prin-

Strictly. — A covenant shall be construed according to the import of the words, as if a lessor covenants that the lessee shall enjoy without interruption, except by the king, his heirs or successors, an interruption by a patentee shall be a breach, for he is not excepted. Com. Dig., p. 267, *citing* Hallings *v.* Connard, Cro. Eliz. 517; Moffitt *v.* Coffin, 3 Oregon 427.

Covenants Limited in Respect to Quantity of Land. — In Whallon *v.* Kauffman, 19 Johns. (N. Y.) 97, the defendant, in a deed conveying a tract of land described by metes and bounds, added, "containing by estimation six hundred acres, and the same is hereby covenanted and warranted to contain at least five hundred acres." After this followed the general covenants that the grantor was seized in fee simple, etc., had full power to convey, etc., and for quiet enjoyment and against incumbrances, etc., and warranty. A title to part of the land failed, but there was over five hundred acres to which the title was not disputed. It was held that the general covenants in the deed were restrained by the special covenants as to the quantity of land, and that there was no warranty above five hundred acres.

Construing Covenant as of Special Warranty by Rejecting Repugnant Words. — In Sanders *v.* Betts, 7 Wend. (N. Y.) 287, the grantor covenanted in these words: "And the said party of the first part, for himself, his heirs, etc., doth covenant, grant, bargain, promise, and agree to and with the said party of the second part, his heirs and assigns, to forever warrant and defend the above bargained premises, and every part and parcel thereof, now being in the quiet and peaceable possession of the said party of the second part, against the said party of the first part, his heirs, etc., and against all and every other person or persons claiming or to claim the said premises, or any part thereof, from and under him, the said party of the second part." The covenant was declared upon as one of general warranty, but it was held that it was the obvious intention of the grantor to make a covenant of special warranty, and that the word "second" was mistakenly used for the word "first," and a construction of special warranty was given to the covenant by rejecting the words "the said party of the second part" as senseless and repugnant.

1. Covenant Limited in Respect to Time. — The defendant, a lessee, covenanted that the plaintiff, paying rent, etc., should have quiet enjoyment of a term upon an underlease to

commence in 1836. The defendant having afterwards forfeited his own term by nonpayment of rent to the superior landlord, the plaintiff could not come into possession of the term to commence in 1836. It was held that the plaintiff could not sue on the covenant for quiet enjoyment; at all events, not before 1836. Ireland *v.* Bircham, 2 Bing. N. Cas. 90, 29 E. C. L. 266.

2. Exception of Mortgage. — Shanahan *v.* Perry, 130 Mass. 460; Cooper *v.* Bigley, 13 Mich. 463; Calkins *v.* Copley, 29 Minn. 471.

A deed of land contained a clause that the conveyance was made subject to a mortgage of thirty-five hundred dollars from A to B, recorded in a certain book and page in the registry, and a covenant that the premises "are free from all incumbrances except as aforesaid." At the time of the conveyance, interest was due on the mortgage, which the grantee was afterwards obliged to pay to prevent a foreclosure. Upon these facts the plaintiff brought an action upon the covenant against incumbrances in the deed, contending that the defendant's covenant was against all incumbrances in excess of thirty-five hundred dollars, but it was held that the mention in the defendant's deed of an existing mortgage of a certain amount, from a certain mortgagor to a certain mortgagee, recorded in a certain book and page of the registry, was only by way of description and identification of that mortgage, which, to the extent of all sums due thereon, whether principal or interest, was a single incumbrance, and as such was excepted out of the defendant's covenant. Shanahan *v.* Perry, 130 Mass. 460.

Filing of Lis Pendens upon Property. — Where a mortgage is specially excepted out of the covenant against incumbrances, the filing of a *lis pendens* upon the property conveyed creates no new incumbrance, but is a mere incident of the excepted incumbrance, and is not a breach of the covenant. Monell *v.* Douglass, (C. Pl.) 17 N. Y. Supp. 178.

Exception Not Void for Uncertainty. — Where the covenant against incumbrances in a deed contained an exception of a "certain mortgage," without giving the date or amount of the mortgage, or the name of the mortgagee, but the proof disclosed only one mortgage upon the property, it was held that such exception was not void for uncertainty, but would be understood as referring to the only mortgage proven in the case. Cooper *v.* Bigly, 13 Mich. 463.

ciple applies both to the quantity of land conveyed by the deed and to the quantity of interest which the grantee takes therein. In respect to the former, the rule is elementary that covenants for title and other dependent covenants cannot apply to land,¹ or appurtenances² not included in the conveyance,

1. Covenants Restricted to the Lands Conveyed.

— An action of covenant for breach of the covenants of seizin and quiet enjoyment will not lie for the eviction of a grantee from the lands taken possession of by him under his deed, when the premises granted are described as a specific lot in a certain tract or patent, and the lands lost are not embraced in such description. Nor is parol evidence admissible to show that the lands lost are within certain limits, designated by the grantor in the negotiation previous to the conveyance as the boundaries of the lot, where the premises from which the plaintiff is evicted are not in fact embraced in the description of the premises contained in the deed. *Tymason v. Bates*, 14 Wend. (N. Y.) 672.

If a deed conveys a tract of land by metes and bounds, excepting therefrom such portion of such land as may have before been conveyed by the grantor to other persons, and contains a general covenant of warranty of the land thereby intended to be conveyed, and also a covenant that if any portion of the land has been before conveyed to other persons the grantor will convey to the grantee other lands of like quantity and quality, the former covenant relates to lands which the deed purports to convey, and not to the land which the grantor covenanted to convey in the latter covenant. *Vance v. Pena*, 33 Cal. 631.

A county by its deed conveyed to the plaintiff all of the swamp and overflowed lands in the county, the various tracts being described in a schedule attached to the deed, and referred to in the descriptive part thereof as follows: "All the lands in said county of Scott, wherever therein situated, belonging to said county of Scott, and known as the swamp and overflowed lands in said county [except, etc.], all of which swamp and overflowed lands belonging to said county at this date are embraced, as it is believed, in the schedule hereinbefore set forth; but all such swamp and overflowed lands belonging to said county [except, etc.], being embraced in this sale, and conveyed by this deed, whether contained in said descriptive schedule, or by error or oversight or otherwise omitted from the same, or erroneously described therein," etc. Some of the lands described in the schedule were afterwards ascertained not to be within the county, and the plaintiff brought an action upon the covenants in the deed; but it was held that it was the obvious intention of the deed to convey only the swamp lands situated within the county, and that the covenants were only co-extensive with the lands actually conveyed. *Hall v. Scott County*, 7 Fed. Rep. 341.

A grantor conveyed to the plaintiff a hotel and lot by the following description: "A parcel of land situated in Buckfield village, and the buildings thereon, known as the Buckfield House and stand, containing one acre more or less, meaning herein to convey the same premises deeded by F. A. W. to me." W.'s deed conveyed the premises by the same general de-

scription. Adjoining the hotel lot was a small triangular piece of ground that had been many years unfenced and unused by its owner, forming a common ground with the hotel lot, there being no visible line between the lots, except that at one corner on the divisional line a granite post was set, and people were in the habit of driving across this common ground when approaching the hotel from a certain direction. The plaintiff was deceived by the situation and use of the premises, supposing the small piece of ground to be a part of his purchase, and he afterwards conveyed the two parcels by metes and bounds to a third person, as the hotel property. Had he investigated the meaning of the granite post or explored the registry of deeds far enough back to have found the first conveyance of the hotel lot by metes and bounds, his error would have been prevented. The small piece of ground was afterwards recovered from the plaintiff's grantee, and the grantee recovered damages from the plaintiff upon the warranty in his deed. In an action by the plaintiff against the grantor's executor to recover the damages thus sustained by him, it was held that no action lay. *Shaw v. Bisbee*, 83 Me. 400.

True Boundaries of Land Control Covenants. — When A conveys land to B., "bounded on land of T.," the true line of T.'s land is the boundary of the land conveyed, although A. and T. had previously agreed by parol on a different line, and had set up stakes to mark such line, and had afterwards held possession of their respective lands according to such line; and if B. be evicted from the land lying between the true and the agreed line, he has no remedy on A.'s covenant of warranty, unless A., at the time of the conveyance, pointed out the agreed line as the true one. *Cornell v. Jackson*, 9 Met. (Mass.) 150, 3 Cush. (Mass.) 506.

Where a warranty deed purports to convey land in a certain survey, the grantee cannot recover for a shortage in the land caused by conflict with an older adverse location, in the absence of an allegation of fraud or mistake as to the number of acres conveyed. *McCreary v. Douglass*, 5 Tex. Civ. App. 492.

2. Covenants Cannot Apply to Appurtenances Not Conveyed.

— The owner of a parcel of land in S. with a hotel thereon known as the E. House, and of an adjoining estate, conveyed the latter estate reserving a right of way over it to the hotel estate; and afterwards conveyed the hotel estate by metes and bounds to T., who afterwards conveyed it to the defendant, who released the right of way to the owner of the adjoining estate, and afterwards conveyed the hotel estate to the plaintiff by a deed, in which the description was as follows: "A certain tract of land [in S.], being the premises known as the E. House, and the same premises bounded and described in the deed of T. to the grantor, * * * to which deed reference may be had for a more particular description of the said premises." The deed of T. to the de-

although the grantee may have purchased under the impression that they were so included, except when the mistake is occasioned by the grantor's representations in the sale that certain monuments or lines are the boundaries of the tract, in which case it has been held that the covenants in the deed are coextensive with the representations.¹

(bb) *Exceptions from Grant.* — The exception of a right of way or other easement through or out of the premises conveyed qualifies the covenants in the deed *pro tanto*.²

Reservations Construed as Exceptions. — And though the grantor may use words which in themselves purport to create a reservation, yet if his obvious intention, as determined from the construction of the whole instrument, be to except a certain right or easement out of the premises conveyed, the deed will be so construed.³

(cc) *Encroachment of Structures upon Adjoining Land.* — Although a conveyance of land carries with it as appurtenant all the structures upon it, it cannot convey as appurtenant structures upon adjoining lands, and the covenants for title being merely coextensive with the grant, the fact that a house on the land conveyed encroaches upon adjoining land will not constitute a breach of these covenants.⁴

defendant contained a similar description, and referred to the deed from his grantor. None of these deeds described or referred to the right of way. It was held that, although the right of way passed by the deed to T. and by his deed to the defendant, as an appurtenance of the estate, yet that it was not included in the description in the deed to the plaintiff. *Parker v. Moore*, 118 Mass. 552.

1. Covenants Coextensive with Representations. — *Cornell v. Jackson*, 9 Met. (Mass.) 150.

The defendant corporation owned certain real estate which it was desirous of selling to the plaintiff, and as the boundaries of the land could not be determined by an inspection of the description contained in the title deed, the president of the defendant corporation, as its authorized agent, pointed out to the plaintiff certain lines as the true boundaries of the tract, and the plaintiff, relying on these representations, purchased the property pointed out for a certain sum and received a conveyance containing covenants of general warranty. A part of the land pointed out was the property of a third party, and was not contained in the deed from the defendant to the plaintiff, and the plaintiff was ejected from this portion of the tract. In an action upon the covenants in the deed it was held that the covenants in the deed were coextensive with the representations made, and that the plaintiff might recover the value of the land from which he had been ejected. *Cambridge City First Nat. Bank v. Colter*, 61 Ind. 153.

2. Exceptions from Grant. — *Leonard v. Adams*, 119 Mass. 366; *Wood v. Boyd*, 145 Mass. 176.

3. Reservations Construed as Exceptions. — The owner of a parcel of land granted by deed, duly recorded, to A. a part of the land, and a right to maintain a dam on the rest; and afterwards conveyed to a third person the whole parcel, "reserving" all the rights of A., his heirs and assigns, therein. It was held that this created an exception and not a reservation; and that the second grantee could not maintain an action against his grantor on the

covenant of seizin in his deed. *Stockwell v. Couillard*, 129 Mass. 231.

A deed with covenants for quiet enjoyment contained the following clause: "Reserving always a right of way as now used on the west side of the above described premises, for cattle and carriages, from the public highway to the piece of land now owned by R., lying north of and adjoining the premises herein conveyed." R., who claimed the right of way by prescription, subsequently brought an action against the grantee for its obstruction, and recovered damages and costs. In an action by the grantee against the grantor upon the covenants in the deed, it was held that, although strictly a reservation in a deed is ineffectual to create a right in any person not a party thereto, yet, there being in fact a right of way existing in R. at the time of the grant, the clause must be construed as an exception from the property conveyed, and that the grantor was not liable to the grantee as for a breach of his covenant. *Bridger v. Pierson*, 45 N. Y. 601.

4. Encroachment of Structures upon Adjoining Land. — Where a lot is conveyed by metes and bounds, the fact that the front wall of the building thereon slightly encroaches on the street, and a side wall on the land of an adjoining owner, does not constitute a breach of the covenant of seizin. *Stearn v. Hesdorfer*, 9 Misc. Rep. (N. Y. C. Pl.) 134.

The defendant purchased a lot of land of the plaintiff, giving back a mortgage upon the premises to secure a portion of the purchase money. Upon the land sold was a dwelling-house, which was discovered later to project fifteen inches upon the adjoining lot, and the defendant purchased this lot in order to protect his title to the house. In an action to foreclose the mortgage, the defendant set up these facts as a counterclaim, but it was held that the defendant gained no title to the portion of the house which did not stand on the lot conveyed to him, and that the plaintiff was not liable upon his covenants because part of the house stood on another lot. *Burke v.*

(*dd*) *Conflicting Descriptions*. — These principles, though well settled, are sometimes difficult of application, where the description of the land in the deed is indefinite, or two or more descriptions are conflicting. But the general rule applicable to such cases is that the greater certainty must prevail; consequently, where there are two or more conflicting descriptions in a deed, preference is to be given to that which is the more certain.¹ Hence, known and fixed monuments will control courses and distances,² and metes and bounds will control quantity,³ unless the deed shows a clear intent to give a definite quantity.⁴

Nichols, 34 Barb. (N. Y.) 430, *affirmed* in 2 Keyes (N. Y.) 670.

A conveyed to B certain premises by metes and bounds with covenants of seizin, against incumbrances and warranty. A portion of the roof and eaves of a house, standing on the land conveyed, extended over upon the adjoining lot of C. In an action by A against B to recover the purchase money, the latter alleged and claimed that the right to maintain and use the projection of said roof and eaves was conveyed to him by A, and that C's right to cut the same away and to oust him from its enjoyment constituted a breach of the covenants in said deed. It was held that if the right to such projection and its use belonged to A at the time of the conveyance, it passed to B as an appurtenance to the parcel granted; and if it did not then belong to him, the projection not being within the description of the premises contained in the deed, the same did not pass, and hence he did not covenant to warrant and defend it. In either case, or adopting either alternative, no breach of either of the covenants ensued. *Meek v. Breckenridge*, 29 Ohio St. 642.

1. *Belden v. Seymour*, 8 Conn. 18; *Nichols v. Turney*, 15 Conn. 101; *Elliott v. Weed*, 44 Conn. 19.

2. **Monuments Control Courses and Distances.** — Where nothing besides course and distance is given, they fix the lines. But where the termini of the lines ascertained by natural or artificial marks are given, the course and distance are controlled, and lines ascertained by known boundaries, or other descriptive circumstances, are preferred to those which can be found only by the compass and chain. *Jones v. Bauskett*, 2 Spears L. (S. Car.) 68. See also the title **BOUNDARIES**, vol. 4, p. 760.

The plaintiff, while the owner of a city lot, erected two houses thereon, one on the north side and another on the south side. The houses were not of equal width, the house on the south side projecting twenty inches beyond the centre line of the lot. The plaintiff conveyed both houses and lots to the defendant, who afterwards conveyed the house on the south side to one C., and reconveyed the north house to the plaintiff. The defendant thought that the houses were of equal width and occupied each a half of the lot, and they were so described in the two conveyances which contained the usual covenants. The deed to C. was afterwards reformed so as to make it convey all the ground including the twenty inches upon which the south house stood. The plaintiff thereupon brought this action upon the covenants of warranty to recover damages for the deficiency. It was held that the recitals in a deed of conveyance as to

the quantity of land which it assumes to convey are not always conclusive as to the dimensions of the particular tract actually conveyed or intended to be conveyed, as monuments are to have a controlling influence rather than courses, distances, and designated quantity, and that the covenants of title must, by the same rule, be limited to the particular parcel of ground intended to be conveyed. *Allen v. Kersey*, 104 Ind. 1.

3. **Metes and Bounds Control Quantity.** — The defendant conveyed to the plaintiff by warranty deed a tract of land described as bounded north on F. street one hundred and eighty-nine feet, east on land of P. one hundred and forty-seven feet, south on lands of W. and P. in all one hundred and eighty-nine feet, and west on land of W. one hundred and forty-seven feet. The distance between the land of P. on the east and that of W. on the west was only one hundred and eighty-four feet. In an action for breach of the defendant's covenant that he was seized of the land described, it was held that the description of the land as bounding on P. on the east and on W. on the west was to be regarded as one of greater certainty than the description of the north and south lines by their length, and that therefore the former description controlled the latter. *Elliott v. Weed*, 44 Conn. 19. See generally the title **BOUNDARIES**, vol. 4, p. 760 *et seq.*

In a deed the premises conveyed were described as a house and lot in a row of houses, and in giving the boundaries of the lot the side lines were stated to be in length "eighty feet, or a fraction more or less." Extrinsic evidence showed that, at the time of the conveyance, the side lines of the lot were marked by fences, and that a fence ran along the rear of the curtilages of the several houses in the row, at a depth of only about sixty-five feet from the front. It was held in an action on the covenant of ownership, setting up a want of title to land beyond this rear fence, that this fence formed a visible boundary of the property conveyed, and controlled the distance in feet, as expressed in the deed, and that, consequently, there was no breach of the covenant. *Smith v. Negbauer*, 42 N. J. L. 305.

Where one conveys by courses and distances, and his covenant of warranty extends to the entire quantity of land included by them, the further description of it in his deed, as a tract which had passed to him by a chain of conveyances, will not restrain the warranty to the primitive bounds of the tract. *Steiner v. Baughman*, 12 Pa. St. 106.

4. See *supra*, this section, *Creation by Necessary Implication — By Description of Land Conveyed*.

cc. COVENANTS RESTRICTED TO ESTATE CONVEYED — (*aa*) *In General*. — Considering the covenants with respect to the estate conveyed, it may be stated as a general principle, that however broad and comprehensive the covenants in a conveyance may be, they are to be construed as securing to the grantee only the estate actually limited to him by the conveyance.¹

(*bb*) *Conveyances of Life Estates*. — Thus, where the interest conveyed is merely a life estate, the fact that the covenants in the deed are made with the grantee, his heirs and assigns, will not enlarge the conveyance to a fee simple.²

(*cc*) *Conveyances by Tenants in Common*. — Where a tenant in common conveys his fractional undivided interest in the land, he is liable upon the covenants contained in the deed only to the extent of his proportionate interest in the premises.³

(*dd*) *Conveyances of Land Subject to Incumbrances*. — So where a conveyance of land is expressly qualified as being subject to a mortgage, the covenants in the deed, though absolute, apply only to the equity of redemption, which is all that such a deed purports to convey.⁴

1. *Blodgett v. Hildreth*, 103 Mass. 484.

2. **Life Estate Not Enlarged by Covenants**. — A deed of conveyance of land to a person omitting the word "heirs" creates at common law only a life estate, and such estate is not enlarged to a fee either by warranty in fee or by covenant of quiet enjoyment to the grantee and his heirs. *Roberts v. Forsythe*, 3 Dev. L. (14 N. Car.) 26; *Snell v. Young*, 3 Ired. L. (25 N. Car.) 379.

In 2 Co. Litt. 385*b*, it is said: "But a warranty of itself cannot enlarge an estate; as if the lessor by deed release to his lessee for life, and warrant the land to the lessee and his heirs, yet doth not this enlarge his estate." The same statement of the law is made in 1 Shep. Touch. 182. See *Second Universalist Soc. v. Dugan*, 65 Md. 460.

Where a tenant for life conveys all his "right, title, and interest" in the land to the grantee and his heirs, with a covenant that he is seized in fee, only the life estate passes, for the covenant cannot enlarge the words of the grant so as to pass a fee by disseizin. *Hurd v. Cushing*, 7 Pick. (Mass.) 160.

In the granting clause of a deed, an estate was conveyed to a woman for life, remainder over to her children. The covenants of the deed were made with the grantee, her heirs and assigns. It was held that the covenants did not enlarge the conveyance to a fee simple, but that the grantee took an estate tail. *Ross v. Adams*, 28 N. J. L. 160; *Adams v. Ross*, 30 N. J. L. 505, 82 Am. Dec. 237.

Conveyance of Leasehold Interest. — The defendant, who was lessee of certain premises, bargained, sold, and assigned his leasehold interest to the plaintiff, to have and to hold the same in as ample a manner to all intents and purposes as the defendant might or could hold and enjoy the same, and covenanted that he had good and lawful right to bargain and transfer the premises as above written, and that the same were free from all arrearages of rent and other incumbrances, etc. The plaintiff was afterwards evicted by a title paramount to that of the landlord, and in an action upon the covenant it was held that it was a qualified covenant only and confined to the acts of the defendant himself, and did not amount to a warranty of the landlord's title.

Knickerbacker v. Killmore, 9 Johns. (N. Y.) 106.

Assignment of Mortgage. — A granted land to B on a condition subsequent, and took back a mortgage on it to secure B's note given for the price. By deed of assignment in the usual form, he afterwards assigned to C "said mortgage deed, the real estate thereby conveyed, and the promissory note, debt, and claim thereby secured." The original deed was referred to in the mortgage, and both were duly recorded before the assignment. It was held that by the assignment of the "real estate thereby conveyed," an absolute title in fee was not passed, but merely a title in mortgage and a title subject to be defeated by the mortgagor's breach of the condition subsequent in the deed. The words of grant in an assignment cannot operate by way of covenant or estoppel beyond the description of the thing granted and assigned. *Merritt v. Harris*, 102 Mass. 326.

3. Conveyance by Tenant in Common. — A covenant of warranty in a conveyance by a tenant in common of his fractional undivided interest in the land attaches merely to the interest which the deed purports to convey. *Emerie v. Alvarado*, 90 Cal. 444; *Coster v. Monroe Mfg. Co.*, 2 N. J. Eq. 467.

A deed by which one of five tenants in common bargains, sells, etc., all his right, title, interest, claim, and demand to a parcel of land, only passes to the purchaser the grantor's one-fifth interest in the premises, and although such deed contains a covenant to warrant and defend such lands to the purchaser, it must be construed to mean only the right, title, and interest of the grantor, and the covenant cannot enlarge the estate granted. *Lamb v. Wakefield*, 1 Sawy. (U. S.) 251.

4. Conveyances of Land Subject to Incumbrances. — *People v. Herbel*, 96 Ill. 284; *Drury v. Holden*, 121 Ill. 130; *Freeman v. Foster*, 55 Me. 508; *Ayer v. Philadelphia, etc., Face Brick Co.*, 159 Mass. 84; *Watts v. Welman*, 2 N. H. 458.

A statement in a deed, after a specific description of the granted premises, that they are subject to certain mortgages, qualifies the estate granted, and a subsequent covenant of warranty applies to the estate as thus quali-

(*cc*) *Conveyance of Grantor's Right, Title, and Interest.* — If a deed purport to convey merely the right, title, and interest of the grantor in and to the land described, instead of conveying the land itself, the covenants in the deed will be limited to the right or interest which the grantor then has in the premises, and will not be broken, even though the grantee be ousted by a paramount title,¹ or though there be incumbrances upon the premises created by the grantor himself;²

fied, which is an equity of redemption. *Brown v. South Boston Sav. Bank*, 148 Mass. 300.

A deed of land to S. recited that the grantor was seized in fee of the "granted premises, that they are free from all incumbrances, except two mortgages, * * * which mortgages said S. assumes and agrees to pay," and contained a covenant to "warrant and defend the same" in the usual form. It was held that the covenant of warranty applied to the grantor's equity of redemption only, and that the grantor, upon nonpayment of one of the mortgages and its foreclosure, did not become liable to the grantee for breach of that covenant. *Lively v. Rice*, 150 Mass. 171.

Covenant Does Not Work Estoppel Against Excepted Mortgage. — The plaintiff mortgaged certain premises to G. to secure a note. He then conveyed the same to the defendant by warranty deed subject to the mortgage. He was afterwards sued upon the note and compelled to pay it on execution, and the mortgagees thereupon "released and conveyed" to him all their rights under the mortgage. He afterwards brought suit as assignee. It was held that he was not estopped by the warranty in the deed from asserting this afterwards acquired title against the grantee. *Kinnear v. Lowell*, 34 Me. 299.

Exception to Be Strictly Construed. — In a deed conveying fee estate the grantor, after a description thereof, added that it was sold subject to the right of the widow and daughter of B. in the same — the daughter's "right to exist no longer than [the widow] occupies the part of the premises to which she is entitled under said B.'s will" — and covenanted that the premises were free from all incumbrances except the above mentioned. By the will of B. the daughter had a right after the widow's death in the estate conveyed. It was held that the grantor was liable to the grantee in an action on the covenant against incumbrances. *Jarvis v. Buttrick*, 1 Met. (Mass.) 480.

Qualification by Reference to Another Deed. — In *Bates v. Foster*, 59 Me. 157, 8 Am. Rep. 406, a deed from the defendant to the plaintiff contained these words following the description of the property: "And meaning hereby to convey to the said B. the same premises and title as conveyed to me by D. W., and no more." It appeared that there was an outstanding mortgage on the land given by a prior owner which the plaintiff had been compelled to pay. It was held that the covenants in the deed were limited by the clause inserted in the description, and that the plaintiff could not recover damages on account of the mortgage.

But the covenants in a deed are not qualified by a mere reference in the deed in aid of its description to another deed which is declared to be subject to a mortgage. In such case the reference will be deemed to have been made for the purpose of describing the

land and not the title to be conveyed. *Powers v. Patten*, 71 Me. 583.

Covenants of warranty in a deed are not qualified by a phrase at the end of the description of the land, being "the same premises deeded by F. A. W. to me," even if through W.'s deed an incumbrance was discoverable. The reference was designed to help identify the premises conveyed, and not to determine the quantity or quality of title. *Shaw v. Bisbee*, 83 Me. 400.

1. Conveyance of Grantor's Right, Title, and Interest. — *Reynolds v. Shaver*, 59 Ark. 299, 43 Am. St. Rep. 36; *Sweet v. Brown*, 12 Met. (Mass.) 175, 45 Am. Dec. 243; *Allen v. Holton*, 20 Pick. (Mass.) 458; *Hull v. Hull*, 35 W. Va. 155, 29 Am. St. Rep. 800. See also *Hope v. Stone*, 10 Minn. 141.

The covenants in a deed are restricted to the grant. And if the grantor conveys only his right, title, and interest in the premises, he is not liable upon his covenants of warranty against persons claiming title under him, though he had previously conveyed the land to another. *Ballard v. Child*, 46 Me. 152.

In *McNear v. McComber*, 18 Iowa 12, the plaintiff instituted suit to recover damages for the breach of warranty in a deed from the defendant to himself, the granting clause of which was in these words, viz.: The defendants "do hereby sell and convey unto said M. M. the following premises, to wit, all our right, title, and interest in and to lot No. 66 in the city of Dubuque, state of Iowa, according to the government plat of said city." Following this were the usual covenants. It was held that the covenants were restrained by the words "all our right, title, and interest," and that a failure of the title did not constitute a breach of warranty.

A deed which recites that the grantors "have bargained, sold, and quitclaimed, and by these presents do bargain, sell, and quitclaim, * * * all our right, title, interest, estate, claim, and demand, both in law and in equity, as well in possession as in expectation, * * * with all and singular the hereditaments and appurtenances thereunto belonging; and we also do promise to defend the property against all claims, if any should come up against said property," — is only a quitclaim deed, and purports to convey only the existing interest and estate of the grantors, and the general covenant following the granting clause does not operate to enlarge the estate granted, but is itself limited to such estate. *Young v. Clippinger*, 14 Kan. 148.

2. Existence of Incumbrances Not a Breach of Covenants. — In a deed of all the grantor's "right and title to one undivided third part of" land bounded and described, covenants that he is seized in fee of the granted premises, that they are free from all incumbrances, and that he will warrant them to the grantee

nor will the grantor be estopped by the covenants from setting up an after-acquired title.¹

To Be Construed Favorably to the Grantee. — Such a construction, it is obvious, robs the grantee of nearly, if not all, of the security which the covenants purport to give; and as the courts are inclined to construe the deed favorably to the grantee whenever possible,² where upon the construction of a deed it appears to be the intention of the conveyance to grant the land, and not merely the grantor's interest therein, the covenants will be given full effect, although the description may also contain the words "being all my right and title to the land," or some similar expression.³

against the lawful claims of all persons, are limited in effect by the description of the subject granted, and are not broken by an eviction of the grantee under an incumbrance previously created by the grantor. *Hoxie v. Finney*, 16 Gray (Mass.) 332.

But in *Milot v. Reed*, 11 Mont. 568, it was held that a covenant in a deed to warrant and defend plaintiff's "right, title, and interest in and to said premises, and the quiet and peaceable possession thereof, unto the said party of the second part, his heirs and assigns, against the acts and deeds of said party of the first part, and all and every person and persons whomsoever, lawfully claiming or to claim the same," constitutes a sufficient warranty to compel the grantor to answer for taxes lawfully levied on the premises conveyed, and existing as a lien thereon at the time of the conveyance thereof.

1. Grantor Not Estopped from Setting Up After-acquired Title. — *Gee v. Moore*, 14 Cal. 472; *Kimball v. Semple*, 25 Cal. 440; *Shumaker v. Johnson*, 35 Ind. 33; *Locke v. White*, 89 Ind. 492; *Miller v. Ewing*, 6 Cush. (Mass.) 34.

Where in a deed, in the ordinary form of bargain, sale, and release, which purports to convey to the grantees "all the estate, right, title, interest, claim, and demand, both in law and equity," of the grantors, "of, in, and to the said premises, and every part thereof," containing no recital or other description whatever of any particular interest owned or possessed by the grantors, or intended to be conveyed, a covenant is inserted by which the grantors agree to "warrant and forever defend the said premises against all persons claiming or to claim, by, from, or under them, their heirs or assigns," such covenant is only coextensive with the grant, and binds only the vested interests of the grantors in the property at the time, and does not extend to an after-acquired title. *White v. Brocaw*, 14 Ohio St. 339.

Grantor Not Estopped to Set Up Interest Afterward Acquired by Descent. — A grantor, being a devisee of an estate in which, by the terms of the will, he had both a vested and a contingent interest, conveyed "all his right, title, and interest" in and to the undivided real estate devised, to the plaintiff by deed with full covenants. It was held that the deed conveyed only the grantor's vested interest, and that, the warranty being only coextensive with the grant, he was not thereby estopped to claim the contingent interest when it became vested in him by the happening of the contingency. *Blanchard v. Brooks*, 12 Pick. (Mass.) 47.

But a release of "all the right, title, or interest," which the releasor has, or may have, in or unto the estate of his father, whether the same may fall to him by will or heirship, includes future rights to be acquired by the releasor; and a covenant never to make claim to "the premises" is a covenant never to make claim to the estate of the father. *Trull v. Eastman*, 3 Met. (Mass.) 121, 37 Am. Dec. 126.

Grantor May Purchase Adverse Title. — A grantor who sells only his right or interest in a parcel of land is not estopped by his deed from purchasing another adverse title to the land and setting it up against his vendee. *Wynn v. Harman*, 5 Gratt. (Va.) 157.

Conveyance of Vested Does Not Include Contingent Interest. — A person to whom an estate was limited by way of executory devise, having a vested right to a share of the same property, made a conveyance before the contingency happened of all her "right, title, and claim to all the land," with a covenant against all claims arising under her. It was held that after the executory devise became vested, she was not estopped by her covenant from claiming the land conveyed by it. *Hall v. Chaffee*, 14 N. H. 215.

A married woman being tenant in common with her brothers and sisters each of a vested remainder in one-sixth part of certain land, joined with her husband in a quit-claim deed of "all the right, title, and estate" which they had in the same; with a covenant that neither they nor their heirs, nor any other persons claiming from or under them, should by any way or means have, claim, or demand any right or title in the premises. The wife subsequently acquired by descent, on the death of some of the other tenants in common without issue, a three-sixths interest in the same estate. It was held that by the deed nothing more passed than the one-sixth to which the wife was then entitled, and that her heirs were not estopped thereby from demanding her share of the three-sixths subsequently acquired. *Wight v. Shaw*, 5 Cush. (Mass.) 56.

2. Construction Favorable to Grantee. — *Elphinstone on Deeds* 425; *Rubery v. Jervoise*, 1 T. R. 229; *Barrett v. Bedford*, 8 T. R. 602; *Warde v. Warde*, 16 Beav. 103; *Pittsburg, etc., R. Co. v. Reno*, 22 Ill. App. 470; *Locke v. White*, 89 Ind. 492; *Gifford v. First Presb. Soc.*, 56 Barb. (N. Y.) 114.

3. When the Land and Not Merely Grantor's Interest Is Conveyed. — *Mills v. Catlin*, 22 Vt. 98; *Locke v. White*, 89 Ind. 492.

Where the grantor in a deed containing covenants of seizin, title against incumbrances,

(d) **By Another Covenant in the Same Deed** — *aa. IN GENERAL.* — The third and last mode by which a covenant may be limited and restrained is by another covenant in the same deed. The principle is well settled that however general the words of a covenant may be, if, from a limitation in another covenant in the same deed, it is plainly and irresistibly to be inferred that the covenantor did not intend to use the words in the general sense which they import, the court will limit the operation of the general covenant so as to effect the true intention. The question, therefore, in every instance is, whether such irresistible inference does arise from the construction of the concomitant covenants.¹

bb. CONSTRUCTION OF ABSOLUTE AND LIMITED COVENANTS — (*aa*) *Intention of Parties to Control.* — In determining this question the text-books and adjudicated cases have indulged in many refinements and subtle distinctions in the endeavor to evolve a rule of universal application, usually founding it upon the particular position

and of general warranty, used terms purporting to convey the estate therein mentioned by metes and bounds, and added the words, "meaning and intending by this deed to convey all my right, title, and interest in and to" the premises so described, it was held that the covenants applied generally to the land mentioned in the deed, and were not restricted to the grantor's right, title, and interest therein. *Hubbard v. Athorp*, 3 Cush. (Mass.) 419. See also *Russ v. Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464.

In *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297, a tract of land was conveyed by deed in which, after the usual words of conveyance and description of the property conveyed, the following clause was inserted: "And also all the estate, right, title, interest, property, possession, claim, and demand of them the said A, and B his wife, of, in, and to the same: To have and to hold the said tract of land so described, * * * to the said C, his heirs and assigns forever, in as full and ample a manner as the said A now hath and enjoyeth the same and in as full and ample a manner as the same hath heretofore been had and enjoyed by the said A, or lawfully might if these presents were not made, be had, used, occupied, possessed, and enjoyed by him, his heirs or assigns." Following this was a covenant against incumbrances. It was contended that this deed only passed such interest as the grantor had in the land conveyed; but the court, by Nelson, J., after reviewing a number of cases, said: "The principle deducible from these authorities seems to be, that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies." To the same effect is *Taggart v. Risley*, 4 Oregon 235. See also *Whiting v. Dewey*, 15 Pick. (Mass.) 434.

Covenant to Warrant and Defend the "Premises." — Where a party conveys all his right, title, and interest in certain lands described in the deed, and covenants to warrant and defend "the premises" against all lawful claims arising under him, the covenant refers to the lands described in the deed and not to the right and title of the grantor. *Loomis v. Bedel*, 11 N. H. 74.

In *Bayley v. McCoy*, 8 Oregon 259, the defendant's intestate executed and delivered to the plaintiff a deed as follows: "That the party of the first part, for and in consideration of the sum of eight hundred dollars to them in hand paid, * * * have bargained, sold, and conveyed unto the said party of the second part, the following described premises, to wit: all of their right, title, and interest in and to lot No. 1 in block No. 11, in the city of, etc.; to have and to hold the said premises with their appurtenances, etc." The deed contained full covenants. It appeared that the defendant only had title to the south half of the premises described. It was held that the word "premises" evidently referred to the whole of the land described, and that the defendant was estopped by the recitals and covenants in the deed from averring and proving that he intended to convey only the south half of the lot.

When Grantor Has No Interest at All. — The defendant sold and conveyed a lot of land to the plaintiff. The operative words of conveyance used in the deed were "sells, conveys, and quitclaims," but immediately following the description was a covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever except the United States. The plaintiff alleged that the defendant had no title or right of any kind to the lot, that the right and title was in another, and claimed damages for breach of the covenants in the deed. It was held that notwithstanding the use of the words "sells, conveys, and quitclaims," the covenant warranting and defending the premises against the lawful claims of all persons whomsoever except the United States, would be meaningless unless construed to mean that the defendant had a settler's or claimant's title to the land, and that the fact that he had no claim or title of any sort was a breach of the covenant. *Williamson v. Test*, 24 Iowa 138.

1. *Miller v. Heller*, 7 S. & R. (Pa.) 32, 10 Am. Dec. 413.

of the limited covenants in the series, as first, last, or occupying some other place.¹ But such attempts have not been regarded with favor as practically useful.² The question, being one of intention, must be determined by the spirit of the covenants when construed together, considered in connection with the subject-matter of the conveyance, and not by the application of technical and arbitrary rules.³ Any rule will be good so long as its applica-

1. Rules of Construction — General and Limited Covenants. — In Sugden on Vendors, c. 15, § 3, the author lays down the following rules to govern the construction of general and restrictive covenants when joined in the same deed:

Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct.

But where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent, or, as expressed by the court in a case quoted below, unless there appear something to connect the general covenant with the restrictive covenant, or unless there are words in the covenant itself amounting to a qualification.

And as, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other, a preceding general covenant will not enlarge a subsequent limited covenant.

Where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others, although they all relate to the same land.

In *Gainsford v. Griffith*, 1 Saund. 58, the rule is laid down that where any sentence contains distinct covenants and there are words of restriction either in the prefatory or concluding part, these words must be extended to every part of the sentence, unless the intention of the parties appears to require a contrary construction.

2. Arbitrary and Technical Rules Disregarded. — In a footnote to *Gainsford v. Griffith*, 1 Saund. 58, Sergeant Williams observes: "It is questionable whether much regard would now be paid to this mode of construction. The chief object of courts of law at present is to discover the true meaning of the parties, and to construe the covenants accordingly. As far as the difference above laid down would tend to find out the intention of the parties, so far would it now be adopted and no farther. The proper rule seems to be that which Lord Mansfield laid down in a case, where the question was, whether certain words in a covenant amounted to a condition precedent or not, 'that the dependence or independence of covenants was to be collected from the sense and meaning of the parties, and that however transposed this might be in the deed, their precedence must depend on the order of time in which the intent of the transaction requires their performance.' *Kingston v. Preston*, cited in *Jones v. Barkley*, 2 Doug. 695." See also *Austin v. Ferguson*, 25 U. C. Q. B. 270.

In *Nind v. Marshall*, 1 Brod. & B. 319, 5 E. C. L. 95, Burrough, J., approving the above, says: "Such a rule has never been acted

upon since I have been in Westminster Hall; on the contrary, it has been always said that the construction must be governed by the intention of the parties to be collected from the context matter by a due attention to the whole of the deed or instrument."

And, in *Foord v. Wilson*, 8 Taunt. 543, 4 E. C. L. 205, Lord Chief Justice Dallas observes: "The order in which the covenants stand, however transposed, is comparatively unimportant."

"The sense and meaning of the parties in any particular part of an instrument," says Lord Ellenborough, C. J., in *Barton v. Fitzgerald*, 15 East 530, "may be collected *ex antecedentibus et consequentibus*; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense if that may be done."

3. The General Rule for the Construction of Covenants is that the intention of the parties, when it can be ascertained from the instrument, must govern, and to come at this, all the parts of it must be considered together. *Com. Dig.*, p. 266; *Foord v. Wilson*, 8 Taunt. 543, 4 E. C. L. 205; *Second Universalist Soc. v. Dugan*, 65 Md. 460; *Wadlington v. Hill*, 10 Smed. & M. (Miss.) 560; *Clark v. Devoe*, 124 N. Y. 120, 21 Am. St. Rep. 652; *Miller v. Heller*, 7 S. & R. (Pa.) 32, 10 Am. Dec. 413; *Easterby v. Heilbron*, 1 McMull. L. (S. Car.) 462; *James v. Adams*, 64 Tex. 193.

It is well settled that in the construction of covenants, technical rules are not so much consulted as the real meaning of the parties where it can be gathered from the instrument itself, and to arrive at the intention, sentences may be transposed and insensible words, or such as have no distinct meaning, may be rejected. The whole instrument must be taken together, and one part may be explained by another. *Killian v. Harshaw*, 7 Ired. L. (29 N. Car.) 497.

The Whole Deed Must Be Before the Court. — A court will not put a construction on the covenants in the deed upon which important rights depend till the whole instrument is before it, so that it may all be construed together. *Howard Mfg. Co. v. Water-lot Co.*, 39 Ga. 574.

Intention May Be Discovered from Attending Circumstances. — "The cardinal point is, what was the intention of the parties as derived from the deed itself. When that is discovered, it ought to be carried into effect, if it can be done consistently with the rules of law. If the words and provisions are doubtful, they are to be taken most strongly against the grantor. If they are susceptible of different constructions, the court may take into consideration the circumstances attending the transaction, the particular situation of the parties and the state of the thing granted at the time of making the grant, for the purpose of ascertaining

tion serves to effectuate the intention of the parties, but it ought to be disregarded whenever it would evidently fail of this purpose.¹

General Covenants to Be Given Effect if Possible. — But while it is true that in the construction of covenants in deeds, intention may be gathered from all parts of the instrument, it must not be forgotten that the words of the covenant itself are the primary source from which this intention is to be drawn. These are the symbols appointed by the parties to denote their purpose, and they are generally the best and surest guide to its discovery.² Hence, when the covenantor has drawn a covenant in general and unqualified form, it must be presumed that he so intended it, and it will be so construed unless such a presumption is utterly irreconcilable and incompatible with a limited covenant in the same deed.³

(bb) *Absolute and Limited Covenants Held to Be Consistent* — **Exception from Covenant Against Incumbrances Only.** — The most common instance of absolute and limited covenants being contained in the same deed is where a mortgage is excepted out of the covenant against incumbrances, but the other covenants are unqualified. The deduction which the courts have made from this circumstance is, that the covenantor admits that there is an incumbrance upon the property, but undertakes and warrants that it shall never disturb the title of the grantee. Under this construction, the covenants are perfectly consistent, and it has accordingly been held that the general covenants are not qualified by the exception.⁴

Other Illustrations of absolute and limited covenants which have been held compatible will be found in the notes below.⁵

the probable intent." Woodworth, J., in *Whallon v. Kauffman*, 19 Johns. (N. Y.) 97.

1. *Dunn v. Dunn*, 3 Colo. 510.

2. *Davis v. Lyman*, 6 Conn. 249.

3. **A Special Covenant Restrains a General One Only Where Two Are Absolutely Irreconcilable**; and where they are independent of each other, though in the same deed, they will be upheld. *Alexander v. Schireber*, 10 Mo. 460; *Walker v. Deaver*, 79 Mo. 675.

4. **Exception of Mortgage from Covenant Against Incumbrances Does Not Affect Other Covenants.** — *King v. Kilbride*, 58 Conn. 109; *Sumner v. Williams*, 8 Mass. 214, 5 Am. Dec. 83; *Estabrook v. Smith*, 6 Gray (Mass.) 572, 66 Am. Dec. 443; *Ruggles v. Barton*, 16 Gray (Mass.) 151; *Welbon v. Welbon*, (Mich. 1896) 67 N. W. Rep. 338; *Merritt v. Byers*, 46 Minn. 74; *Bennett v. Keehn*, 67 Wis. 154.

In *Sandwich Mfg. Co. v. Zellmer*, 48 Minn. 408, a deed the interpretation of which was sought, contained the following covenants: "The parties of the first part do covenant with the said party of the second part, its successors and assigns, as follows: first, that they are lawfully seized of said premises; second, that they have good right to convey the same; third, that the same are free from all incumbrances except a mortgage of seven hundred dollars; fourth, that the said party of the second part and its successors and assigns shall quietly enjoy and possess the same, and that the said parties of the first part will warrant and defend the title to the same against all lawful claims." It was held that the covenant of warranty was not restricted by the exception in the preceding covenant against incumbrances.

But in *Bricker v. Bricker*, 11 Ohio St. 240, where the limitation was not the exception of

a specified incumbrance, but the covenant against incumbrances was limited to the acts of the grantors, a different decision was reached. In this case the conveyance contained a covenant "that the aforesaid premises are and forever shall remain free from all former and other incumbrances and liens whatsoever, done or suffered to be done by them, the said A and B. And the said A, and B his wife, and their heirs, all and singular the premises hereby bargained and sold, with the appurtenances, unto the said C, his heirs and assigns, against the said A and B, their heirs, and all and every other person or persons whatsoever, do and will warrant and forever defend by these presents." In an action to recover upon this covenant for damages sustained in consequence of existing incumbrances upon the lands so conveyed, it was held that the general covenant of warranty was qualified by the preceding limited covenant against incumbrances, and that the action could not be maintained.

5. **A Limited Covenant for Title and a General Covenant for Quiet Enjoyment Are Consistent.** — In *Howell v. Richards*, 11 East 633, Lord Ellenborough, C. J., said: "The covenant for title, and the covenant for right to convey, are indeed what is somewhat improperly called synonymous covenants; they are however connected covenants generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may therefore properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. * * * And it is perfectly consistent with reason and good sense, that a cautious

(cc) *Absolute and Limited Covenants Held to Be Inconsistent.* — The cases in which covenants have been construed to be inconsistent and so to qualify each other are likewise dependent each upon its own peculiar circumstances; but three instances in which this has been held may be stated by way of illustration. Where the words of limitation or qualification, though annexed to one covenant only, apparently are intended to apply to the other covenants for title as well, they will be so construed.¹ So, where there is an exception of a mortgage from the covenant of warranty, it will be held to qualify the covenant

grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment." See also *Young v. Raincock*, 7 C. B. 310, 62 E. C. L. 310.

Limited Covenants of Warranty and Against Incumbrances Are Consistent with an Absolute Covenant of Seizin. — A deed with covenants of seizin, warranty, and against incumbrances, contained also a condition that the covenants of warranty and against incumbrances should be limited in their operation to a specific portion of the land conveyed; it was held that the covenant of seizin extended to the whole land. *Cornell v. Jackson*, 3 Cush. (Mass.) 506.

Other Consistent Covenants. — A deed contained two covenants. In the first of them, the grantors for themselves, their heirs, executors, and administrators, covenanted with the grantee, his heirs and assigns, that the premises were and forever after should be free from all incumbrances whatsoever, done or suffered to be done by the grantors. The second covenant was one of general warranty, in which it was provided that if the land or any part thereof should at any time be taken by a prior legal claim or claims, then and in such case the grantors would make good to the grantee and his heirs such part or parts so lost, by supplying to his use other lands in fee of equal quantity and quality. It was held that the covenants were independent, and that the first was not qualified by the provision in the second respecting recompense in lands, and that the grantee might recover pecuniary damages for the breach of the first covenant. *Duval v. Craig*, 2 Wheat. (U. S.) 45.

In *Rowe v. Heath*, 23 Tex. 614, a deed contained the following covenants of warranty, to wit: "for him the said R. H., his heirs and assigns, to have and to hold forever, as his own right, title, and property, free from the claim or claims of me, my heirs, or creditors, and all other person or persons whomsoever, to claim the same, or any part thereof, lawfully; and further, I do bind myself, my heirs, executors, and administrators, severally and jointly, unto the said R. H., his heirs, executors, and administrators, to warrant and forever defend the right and title to said land, against all legal claim or claims to said land and premises, in virtue of the said C. patent and deed to me." It was held that the proper construction of these covenants, standing together, was, that a general warranty was intended. There was nothing in the latter covenant which showed an intention on the part of the grantor to restrain the generality of the preceding one.

For other illustrations of consistent covenants, see *Smith v. Compton*, 3 B. & Ad. 189, 23 E. C. L. 55; *Austin v. Ferguson*, 25 U. C.

Q. B. 270; *Wallbridge v. Everitt*, 22 U. C. C. P. 28; *Sheets v. Joyner*, 11 Ind. App. 205.

Consistent Covenants in Assignments of Leases. — For instances where limited and absolute covenants in assignments of leases have been held consistent, see *Nind v. Marshall*, 1 Brod. & B. 319, 5 E. C. L. 95; *Crossfield v. Morrison*, 7 C. B. 286, 62 E. C. L. 286; *Rigby v. Great Western R. Co.*, 4 Exch. 220.

1. When Words of Qualification Apparently Apply to All Covenants. — In *Foord v. Wilson*, 8 Taunt. 543, 4 E. C. L. 205, the assignor of a term covenanted that he had not at any time done any act whereby the premises assigned could be encumbered; and that, notwithstanding any such act, the lease was a good and subsisting lease, and that the defendant, at the time of executing the assignment, had in himself good right to assign the premises in manner aforesaid. It was held, that the covenant that the assignor had good right to assign, was qualified and restrained to his own acts only.

In *Browning v. Wright*, 2 B. & P. 13, the defendant W. granted certain premises in fee to the plaintiff B., and covenanted in the deed that he, the said W., for and notwithstanding anything by him done to the contrary, was lawfully and absolutely seized of the said piece or parcel of land thereby granted, of a good, sure, perfect, lawful, absolute, and indefeasible estate in fee simple, without any manner of condition, limitation, use, trust, or any other restraint, matter or thing whatsoever to alter, change, charge, defeat, or determine the same; and that he had good right, full power, and lawful and absolute authority to convey and assure the same to the said plaintiff, his heirs and assigns, in manner aforesaid. It was held that this was to be construed as one covenant, and that the words "notwithstanding anything by him done to the contrary," qualified the last as well as the first clause of the covenant. A similar case is *Stannard v. Forbes*, 6 Ad. & El. 572, 33 E. C. L. 149. See also *David v. Sabin*, (1893) 1 Ch. 523, where the covenants implied under the provisions of the Conveyancing Act, 1881, are said by Lindley, L. J., to be construed in accordance with the principle established by *Browning v. Wright*, 2 B. & P. 13.

In *Allemong v. Gray*, 92 Va. 216, where the case of *Browning v. Wright*, 2 B. & P. 13, was cited with approval, the covenants in the deed were that the grantors "will warrant specially the land hereby conveyed; that they have the right to convey the said land to the said grantees; that the said grantees shall have quiet possession thereof free from all incumbrances; that they will execute such further assurances of said land as may be requisite, and that they have done no act to encumber the same." It was held that the special covenant

against incumbrances also;¹ and for the same reason, where there is the mention and exception of a paramount title in the covenant of warranty, the same exception will be applied to the covenant of seizin.²

c. COVENANTS IN LAW—(1) *In Conveyances in Fee*—(a) *In General*—*aa. AT COMMON LAW.*—The doctrine of implied covenants in conveyances in fee has its origin in the feudal warranty which was annexed to every fee as an incident of military tenure, warranty by the lord and homage by the tenant being reciprocal duties.³

Signification of the Word "Give."—When in later times it became usual to authenticate the conveyance of the fee by the delivery of a feoffment, the verb *do* or *dedi*, which was the apt and indispensable word for the creation of a feudal estate, came in this way to have a secondary and technical signification,⁴ which no other synonymous word possessed.⁵

of warranty limited all the succeeding covenants.

1. Exception of Mortgage from Covenant of Warranty Qualifies Covenant Against Incumbrances.—In *Morrison v. Morrison*, 38 Iowa 73, the deed contained the covenants that the grantor was seized of the premises; that they were free and clear of all incumbrances; that he had good right to sell; and that he would "warrant and defend the said premises against the lawful claims of all persons whomsoever, except a mortgage for eight hundred dollars to C. H. B." It was held that the covenant against incumbrances was qualified by the excepting of a mortgage from the covenant of warranty.

2. Exception of Paramount Title from Covenant of Warranty Qualifies Seizin.—Where the grantor in a deed covenanted that he was well seized, etc., and had good right to convey, etc., and then added that he would warrant and defend the grantee, her heirs and assigns, against all and every person lawfully claiming or to claim the whole or any part of the premises, "except as against the United States," it was held that both covenants must be taken and construed together, and that the latter restricted and qualified the first. *Dunn v. Dunn*, 3 Colo. 510. A similar case is *Cole v. Hawes*, 2 Johns. Cas. (N. Y.) 203.

General Covenant in Deed Qualified by Special Covenant in Mortgage to Secure Purchase-Money.—The defendant conveyed lands to the plaintiffs by warranty deed with a general covenant against incumbrances, and the plaintiff executed to the defendant a deed of trust upon the same lands to secure the payment of two promissory notes, in which deed of trust he expressly covenanted to pay all taxes then existing on such lands. It was held that the general covenant in the deed was qualified by the special covenant in the deed of trust, and that the plaintiff could not recover in a suit upon the covenant against incumbrances for taxes paid by him on the lands conveyed to him by the defendant. *Geer v. Redman*, 92 Mo. 375.

3. Implied Warranty at Common Law.—*Doe v. Dowdall*, 3 Houst. (Del.) 369, 11 Am. Rep. 757; *Allen v. Sayward*, 5 Me. 227, 17 Am. Dec. 221; *Bricker v. Bricker*, 11 Ohio St. 240.

"The Doctrine of Warranty Is of Feudal Origin, and as anciently understood and practiced involved the application of a system of rules of great subtlety and refinement. It grew out of

the relation of lord and vassal in respect to the land which the former gave to the latter, and for which he was to receive in return the services prescribed by the terms of the tenure by which the latter held it. Upon accepting homage, the lord became bound, among other things, to defend the title of the land for which the vassal had done the homage. If the tenant's title was disputed, he might vouch in the lord to defend it, and if he was evicted, the lord was bound to give him other land by way of recompense equal in value to that he had lost." 3 Washb. on Real Property 661; Williams on Real Property (6th Am. ed.) *443, note; 2 Bl. Com. 300.

4. Signification of the Word "Give."—*Douglass v. Lewis*, 131 U. S. 75; *Doe v. Dowdall*, 3 Houst. (Del.) 369, 11 Am. Rep. 757; *Allen v. Sayward*, 5 Me. 227, 17 Am. Dec. 221; *Dow v. Lewis*, 4 Gray (Mass.) 468; *Bricker v. Bricker*, 11 Ohio St. 240; *Kent v. Welch*, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266.

"In a feoffment in fee, warranty was implied by the ancient law when it was a pure gift, *donatio*, or when homage ancestral was imposed. It seems singular at this day, as has been remarked by Sir Martin Wright and by Chancellor Kent, that warranty should be attached by law to a fee which was a pure gift, and not to a fee created for a valuable consideration. The word by which the *donatio*, or gift, was made was *do* or *dedi*, and hence the warranty which the law attached to the *donatio*, or gift, became attached to the word of art by which it was made, so that it came to be held that that word, whenever used in any conveyance of real estate, implied warranty." Mack v. Patchin, 29 How. Pr. (Buffalo Super. Ct.) 20.

5. No Other Word Imports Warranty.—There is no other word besides "give" which implies a warranty in the conveyance of fee simple estates. *Coke Litt.* 385; *Rickets v. Dickens*, 1 Murph. (5 N. Car.) 343, 4 Am. Dec. 555.

In the absence of statute no covenant arises from the use of the words "grant, bargain, and sell." *Hoy v. Taliaferro*, 8 Smed. & M. (Miss.) 727; *Duncan v. Lane*, 8 Smed. & M. (Miss.) 744; *Aiken v. Franklin*, 42 Minn. 91; *Frost v. Raymond*, 2 Cai. (N. Y.) 188, 2 Am. Dec. 228.

"We are unable to assign a very solid reason for this distinction between the force and effect of the words 'give' and 'grant.' It arose from artificial reasons derived from

Statutes De Bigamis and Quia Emptores. — This operation of the verb *do* or *dedi* was afterwards changed in a measure by the passage of the statutes *de bigamis* and *quia emptores*, which confined the implied warranty to the life of the feoffor except in cases of gifts in tail and leases for life.¹

Deeds under Statute of Uses. — The warranty, being of feudal origin, does not arise from the use of the verb in instruments which are operative by virtue of the statute of uses.²

bb. UNDER STATUTES — (*aa*) *Statute of Anne.* — In 1707 the statute of 6 Anne, c. 35, was enacted, which provided among other things that in all deeds of bargain and sale enrolled in pursuance of this act, whereby an estate of inheritance in fee simple was limited to the bargainee and his heirs, the words "grant, bargain, and sell" should amount to, and be construed to be, an express covenant that the bargainor, notwithstanding any act done by him, was, at the time of the execution of the deed, seized of an indefeasible estate in fee simple, free from all incumbrances and for quiet enjoyment thereof against the bargainor, his heirs and assigns and all claiming under him, and also for further assurance, unless the same shall be restrained by express particular words contained in the deed, and that the bargainee, his heirs, executors, administrators, and assigns respectively, should and might, in any action to be brought, assign a breach or breaches thereof as they might do in case such covenants were expressly inserted in the deed.³ This statute was of a local character, and would be comparatively unimportant were it not for the fact that it has served as a prototype for, and influenced the construction of, similar statutes in the United States.

(*bb*) *In the United States.* — Several years after the passage of the English act, a statute, evidently designed to effect the same purpose, was passed by the colony of *Pennsylvania*, the principal difference between the English and the colonial statute being that the latter omitted from the covenant of seizin the words "notwithstanding any act done by him;" and upon the ground of this difference, much controversy has arisen as to the proper construction of the latter statute. But it has been held that the statute did not intend

the feudal law. The distinction is now become merely technical, but it is sufficient that it clearly exists, and we are certainly not at liberty to confound the words, or change their established operation." Kent, C. J., in *Frost v. Raymond*, 2 Cai. (N. Y.) 193, 2 Am. Dec. 228.

1. Statutes de Bigamis and Quia Emptores. — "The statute *de bigamis* (4 Edw. I., c. 6) is very material to ascertain the ancient law on the subject, since it was only declaratory of the common law. (2 Inst. 274.) It says 'that in deeds wherein is contained *dedi* and *concessi* without homage, or without a clause of warranty, and to be holden of the givers and their heirs, by certain services, it is agreed that the givers and their heirs shall be bound to warranty. And where is contained *dedi* and *concessi*, etc., to be holden of the chief lord of the fee, and not of the feoffors or their heirs, reserving no services without homage, or without the aforesaid clause, their heirs shall not be bound to warranty, notwithstanding the feoffor during his own life by force of his own gift shall be bound to warrant.' By this statute, then, *dedi* is declared to amount to a warranty for the life of a feoffor (4 Co. 81a); and this is the word that Coke considers (2 Inst. 275b) as the real operative word to create a warranty in law, and it hath this effect whether the conveyance in which it is found

operate as a feoffment, release, or confirmation. The statute of *quia emptores* (18 Edw. I.), which followed soon after, prohibited all subinfeudations, and put an end to homage, which was, in those days, parcel of the tenure reserved to the feoffor, by declaring that it should be lawful for every freeman to sell his own lands, and that the feeoffee should hold the lands of the chief lord of the fee by the same services that the feoffor was bound to before. This statute accordingly changed, in a great degree, the operation of the word *dedi*, by confining the implied covenant it contained to the life of the feoffor, according to the directions of the statute *de bigamis*, except in cases of gifts in tail and leases for life. (2 Inst. 275.) Since that time it has been well understood and declared through all the books that the word *dedi*, in a deed in fee, amounted to a warranty in law to the feeoffee and his heirs only during the life of the feoffor. (Co. Litt. 334a; Touch. 180, 182; F. N. B. 134, H.; 2 Bl. Com. 300.)" *Per* Kent, C. J., in *Frost v. Raymond*, 2 Cai. (N. Y.) 193, 2 Am. Dec. 228. See also *Ricketts v. Dickens*, 1 Murph. (5 N. Car.) 343, 4 Am. Dec. 555.

2. *Allen v. Sayward*, 5 Me. 227, 17 Am. Dec. 221; *Powell v. Lyles*, 1 Murph. (5 N. Car.) 348.

3. For the full text of the statute, see *Douglas v. Lewis*, 131 U. S. 75.

to bind the grantor to a general warranty, but merely to a covenant that he has not done any act nor created any incumbrance whereby the estate granted by him may be defeated.¹ Under any other construction there would be great danger of imposition upon the ignorant and the unwary by entrapping them into a liability which they never intended to incur, and the decision has been received with approbation as divesting the statutes of this dangerous tendency,² and has been followed in the states in which the statute has been re-enacted.³ The framers of the later statutes upon this

1. Construction of Pennsylvania Statute. — In *Gratz v. Ewalt*, 2 Binn. (Pa.) 99, the construction of this statute was carefully considered, and Tilghman, C. J., in delivering the opinion, said: "The meaning is not clearly expressed; but I take it to be a covenant * * * that the estate was indefeasible as to any act of the grantor. For if it was intended that the covenant should be that the grantor was seized of an estate absolutely indefeasible, it was improper to add the subsequent words, 'freed from incumbrances done or suffered by him.' * * * The words, 'seized of an indefeasible estate in fee simple,' are to be considered, therefore, not as standing alone, but in connection with the words next following, 'freed from incumbrances done or suffered from the grantor.' I am the more convinced that this was the intention of the legislature, by comparing the expressions in this act with the 30th section of the statute 6 Anne, c. 35, which contains a provision on the same subject, and was evidently in the eye of the persons who framed our law. The British statute makes use of more words, but the intention is more clearly expressed. It declares that the words 'grant, bargain, and sell' shall amount to a covenant that the bargainor, notwithstanding any act done by him, was at the time of the execution of the deed seized of an indefeasible estate in fee simple, etc. Our law seems intended to express the substance of the British statute in fewer words, and has fallen into a degree of obscurity which is often the consequence of attempting brevity. I can conceive no good reason why our legislature should have wished to carry this implied warranty farther than the British statute did; because it has bad effects to annex to words an arbitrary meaning far more extensive than their usual import, and which must be unknown to all but professional men. It might be very well to guard against secret acts of the grantor with which none but himself and those interested in keeping the secret could be acquainted. As for any further warranty, if it was intended by the parties, it was best to leave them to the usual manner of expressing it in plain terms." Followed in *Funk v. Voneida*, 11 S. & R. (Pa.) 109, 14 Am. Dec. 617; *Seitzinger v. Weaver*, 1 Rawle (Pa.) 377; *Whitehill v. Gotwalt*, 3 P. & W. (Pa.) 313; *Browne v. Lewis*, 13 Phila. (Pa.) 7; *Knepper v. Kurtz*, 58 Pa. St. 480; *Shaffer v. Greer*, 87 Pa. St. 370.

2. 4 Kent's Com. 473. See also *Roebuck v. Dupuy*, 2 Ala. 535; *Finley v. Steele*, 23 Ill. 56.

3. Decisions under Similar Statutes Approving the Pennsylvania Construction — *Alabama*. — *Roebuck v. Dupuy*, 2 Ala. 535; *Stewart v. Anderson*, 10 Ala. 504; *Claunch v. Allen*, 12 Ala. 164; *Heflin v. Phillips*, 96 Ala. 561.

Arkansas. — *Winston v. Vaughan*, 22 Ark. 72, 76 Am. Dec. 418.

Illinois. — *Prettyman v. Wilkey*, 19 Ill. 235; *Hawk v. McCullough*, 21 Ill. 220; *Finley v. Steele*, 23 Ill. 56; *Ward v. Luneen*, 25 Ill. App. 160.

The covenant implied from the use of the words "grant, bargain, sell, and convey," does not extend to an incumbrance created by the former owner of the land, such as a grant or sale of mineral rights or a right of way. *Parker v. Parker*, 93 Ala. 80.

After-acquired Title. — Under a deed containing the words "grant, bargain, and sell," an after-acquired title of the grantor inures to the benefit of the grantee. *D'Wolff v. Haydn*, 24 Ill. 526; *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 260; *Pratt v. Pratt*, 96 Ill. 184.

Quitclaim Deed. — Where the words "bargain and sell" are used in connection with the word "quitclaim" in a deed which purports to convey only the grantor's title and interest, the implied warranty is negative and the deed is a mere quitclaim. *Derrick v. Brown*, 66 Ala. 163.

Mortgages. — The words "grant, bargain, and sell," when used in a mortgage, imply the same covenant as when used in an absolute conveyance. *Stewart v. Anderson*, 10 Ala. 504; *Jones v. Reese*, 65 Ala. 134; *Pratt v. Pratt*, 96 Ill. 184.

Articles of Agreement for Conveyance of Land. — The covenants raised by the words "grant, bargain, and sell," are not applicable alone to deeds executed, but extend to articles of agreement for the conveyance of land. *Seitzinger v. Weaver*, 1 Rawle (Pa.) 377.

An agreement for the sale of land in which the vendor covenants that upon the payment of the purchase money he will "well and sufficiently grant, convey, and assure the said tract of land" to the vendee, his heirs and assigns, there is no general warranty of title, but only a special warranty against the grantor and his heirs. *Cadwalader v. Tryon*, 37 Pa. St. 318.

Bond for Title. — The words, "grant, bargain, and sell," employed in the assignment of a bond for title, do not import, nor does the act of assignment imply, a covenant that the vendor will comply with his contract to convey, or that the assignor will repay to the assignee all sums expended in obtaining title; the assignor undertakes merely that he is owner of the bond for title, and to invest the assignee therewith. *Hazer v. Vost*, 54 Ark. 485.

Mississippi. — The Mississippi statute is similar to that of Pennsylvania, except that it provides that the words "grant, bargain, and sell" shall operate as an express covenant to the grantee, his heirs and assigns, that the gran-

subject, however, have been careful to draw them in a form which admits of no doubt as to their intent.¹

(b) **In Exchanges.**—At Common Law a warranty was implied in an exchange of land from the use of the granting word *escambium*, or "exchange," which was indispensable to the operation of this sort of deed; that is, there was a condition annexed to the transaction by law, that if one of the parties was evicted from the land conveyed to him, he might re-enter upon the land which he had given in exchange.²

In the United States.—This is presumably still the law in those parts of the United States where the exchange as a mode of conveyance is still in use and

tor was seized of an estate free from incumbrances, etc., instead of an estate in fee simple. It is accordingly held that the fact that the grantor had only a life estate in the premises is not a breach of the covenant. *Cunningham v. Dillard*, 71 Miss. 61, *distinguishing* *Bush v. Cooper*, 26 Miss. 599, 59 Am. Dec. 270, which was decided under a former statute in which the words "in fee simple" were employed.

Missouri and New Mexico.—Section 2402 of the Rev. Stat. of Missouri, provides that the words "grant, bargain, and sell," in all conveyances in which any estate of inheritance in fee simple is limited, shall, unless restrained by expressed terms contained in such conveyances, be construed to be the following expressed covenants on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns: First, that the grantor was, at the time of the execution of such conveyance, seized of an indefeasible estate, in fee simple, in the real estate thereby granted; second, that such real estate was, at the time of the execution of such conveyance, free from incumbrances done or suffered by the grantor or any person under whom he claims; third, for further assurances of such real estate to be made by the grantor and his heirs to the grantee and his heirs and assigns; and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance. The construction placed upon this statute is that the covenants created thereby are distinct and independent, and that the first is not qualified by the succeeding ones. *Alexander v. Schreiber*, 10 Mo. 460; *Dickson v. Desire*, 23 Mo. 151; *Magwire v. Riffin*, 44 Mo. 512; *Jones v. Whitsett*, 79 Mo. 191; *Allen v. Kennedy*, 91 Mo. 324; *Tracy v. Greffet*, 54 Mo. App. 562; *Schnelle*, etc., *Lumber Co. v. Barlow*, 34 Fed. Rep. 853.

In *Douglass v. Lewis*, 131 U. S. 75, the court, by Fuller, C. J., construing the *New Mexico* statute, which is taken from that of Missouri, but dissenting from the construction of that statute by the Supreme Court of Missouri, says: "It appears to us, however, that where the question arises not upon the covenants in a deed, but upon the construction of a statute which turns certain words of grant into express covenants, the same rule of construction does not apply. In respect to deeds, the words are to be taken most strongly against the party using them, while in respect to statutes, if in derogation of the common law, as that under consideration is, they should be construed strictly. And, so construed, the statute of New Mexico seems clearly within the

conclusion reached in *Gratz v. Ewalt*, 2 Binn. (Pa.) 95. The covenant that the grantor is 'seized of an indefeasible estate in fee simple' is a covenant for a perfect title, and to couple with it a covenant that the land is free from incumbrances, 'made or suffered to be made by the grantor, or by any person claiming the same under him,' is incongruous and repugnant, unless the prior covenant is held to mean 'notwithstanding any act done by the grantor.' "

All the Statutory Words Must Be Employed to Create a Covenant.—Where the statute provides that the words "grant, bargain, and sell," when used in a deed, shall import a certain covenant, the use of only one or two of these words will not have that effect. *Gee v. Pharr*, 5 Ala. 586, 39 Am. Dec. 339; *Claunch v. Allen*, 12 Ala. 159; *Frink v. Darst*, 14 Ill. 304, 58 Am. Dec. 575; *Wheeler v. Wayne County*, 132 Ill. 599; *Whitehill v. Gotwalt*, 3 P. & W. (Pa.) 323.

1. Statutes Expressly Creating Covenant of Special Warranty.—In the later statutes, it is usually set forth that the words prescribed in the statute shall import the following covenants, and none other, on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns, unless restrained by express terms contained in the conveyance: (1) That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee; and (2) that such estate is at the time of the execution of such conveyance free from incumbrances, done, made, or suffered by the grantor, or any person claiming under him. Civ. Code of Cal. (Deering's Annot. Codes and Stat.), § 1113; Rev. Code of Dakota, (1885), § 628; Comp. Stat. of Montana, § 285; Gen. Stat. of Nevada, § 2618; Rev. Stat. of Texas, § 633. See also Laws of Delaware (1894), c. 83, § 2.

Construction of Covenants in Law.—In construing a covenant in a deed, the words are to be taken most strongly against the party using them; but in construing a covenant created by statute out of language of grant in a deed, and in derogation of the common law, the words should be construed strictly. *Douglass v. Lewis*, 131 U. S. 75, 3 N. Mex. 345.

2. Exchange Creating Covenant.—*Bustard's Case*, 4 Coke 121; *Grimes v. Redmon*, 14 B. Mon. (Ky.) 189. See also *Dean v. Shelly*, 57 Pa. St. 427, 98 Am. Dec. 235; *Bixler v. Saylor*, 68 Pa. St. 148; *Gamble v. McClure*, 69 Pa. St. 284; *Walker v. Renfro*, 26 Tex. 142.

implied covenants have not been abolished by statute.¹

(c) **In Partitions.**—At common law a warranty was implied in a partition between coparceners, so that, if one of them was evicted from the land allotted to her, she might demand compensation for her loss from the others. But it was otherwise in partitions between joint tenants and tenants in common. The reason of this distinction was that coparceners were compellable to make partition, and the law, having established this right, thought it expedient as well as just that they should not be placed in a worse condition by the partition than if they had continued to enjoy their respective interests in the land without a division. Partition between joint tenants and tenants in common, however, being the result of their own act, the law left them to secure themselves as best they might.² As the law upon this subject has in modern times undergone many changes, this distinction is now of no practical value, but it has, nevertheless, had its influence upon the formation of the modern law, for a full treatment of which reference is made to another part of this work where the subject will be discussed under an appropriate title.³

(d) **In Deeds Made Pursuant to Judicial Sales.**—When a deed is made by an officer or agent of the law, which contains no express covenants and which simply purports to be, and is, but the mere execution of a power conferred by judicial decree, by testament, or by statute, and in which the grantor does not assume to have or convey any title of his own, no implied covenant arises upon which such officer or agent can be held liable.⁴

(2) **In Leases.**—Anciently, from the use of the word “demise” in a lease, two covenants were implied—the one that the lessor had power to create the term; the other that the lessee should have quiet enjoyment.⁵ In later times, the same covenants are implied from the use of the words “let”⁶ or “lease,”⁷ or any equivalent word of conveyance; and from this gradual relaxation of the rule it has now come to be well settled that these covenants will be implied from the very relation of landlord and tenant.⁸

1. See the title EXCHANGE OF PROPERTY.

2. *Weiser v. Weiser*, 5 Watts (Pa.) 279, 30 Am. Dec. 313; *Patterson v. Lanning*, 10 Watts (Pa.) 135, 36 Am. Dec. 154.

3. See the title PARTITION.

4. See the title JUDICIAL SALES.

5. “Demise” Imports Covenants.—Co. Litt. 384; Bacon's Abr., tit. Covenant; Line v. Stephenson, 5 Bing. N. Cas. 183, 35 E. C. L. 77; Holder v. Taylor, Hob. 12; Spencer's Case, 5 Coke 16; Iggulden v. May, 9 Ves. Jr. 330; Adams v. Gibney, 6 Bing. 656, 19 E. C. L. 194; Sumner v. Williams, 8 Mass. 201, 5 Am. Dec. 83; Frost v. Raymond, 2 Cai. (N. Y.) 193, 2 Am. Dec. 228; Barney v. Keith, 4 Wend. (N. Y.) 502; Grannis v. Clark, 8 Cow. (N. Y.) 36; Bruce v. Fulton Nat. Bank, 79 N. Y. 162, 35 Am. Rep. 505; Hemphill v. Eckfeldt, 5 Whart. (Pa.) 274; Lanigan v. Kille, 97 Pa. St. 120, 39 Am. Rep. 797.

But where a conveyance is of a freehold estate, words of lease do not amount to a covenant for quiet enjoyment. Black v. Gilmore, 9 Leigh (Va.) 446, 33 Am. Dec. 253.

6. “Let” Imports Covenants.—Hart v. Windsor, 12 M. & W. 68; Mostyn v. West Mostyn Coal, etc., Co., 1 C. P. Div. 152; Bulmer v. Reg., 3 Can. Exch. Rep. 184; Foster v. Peyser, 9 Cush. (Mass.) 242, 57 Am. Dec. 43.

7. “Lease” Imports Covenants.—Maeder v. Carondelet, 26 Mo. 112; Hamilton v. Wright, 28 Mo. 199; Maule v. Ashmead, 20 Pa. St. 482; Ross v. Dysart, 33 Pa. St. 452. *Contra*, Lovering v. Lovering, 13 N. H. 513.

8 C. of L.—6

8. Relation of Landlord and Tenant Implies Covenant for Quiet Enjoyment—*England*.—Bandy v. Cartwright, 8 Exch. 913; Hall v. London Brewery Co., 2 B. & S. 737, 110 E. C. L. 737.

Illinois.—Wade v. Halligan, 16 Ill. 507.

Indiana.—Avery v. Dougherty, 102 Ind. 443, 52 Am. Rep. 680.

Massachusetts.—Ellis v. Welch, 6 Mass. 246, 4 Am. Dec. 122; Dexter v. Manley, 4 Cush. (Mass.) 14; Dunclee v. Webber, 151 Mass. 408.

New York.—New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Mack v. Patchin, 42 N. Y. 167, 1 Am. Rep. 506; Boreel v. Lawton, 90 N. Y. 296, 43 Am. Rep. 170; Conley v. Schiller, (Ulster County Ct.) 24 N. Y. Supp. 473.

Pennsylvania.—Ross v. Dysart, 33 Pa. St. 452; Schuylkill, etc., Imp., etc., Co. v. Schmoele, 57 Pa. St. 271; Barns v. Wilson, 116 Pa. St. 303; Brennan v. Jacobs, (Pa. 1888) 15 Atl. Rep. 685.

And see generally the titles LANDLORD AND TENANT; LEASE.

The defendant leased to the plaintiff certain real estate comprising a factory, water power, tools, machinery, and apparatus for carrying on a particular branch of manufacture. The lease contained a reservation in favor of the lessor of one room in the factory and the privilege of running a turning lathe and saw therein during the term. The lessee claimed that the lessor was making a misuse of the power re-

No Covenant as to Physical Conditions.—There is, however, no implied covenant or warranty, upon the demise of real estate, that it is fit for occupation or suitable for the purpose for which it is let.¹

(3) *Abrogation of Implied Covenants by Statute.*—In *England*² and in some of the *United States* it is now provided by statute that no covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not.³

Leases Not Within the Statute.—But it has been held that these statutes do not extend to leases for years. A lease is not a conveyance of real estate within the meaning of the statute, but creates a mere chattel interest in land.⁴

d. COVENANTS IN DEED AND IN LAW CONSTRUED TOGETHER.—When

served to him in the lease by using in the running of such lathe and saw an undue portion of the water power of the mill. In an action of covenant broken, it was held that there was an implied covenant arising from the lease of free and peaceful enjoyment of the premises during the term, and that if the lessor was misusing the power reserved to him it would amount to a breach of the covenant. *Dexter v. Manley*, 4 Cush. (Mass.) 14.

Effect of This Implied Covenant.—Though a lease of land implies a covenant of quiet enjoyment, yet that covenant is not designed as an indemnity against any and all disturbance of the lessee's enjoyment, but extends only to acts of the lessor himself, and to injuries inflicted under title paramount. *Barns v. Wilson*, 116 Pa. St. 303. And see *infra*, this title, *Effect and Breach of Covenants—Covenant for Quiet Enjoyment*.

1. No Covenant of Physical Conditions—England.—*Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, 12 M. & W. 68.

United States.—*Doyle v. Union Pac. R. Co.*, 147 U. S. 413.

Illinois.—*McCoull v. Herzberg*, 33 Ill. App. 542.

Massachusetts.—*Foster v. Peyser*, 9 Cush. (Mass.) 242, 57 Am. Dec. 43; *Stevens v. Pierce*, 151 Mass. 207.

Montana.—*Blake v. Dick*, 15 Mont. 236, 48 Am. St. Rep. 671.

New Jersey.—*Naumberg v. Young*, 44 N. J. L. 332, 43 Am. Rep. 380.

New York.—*Cleves v. Willoughby*, 7 Hill (N. Y.) 83; *Westlake v. De Graw*, 25 Wend. (N. Y.) 669; *Sully v. Schmitt*, (Buffalo Super. Ct.) 31 N. Y. St. Rep. 443, *affirming* 11 N. Y. Supp. 694; *Witty v. Matthews*, 52 N. Y. 512; *Edwards v. New York, etc., R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659; *Franklin v. Brown*, 118 N. Y. 110, 16 Am. St. Rep. 744; *Edwards v. McLean*, 122 N. Y. 302; *Rotter v. Goerlitz*, (C. Pl.) 34 N. Y. St. Rep. 1001.

Pennsylvania.—*Harlan v. Lehigh Coal, etc., Co.*, 35 Pa. St. 287.

For a full discussion of this subject, see the title LANDLORD AND TENANT.

2. Abrogation of Implied Covenants by Statute—England.—Under statute 8 & 9 Vict., c. 106, § 4, it is provided that the words "give" and "grant," when used in a deed executed after the first of October, 1845, do not imply any covenant, except so far as they may do so by virtue of some statute. The object of this enactment appears to have been to prevent any general warranty of title from arising by the use of these words; and it probably would

not be held to interfere with the rule of law that any words of assurance operate as a covenant for quiet enjoyment of the interest expressed to be assured as against the future acts of the party making the assurance. *Dart on Vendor and Purchaser* (5th ed.), p. 562.

The exceptions mentioned in the statute seem to be the words "grant, bargain, and sell," in bargains and sales of hereditaments in Yorkshire registered under 6 Anne, c. 35, §§ 30 and 34, and 8 Geo. II., c. 6, § 35; the word "grant" in a conveyance by the promoters of an undertaking under the Lands Clauses Act, 1845 (8 and 9 Vict., c. 18), § 132, which is equivalent to covenants for title unless limited by express covenant; and a conveyance by a joint stock company under 19 and 20 Vict., c. 47, § 46, which is to imply the ordinary covenant for title, unless the implication be expressly negated. *Elphinstone on Deeds*, p. 423.

3. In the United States.—*Howell's Annot. Stat. Mich.* (1882), § 5655; *Stat. Minn.* (1894), § 4165; 2 N. Y. Rev. Stat. (7th ed.), p. 2195; *New York v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *Underhill v. Saratoga, etc., R. Co.*, 20 Barb. (N. Y.) 455; *Sandford v. Travers*, 40 N. Y. 140; 2 Hill's Annot. Laws Oregon (1892), § 3007; *Taggart v. Risley*, 4 Oregon 235; *Annot. Stat. Wis.* (San. & Ber.), vol. 1, § 2204; *Rev. Stat. Wyoming* (1887), tit. 1, c. 1, § 5.

4. Leases Not Within the Statute.—*Lynch v. Onondaga Salt Co.*, 64 Barb. (N. Y.) 558; *Conley v. Schiller*, (Ulster County Ct.) 24 N. Y. Supp. 473; *Edwards v. Perkins*, 7 Oregon 149.

The provision of the *New York Revised Statutes* that no covenant shall be implied in any conveyance of real estate does not extend to implied covenants of warranty as to the quiet enjoyment of the demised premises, in a lease of a term of years, creating a mere chattel interest in land. Such a lease is not, in the ordinary acceptation of the term, a conveyance of the land. *Tone v. Brace*, 11 Paige (N. Y.) 566, *overruling* *Kinney v. Watts*, 14 Wend. (N. Y.) 38.

A Lease by a City of the Right to Collect Wharfage upon all vessels that shall lie against or touch at the wharves, slips, and piers of a certain district, is not a conveyance of real estate within the meaning of the statute (1 Rev. Stat. 738, § 140), forbidding the implication of covenants. *New York v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538.

The Tendency of Modern Decisions Is Not to Imply Covenants which might and ought to have been expressed if intended. *Sheets v. Selden*, 7 Wall. (U. S.) 423.

special or limited covenants for title are expressed in a conveyance from the granting words of which more general covenants are implied at law, it is often a vexed question to determine what effect the covenants which are expressed have upon those which are implied. In *England* and in most of the *United States* it is held that express covenants abrogate the operation of implied covenants, in accordance with the rule of interpretation that the expression of one thing in a contract is the exclusion of another.¹

View that Both Operative when Not Inconsistent. — In other jurisdictions, however, it is held that both the express and implied covenants may be operative if they be not inconsistent.²

2. Joint and Several Covenants — *a.* IN RESPECT TO THE COVENANTORS. — A covenant by two or more covenantors is joint as to them if not declared to be several, or joint and several. Thus, where a lessee and his sureties cove-

1. Implied Covenants Restrained by Express Covenants. — *Elphinstone on Deeds* 425.

England. — *Clarke v. Samson*, 1 Ves. 100; *Browning v. Wright*, 2 B. & P. 13; *Nokes's Case*, 4 Coke 80; *Line v. Stephenson*, 4 Bing. N. Cas. 678, 33 E. C. L. 492, 5 Bing. N. Cas. 183, 35 E. C. L. 77; *Merrill v. Frame*, 4 Taunt. 329; *Stannard v. Forbes*, 6 Ad. & El. 572, 33 E. C. L. 149.

United States. — *Douglass v. Lewis*, 131 U. S. 75.

Illinois. — *Finley v. Steele*, 23 Ill. 56.

Kentucky. — *Blair v. Hardin*, 1 A. K. Marsh. (Ky.) 231.

Maryland. — *Glenn v. Baltimore*, 67 Md. 390; *Morris v. Harris*, 9 Gill (Md.) 19.

Mississippi. — *Weems v. McCaughan*, 7 Smed. & M. (Miss.) 422, 45 Am. Dec. 314.

New Hampshire. — *Crouch v. Fowle*, 9 N. H. 219, 32 Am. Dec. 350.

New Mexico. — *Douglass v. Lewis*, 3 N. Mex. 345.

New York. — *Kent v. Welch*, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266; *Vanderkarr v. Vanderkarr*, 11 Johns. (N. Y.) 122; *Lynch v. Onondaga Salt Co.*, 64 Barb. (N. Y.) 558.

Pennsylvania. — *Weiser v. Weiser*, 5 Watts (Pa.) 279, 30 Am. Dec. 313.

An express covenant qualifies and restrains the generality of an implied covenant. *Expressum facit cessare tacitum.* *Weiser v. Weiser*, 5 Watts (Pa.) 279, 30 Am. Dec. 313.

All rules for the construction of deeds are founded upon the idea of arriving at the intention of the parties; and when they have made an express agreement touching the same subject, it is to be presumed that they have expressed all that was agreed upon. *Lynch v. Onondaga Salt Co.*, 64 Barb. (N. Y.) 558.

The covenants raised by land, from the use of particular words in the deed, are only intended to be operative when the parties themselves have omitted to insert covenants; where the grantor does insert covenants, they constitute the extent of his liability. A deed, therefore, which contains the words "grant, bargain, and sell" (which words the statute gives a certain construction to), but concludes with an express covenant of warranty, imposes no further liability on the grantor than is contained in his express covenant. *Weems v. McCaughan*, 7 Smed. & M. (Miss.) 422, 45 Am. Dec. 314.

In *Crouch v. Fowle*, 9 N. H. 219, 32 Am.

Dec. 350, where the counsel for the plaintiff attempted to draw a distinction between the different classes of covenants, arguing that express covenants relating to possession could not be held to restrain implied covenants relating to title, *Parker, C. J.*, delivering the opinion of the court, said: "This distinction, however, seems not to be sustained by authority, and is inconsistent with the principle upon which the decisions have been based. Express covenants relating to possession may furnish quite as strong reasons against implying a covenant of title from the general language of the deed, as express covenants relating to the title itself."

2. Covenants in Deed and in Law Both Operative when Not Inconsistent. — *Roeback v. Dupuy*, 2 Ala. 535; *Gates v. Caldwell*, 7 Mass. 68; *Alexander v. Schreiber*, 10 Mo. 460.

A covenant of special warranty against the claims of all persons by, through, or under the covenantor is not inconsistent with the covenants implied under the statute from the use of the words "grant, bargain, and sell." Accordingly, the statutory effect of these terms attaches to a deed which contains them, and also such special warranty. *Tracy v. Greffet*, 54 Mo. App. 562.

A special covenant "now and forever warranting and defending the said premises against all taxes against us, and against our own acts in the premises," limits the general covenants against incumbrances and for quiet enjoyment, but not the general covenant of seizin. *Jackson v. Green*, 112 Ind. 341.

A deed of partition between owners in common contained the following stipulation: "We do hereby agree and bind ourselves to each other that the above is a fair and just division and allotment of all the interest that we have owned in common in said Arocha grant of land, and that we will mutually guarantee title thereto against every person whomsoever lawfully claiming or to claim the same, by, through, or under us, or either of us." It afterwards appeared that some of the land partitioned was not within the Arocha grant, and that the parties to the deed had never had any title to it. It was held that the limited warranty expressed in the deed referred only to the land within the Arocha grant, but that there was a general warranty implied by law as to the rest, and that one of the parties to the deed being ousted by a superior title from land included in the partition, and lying outside

nant to pay rent, and the agreement is not stated to be joint and several, the covenant is joint, and an action cannot be maintained against the sureties alone for rent which has accrued under the lease.¹

Several Covenants by Joint Grantors. — But where a deed is made by two or more grantors, of land which they had held in common, but each receives a specified portion of the purchase money and each covenants for his separate undivided share, it has been held that the covenants are several and not joint, and recovery may be had of each grantor separately.²

of the line of the Arocha grant, could demand contribution from the other parties to the deed. *James v. Adams*, 64 Tex. 193.

1. Joint Covenant to Pay Rent. — *Elkin v. Moore*, 6 B. Mon. (Ky.) 462; *Philadelphia v. Reeves*, 48 Pa. St. 472.

Several Covenants to Pay Rent. — "But where two persons covenant jointly and severally with another, the covenantee may bring an action against one of the covenantors only, though their interest in the subject-matter of the covenant be joint; as where A lets lands to B and C, and they covenant jointly and severally with the lessor to pay the rent, or the like, he may bring an action against either of the covenantors; because they are sureties for each other for the due performance of the covenants, and it is as competent for each of them to covenant for the other as it is for a stranger to covenant for both, which is a usual thing." Note by Sergeant Williams in *Eccleston v. Clipsham*, 1 Saund. 154.

In an indenture of lease of a colliery, the two lessees covenanted jointly and severally with the lessor in manner following, viz., etc.; then followed a string of covenants in respect to the working of the colliery, wherein the lessees covenanted jointly and severally; and then came a covenant that the moneys appearing to be due should be accounted for and paid by the lessees, their executors, etc. (not saying "and each of them"). It was held that this as well as the former covenants were several as well as joint, by reason of the introductory words. *Northumberland v. Errington*, 5 T. R. 522.

2. Several Covenants by Joint Grantors. — In *Evans v. Sanders*, 10 B. Mon. (Ky.) 291, the plaintiff sued out a warrant "in covenant on warranty" for fifteen dollars against the defendant W., and another of the same character against the defendant S. The record showed that the warrant in each case was founded upon a deed made by four heirs and devisees of J. S., deceased, of whom the defendants were two, conveying to the plaintiff a tract of land "for the consideration of the sum of sixty dollars (that is to say, fifteen dollars per share) to them in hand paid," etc. The warranty in the deed is that each of said heirs, "for his separate undivided share aforesaid in said tract of land hereby conveyed, warrants and will each separately for his own share forever defend said interest," etc. The lower court was of the opinion that as the indenture was in the names of the four devisees, and as the entire consideration was sixty dollars, the action should have been for the whole and not to recover each one's portion separately. Upon appeal this ruling was reversed. *Graham, J.*, delivering the opinion of the court, said: "The rule is this: In the

case of parties demising or granting the separate interest of each in an estate, the covenant shall be considered coextensive with the interest granted; and, therefore, these shall be several where a several interest is granted, and joint if a joint interest be granted. (1 Chitty 47.) In this case, although all have united in the deed, it is in fact the separate covenant of each. The consideration is fifteen dollars to each, and the covenant expressly stipulates that each heir warrants separately for his own share. The plaintiff very properly sued out his warrant against each separately, and if he can prove a breach of the covenant of warranty, will be entitled to recover of each defendant."

Joint Covenant by Partitioners. — The defendants W. and M. had been the owners of, and held as tenants in common, a lot of land through which a canal or race had been dug. They subsequently executed a partition deed which, among other things, contained the following clause: "They, the said W. and M., agree that they, their heirs and assigns, at their equal and joint expense, shall cause the canal or race through their respective lots * * * to be widened, etc., which race and the headgates shall at all times forever be kept in order at the equal and joint expense of W. and M." W. employed the plaintiff to do work in widening the canal, telling him that M. was equally interested with him in having the work done. In an action brought by the plaintiff against W. and M. to recover for the value of the work so done, it was held that M. was not liable. The covenant between W. and M. was not a partnership agreement, and gave neither party authority to bind the other, and the circumstance of M. having been frequently at the place where the work was being done, and saying nothing to the plaintiff to induce him to believe that he was to look to W. alone for payment, was no evidence of M.'s liability. *McCreedy v. Freedly*, 3 Rawle (Pa.) 251.

Covenant Against Acts of Joint Grantor Not Extended to Acts of One. — A tract of land was granted by the Mexican government to P. and V., and afterwards patented to them by the United States. P. conveyed to the plaintiff a portion of said land lying southeasterly of the Alamo creek, excepting from the conveyance such land as might theretofore have been conveyed by V. and P. to any person or persons. P. covenanted in the deed that if any portion of said land had before been conveyed by P. and V. to any person, he would convey such portion to the plaintiff if he could procure a reconveyance to him; but if he could not, that he would, upon reasonable notice, convey to the plaintiff other lands, in quantity and quality of equal value. It was held that

b. IN RESPECT TO THE COVENANTEES. — A covenant which is made with two or more covenantees is to be construed as joint, unless it seems two things concur to render it several. First, the covenantees, as grantees or lessees, must each take a separate estate in the subject of the conveyance,¹ or, as lessors, have a separate interest in the fruits of the covenant;² and secondly, the covenant must contain words of severalty, as "with each of them," or some similar expression.³ The necessity of words of severalty has, however, been denied by some authorities, by whom it is held that even though the form of

no action lay upon the covenant to convey other lands if a portion of the land intended to be conveyed had before been sold by P. alone, and not by V. and P. *Vance v. Pena*, 33 Cal. 631.

1. Grantors Must Take Several Interests to Render Covenants Several. — In *Slingsbie's Case*, 5 Coke 18, A, by indenture, covenanted, promised, and agreed to and with B and C his wife, and to and with D and E his wife, and their assigns, and to and with each of them, that he, A, at the sealing and delivery of the indenture, was lawfully and sole seized of a certain rectory. In an action by B and C upon this covenant it was held that the covenant was joint, notwithstanding the words "to and with each of them," and that D and E must join in the action. And this distinction was there taken, which Lord Kenyon, C. J., in *Anderson v. Martindale*, 1 East 497, refers to as being very sensible, that "where every of the covenantees is to have a several interest or estate, there the addition of the words *cum quolibet eorum* will make the covenant several, in respect of their several interests. As if one by indenture demise Blackacre to A, and Whiteacre to B, etc., and covenant with them and each of them that he is lawful owner of the said acres, there in respect of the several interests the covenant by those words is made several. But if he demise to them the acres jointly, then those words are void; for a man, by his covenant, cannot, unless in respect of several interests, make it first joint, and then several by those or the like words."

In *Anderson v. Martindale*, 1 East 497, it was held that a covenant to and with A, his executors, administrators, and assigns, and to and with B and her assigns, to pay an annuity to A, his executors, etc., during B's life, is a joint covenant to A and B, in which they have a joint legal interest, although the benefit be for A only; and therefore, on the death of A, the right of action survives to B, and A's administrator cannot sue on the covenant.

When Covenantees' Interests Are Joint. — A testator devised certain land, which had been conveyed to him with covenant of warranty, to his two sons in severalty. The sons having been evicted by a paramount title brought suit on the covenant in the deed to their father, declaring jointly against the heir-at-law of the covenantor. On demurrer it was held that the covenant ran with the land, and that they had a joint interest in the covenant against the covenantor, although their interests between themselves were several, and that consequently they had the right to bring a joint action on the covenant. *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480.

When Covenantees' Interests Are Several. — D., H., and J. owned tracts of swamp land lying

adjacent to one another. By a sealed instrument signed by them all, D. and H. agreed to let J. cut a draining ditch "through their respective lands," and J., in consideration of this permission, entered into certain covenants. In the clause prescribing the penalty for any breach of this agreement or covenants, the parties bound themselves for the "faithful performance of all the agreements made by us respectively, each to the other, in the sum of one thousand dollars." D. and H. held their lands severally and independently of each other. On breach of one of the covenants by J., D. brought suit without joining H. as co-plaintiff, and the narrative was demurred to on the ground that the covenant was made to D. and H. jointly, and not severally. It was held that the interests of D. and H. being separate and independent, the covenant must be construed to be several. *Jacobs v. Davis*, 34 Md. 201.

2. When Lessors Are to Receive Specific Portions of the Rent. — The defendants entered into an instrument under seal, reciting that they had rented of A, and B, trustee of C, for one year, a mill, for which they were to pay one hundred and fifty dollars to A, and one hundred and fifty dollars to B, trustee as aforesaid, or such other trustee of C as may be legally appointed; said sums to be paid in quarterly payments, recoverable by distress or otherwise by said A and B, or a person authorized to receive, jointly or separately, as to either of them may be convenient. It was held that under this agreement there was no joint legal interest in the covenantees, and that each might maintain separate actions for the recovery of his portion of the rent. *Lahy v. Holland*, 8 Gill (Md.) 445, 50 Am. Dec. 705.

3. Covenant Must Contain Words of Severalty. — In *Catlin v. Barnard*, 1 Aik. (Vt.) 9, it appeared that by a certain indenture made between A of the first part, and B of the second part, and C and D of the third part, the said A and B demised unto the parties of the third part a certain building, etc., and in the said indenture the parties of the third part did covenant and agree with the said parties of the first and second parts, among other things, that they would pay to the said A, on the first day of May, 1824, the sum of three hundred and fifty-four dollars, and that they would pay to the said B, on the said first day of May, 1824, the sum of seven hundred dollars. An action brought jointly by A and B upon this covenant was held to be properly brought. Royce, J., after considering the cases above mentioned, says: "From these authorities two things appear to be necessary to change a covenant to two or more persons, apparently joint, into several covenants to each of the covenantees. First, a several interest of each

the covenant be joint, if the interest of the covenantees be several the covenant may be construed as several.¹

III. EFFECT AND BREACH OF COVENANTS — 1. General Principles. — Before commencing an explanation of the meaning of the different covenants contained in a deed, certain general principles which are, in the main, applicable to all the covenants, will be stated.

Operative Merely as Assurances. — The usual covenants inserted in deeds operate merely as assurances of the title which the deed purports to convey; they do not pass any estate² or enlarge or restrict the estate conveyed.³

Knowledge of Parties as to Defects or Incumbrances — General Rule. — It is a well-settled rule that knowledge by the grantee at the time of the conveyance, of the existence of an incumbrance on the land, or of a defect in the grantor's title, does not control the force and effect of the express covenants in the deed or affect the question of breach.⁴

covenantee in the fruits of the covenant, and secondly, the addition of the words, 'with each of them,' or other equivalent expression."

1. Covenant Need Not Contain Words of Severalty. — In *Platt on Covenants*, 123, the doctrine is laid down that covenants shall not be construed to be joint or several from the particular language in which they may be conceived, but shall be measured and molded according to the interests of the covenantees.

In a foot-note by Sergeant Williams in *Eccleston v. Clipsham*, 1 Saund. 153, it is said: "Though a man covenant with two or more jointly, yet, if the interest and cause of action of the covenantees be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint."

2. Covenant that After-acquired Title Shall Vest in Grantee. — A covenant that any after-acquired title shall vest in the grantee in a deed of quit-claim and release is ineffectual to vest such title. — *Anderson v. Yoakum*, 94 Cal. 227, 28 Am. St. Rep. 121.

3. Covenants Restricted to Estate and Land Conveyed. — *Lehndorf v. Cope*, 122 Ill. 317. See *supra*, this title, *Creation and Construction*.

4. Covenantee's Knowledge of Defects or Incumbrances Immaterial — England. — *Levit v. Witherington*, Lutw. 317; *Page v. Midland R. Co.*, (1894) 1 Ch. 11.

Canada. — *Trust, etc., Co. v. Covert*, 27 U. C. Q. B. 120. See *Moore v. Boulton*, 10 U. C. Q. B. 140.

United States. — *Barlow v. Delaney*, 40 Fed. Rep. 97; *New Orleans v. Gaines*, 138 U. S. 595. *Alabama.* — *Dunn v. White*, 1 Ala. 645; *Copeland v. McAdory*, 100 Ala. 553.

Georgia. — *Miller v. Desverges*, 75 Ga. 407.

Illinois. — *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Wadhams v. Swan*, 109 Ill. 46; *Wadhams v. Innes*, 4 Ill. App. 642; *Schmis-seur v. Penn*, 47 Ill. App. 278. See *Koerper v. Jung*, 33 Ill. App. 144. Compare *White v. Kibby*, 42 Ill. 510.

Indiana. — *Medler v. Hiatt*, 8 Ind. 171; *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Watts v. Fletcher*, 107 Ind. 391; *Teague v. Whaley*, (Ind. App. 1898) 50 N. E. Rep. 41. Compare *Allen v. Kersey*, 104 Ind. 1.

Iowa. — *Van Wagner v. Van Nostrand*, 19 Iowa 422; *Barlow v. McKinley*, 21 Iowa 69; *Gerald v. Elley*, 45 Iowa 322; *McGowen v.*

Myers, 60 Iowa 256; *Flynn v. White Breast Coal, etc., Co.*, 72 Iowa 738; *Yancey v. Tatlock*, 93 Iowa 386.

Kansas. — *Batterton v. Smith*, 3 Kan. App. 419.

Maine. — See *Holmes v. Danforth*, 83 Me. 139.

Massachusetts. — *Townsend v. Weld*, 8 Mass. 146; *Harlow v. Thomas*, 15 Pick. (Mass.) 66.

Michigan. — *Sparrow v. Smith*, 63 Mich. 209; *Eaton v. Chesebrough*, 82 Mich. 214.

Missouri. — *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Williamson v. Hall*, 62 Mo. 405.

Nebraska. — *Burr v. Lamaster*, 30 Neb. 688, 27 Am. St. Rep. 428.

New York. — *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432; *Suydam v. Jones*, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552; *Docter v. Darling*, 68 Hun (N. Y.) 70. Compare *Roberts v. Levy*, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 311.

North Carolina. — *Martin v. Martin*, 1 Dev. L. (12 N. Car.) 413; *Gragg v. Wagner*, 71 N. Car. 316.

Ohio. — *Long v. Moler*, 5 Ohio St. 271.

Oregon. — *Corbett v. Wrenn*, 25 Oregon 305.

Pennsylvania. — *Cathcart v. Bowman*, 5 Pa. St. 317; *Funk v. Voneida*, 11 S. & R. (Pa.) 109, 14 Am. Dec. 617.

Vermont. — *Butler v. Gale*, 27 Vt. 739.

Wisconsin. — *Bennett v. Keehn*, 67 Wis. 154.

Texas Rule. — It has been held in Texas that one who accepts a deed with knowledge of an incumbrance or adverse claim which may affect his interest in the property purchased cannot, before the adverse claim is established, set up a breach of the covenant. *Texas Western R. Co. v. Gentry*, 69 Tex. 625. But it has been held that in an action by a grantee for breach of the covenant against incumbrances, the grantor, who has encumbered the land, cannot invoke the doctrine of notice arising from circumstances sufficient to provoke inquiry by the grantee. *Parish v. White*, 5 Tex. Civ. App. 71.

Grantor's Ignorance of the Defect or Incumbrance. — Since one of the reasons for requiring covenants in deeds is to guard against possible ignorance of his own title on the part of the grantor, he cannot, of course, escape liability on his covenants on the ground that he was ignorant of the existence of the defect of incumbrance which works a breach. *Lloyd v. Quimby*, 5 Ohio St. 263.

Reason for the Rule.—If the grantor wishes to exclude known defects or incumbrances from the operation of the covenants, he should do so by incorporating the intended limitation in the covenants themselves. Failing to do so he must be bound by the express words of the covenants, and cannot be permitted to destroy the force of their language by parol.¹ Besides, it does not follow from the fact that the parties had knowledge of a particular incumbrance on the land, or defect in the title, that they intended to exclude it from the protection of the covenants; men often take warranties knowing of defects in the title.²

Exceptions to the Rule.—The general rule above stated has been qualified in some of the *United States*. It has been held that a highway which is open and in use, so that the grantee must be charged with notice of its existence, is excepted from the protection of the covenants in a deed.³ And, again, it has been held that the covenants do not extend to apparent easements which openly affect the physical condition of the land, or, what amounts to the same thing, of which the grantee has knowledge.⁴ But these exceptions are contrary to the vast preponderance of authority, according to which the appropriate covenants in a deed, in the absence of statutory provision to the contrary,⁵ extend to public and private ways,⁶ and to other

1. **Reason for the Rule.**—*Miller v. Desverges*, 75 Ga. 407; *Townsend v. Weld*, 8 Mass. 146; *Harlow v. Thomas*, 15 Pick. (Mass.) 66; *Long v. Moler*, 5 Ohio St. 272; *Collingwood v. Irwin*, 3 Watts (Pa.) 306.

2. See *Miller v. Desverges*, 75 Ga. 407.

In *Barlow v. Delaney*, 40 Fed. Rep. 97. *Brewer, J.*, said: "The very purpose of the covenant is protection against defects; and to hold that one can be protected only against unknown defects would be to rob the covenant of more than one-half its value, besides destroying the force of its language. If from the force of a covenant it is desired to eliminate known defects or to limit the covenant in any way, it is easy to say so. General in its language, it reaches to all defects within its terms, known or unknown."

In *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290, *Mr. Justice Walker*, in delivering the opinion of the court, said: "A person may warrant an article to be sound when both buyer and seller know it is unsound; so the seller may warrant the quantity or quality of an article he sells, when both parties know that it is not of the quality or does not contain the quantity warranted. In fact, the reason the purchaser insists upon covenants for title, or a warranty of quality or quantity, is because he either knows or fears that the title is not good, or that the article lacks in quantity or quality. If he were perfectly assured on those questions, he would seldom be tenacious in obtaining a covenant or warranty." This language was quoted with approval in the later case of *Wadhams v. Innes*, 4 Ill. App. 642. See also *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426.

If there is an incumbrance on the land the purchaser has a right to assume that it will be discharged by the vendor. *Dunn v. White*, 1 Ala. 645. In the case of *Long v. Moler*, 5 Ohio St. 272, *Brinkerhoff, J.*, said: "Nothing is more common, we apprehend, than for parties to make and accept covenants of this kind with a full knowledge of existing incumbrances; the covenantor relying on his ability to discharge them, and the covenantee on the

security which the covenant affords; and the fact of a purchaser having notice of an incumbrance is the very reason of his taking a covenant within whose scope it is included."

3. **Highways Opened and in Use, or Known to Grantee, Excepted.**—*Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432. See *Moore v. Boulton*, 10 U. C. Q. B. 140.

For a list of the cases in which this exception has been recognized, see *infra*, this title and division, the subdivision *Covenant Against Incumbrances*.

4. **Apparent Easements Excepted.**—*Barre v. Fleming*, 29 W. Va. 314.

In *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85, it was held that an easement obviously and notoriously affecting the physical condition of the land at the time of its sale is not embraced in a general covenant against incumbrances. And in *Memmert v. McKeen*, 112 Pa. St. 315, it was held that incumbrances are of two kinds, first such as affect the title, and second such as affect only the physical condition of the property; that where incumbrances of the former class exist, the covenant is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title; that where, however, there is a servitude imposed upon the land which is visible to the eye, and which affects not the title but the physical condition of the property, it is presumed that the grantee took the property in contemplation of such condition and with reference thereto.

5. **Statutory Recognition of Exceptions.**—By section 10 of the *Illinois Conveyance Act*, it was provided that no covenant of warranty shall be broken by the existence of a highway upon the land conveyed, unless otherwise particularly specified in the act. See *Schmisseur v. Penn*, 47 Ill. App. 278.

6. **Exceptions Not Recognized—In the Case of Highways—Alabama.**—*Copeland v. McAdory*, 100 Ala. 553.

Connecticut.—*Hubbard v. Norton*, 10 Conn. 423.

Illinois.—*Beach v. Miller*, 51 Ill. 206, 2 Am.

casements¹ whether or not they affect the apparent physical condition of the land or are otherwise known to the grantee.

Knowledge of Outstanding Lease. — It has been held that if the purchaser knows that the premises are in the possession of a tenant and no special contract is made, the occupant becomes the tenant of the purchaser, and there will be no breach of the covenants in the deed.²

Title or Incumbrance Owned by Covenantee. — The covenants in a deed extend to only such paramount titles or incumbrances as are owned by third persons; and if, at the time of the conveyance, the purchaser has in himself the valid title to the premises, or owns an incumbrance thereon, that fact will not sustain a recovery on the covenants.³

Tortious Acts and Invalid Claims of Third Persons. — The covenants in a deed are limited to legal acts or claims, and afford no protection against wrongful acts or invalid claims of third persons.⁴

2. Covenant of Seizin — *a. FORCE AND EFFECT* — (1) *Of the Usual Covenant.* — As to the meaning which is to be given to the usual covenant of seizin there is some difference of judicial opinion.

(a) **Viewed as an Assurance of Seizin Only.** — In some of the *United States* it is held that the covenant of seizin, expressed in the usual terms, does not require the grantor to have an indefeasible title, but that bare actual possession under claim of title fulfils the covenant.⁵

Rep. 290; *Wadhams v. Swan*, 109 Ill. 46; *Schmisser v. Penn*, 47 Ill. App. 278. See *Wadhams v. Innes*, 4 Ill. App. 642.

Indiana. — *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731.

Iowa. — *Flynn v. White Breast Coal, etc., Co.*, 72 Iowa 738; *Barlow v. McKinley*, 24 Iowa 69; *Gerald v. Elley*, 45 Iowa 322.

Maine. — See *Holmes v. Danforth*, 83 Me. 139.

Missouri. — *Williamson v. Hall*, 62 Mo. 405. *Vermont.* — *Butler v. Gale*, 27 Vt. 739.

See *infra*, this title and division, the subdivision *Covenant Against Incumbrances*.

1. Same — In the Case of Other Easements. — *Medler v. Hiatt*, 8 Ind. 171; *McGowen v. Myers*, 60 Iowa 256; *Mohr v. Parmelee*, 43 N. Y. Super. Ct. 320; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432.

In commenting upon the cases of *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85, and *Memmert v. McKeen*, 112 Pa. St. 315, *Earl, J.*, delivering the opinion in the case of *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432, said: "We do not yield assent to these authorities. They have no sanction in any of the cases decided in this state, and have no adequate foundation in principle or reason. They open to litigation, upon parol evidence in every action for the breach of the covenant against incumbrances caused by the existence of an easement, the question whether the grantee knew of its existence; and in every such case the protection of written covenants can be absolutely taken away by disputed oral evidence. We think the safer rule is to hold that the covenants in a deed protect the grantee against every adverse right, interest, or dominion over the land, and that he may rely upon them for his security. If open, visible, and notorious easements are to be excepted from the operation of covenants, it should be the duty of the grantor to except them, and the burden should not be cast upon the grantee to show that he was not aware of

them. The security of titles demands that a grant made without fraud or mutual mistake shall bind the grantor according to its written terms. It should not be incumbent upon the grantee to take special and particular covenants against visible and apparent defects in the title, or incumbrances upon the land; but it should be incumbent upon the grantor, if he does not intend to covenant against such defects and incumbrances, to except them from the operation of his covenants."

2. Lindley v. Dakin, 13 Ind. 388; *Page v. Lashley*, 15 Ind. 152; *Weld v. Traip*, 14 Gray (Mass.) 330; *Demars v. Koehler*, (N. J. 1897) 38 Atl. Rep. 808.

3. Title or Incumbrance Held by Covenantee. — *Beebe v. Swartwout*, 8 Ill. 162; *Furness v. Williams*, 11 Ill. 229; *Smiley v. Fries*, 104 Ill. 416; *Carson v. Cabeen*, 45 Ill. App. 262; *Horrigan v. Rice*, 39 Minn. 49; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161; *Biggus v. Brady*, 1 McCord L. (S. Car.) 500. But see *Bean v. Mayo*, 5 Me. 89; *Comstock v. Son*, 154 Mass. 389. See the title *ESTOPPEL*; and see *infra*, this title and division, the subdivision *Covenant of Seizin*.

4. Covenants Limited to Legal Acts and Claims — *England.* — *Jerritt v. Wear*, 3 Price 575, 18 Rev. Rep. 665.

United States. — *Somerville v. Hamilton*, 4 Wheat. (U. S.) 230.

California. — *West v. Masson*, 67 Cal. 169.

Iowa. — *Jerald v. Elly*, 51 Iowa 321.

New York. — *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173.

Texas. — *Norton v. Schmucker*, 83 Tex. 212.

Vermont. — *Gleason v. Smith*, 41 Vt. 293.

Wisconsin. — *Smith v. Hughes*, 50 Wis. 620.

See *infra*, this title and division, the subdivisions *Covenant of Seizin*; *Covenants of Warranty and for Quiet Enjoyment*; and *Covenant Against Incumbrances*.

5. Doctrine of Actual Seizin. — This doctrine, to the effect that the covenant of seizin is suffi-

Reason for the Construction. — The exact ground upon which this doctrine is based cannot be stated with certainty.¹

Criticism and Rejection of the Construction. — This doctrine has been subjected to a great deal of adverse criticism.² And in a few states where this doctrine

ciently complied with if the grantor has actual seizin, was, it seems, first announced in the *Massachusetts* case of *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61, decided in 1807, wherein Parsons, C. J., delivered the opinion of the court.

The same doctrine was applied the next year in *Beace v. Jackson*, 4 Mass. 408, the grantor having entered upon the lands, claiming to hold them by a grant from the commonwealth. The court, by Parsons, C. J., said: "It is very clear that the defendant's intestate [the grantor] being in possession, claiming a fee simple in the land, was able to convey. So the covenant of seizin was not broken." The doctrine has been adhered to in *Massachusetts*, *Chapel v. Bull*, 17 Mass. 213; *Wait v. Maxwell*, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Follett v. Grant*, 5 Allen (Mass.) 174. See also *Kirkendall v. Mitchell*, 3 McLean (U. S.) 144; *Slater v. Rawson*, 1 Met. (Mass.) 450.

And this doctrine has been adopted in *Maine*, *Fairbrother v. Griffin*, 10 Me. 91; *Cushman v. Blanchard*, 2 Me. 266, 11 Am. Dec. 76; *Wheeler v. Hatch*, 12 Me. 389; *Hacker v. Storer*, 8 Me. 222; *Boothby v. Hathaway*, 20 Me. 251; *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *Wilson v. Widenham*, 51 Me. 566; *Montgomery v. Reed*, 69 Me. 510.

It seems that the United States Supreme Court, in the case of *Peters v. Bowman*, 98 U. S. 56, understood this to be the law in *Mississippi*.

Modified Doctrine of Ohio. — In Ohio this doctrine has been adopted in a modified form. It has been there held that a seizin in fact of the grantor at the time the deed was executed is a sufficient compliance with the covenant of seizin in the deed. If the grantor is in exclusive possession of the land at the time of the conveyance claiming a fee adverse to the owner, although he was in by his own disseizin, his covenant of seizin is not broken until the purchaser or those claiming under him are evicted by title paramount. He has seizin in deed, as contradistinguished from a seizin in law, sufficient to protect him from liability under his covenant so long as those claiming under him continue so seized. This doctrine was first maintained in *Backus v. McCoy*, 3 Ohio 211, 17 Am. Dec. 585, and soon after that decision was followed in *Robinson v. Neil*, 3 Ohio 525. It has also been followed in subsequent cases: *Foot v. Burnet*, 10 Ohio 317, 36 Am. Dec. 90; *Devore v. Sunderland*, 17 Ohio 52, 49 Am. Dec. 442; *Gest v. Kenner*, 2 Handy (Ohio) 86. In the case of *Stambaugh v. Smith*, 23 Ohio St. 584, it was declared that "these decisions have become a rule of property in this state, and must be followed under the rule of *stare decisis*, if they cannot be sustained upon any other grounds." Again, in *Great Western Stock Co. v. Saas*, 24 Ohio St. 542, this was declared to be no longer an open

question in Ohio. And the question was in *Lane v. Fury*, 31 Ohio St. 574, assumed to be settled. See also *Wetzell v. Richcreek*, 53 Ohio St. 62.

1. Grounds for the Construction. — In *Wilcox's* note to *Foot v. Burnet*, 10 Ohio 327, it is said that "this rule seems in some measure to have grown out of the hardship, real or apparent, of permitting a grantee to recover back the consideration money and interest, while he or his assignee is enjoying a possession that by lapse of time may ripen into a perfect title," but in point of fact this is not permitted even where the covenant is held to have been broken. See *infra*, this title, the division *Damages*.

It has also been said that this construction is due to the fact that the word "seizin" is taken in the sense of "possession," which might in time ripen into a valid title. But this can hardly be a sufficient explanation, for the same construction is put upon the covenant for good right to convey, which is not necessarily based upon possession. See *infra*, this title and division, the subdivision *Covenant of Right to Convey*.

The best and in all probability the true explanation is that suggested by *Hutchinson*, C. J., in *Catlin v. Hurlburt*, 3 Vt. 407, and elaborated by Mr. Rawle (Covenants for Title, 5th ed., §§ 47-54), that the doctrine sprang from that of adverse possession as connected with the champerty acts. The "Pretended Title Act," 32 Hen. VIII., c. 9, § 2 (A. D. 1540), prohibited the bargain, sale, or transfer of any premises of which the party had not been in possession or received the rents and profits for a year previously, under a penalty, imposed upon a purchaser who bought knowingly, as well as the seller, of the forfeiture of the value of the premises. This statute has been re-enacted in some of our states, either literally or with modifications; in others (including *Massachusetts*, see *Brinley v. Whiting*, 5 Pick. (Mass.) 348; and formerly *Maine*, see *Buck v. Babcock*, 36 Me. 491), the prohibition of champerty was regarded as part of the common law of the state, while in still others it is not prohibited in any way. See the title *CHAMPERTY AND MAINTENANCE*, vol. 2, p. 815. In the two former classes of states it results that a conveyance of real estate of which there is an adverse possession is of itself champerty and an offense. The courts of *Maine* and *Massachusetts*, which first held the doctrine of actual seizin, seem to have regarded the covenants for seizin and of good right to convey as assurances to the purchaser that there was no such adverse possession of the land as would bring upon him the penalties of champerty, and, should this be untrue, to furnish him with a recompense. The transfer of an actual seizin fulfilled the covenant within the spirit of the champerty acts.

2. See *Lockwood v. Sturdevant*, 6 Conn. 385; *Richardson v. Dorr*, 5 Vt. 21.

was at first adopted it was afterwards rejected.¹

(b) Viewed as an Assurance of Title. — In *England* and, for the most part, in the *United States*, the word "seizin" as used in this covenant is regarded as the equivalent of "title," *i. e.*, practically the *juris et seisinæ conjunctio* of the common law,² and the covenant has therefore been defined as "an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey."³ In other words, the covenant of seizin, as usually expressed, means that the grantor is seized of an indefeasible estate.⁴

(2) *Of the Covenant of Seizin of an Indefeasible Estate.* — This contrariety of opinion can, of course, only exist as to the meaning of the usual covenant, *i. e.*, the covenant that the grantor is seized; where the covenant is that he is seized of an indefeasible estate, it will everywhere be construed to be an assurance that the grantor has an indefeasible title to the land conveyed, and nothing short of that will satisfy the covenant.⁵

b. WHAT CONSTITUTES A BREACH — (1) *In General.* — Where the covenant is more comprehensive than usual, and in terms covenants that the grantor is "seized of an indefeasible estate," there is, of course, little room for any disagreement as to what constitutes a breach. This covenant is not satisfied by seizin in fact, or actual possession by the grantor under claim of title, and a delivery of such seizin or possession to the grantee; it is a covenant of title, and though the maker of the covenant puts the covenantee in possession of the premises conveyed, yet unless by his deed he invests him with an indefeasible estate in the premises, his covenant of seizin is broken.⁶ But where the covenant is in the usual terms and merely covenants that the

1. **Rejection of Doctrine of Actual Seizin.** — The doctrine of "actual seizin" was adhered to in *New Hampshire* in *Willard v. Twitchell*, 1 N. H. 178, and *Breck v. Young*, 11 N. H. 491, but discarded in *Parker v. Brown*, 15 N. H. 186.

And in *Illinois* the court in an early case expressed its approval of the *Massachusetts* and *Ohio* doctrines, the distinction between the two not being recognized. *Watts v. Parker*, 27 Ill. 228. This case, however, did not require or admit of the application of the doctrine, and in a much later case, that of *Clapp v. Herdman*, 25 Ill. App. 509, it was explicitly held that an indefeasible estate alone fulfilled the covenant for seizin, no mention being made of *Watts v. Parker*, 27 Ill. 228.

In *Nebraska* the *Ohio* doctrine was followed in *Scott v. Twiss*, 4 Neb. 133, but discarded, without notice of that case, in *Real v. Hollister*, 20 Neb. 112.

2. See the article REAL PROPERTY.

3. Lord Ellenborough, in *Howell v. Richards*, 11 East 641, quoted in *Brandt v. Foster*, 5 Iowa 287; *Pecare v. Chouteau*, 13 Mo. 527.

4. **Doctrine Requiring Indefeasible Title** — *England*. — *Howell v. Richards*, 11 East 641.

United States. — *Thomas v. Perry*, Pet. (C. C.) 57; *Pollard v. Dwight*, 4 Cranch (U. S.) 430.

Connecticut. — *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Lockwood v. Sturdevant*, 6 Conn. 385; *Comstock v. Comstock*, 23 Conn. 349.

Illinois. — *Clapp v. Herdman*, 25 Ill. App. 509; *Frazier v. Peoria County*, 74 Ill. 282.

Indiana. — *Whisler v. Hicks*, 5 Blackf. (Ind.) 100, 33 Am. Dec. 454; *Worley v. Hineman*, 6 Ind. App. 240; *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Hooker v. Folsoin*, 4 Ind. 90.

Iowa. — *Brandt v. Foster*, 5 Iowa 287; *Zent v. Picken*, 54 Iowa 535.

Kentucky. — *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 430, 19 Am. Dec. 139; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271.

Minnesota. — *Allen v. Allen*, 48 Minn. 462.

Nebraska. — *Real v. Hollister*, 20 Neb. 112.

New Hampshire. — *Parker v. Brown*, 15 N. H. 186, overruling *Willard v. Twitchell*, 1 N. H. 177, and *Breck v. Young*, 11 N. H. 491; *Partridge v. Hatch*, 18 N. H. 498.

New York. — *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; *Morris v. Phelps*, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323; *Abbott v. Allen*, 14 Johns. (N. Y.) 248; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161; *M'Carty v. Leggett*, 3 Hill (N. Y.) 134; *Mott v. Palmer*, 1 N. Y. 564; *Coit v. McReynolds*, 2 Robt. (N. Y.) 655.

South Carolina. — *Pringle v. Witten*, 1 Bay (S. Car.) 256, 1 Am. Dec. 612.

Tennessee. — *Woods v. North*, 6 Humph. (Tenn.) 309, 44 Am. Dec. 312; *Kincaid v. Brittain*, 5 Sneed (Tenn.) 119; *Recohs v. Younglove*, 8 Baxt. (Tenn.) 385.

Vermont. — *Hastings v. Webber*, 2 Vt. 407; *Catlin v. Hurlburt*, 3 Vt. 407; *Richardson v. Dorr*, 5 Vt. 21; *Mills v. Catlin*, 22 Vt. 106.

See also *Lindsey v. Veasy*, 62 Ala. 421; *Matteson v. Vaughn*, 38 Mich. 376.

5. **Indefeasible Estate — Construction of Covenant For.** — *Macdougall v. Macdonell*, 5 U. C. C. P. 355; *Bender v. Fromberger*, 4 Dall. (Pa.) 436; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Smith v. Strong*, 14 Pick. (Mass.) 132; *Prescott v. Trueman*, 4 Mass. 631, 3 Am. Dec. 246; *Collier v. Gamble*, 10 Mo. 472; *Abbott v. Allen*, 14 Johns. (N. Y.) 252; *Garfield v. Williams*, 2 Vt. 328; *Pierce v. Johnson*, 4 Vt. 253.

6. *Clapp v. Herdman*, 25 Ill. App. 509; *Adkins v. Tomlinson*, 121 Mo. 487.

grantor is seized, without stating that the seizin is of an indefeasible estate, the question whether or not a particular state of facts does or does not constitute a breach will, of course, in most cases depend upon which construction is to be applied.

(2) *Under the Doctrine of Actual Seizin* — (a) **Grantor's Want of Title.** — Where the covenant of seizin has received the narrower construction and is regarded as an assurance that the covenantor has merely actual seizin, the covenant will not be broken if he is seized in fact although he may not have an indefeasible estate.¹

Where the Covenantor Holds by a Voidable Conveyance. — Since it is only necessary, within this view of the force and effect of the covenant, that the grantor should be seized at the time of his conveyance, and since a deed which is merely voidable and not void conveys a seizin, it is not a breach of the covenant of seizin that the only title which he has to the land is by a voidable deed.²

(b) **Grantor's Want of Seizin.** — If, however, the grantor does not have actual seizin of the premises at the time of his conveyance, that is, unless he is in actual possession under a claim of right,³ the covenant is, within this view of its force and effect, immediately broken.⁴

(3) *Where the Covenant Is Deemed an Assurance of Title* — (a) **Grantor's Want of Title** — *aa. GENERAL RULE.* — But where the covenant of seizin is regarded as an assurance of an indefeasible estate in the grantor, something more than possession under claim of title is required to satisfy the covenant. If the covenantor by reason of a valid⁵ outstanding title in a third person⁶ has no title to the premises, the covenant is of course broken even although the covenantor may himself have possession and may put the covenantee in possession of the premises conveyed.⁷

1. Defeasibility of Grantor's Title Not a Breach. — *Boothby v. Hathaway*, 20 Me. 251; *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *Wilson v. Widenham*, 51 Me. 566.

A breach of the covenant of seizin and right to convey, in a deed made by one who for several years has been in the actual, exclusive, and adverse possession of land, is not shown by proof that his record-title was only by mortgages, which he afterwards assigned to a third person as collateral security for a debt which has since been paid. *Follett v. Grant*, 5 Allen (Mass.) 174.

2. Where the Grantor Holds under the Deed of a Person Non Compos Mentis, not under guardianship, it has been held that such deed, being voidable only and not void, conveys a seizin which will support his covenant of seizin. *Wait v. Maxwell*, 5 Pick. (Mass.) 217, 16 Am. Dec. 391.

3. Claim of Right — Necessity For. — *Wheeler v. Hatch*, 12 Me. 389.

4. Seizin — Want of Constitutes a Breach. — *Cushman v. Blanchard*, 2 Me. 266, 11 Am. Dec. 76; *Hacker v. Storer*, 8 Me. 232; *Wheeler v. Hatch*, 12 Me. 389; *Montgomery v. Reed*, 69 Me. 510; *Innes v. Agnew*, 1 Ohio 386; *Wetzell v. Richcreek*, 53 Ohio St. 62.

Where A. conveyed land to B., bounded on land of T., and A. and T. had previously agreed by parol on a different line from the true line, and had set up stakes to mark such line, the possession of the land by T. between the true and the conventional lines under such agreement, claiming title thereto, at the time of A.'s deed to B., was held to be a breach of the covenant of seizin in such deed. *Cornell v. Jackson*, 3 Cush. (Mass.) 506. For an exposition of

the decision in this case, see *Blanchard v. Ellis*, 1 Gray (Mass.) 202, 61 Am. Dec. 417.

Occupancy of the Grantor's Tenant. — Where the grantor's lessee has been in the exclusive occupation of the premises for a period of thirty-one years next preceding the conveyance, there is no breach of the covenant of seizin contained therein. *Ginn v. Hancock*, 31 Me. 42.

5. Assertion of Void Title No Breach. — A third person's claim of title to the premises, unless valid, does not affect the covenant, and no money paid to extinguish a void title, by a covenantee holding the true title, is recoverable. *Sample v. Whorton*, 68 Wis. 626.

6. Outstanding Title Must Be in Third Person. — The covenant extends only to a title existing in a third person which may defeat the estate granted by the covenantor. It does not contemplate a title already vested in the covenantee, and is not broken by the existence of such title. *Furness v. Williams*, 11 Ill. 229; *Horrigan v. Rice*, 39 Minn. 49; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161.

7. Anderson v. Knox, 20 Ala. 156; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271; *Clapp v. Herdman*, 25 Ill. App. 509; *Brandt v. Foster*, 5 Iowa 287; *Allen v. Allen*, 48 Minn. 462.

Prior Conveyance of Conditional Fee by Covenantor. — Where the grantor has previously conveyed to a railway company, not merely a right of way, but at least a conditional fee in, as well as the immediate possession and right to use, a strip of land forming part of the land conveyed to the covenantee, there is a breach of the covenant of seizin. *Messer v. Oestreich*, 52 Wis. 684.

bb. INTEREST IN THE LAND OUTSTANDING. — The covenant is broken not only by a complete failure of title, but also by the fact that there is outstanding any interest or estate which affects the title.¹ And it has been held that there will be a breach of the covenant of seizin if there is an outstanding estate in a life tenant.²

Outstanding Estate for Years. — And an outstanding estate for years may be a breach of the covenant under some circumstances, as where such term of years practically affects the quantity and quality of the estate covenanted to be conveyed.³ Usually, however, the possession of a tenant for years is deemed to be the possession of the covenantee, and the existence of the term is no breach, the rent being apportioned at the time of the conveyance.⁴

cc. WANT OF TITLE TO THINGS AFFIXED TO THE LAND. — The covenant of seizin is as broad as the conveyance, and if things which are apparently part and parcel of the land so as to come within the description of the granted premises, and which would properly pass by the conveyance, are not owned by the grantor, there is a partial breach of the covenant.⁵

Structures Partly on Adjacent Land. — But the fact that the structures on the land conveyed are partly on adjacent land does not constitute a breach.⁶

dd. ESTATE OF GRANTOR DIFFERENT FROM THAT CONVEYED — *Joint or Several Ownership.* — The covenant of seizin in a deed which purports to convey an entire estate is broken if the grantor has only an estate in common.⁷ And so, on the other hand, if the grantor conveys an undivided portion of a tract of land, the covenant is broken if a partition has been made.⁸

Estate of Grantor Less than Fee Simple. — It has been held that while the covenant of seizin is broken as soon as made if the vendor has no title, the fact that he does not have a good title in fee simple will not constitute a breach,⁹ but this is by no means certain.¹⁰ And where the grantor covenants that he is seized of an indefeasible estate in fee simple, the covenant is unquestionably broken if he has only a life estate.¹¹

Right to Maintain Dam. — A covenant of seizin in a conveyance of a mill site with the right to raise the water to a certain height by damming, is broken if the grantor does not possess the right to raise the water to the specified height. *Traster v. Snelson*, 29 Ind. 96; *Walker v. Wilson*, 13 Wis. 522; *Hall v. Gale*, 14 Wis. 55, 20 Wis. 293.

And it has been held that there is a breach of the covenant of seizin in a conveyance of a dam constructed to raise the water to a certain height, even though the deed did not expressly convey the right to dam the water up to that height. *Adams v. Conover*, 87 N. Y. 422, 41 Am. Rep. 381.

1. Right to Spring on Land. — Thus the previously acquired right of a third person to the water of a spring on the land and of drawing it away by an aqueduct to his own premises was held a breach of the covenant of seizin. *Clark v. Conroe*, 38 Vt. 469.

2. Estate in Life Tenant Outstanding. — *Mills v. Catlin*, 22 Vt. 106.

3. Life Tenant v. Van Nostrand, 19 Iowa 422.

4. Lindley v. Dakin, 13 Ind. 389; *Page v. Lashley*, 15 Ind. 152; *Kellum v. Berkshire L. Ins. Co.*, 101 Ind. 455.

5. Removal of Structures by Grantor's Tenant. — The removal of a structure, such as a fence or stable, by a tenant pursuant to a prior agreement with the grantor, constitutes a breach of the covenant of seizin. *Van Wagner v. Van Nostrand*, 19 Iowa 427; *Mott v.*

Palmer, 1 N. Y. 564. See *Green v. Collins*, 86 N. Y. 246, 40 Am. Rep. 531.

But an unauthorized removal of fixtures by a tenant is of course no breach of the covenant. *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173.

See *infra*, this title and division, the subdivision, *Covenants of Warranty and for Quiet Enjoyment* — *Loss of Appurtenances*.

6. Encroachment of Structures on Adjoining Land. — It was so held in the case of a conveyance of land without any mention of the structures, when the dwelling-house thereon projected fifteen inches upon the adjoining premises. *Burke v. Nichols*, 2 Keyes (N. Y.) 671.

And a covenant of seizin in a conveyance of certain premises described by metes and bounds, "with the buildings and improvements thereon erected," was held not to be broken by the encroachment of the building on the street or on the land of an adjoining owner. *Stearn v. Hesdorfer*, 9 Misc. Rep. (N. Y. C. Pl.) 134.

See *supra*, this title, the division *Creation and Construction*.

7. Downer v. Smith, 38 Vt. 464.

8. Morrison v. McArthur, 43 Me. 567.

9. Fee Simple Estate — Whether Demanded by the Usual Covenant. — *Axtel v. Chase*, 77 Ind. 74.

10. See Frazer v. Peoria County, 74 Ill. 282.

11. Fee Simple Estate Demanded by Covenant of Seizin of Indefeasible Estate in Fee Simple. — *Lockwood v. Sturdevant*, 6 Conn. 373; *Frazer*

(b) **Grantor's Want of Possession.**—In the jurisdictions where the covenant of seizin is construed to be an assurance of title, the covenant of seizin is satisfied if the covenantor has title, even though he may not be in actual possession of the premises,¹ unless, indeed, the land is in the adverse possession of a third person, so as to render the deed void for champerty.

Adverse Possession by Third Person.—Such adverse possession may possibly amount to a breach of the covenant of seizin,² as it certainly would of the covenant for a good right to convey.³

(4) **Points of Agreement Between the Two Views.**—From what has been said, it is apparent that there may be an agreement in particular cases between these divergent views. Thus, whichever rule is adopted, it is clear that if the defendant is in possession of the land and claims the title at the time of his conveyance, and no paramount title in a third person is shown, no breach of the covenant of seizin is established.⁴ So, on the other hand, if the grantor does not, at the time of his conveyance, have either title to or actual possession of the land under claim of right, the covenant of seizin is broken within either construction.⁵

(5) **Non-existence of the Land.**—It is a breach of the covenant of seizin if there is no such land in existence as the deed purports to convey.⁶ But it cannot be said that a deed purports to convey land which does not exist within the meaning of this rule, simply because the land is incorrectly described as being in a certain city, if it can be identified by the description and reference in the deed.⁷

v. Peoria County, 74 Ill. 282. See *Comstock v. Comstock*, 23 Conn. 349.

Mortgagee's Interest.—A mortgagee's estate has been held insufficient to satisfy a covenant that the grantor is seized in fee simple. *Mercantile Trust Co. v. South Park Residence Co.*, 104 Ky. 271, 15 Ky. L. Rep. 70.

1. **Grantor's Want of Possession Not Necessarily a Breach.**—*Nichols v. Nichols*, 5 Hun (N. Y.) 108. But compare *Thomas v. Perry*, Pet. (C. C.) 52; *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 430, 19 Am. Dec. 139.

Thus, in *Worley v. Hineman*, 6 Ind. App. 240, it was held that the fact that the grantor in a deed which contained a covenant of seizin did not have possession of the premises at the time of the conveyance, did not constitute a breach of the covenant, where he had the title subject only to a mortgage lien.

Occupancy of Premises by Tenant.—The occupancy of the premises by the grantor's tenant has been held not to be a breach of the covenant of seizin, where the fact of such occupancy and the title of the tenant were known at the time to the purchaser. *Lindley v. Dakin*, 13 Md. 388.

Where the Conveyance Is of Lands Whereof the Grantor Is Seized.—It has been held that where the grantor conveys certain lands "whereof he is now seized" the covenant of seizin in the deed goes to the title only, and is not broken as to any land which was not in his possession. *Thomas v. Perry*, Pet. (C. C.) 49.

2. **Third Person in Adverse Possession.**—See *Nichols v. Nichols*, 5 Hun (N. Y.) 108; *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 430, 19 Am. Dec. 139.

It has been held that a conveyance of lands, held adversely to the grantor at the time, especially where he has been defeated in a suit to annul the deed under which the adverse claimant held, will not pass title to the

grantee, and as to lands thus held adversely, there is a breach of the covenant of seizin in the deed. *Lindsey v. Veasy*, 62 Ala. 421.

3. See *infra*, this title and division, the subdivision *Covenant of Right to Convey*.

4. **Grantor in Possession, and Title in Third Person Not Shown.**—In an action upon a covenant of seizin, where the defendant has possession under the deed, and no paramount title in a third person is shown, the cause of action is not made out. *Staats v. Garrett*, 23 N. Y. Wkly. Dig. 529.

5. **Want of Both Title and Possession.**—*Adkins v. Tomlinson*, 121 Mo. 487; *Rombough v. Koons*, 6 Wash. 558.

Recording Tax Deed Issued to Third Person on Certificate Made Prior to Conveyance.—It has been held in *Wisconsin* that since the recording of a tax deed vests constructive possession, the covenant for seizin of vacant land is broken by the recording, subsequently to the conveyance, of such a deed issued to a third party on a certificate of a tax sale made prior to the conveyance. *Daggett v. Reas*, 79 Wis. 60.

6. **Non-existence of the Land.**—*Bacon v. Lincoln*, 4 Cush. (Mass.) 210, 50 Am. Dec. 765; *Basford v. Pearson*, 9 Allen (Mass.) 387, 85 Am. Dec. 764.

7. **Land Incorrectly Described but Capable of Identification Not Deemed Non-existent.**—A deed described the land as being in a certain city. The land had formerly been within the limits of that city, but, by reason of the legislative change of the boundaries, it had for many years been outside of the city limits, and in another town. But the court found that, notwithstanding this misdescription, the land could be identified by the description and reference in the deed, and held that the land was not non-existent within the rule that a covenant of seizin is broken if there is no such

(6) *Deficiency of Land in Quantity.*—It has been said that a covenant of seizin is broken if there is a material deficiency in the amount of the land conveyed.¹ And, no doubt, if the terms of the covenant are that the land contains a certain number of acres, there is a partial breach of the covenant if the acreage is materially less.² But where the statement of quantity in a deed of land is merely descriptive, the fact that the land conveyed contains a less number of acres than is specified in such statement does not constitute a breach of the covenant of seizin.³

(7) *Existence of Easements and Incumbrances*—**General Rule.**—Since the existence of an incumbrance upon or an easement over land does not prevent the fee from being vested in another, it is settled that the covenant of seizin is not broken by the existence of easements or incumbrances which do not strike at or affect the technical seizin of the purchaser.⁴

Right to Build Wall.—Hence it has been held that the right to erect a partition wall on the granted premises is not a breach of the covenant of seizin.⁵

Rights of Way.—Where a public highway is merely an easement and does not affect the fee, the existence of such highway over the land does not constitute a breach of the covenant of seizin.⁶ Nor can the occupancy of land by a railroad company, under condemnation proceedings, when the right so acquired is merely an easement, be relied upon as a breach of the covenant of seizin.⁷ Where, however, a third person or the public does not have merely the right of way over a strip of land, but owns the fee, a covenant of seizin in a deed conveying a tract of land of which the strip forms a part, such covenant being construed to be a covenant of title, is of course broken.⁸

Mortgages.—Since a mortgage is now almost universally regarded as a mere security for the payment of the debt, and the legal title to the mortgaged land is deemed to be in the mortgagor until foreclosure, an outstanding mortgage is not a breach of the covenant of seizin.⁹

Judgments Against Grantor.—Neither is an outstanding judgment against the covenantor a breach of the covenant of seizin.¹⁰

land in existence as the deed purports to convey. *Perry v. Clark*, 157 Mass. 330.

1. See *Moore v. Johnston*, 87 Ala. 220.

2. See *McArthur v. Morris*, 84 N. Car. 405.

3. *Mann v. Pearson*, 2 Johns. (N. Y.) 37.

In *McArthur v. Morris*, 84 N. Car. 405, an exception in a deed conveying land of "eighty acres more or less heretofore conveyed to L., joining said L.'s land," was deemed merely descriptive and not of the essence of the contract, and it was held that although the portion conveyed to L. was found upon survey to contain one hundred and seventy acres, there was no breach of the covenant of seizin.

4. **Easements and Incumbrances—Covenant of Seizin Not Broken by Existence of.**—*Moore v. Johnston*, 87 Ala. 220; *Vaughn v. Stuzaker*, 16 Ind. 338; *Quick v. Taylor*, 113 Ind. 540; *Blondeau v. Sheridan*, 81 Mo. 545.

Thus, where a defendant set up as a counterclaim to a suit on a purchase money note, that there had been an entire failure of title to a part of the land, by reason of a prior conveyance to a railroad company, it was held that proof of a conveyance of a mere easement in or right of way over the land did not support the counterclaim pleaded. *Douglass v. Thomas*, 103 Ind. 187. This was upon the theory that an easement or right of way was nothing more than an incumbrance on the land and a breach of the covenant against incumbrances, and hence did not sustain a counterclaim which alleged a breach of the

covenant of seizin. See *Quick v. Taylor*, 113 Ind. 540.

5. *Blondeau v. Sheridan*, 81 Mo. 545.

6. **Highway—Existence of, Not a Breach of the Covenant.**—*Moore v. Johnston*, 87 Ala. 220; *Vaughn v. Stuzaker*, 16 Ind. 338; *Shelbyville, etc., Turnpike Co. v. Green*, 99 Ind. 205; *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272.

7. **Right of Way Acquired by Condemnation.**—*Quick v. Taylor*, 113 Ind. 540; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Smith v. Hughes*, 50 Wis. 620.

8. *Messer v. Oestreich*, 52 Wis. 689. See *Daisy Realty Co. v. Brown*, (Ky. 1896) 35 S. W. Rep. 637.

9. **Outstanding Mortgage—Not a Breach.**—*Reasoner v. Edmundson*, 5 Ind. 393; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 380. See also *Stanard v. Eldridge*, 16 Johns. (N. Y.) 255.

But where the covenant is not only that the defendant is seized of an absolute and indefeasible estate of inheritance, but it is superadded that he is so seized "without any manner of condition to alter, change, determine, or defeat the same," it has been held that the covenant is in effect and substance a covenant against incumbrances, and that it is broken by the existence of a mortgage upon the premises. *Stanard v. Eldridge*, 16 Johns. (N. Y.) 255.

10. *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376.

Right of Dower. — The expectant right of the wife to dower in the lifetime of the husband is no estate, but a mere possibility, and is no breach of the covenant of seizin.¹ And since the covenant, if broken at all, is broken at the time it is made, the vesting of dower in the wife upon the death of the husband will not be a breach.²

(8) *Effect of Subsequent Acts or Events on Question of Breach* — **General Rule.** — Since the courts, whether adopting the one or the other of the constructions which have been discussed above, are almost unanimously agreed that the covenant of seizin is a covenant in the present tense, it may be stated as a general rule that the determination of the question as to whether or not there is a breach cannot be affected one way or the other by matters taking place after the conveyance.³

Subsequent Eviction Immaterial. — Thus where the covenant is construed to mean simply that the grantor has actual seizin, or possession of the premises under a claim of right, if the grantor has such seizin at the time of the conveyance the covenant is satisfied, and his subsequent eviction by the holder of a para-

1. **Inchoate Right of Dower.** — *Whisler v. Hicks*, 5 Blackf. (Ind.) 100, 33 Am. Dec. 454; *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; *Tuite v. Miller*, 10 Ohio 382; *Massey v. Craine*, 1 McCord L. (S. Car.) 489. See generally the title **DOWER**.

2. *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139. But compare *Lewis v. Lewis*, 5 Rich. L. (S. Car.) 12.

3. **Subsequent Acts or Events Cannot Work a Breach.** — There can be no breach of the covenant by anything which takes place after the conveyance. *Vorhis v. Forsythe*, 4 Biss. (U. S.) 409; *Brady v. Spurck*, 27 Ill. 478; *Jones v. Warner*, 81 Ill. 343; *Seckler v. Fox*, 51 Mich. 92; *Wagner v. Finnegan*, 54 Minn. 251; *Coit v. McReynolds*, 2 Robt. (N. Y.) 655.

Invalidation of Proceedings, Through Which Grantor Derived Title, by Subsequent Judgment. — The title of the defendant in the case of *Coit v. McReynolds*, 2 Robt. (N. Y.) 655, was derived under a deed from the sheriff, executed in pursuance of a judgment of foreclosure of a mortgage, and a sale thereunder to the defendant. After the sale to the plaintiff's intestate, and delivery of the deed containing the covenant of seizin sued upon, the sale under the judgment was, upon the application of the holder of a prior mortgage, set aside, and the judgment reopened. The prior mortgage was subsequently foreclosed, and the plaintiff's intestate, who was a party defendant in the action, upon the sale of the premises, lost the property. This action was then brought by her administrator to recover damages for breach of the defendant's covenant of seizin, but it was held that the facts did not show a breach of that covenant. The court, by Monell, J., said: "The deed to Mrs. Clark [the plaintiff's intestate] was delivered nearly a year before the order vacating the sale was entered, although the motion at special term, which was denied, was made previously. Until that order was entered, the title which the defendant acquired under the sheriff's deed, and which he conveyed to Mrs. Clark, had not been disturbed, and except for that order it would not have been disturbed. The sheriff's deed invested the defendant with a title to the premises, which was capable of

being granted; and Mrs. Clark took, under her deed, the precise title which the defendant had. I am unable to give any other or greater effect to the order of the Supreme Court, than that it restored the lien and operation of the two prior mortgages. It did not operate as a disseizin of the defendant's title, at least in the sense that it would relate back, and work a breach of the covenant of seizin in his deed. It left the prior mortgagees to enforce their remedies to the same extent as if they had not been parties to the foreclosure suit. That the order of the Supreme Court did not operate as a disseizin of the defendant's title, was substantially decided in this court, in *Holden v. Sackett*, 12 Abb. Pr. (N. Y. Super. Ct.) 473. It is there said that a judicial sale, made pursuant to the decree or judgment of a competent court, having jurisdiction of the subject-matter and of the parties, passes title to the purchaser, even though the judgment should afterwards be reversed, or set aside for error or irregularity on appeal, and the cases there cited in support of this proposition, I think fully sustain it. * * * The covenantor either was seized or he was not, at the time he made his covenant. If he was seized, his covenant was not broken at the time, and it would not be broken afterwards." As to whether or not there might have been a recovery on a covenant against incumbrances, see *infra*, this title and division, the subdivision *Covenant Against Incumbrances*.

Statute of Limitations Running in Favor of Invalid Tax Deed. — So where the plaintiff alleges a breach of the covenant of seizin by reason of a tax deed outstanding at the time of the conveyance, the defendant may show the invalidity of the tax deed, and if it was in fact invalid there is no breach, even though the statute of limitations may have run in favor of the deed since the time of the conveyance. See *McInnis v. Lyman*, 62 Wis. 191.

Subsequent Conveyance by Defendant's Grantor. — A breach of the covenant of seizin is not established by showing a conveyance by the defendant's grantor subsequent to the conveyance to the defendant. *Vorhis v. Forsythe*, 4 Biss. (U. S.) 409.

mount title will not amount to a breach of the covenant.¹ And again, if the covenant is construed to be a covenant of title, the only question is whether or not the covenantor was seized of an indefeasible estate at the instant when he made the covenant; if he does not have the title the covenant is at once broken, and there need be no eviction to complete the breach.²

Subsequent Acquisition of Title by Covenantor Immaterial.—For the same reason, if the covenantor did not have title at the time of executing the deed, there is a breach of the covenant within the last-mentioned construction, notwithstanding the fact that he may subsequently have acquired the title.³

3. Covenant of Right to Convey—*a.* **FORCE AND EFFECT.**—The covenant that the grantor has a good right to convey has been said to be synonymous with the covenant of seizin.⁴ But while seizin implies a good right to convey,⁵ the converse is not always true,⁶ as is seen in the case of a conveyance in execution of a power.⁷

b. **BREACH.**—Where the covenant that the grantor has a good right to

1. Eviction by Holder of Paramount Title Not a Breach.—See *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *Follett v. Grant*, 5 Allen (Mass.) 174.

But According to the Doctrine Peculiar to Ohio while the covenant of seizin is not broken until eviction, either actual or constructive, in a case where the grantor was in actual possession of the land, under a claim of title, at the time of the conveyance, and where the grantee entered under the deed, it seems that such subsequent eviction will constitute a breach. *Backus v. McCoy*, 3 Ohio 211, 17 Am. Dec. 585; *Robinson v. Neil*, 3 Ohio 525; *Foote v. Burnet*, 10 Ohio 317, 36 Am. Dec. 90; *Devore v. Sunderland*, 17 Ohio 52, 49 Am. Dec. 442; *Stambaugh v. Smith*, 23 Ohio St. 584; *Great Western Stock Co. v. Saas*, 24 Ohio St. 542; *Wetzell v. Richcreek*, 53 Ohio St. 62.

Nebraska.—And of course the same rule obtained in Nebraska before the *Ohio* doctrine was discarded (*Scott v. Twiss*, 4 Neb. 133), which was done in the case of *Real v. Hollister*, 20 Neb. 112.

2. Eviction of Covenantor Not Necessary to a Breach—*United States.*—*Le Roy v. Beard*, 8 How. (U. S.) 451.

Arkansas.—*Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Benton County v. Rutherford*, 33 Ark. 640.

Illinois.—*Tone v. Wilson*, 81 Ill. 529.

Iowa.—*Brandt v. Foster*, 5 Iowa 287; *Zent v. Picken*, 54 Iowa 535.

Kentucky.—*Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271, 15 Ky. L. Rep. 70.

Michigan.—*Matteson v. Vaughn*, 38 Mich. 373.

Missouri.—*Schnelle, etc., Lumber Co. v. Barlow*, 34 Fed. Rep. 853, applying the law of Missouri; *Hall v. Bray*, 51 Mo. 288.

New Hampshire.—*Parker v. Brown*, 15 N. H. 176.

New Jersey.—*Lot v. Thomas*, 2 N. J. L. 386, 2 Am. Dec. 354.

South Carolina.—*Pringle v. Witten*, 1 Bay (S. Car.) 256, 1 Am. Dec. 612; *Bell v. Hugins*, 1 Bay (S. Car.) 326.

Tennessee.—*Miller v. Bentley*, 5 Sneed (Tenn.) 671.

The fact of eviction may, however, materially affect the measure of damages. See *infra*, this title, the division *Damages*.

3. Breach Notwithstanding Grantor's Subsequent Acquisition of Title.—*Sayre v. Sheffield Land, etc., Co.*, 106 Ala. 440; *Bethell v. Bethell*, 92 Md. 318; *Resser v. Carney*, 52 Minn. 397; *Morris v. Phelps*, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323; *Tucker v. Clark*, 2 Sandf. Ch. (N. Y.) 96; *Rombough v. Koons*, 6 Wash. 558; *McInnis v. Lyman*, 62 Wis. 191.

4. Covenants of Seizin and Right to Convey Identical.—*Slater v. Rawson*, 6 Met. (Mass.) 439; *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Baldwin v. Timmins*, 3 Gray (Mass.) 302; *Willard v. Twitchell*, 1 N. H. 177.

5. Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139.

Except in the case of a minor, whose conveyance is always subject to disaffirmance by him after attaining his majority. *Nash v. Ashton*, *Skinner* 42; *T. Jones* 195.

6. Difference Between the Covenants.—*General Finance, etc., Co. v. Liberator Permanent Ben. Bldg. Soc.*, 10 Ch. Div. 23.

In the case of *Devore v. Sunderland*, 17 Ohio 52, 49 Am. Dec. 442, *Reed, J.*, said: "These covenants are synonymous but not converse. If a man be seized in fee he has the power to sell, but he may have the power to sell and not be seized. When, therefore, the power to sell results from seizin, the two covenants are inseparable and of the same nature."

In *Slater v. Rawson*, 6 Met. (Mass.) 439, *Wilde, J.*, in delivering the opinion of the court, said: "In some cases, however, the covenants of seizin and right to convey do not stand on the same footing; for if a grantor covenants that he is seized in fee, when he has only an estate for years, he would have good right to convey, and his estate would pass to his grantee; so that the covenant of warranty would run with the land, although the covenant of seizin had been broken."

7. In Conveyances in Execution of a Power.—Until rather lately it was usual in *England*, to save the expense of having in future to levy a fine to bar dower, to convey property to such uses as the purchaser should appoint, and in default of appointment to the use of him and his heirs. A conveyance by the purchaser, being made by virtue of the power only, was properly accompanied by the covenant for right to convey, and not by that for seizin. *Sugd. Vend.* (14th ed.) 573; *Rawle on Covenants for Title* (5th ed.), § 66.

convey is regarded as synonymous with the covenant of seizin, and the latter covenant is regarded as broken if the grantor is not in actual possession of the land claiming title, the covenant of right to convey is, of course, broken by that fact.¹ Where, however, the covenant is construed according to the natural interpretation of its words, it must be broken by the absence in the vendor of the right to the premises—the *jus* as distinguished from the *seisina*.² And it will not be broken by a mere adversary possession,³ unless there are champerty laws in force which inhibit the conveyance of land by one not in possession.⁴

Existence of Mortgage.—Since a mortgage, though it purports to pass the legal title, is almost universally regarded, at the present day, as a mere security for the payment of the debt, the fact that the land conveyed is encumbered by a mortgage lien does not amount to a breach of the covenant of right to convey.⁵

Existence of Inchoate Right of Dower.—And it has been held that the covenant of good right to sell is not broken by the existence at the time of the conveyance of an inchoate right of dower.⁶

4. Covenants of Warranty and for Quiet Enjoyment—*a.* **FORCE AND EFFECT**—**Essential Sameness of the Covenants.**—The covenants of warranty and that for quiet enjoyment are in the main identical.⁷

Distinguished from the Covenant of Seizin.—They both differ from the covenant of seizin in that neither is a covenant that the grantor or lessor has an indefeasible title to the premises conveyed,⁸ but only that the covenantee shall not be disturbed in or deprived of the quiet enjoyment of the land.

Attempts to Distinguish the Covenants.—Though admitting the general sameness of these covenants, the courts have in several instances attempted to draw a distinction between them.⁹ Thus it has been said that while both relate to

1. Grantor's Want of Possession Regarded as a Breach.—*Slater v. Rawson*, 1 Met. (Mass.) 450; *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61. As to what constitutes a breach of the covenant of seizin see *supra*, this title and division, the subdivision *Covenant of Seizin*.

2. Grantor's Want of Right to Premises Regarded as a Breach.—*Rawle on Covenants for Title*, § 68. See *Mitchell v. Hazen*, 4 Conn. 513, 10 Am. Dec. 169; *Beck v. Barlow*, 6 New Bruns. 465.

Where certain persons who were the heirs and executors of the deceased owner of a certain piece of land attempted to convey the land, and covenanted that they "had good and lawful authority to sell and convey the same," when in fact they had authority to sell and convey only four undivided fifths of the same, it was held that the covenant was broken as soon as the deed was delivered. *Scantlin v. Allison*, 12 Kan. 85.

Where the holder of a mortgage, after having released a considerable portion of the land, assigned the mortgage with a covenant that he had "good right and lawful authority to grant, bargain, and sell" the same, it was held that the covenant was broken by the existence of the previous release. The court said that the plain meaning of this covenant was "that he had good right and authority to convey the mortgage as an existing lien on the land described therein; as a valid instrument according to its terms and not as a mere paper, the force and validity of which as an effective instrument he had previously destroyed or impaired." *Byles v. Lawrence*, 35 Mich. 458.

3. Triplett v. Gill, 7 J. J. Marsh. (Ky.) 432.

4. Rawle Cov. Tit. (5th ed.), p. 83, n. 3.

5. Mortgage Outstanding Not a Breach.—*Reasoner v. Edmundson*, 5 Ind. 393. See *Brunskill v. Wilson*, 25 U. C. Q. B. 248.

6. Dower—Existence of Inchoate Right Not a Breach.—*Tuite v. Miller*, 10 Ohio 382.

7. Sameness of the Covenants.—*Caldwell v. Kirkpatrick*, 6 Ala. 60, 41 Am. Dec. 36; *Copeland v. McAdory*, 100 Ala. 553; *Mitchell v. Warner*, 5 Conn. 497; *Athens v. Nale*, 25 Ill. 195; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385; *Barry v. Guild*, 126 Ill. 439; *Kramer v. Carter*, 136 Mass. 504; *Mills v. Rice*, 3 Neb. 76; *Fowler v. Poling*, 6 Barb. (N. Y.) 165; *Rea v. Minkler*, 5 Lans. (N. Y.) 196.

In *Mitchell v. Warner*, 5 Conn. 497, *Hosmer, C. J.*, pointed out that the material difference between the two covenants originally consisted in the different remedies for their infraction. But "this diversity has long ceased to exist; and now a personal action of covenant broken is maintainable on a real covenant of general warranty for the recovery of damages, as it always was on the covenant for quiet enjoyment." See *infra*, this title, the division *Remedies*.

8. Distinguished from Covenant of Seizin.—*Caldwell v. Kirkpatrick*, 6 Ala. 60, 41 Am. Dec. 36; *Blydenburgh v. Cotheal*, 1 Duer (N. Y.) 176; *Vanderkarr v. Vanderkarr*, 11 Johns. (N. Y.) 122; *Clarke v. McNulty*, 3 S. & R. (Pa.) 364.

9. Distinctions Attempted.—In *Stewart v. West*, 14 Pa. St. 336, the court, by *Gibson, C. J.*, drew a distinction between the covenant for quiet enjoyment and that of warranty, viz., "that the former is broken by the very commencement of an action on the better title," but the cases do not seem to warrant a distinc-

the possession, the covenant of warranty is more than the covenant for quiet enjoyment; for the former is an undertaking to defend not merely the possession, but also the land and the estate in it.¹ Again, it has been said that the covenant for quiet enjoyment relates only to the possession, and the eviction which will constitute a breach is merely required to be of lawful right, while the covenant of warranty relates also to the title, and the eviction must be not only by lawful right, but by paramount title.² But these distinctions, so far as they are intelligible, are not warranted by the authorities. This is especially true of the second one.

Summary. — As commonly understood, both these covenants amount to an assurance that the covenantee shall not be evicted by paramount title. And since whatever constitutes a breach of the one covenant is, within this view, a breach of the other,³ the breach of these covenants will be discussed together.

b. WHAT CONSTITUTES A BREACH — (1) *Constituent Elements* — (a) **General Rule** — It has been laid down as a rule deducible from all the authorities, that to constitute a breach of the covenant of warranty there must be an eviction of the covenantee under a paramount title.⁴ And this union of acts of disturbance and lawful title has been declared to be necessary to a breach of the covenant for quiet enjoyment.⁵

(b) **Eviction** — *aa. GENERAL RULE REQUIRING.* — Since both of these covenants relate to the possession and are covenants for quiet enjoyment, there can be no doubt as to the necessity of an eviction. Unless there has been an eviction of the grantee there is no breach of either the covenant of warranty⁶ or

tion on this ground. Either of these covenants may be broken by the covenantee yielding to an outstanding paramount title which is asserted by a suit, but neither covenant is broken without a yielding to the paramount title so asserted. See *infra*, this title and division, the subdivision *Yielding to Paramount Title or Interest*.

1. *Kramer v. Carter*, 136 Mass. 504; *Williams v. Wetherbee*, 1 Aik. (Vt.) 233.

2. *Dugger v. Oglesby*, 3 Ill. App. 94; *Fowler v. Poling*, 6 Barb. (N. Y.) 165.

3. *Both Covenants Broken by Same Acts.* — *Copeland v. McAdory*, 100 Ala. 553; *Barry v. Guild*, 126 Ill. 439; *Mills v. Rice*, 3 Neb. 76.

4. *Union of Acts of Disturbance and Lawful Title Necessary* — *United States*. — *Day v. Chism*, 10 Wheat. (U. S.) 449.

Alabama. — *Griffin v. Reynolds*, 17 Ala. 198.

Illinois. — *Beebe v. Swartwout*, 8 Ill. 162; *Barry v. Guild*, 28 Ill. App. 39, *affirmed* 126 Ill. 439.

Indiana. — *Hooker v. Folsom*, 4 Ind. 90; *Hooker v. Richards*, 5 Ind. 219; *Woodford v. Leavenworth*, 14 Ind. 311.

Kentucky. — *Booker v. Bell*, 3 Bibb (Ky.) 174, 6 Am. Dec. 641.

Massachusetts. — *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Twambly v. Henley*, 4 Mass. 441; *Bearce v. Jackson*, 4 Mass. 408; *Merritt v. Morse*, 108 Mass. 275.

Nebraska. — *Mills v. Rice*, 3 Neb. 76.

Ohio. — *Innes v. Agnew*, 1 Ohio 386; *King v. Kerr*, 5 Ohio 154, 22 Am. Dec. 777.

Pennsylvania. — *Clarke v. McAnulty*, 3 S. & R. (Pa.) 364.

Wisconsin. — *McLennan v. Prentice*, 85 Wis. 427.

5. *Hoppes v. Cheek*, 21 Ark. 585; *Barry v. Guild*, 126 Ill. 439.

6. *Necessity for Eviction* — *Covenant of Warranty* — *United States.* — *Barlow v. Delaney*, 40 Fed. Rep. 97, a case arising in *Missouri*.

Alabama. — *Copeland v. McAdory*, 100 Ala. 553; *Griffin v. Reynolds*, 17 Ala. 198.

California. — *Norton v. Jackson*, 5 Cal. 262.

Connecticut. — *Mitchell v. Warner*, 5 Conn. 497.

District of Columbia. — *Smoot v. Coffin*, 4 Mackey (D. C.) 407.

Georgia. — *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Hampton v. Pool*, 28 Ga. 514.

Illinois. — *Barry v. Guild*, 126 Ill. 439; *Kirkendall v. Keogh*, 2 Ill. App. 492.

Indiana. — *Hannah v. Henderson*, 4 Ind. 174; *Marvin v. Applegate*, 18 Ind. 425.

Kansas. — *Claffin v. Case*, 53 Kan. 560.

Kentucky. — *Huff v. Cumberland Valley Land Co.*, (Ky. 1895) 30 S. W. Rep. 660.

Massachusetts. — *Emerson v. Proprietors, etc.*, 1 Mass. 464, 2 Am. Dec. 34; *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Gilman v. Haven*, 11 Cush. (Mass.) 330; *Chapel v. Bull*, 17 Mass. 213.

Minnesota. — *Allis v. Nininger*, 25 Minn. 525.

Mississippi. — *Hoy v. Taliaferro*, 8 Smed. & M. (Miss.) 727; *Witty v. Hightower*, 12 Smed. & M. (Miss.) 478; *Glenn v. Thistle*, 23 Miss. 42.

New Jersey. — *Carter v. Denman*, 23 N. J. L. 260.

New York. — *Blydenburgh v. Cotheal*, 1 Duer (N. Y.) 176; *Kent v. Welch*, 7 Johns. (N. Y.) 258, 5 Am. Dec. 266; *Vanderkarr v. Vanderkarr*, 11 Johns. (N. Y.) 122; *Miller v. Watson*, 5 Cow. (N. Y.) 195; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Greenvault v. Davis*, 4 Hill (N. Y.) 643; *Kidder v. Bork*, 12 N. Y. Misc. Rep. (Buffalo Super. Ct.) 519.

North Carolina. — *Coble v. Wellborn*, 2 Dev. L. (13 N. Car.) 388.

Ohio. — *Johnson v. Nyce*, 17 Ohio 66, 49 Am. Dec. 444; *Gest v. Kenner*, 2 Handy (Ohio) 86.

Pennsylvania. — *Patton v. McFarlane*, 3 P. & W. (Pa.) 419; *Clarke v. McAnulty*, 3 S. & R.

the covenant for quiet enjoyment.¹

bb. REASON FOR THE RULE. — The rule that there must be an eviction before there can be a recovery upon covenants of warranty and for quiet enjoyment has its foundation in the reason that the covenantee, who has obtained possession, should not be permitted to recover for breach of the covenant for a mere failure or defect of title so long as he is left in possession, as he may never be disturbed, and thus he may never suffer damage; his possession may, in fact, ripen into title by the adverse holding,² or the grantor may subsequently perfect his title.³

cc. APPLICATION OF THE RULE. — **Existence of Outstanding Paramount Title.** — So long as the actual possession of the property remains in the covenantee or his assignee, an action for the breach of the covenant will not lie, though there

(Pa.) 364; *Dickinson v. Voorhees*, 7 W. & S. (Pa.) 353; *Stewart v. West*, 14 Pa. St. 336; *Knepper v. Kurtz*, 58 Pa. St. 480; *McGrew v. Harmon*, 164 Pa. St. 122.

Tennessee. — *Crutcher v. Stump*, 5 Hayw. (Tenn.) 100; *Ferriss v. Harshea, Mart. & Y.* (Tenn.) 52, 17 Am. Dec. 782; *Allison v. Allison*, 1 Yerg. (Tenn.) 16; *Supe v. Supe*, 2 Head (Tenn.) 169.

Texas. — *McGregor v. Tabor*, (Tex. Civ. App. 1894) 26 S. W. Rep. 443.

Vermont. — *Rich v. Wait*, N. Chip. (Vt.) 68; *Clark v. Conroe*, 38 Vt. 469.

Virginia. — *Marbury v. Thornton*, 82 Va. 702.

Washington. — *Morgan v. Henderson*, 2 Wash. Ter. 367.

Wisconsin. — *McLennan v. Prentice*, 85 Wis. 427.

A grantee in a deed containing a covenant of warranty who immediately mortgages back the estate to his grantor and afterwards gives him possession under the mortgage, becoming his tenant, cannot maintain an action on the covenant of warranty in the deed to himself, on account of an entry and ouster by one having an older and better title than his grantor, because such entry and ouster are not against his possession, but against that of his grantor and mortgagee. *Gilman v. Haven*, 11 Cush. (Mass.) 330.

Partial Conflict with Older Surveys. — It has been held in *Texas* that an ouster of the grantee, or an offer by him to surrender possession, is not necessary to enable him to bring an action for breach of the covenant of warranty, in case of a partial conflict with older surveys, where both parties were under mutual mistake when the deed was made. *Doyle v. Hord*, 67 Tex. 621; *Groesbeck v. Harris*, 82 Tex. 411; *Gass v. Sanger*, (Tex. Civ. App. 1893) 30 S. W. Rep. 502.

1. Same — Covenant for Quiet Enjoyment. — *Shep. Touch.* 171.

England. — *Howard v. Maitland*, 11 Q. B. Div. 695.

California. — *Levitzky v. Canning*, 33 Cal. 299; *Bryan v. Swain*, 56 Cal. 616.

Connecticut. — *Mitchell v. Warner*, 5 Conn. 497.

Maine. — *Boothby v. Hathaway*, 20 Me. 251; *Ware v. Lithgow*, 71 Me. 63.

Minnesota. — *Moore v. Frankfield*, 25 Minn. 540.

Nebraska. — *Real v. Hollister*, 20 Neb. 112; *Anderson v. Buchanan*, 20 Neb. 272.

New York. — *Fowler v. Poling*, 6 Barb. (N. Y.) 165; *Waldron v. M'Carty*, 3 Johns. (N. Y.) 471; *Kortz v. Carpenter*, 5 Johns. (N. Y.) 120; *Van Slyck v. Kimball*, 8 Johns. (N. Y.) 198; *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272; *Newburgh v. Galatian*, 4 Cow. (N. Y.) 340; *Webb v. Alexander*, 7 Wend. (N. Y.) 281; *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *Lynch v. Sauer*, 16 Misc. Rep. (N. Y. Supreme Ct.) 1.

Tennessee. — *Hayes v. Ferguson*, 15 Lea (Tenn.) 1, 54 Am. Rep. 398.

Washington. — *Morgan v. Henderson*, 2 Wash. Ter. 367; *Jackson v. McAuley*, 13 Wash. 298.

In Conveyance of Fee by Tenant for Life. — Where a tenant for life conveys in fee with his covenant it is not broken till eviction by the remainderman after the termination of the life estate. *Wilder v. Ireland*, 8 Jones L. (53 N. Car.) 88; *Parker v. Richardson*, 8 Jones L. (53 N. Car.) 452.

Modified Form of the Covenant. — Where, as is usual in *England*, the covenant against incumbrances is so connected with that for quiet enjoyment that the enjoyment is to be free from whatever disturbance may be occasioned by the existence of any incumbrance, the existence of an incumbrance is itself a breach of the latter covenant, and the covenantee may bring an action for the breach, on paying off the incumbrance, without waiting to be evicted. *Hall v. Dean*, 13 Johns. (N. Y.) 105.

2. Reason for the Rule. — *Norton v. Jackson*, 5 Cal. 262; *Shattuck v. Lamb*, 65 N. Y. 499; *Scriven v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224; *McGregor v. Tabor*, (Tex. Civ. App. 1894) 26 S. W. Rep. 443.

3. In Morgan v. Henderson, 2 Wash. Ter. 367, Hoyt, J., said: "Not only do the authorities establish the doctrine that this covenant is not broken by the naked fact that there is a better title outstanding, but we think that this is so upon reason also; for it may well happen that a person may in the best of faith convey a piece of land, of which he has not a perfect title, being satisfied that he will be able to perfect his title so as fully to protect his grantee, and yet, under the rule contended for by the plaintiff in this cause, the covenant for quiet possession in his deed would be broken when made, and an action thereon would lie, even although the grantor should make perfect his title the next day after making the deed."

may in fact exist an outstanding paramount title, the enforcement of which will work a change in the possession.¹

Existence of Incumbrances. — Nor are these covenants to be treated as covenants against incumbrances, so that they will be broken by the fact that there is an outstanding incumbrance, *e. g.*, a mortgage on the land, where no steps have been taken towards its enforcement.²

Existence of Right of Dower. — Nor is the existence of a mere dower interest, which the widow of the covenantor has never proceeded to enforce, a breach of the covenant of warranty.³

Outstanding Taxes. — The mere fact that taxes on the premises were, at the time of the conveyance, due and unpaid, has been held not to be a breach of the covenant to warrant and defend.⁴

Grantor's Title Limited to Life Estate. — A covenant for quiet enjoyment in a deed conveying a fee is not, it has been held, broken if the covenantor has title only to a life estate.⁵

Existence of Right of Way. — Nor does the mere existence of an unopened right of way, without user, constitute a breach of the covenant of warranty.⁶

dd. INAPPLICABILITY OF RULE WHERE COVENANT EMBRACES A COVENANT OF SEIZIN. — The statutes of some of the states have prescribed a short form of warranty which has been decided to contain in itself the five other covenants⁷ including the covenant of seizin, so that whatever would constitute a breach of any one of the five covenants will give an action on the statutory covenant of warranty.

1. Mere Existence of Outstanding Paramount Title Not a Breach. — *Moore v. Vail*, 17 Ill. 185; *Scott v. Kirkendall*, 88 Ill. 465, 30 Am. Rep. 562; *Kirkendall v. Keogh*, 2 Ill. App. 492; *Hannah v. Henderson*, 4 Ind. 174; *Blydenburgh v. Cotheal*, 1 Duer (N. Y.) 176.

Judgment in Partition Between Assignee of Covenantant and Owner of Paramount Title. — Thus it has been held that a judgment in partition between an assignee of the covenantant who is in possession of the premises, and a person holding a paramount title in fee to an undivided portion thereof, allotting to each in severalty his portion, will not give an action on the covenant for quiet enjoyment. *Moore v. Frankenfield*, 25 Minn. 540.

2. Incumbrances — Mere Existence of Not a Breach — Connecticut. — *King v. Killbride*, 58 Conn. 109.

Illinois. — *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385.

Indiana. — *Clark v. Lineberger*, 44 Ind. 223.

Massachusetts. — *Foster v. Woodward*, 141 Mass. 160.

Missouri. — *Koenig v. Branson*, 73 Mo. 634. *New Jersey.* — *Zabriskie v. Baudendistel*, (N. J. 1890) 20 Atl. Rep. 163.

North Carolina. — *Grist v. Hodges*, 3 Dev. L. (14 N. Car.) 198.

Virginia. — *Findlay v. Toncray*, 2 Rob. (Va.) 379; *Marbury v. Thornton*, 82 Va. 702; *Washington City Sav. Bank v. Thornton*, 83 Va. 157.

3. Dower — Mere Existence of Right Not a Breach. — *Tierney v. Whiting*, 2 Colo. 620; *Ayres v. McConnel*, 15 Ill. 230; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385.

In *Blevins v. Smith*, 104 Mo. 583, an inchoate right of dower was held to be a breach of what the reported opinion states as a "covenant of warranty." As the case relied upon in support of this decision (*Walker v.*

Deaver, 79 Mo. 664) held such a right to be a breach of the implied covenant against incumbrances, it is probable that the words "covenant of warranty" were not used in a technical sense, but as equivalent to "covenants in a warranty deed," or words to that effect. But see *Blanchard v. Blanchard*, 48 Me. 174.

In *Canada* it is held that an inchoate right of dower, that is, the right of a married woman while it is contingent on her surviving her husband, is no breach of the covenant for quiet enjoyment. *Hoyt v. Widdifield*, 5 U. C. Q. B. 180; *Thornhill v. Jones*, 12 U. C. Q. B. 231; *Dack v. Currie*, 12 U. C. Q. B. 334. See *Cuthbert v. Street*, 9 U. C. C. P. 115.

In *South Carolina*, since the general warranty prescribed by the Act of 1795 (5 Stat. 266) contains, among others, the covenant against incumbrances, it is of course broken by the existence of a contingent right of dower in the land. *Jeter v. Glenn*, 9 Rich. L. (S. Car.) 374.

See *infra*, this title and division, the subdivision *Covenant Against Incumbrances*.

4. Mere Lien of Unpaid Taxes Not a Breach. — *Leddy v. Enos*, 6 Wash. 247.

Where the covenantant gave a purchase money mortgage, which the covenantor proceeded to foreclose, it was held that taxes and assessments due prior to the sale could not be set off as breaches of the covenants for quiet enjoyment and of warranty, although the covenantor had been notified to pay them, and by reason of his failure to do so the premises had been sold and bid in by the city, there having been no disturbance of the covenantant's possession, nor any suit as yet brought against the covenantant by the city. *Zabriskie v. Baudendistel*, (N. J. 1890) 20 Atl. Rep. 163.

5. Wilder v. Ireland, 8 Jones L. (53 N. Car.) 87.

6. Brown v. Young, 69 Iowa 625.

7. See *supra*, this title, the division *Creation and Construction*.

As eviction is not necessary to a breach of the covenant of seizin,¹ there may be a recovery on this statutory covenant before there has been an eviction.²

cc. EXCEPTION TO RULE WHERE TITLE IS IN THE UNITED STATES. — It has been held that where the paramount title to the lands conveyed is in the United States, the covenant of warranty is broken as soon as made, without the necessity of any future eviction of the grantee.³

(c) **Paramount Title or Interest** — *aa. IN GENERAL.* — While it is not disputed but that an eviction of the covenantee is necessary to constitute a breach of either the covenant of warranty or the covenant for quiet enjoyment, there have been some attempts to limit the application of the rule that, to amount to a breach, the eviction must have been under a paramount title to the covenant of warranty.

bb. COVENANT OF WARRANTY — **General Rule.** — As to the covenant to warrant and defend, there is no question but that to constitute a breach the eviction must be under an adverse title superior to that derived from the warrantor.⁴

cc. COVENANT FOR QUIET ENJOYMENT — **General Rule.** — It has been said that to constitute a breach of the covenant for quiet enjoyment the eviction need not be under paramount title, and that there will be a breach of the covenant if the eviction is by lawful right.⁵ But the consensus of judicial opinion supports

1. See *supra*, this title and division, the subdivision *Covenant of Seizin*.

2. **Eviction Not Necessary to Breach of Certain Statutory Covenants of Warranty.** — It has been so held as to the statutory form of general warranty provided for by the *South Carolina* statute of December, 12, 1795. *Mackey v. Collins*, 2 Nott & M. (S. Car.) 186, 10 Am. Dec. 586; *Biggs v. Bradly*, 1 McCord L. (S. Car.) 500; *Sumter v. Welsh*, 2 Bay (S. Car.) 558, 1 Brev. (S. Car.) 539; *Furman v. Elmore*, 2 Nott & M. (S. Car.) 189, note; *Moore v. Lanham*, 3 Hill L. (S. Car.) 304; *Jeter v. Glenn*, 9 Rich. L. (S. Car.) 374; *Evans v. McLucas*, 12 S. Car. 62.

The same rule holds in *Iowa*, where the form of warranty for a deed in fee (Miller's Rev. Code, 1888, § 1970, p. 732) is held to include the usual covenants. *Funk v. Cresswell*, 5 Iowa 91; *Van Wagner v. Van Nostrand*, 19 Iowa 422.

3. *Pevey v. Jones*, 71 Miss. 647, 42 Am. St. Rep. 486. But see *contra*, *Brown v. Corson*, 16 Oregon 388. See *infra*, this title and division, the subdivisions *Necessity of Hostile Assertion of Outstanding Title*; *Sufficiency of the Hostile Assertion*.

4. **Necessity of Eviction Being under Paramount Title** — *England.* — *Wolton v. Hele*, 2 Saund. 178.

Alabama. — *Griffin v. Reynolds*, 17 Ala. 198.

Colorado. — *Tierney v. Whiting*, 2 Colo. 620.

Georgia. — *Tuggle v. Hamilton*, 100 Ga. 292; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279.

Illinois. — *Dugger v. Oglesby*, 3 Ill. App. 94; *Sisk v. Woodruff*, 15 Ill. 15; *Barry v. Guild*, 126 Ill. 439.

Indiana. — *Crance v. Collenbaugh*, 47 Ind. 256.

Kentucky. — *Stephen v. Pattie*, 3 Bibb (Ky.) 117; *Booker v. Meriwether*, 4 Litt. (Ky.) 212; *Jones v. Jones*, 87 Ky. 82.

Louisiana. — *Kelly v. Wiseman*, 14 La. Ann. 671.

Maryland. — *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480.

Massachusetts. — *Jenkins v. Hopkins*, 8 Pick. (Mass.) 346.

Missouri. — *Morgan v. Hannibal*, etc., R. Co., 63 Mo. 129.

Nebraska. — *Snyder v. Jennings*, 15 Neb. 372.

New York. — *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120; *Miller v. Avery*, 2 Barb. Ch. (N. Y.) 582; *Beyer v. Schultze*, 54 N. Y. Super. Ct. 212. See *Rickert v. Snyder*, 9 Wend. (N. Y.) 416.

Tennessee. — *Stuart v. Nelson*, 4 Hayw. (Tenn.) 200.

Texas. — *Westrope v. Chambers*, 51 Tex. 178; *Maverick v. Routh*, 7 Tex. Civ. App. 669; *Norton v. Schmucker*, 83 Tex. 212.

Vermont. — *Williams v. Wetherbee*, 1 Aik. (Vt.) 233; *Gleason v. Smith*, 41 Vt. 293; *Swazey v. Brooks*, 34 Vt. 451.

A owning land in fee conveyed it in 1816 to B in fee, by a deed containing the usual covenants of seizin and warranty. In 1820 C, claiming such conveyance to have been fraudulent, levied an execution on the land as the estate of A and had it set off to him. In an action of ejectment afterwards brought by C against B for the land it was held that as a recovery and consequent eviction by C would not subject A on his covenant of warranty, A was a competent witness for B. *Giddings v. Canfield*, 4 Conn. 482.

Grantor's Deed Not Recorded. — A party who was the actual owner of a farm and in possession thereof, traded the same subject to a mortgage of eight hundred dollars, but the grantee, in consequence of the omission of a deed in the grantor's chain of title on the record, was unable to effect a loan on the farm, in consequence of which the mortgage was foreclosed and the grantee evicted. The grantor afterwards procured a second deed to supply the missing link in his chain of title. It was held that the grantor had title when he conveyed the land, and that damages for loss of the farm being too remote, the grantee could not recover them in an action for breach of the covenant of warranty. *Lamb v. Buker*, 34 Neb. 485.

5. **Eviction by Lawful Right Deemed Sufficient.** — *Dugger v. Oglesby*, 3 Ill. App. 94; *Fowler v. Poling*, 6 Barb. (N. Y.) 165.

the proposition that to constitute a breach of this covenant the eviction must, as in the case of the covenant of warranty, be under some outstanding paramount title or interest.¹

Tortious Acts by Third Persons.—Tortious acts of third persons are certainly not within the purview of this covenant. Although it was, in an early English case, held that the covenant for quiet enjoyment extends to and is broken by a tortious eviction,² this is not the law. On the ground that the covenantee has his remedy by action against the wrongdoer for all tortious entries and disturbances, it was at an early date decided in *England*,³ and is now the law both there and in the *United States*, that this covenant affords no assurance against and is not broken by the wrongful act of a third person,⁴ unless, indeed, the covenant by its terms extends to such acts.⁵

1. Eviction Required to Be under Paramount Title.—*Hoppes v. Cheek*, 21 Ark. 585; *Mills v. Rice*, 3 Neb. 76; *Webb v. Alexander*, 7 Wend. (N. Y.) 281; *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120; *Kelly v. Dutch Church*, 2 Hill (N. Y.) 105; *Beyer v. Schultze*, 54 N. Y. Super. Ct. 212; *Wilder v. Ireland*, 8 Jones L. (53 N. Car.) 88; *Faries v. Smith*, 11 Rich. L. (S. Car.) 80; *Knapp v. Marlboro*, 34 Vt. 235.

2. Whether Broken by Tortious Eviction—Early View.—*Mountford v. Catesby*, 3 Dyer 328a.

3. Same—Established Doctrine.—In *Hays v. Bickerstaff*, Vaugh. 118, a lease of a portion of a long term of years had been made with a general covenant for quiet enjoyment, and the reversion in the term had been assigned to a third person, who evicted the tenant, although the latter had attorned to him. On action brought by the tenant against his lessor, it was held that the covenant, however generally expressed, must be understood as applying merely to the acts of those claiming by title, because (1) the grantor does not expressly covenant tortious acts of strangers; (2) he could not reasonably be required to do so, as he could neither foresee nor prevent them; (3) the covenantee has his legal remedy against the wrongdoer; (4) he does not need a remedy against the covenantor also; (5) such a remedy would enable him to injure his covenantor by procuring a stranger to make a tortious disturbance; and (6) the express words of the covenant were that the covenantee should lawfully enjoy the premises without let or hindrance. This was in accord with the oldest authorities. "If one lease for years and covenant to warrant the land, and the lessee be ousted by wrong, he shall not have covenant; otherwise if it be by elder title," *Brooke's Abr. Guaranties*, pt. 1; *Y. B.* 26 Hen. VIII. 71; *Y. B.* 22 Hen. VI. (Pasch.) 26. And the doctrine is now established. *Tisdale v. Essex*, Hob. 34; *Wotton v. Hele*, 2 Saund. 178, note; *Nokes v. James*, Cro. Eliz. 675; *Lewis v. Smith*, 9 C. B. 610, 67 E. C. L. 610; *Howell v. Richards*, 11 East 633; *Dudley v. Folliot*, 3 T. R. 584; *Nash v. Palmer*, 5 M. & S. 374.

4. United States.—*Andrus v. St. Louis Smelting, etc., Co.*, 130 U. S. 643.

Alabama.—*Chestnut v. Tyson*, 105 Ala. 140.

Arkansas.—*Hoppes v. Cheek*, 21 Ark. 585.

California.—*Playter v. Cunningham*, 21 Cal. 229; *Branger v. Manciet*, 30 Cal. 624.

Illinois.—*Beebe v. Swartwout*, 8 Ill. 162; *Gazzolo v. Chambers*, 73 Ill. 75.

Indiana.—*Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680.

Massachusetts.—*Bartlett v. Farrington*, 120 Mass. 284; *Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122; *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522; *Kimball v. Grand Lodge, etc.*, 131 Mass. 59.

Mississippi.—*Surget v. Arighi*, 11 Smed. & M. (Miss.) 96, 49 Am. Dec. 46.

New York.—*Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; *Folliard v. Wallace*, 2 Johns. (N. Y.) 402; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330, 38 Am. Dec. 637; *Kelly v. Dutch Church*, 2 Hill (N. Y.) 105; *Connor v. Bernheimer*, 6 Daly (N. Y.) 295; *Meeks v. Bowerman*, 1 Daly (N. Y.) 100; *Butterworth v. Volkening*, 4 Thomp. & C. (N. Y.) 650; *Johnson v. Oppenheim*, 34 N. Y. Super. Ct. 416; *Coddington v. Dunham*, 35 N. Y. Super. Ct. 412.

North Carolina.—*Wilder v. Ireland*, 8 Jones L. (53 N. Car.) 88.

Pennsylvania.—*Brick v. Coster*, 4 W. & S. (Pa.) 499; *Spear v. Allison*, 20 Pa. St. 200; *Schuykill, etc., Imp., etc., Co. v. Schmoele*, 57 Pa. St. 271; *Moore v. Weber*, 71 Pa. St. 420, 10 Am. Rep. 708.

South Carolina.—*Rantin v. Robertson*, 2 Strobb. L. (S. Car.) 366.

Vermont.—*Underwood v. Birchard*, 47 Vt. 305.

5. Covenant Extended to Tortious Acts.—Of course the covenant may be so worded as to extend to tortious disturbances, as in *Chaplain v. Southgate*, 10 Mod. 384, where the covenant was for enjoyment "against all claiming or pretending to claim any right." See the same case reported under the name *Southgate v. Chaplin*, 1 Comyns Rep. 230. See also *Hunt v. Allen*, Winch. 25.

Where the Covenant Is Against Eviction by Any Person.—In the case of *Mountford v. Catesby*, 3 Dyer 328a, it was held that an express assumption that the lessee should enjoy quietly and peaceably "without eviction and interruption of any person," etc., was held to bind the lessor against wrongful entries. *Hobart* 35. So where the lessor in a lease for years covenanted that the lessee "might or should peaceably, quietly, and lawfully have, hold, and enjoy the premises without interruption of him or any other person," and the plaintiff in an action on the bond to perform these covenants assigned the entry of a stranger who had no right as a breach, the opinion of Coke and the court was clearly for the plaintiff. See marginal note to *Mountford v. Catesby*, 3 Dyer 328a. But this does not

By the Covenantor.—But while the main object of a covenant for quiet enjoyment is to protect the grantee or lessee from the lawful claims of third persons having a title paramount to that of the covenantor, the covenant may be broken by a forcible entry or disturbance by the grantor or lessor,¹ his heirs or executors.² Where the acts done by the grantor amount to a claim of title by him, the covenant is broken.³ It is not, however, every mere trespass by the covenantor upon the premises that will constitute a breach of this covenant; to have that effect the entry must amount to an assumption of title.⁴

(2) *What Constitutes Eviction*.—(a) **Dispossession by Process of Law.**—Technically, an eviction is a legal deprivation of the possession of land, or dispossession by process of law.⁵ The requirement that there must have been an eviction of the grantee before there can be a breach of the covenants of warranty or for quiet enjoyment is, of course, satisfied by such an eviction.⁶

seem to have been accepted as the law in all the early English cases. Thus where the condition of a bond was "that if the obligee enjoy, etc., according to the indenture, without let or interruption of any man," it was agreed by all the justices that if he be ousted by one who has no right, the bond is not forfeited; for it shall be intended of lawful lets and interruptions. And this is the law according to Periam, if the words "according to the indenture" had been omitted. See marginal note to *Mountford v. Catesby*, 3 Dyer 328a. And in a case much later than those above cited, it was held that the words of a covenant, "without let, etc., of the defendant and his heirs and of all and every other person or persons whomsoever," were restricted to lawful interruptions; "for even a general warranty, which is conceived in terms more general than the present covenant, has been restrained to lawful interruptions. *Dudley v. Folliott*, 3 T. R. 584. See also *Tisdale v. Essex*, Moo. 861, Hob. 35, 1 Rolle 397; *Holder v. Taylor*, Hob. 12; *Chantflower v. Priestly*, Cro. Eliz. 914, Noy 50; *Broking v. Cham*, Cro. Jac. 425; *Hamond v. Dod*, Cro. Car. 5; *Hays v. Bickerstaff*, Vaugh. 118; *Chaplain v. Southgate*, 10 Mod. 384.

In the United States a covenant of quiet enjoyment, even though it warrants the possession against the acts of "any person or persons whatever," is not construed to protect the covenantee against tortious disturbances or evictions by third persons. *Branger v. Manciet*, 30 Cal. 624; *Gleason v. Smith*, 41 Vt. 293.

Covenant for Enjoyment Without Eviction by Persons Particularly Named.—It has been said that a covenant for enjoyment without eviction by persons particularly named is a warranty against the wrongful as well as the rightful entries by such persons. *Shep. Touch.* 166; *Nash v. Palmer*, 5 M. & S. 379; *Foster v. Mapes*, Cro. Eliz. 212; *Lucy v. Leviston*, Freem. 103, 3 Keb. 163; *Nash v. Palmer*, 5 M. & S. 379; *Fowle v. Welsh*, 1 B. & C. 29, 8 E. C. L. 14, 2 D. & R. 133. See also *Perry v. Edwards*, 1 Stra. 400.

1. Tortious Acts of Covenantor.—It was held in *Davie v. Sacheverell*, 1 Rolle Abr. 429, pl. 7, that a lessor's covenant against lawful disturbance by the lessor is not broken by his entry as a mere trespasser on the lessee. But subsequently a distinction was made between a tortious entry by a stranger and by the covenantor himself. And it is now admitted

law that the covenantor cannot plead that his entry was unlawful in order to avoid the consequences of his own wrongful act: for as against the covenantor himself the court will not consider the word "lawful." *Platt on Covenants* 319; *Cave v. Brookesby*, W. Jones 360; *Tisdale v. Essex*, Hob. 34; *Penning v. Plat*, Cro. Jac. 383; *Corus v. —*, Cro. Eliz. 544; *Andrews's Case*, Cro. Eliz. 214; *Forte v. Vines*, 2 Rolle 21; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376. See *Beebe v. Swartwout*, 8 Ill. 162.

2. Entry by Executors of Covenantor.—It has been so held where the entry was by executors of the covenantor. *Ratcliffe v. —*, Brownl. 80.

3. Where Acts of Covenantor Amount to an Assumption of Title.—*Lloyd v. Tomkies*, 1 T. R. 671; *Crosse v. Young*, 2 Show. 425; *Claunch v. Allen*, 12 Ala. 159; *New York v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538; *Romaine v. Brewster*, 6 Misc. Rep. (N. Y. City Ct.) 531.

The rule has been applied where the covenantor erected a gate across a way leading to the close which he had conveyed. *Andrew v. Paradise*, 8 Mod. 319. See also *Hunt v. Allen*, Winch. 25.

Suit by Grantor to Set Aside Deed for Fraud.—It has been held to be a breach of the covenant for "quiet and peaceable possession," for a grantor to commence an action to set aside his deed for fraud after the value of the premises has appreciated and withdraw it after it has again depreciated. *Akerly v. Vilas*, 23 Wis. 207, 99 Am. Dec. 165.

4. Mere Trespass by Covenantor.—*Penn v. Glover*, Cro. Eliz. 421; *Claunch v. Allen*, 12 Ala. 159; *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680; *Bartlett v. Farrington*, 120 Mass. 284. See *Beebe v. Swartwout*, 8 Ill. 162; *New York v. Mabie*, 13 N. Y. 151, 64 Am. Dec. 538.

Entry by Landlord to Make Repairs.—*A fortiori*, a mere interruption of the use and enjoyment of the premises, consequent upon repairs being made by the landlord to other parts of the building, without an actual entry upon the demised premises, or any actual or constructive eviction of the tenant, is no breach of the covenant. *Doupe v. Genin*, 1 Sweeney (N. Y.) 25; *White v. Thurber*, 55 Hun (N. Y.) 447.

5. Funk v. Creswell, 5 Iowa 62; *Thomas v. Stickle*, 32 Iowa 71. See the title EVICTION.

6. Dimond v. Billingslea, 2 Har. & G. (Md.) 264.

Eviction by Legal Process under Prior Mortgage. — Unquestionably a cause of action on a covenant of warranty or for quiet enjoyment accrues to the covenantee upon his eviction by legal process under a prior mortgage.¹

Eviction by Suit in Equity. — On the ground that a court of law could not recognize proceedings in equity, it was at one time doubted whether a suit in equity was a disturbance within the meaning of the old form of covenant for quiet enjoyment,² and in consequence the covenant was extended to cover suits in equity.³ But it is now settled that a disturbance of the title or possession of the land by a suit in equity is a breach of the covenant.⁴

(b) **Necessity of Eviction by Process of Law.** — The older authorities undoubtedly favor the view that there can be no breach of the covenant of warranty or for quiet enjoyment without an actual eviction by process of law.⁵ But this requirement was early abandoned in *England*.⁶ And in those of the *United States* where it seems to have at one time obtained, it has since been rejected.⁷

Delivery of Seizin by Sheriff. — It has been held that the delivery of seizin by the sheriff to the creditor, in satisfaction of his execution, is an eviction and constitutes a breach of the covenant of warranty. *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182; *Wyman v. Bridgen*, 4 Mass. 150; *Bigelow v. Jones*, 4 Mass. 512.

Decree in Equity Directing Conveyance and Delivery of Possession. — And it has been held that a decree in equity directing the defendant, *i. e.*, the covenantee, to execute a deed and deliver possession of the land is tantamount to an eviction by process of law and constitutes a breach of the covenant for quiet enjoyment. *Martin v. Martin*, 1 Dev. L. (12 N. Car.) 413.

Dower Assigned and Widow Placed in Possession. — Unquestionably, if a claim for dower is prosecuted, dower assigned by metes and bounds and the widow put in possession, a covenant of warranty is broken. *Jackson v. Hanna*, 8 Jones L. (53 N. Car.) 188; *Johnson v. Nyce*, 17 Ohio 66, 49 Am. Dec. 444. See *Dimond v. Billingslea*, 2 Har. & G. (Md.) 264.

Judgment in Trespass. — In *Williams v. Shaw*, Term (4 N. Car.) 197, the Supreme Court of *North Carolina* held that there was a breach of the covenant for quiet enjoyment when one claiming a superior title obtained a judgment for damages in an action of trespass *quare clausum fregit* against the covenantee. Taylor, C. J., said: "It is wholly immaterial whether the eviction is effected by legal process or by private disturbance and molestation. * * * But if a legal recovery were necessary I should not hesitate in considering the judgment in an action of trespass *quare clausum fregit* as effectual for that purpose." On the authority of this case, an action of trespass by a prior lessee against a subsequent lessee though not brought till after the expiration of the prior lease, has been held in *California* to amount to an eviction and to entitle the subsequent lessee to an action on his covenant for quiet enjoyment. *McAlister v. Landers*, 70 Cal. 79.

1. *Tufts v. Adams*, 8 Pick. (Mass.) 547; *Cheney v. Straube*, 35 Neb. 521; *Stewart v. Drake*, 9 N. J. L. 139; *Winslow v. McCall*, 32 Barb. (N. Y.) 241.

2. **Suit in Equity.** — See *Platt on Cov.* 322; *Selby v. Chute*, Moo. 859, 1 Brownl. 23.

3. *Shep. Touch.* by Prest. 166; 2 Sugd. Vend. & Purch. (14th ed.) 600.

4. *Calthorp v. Heyton*, 2 Mod. 54; *Hunt v. Danvers*, T. Raym. 370, in which the case of *Selby v. Chute*, Moo. 859, 1 Brownl. 23, is commented upon as wrongly reported; *Morgan v. Hunt*, 2 Vent. 213; *Selby v. Chute*, Moo. 859; *Trust, etc., Co. v. Covert*, 30 U. C. Q. B. 239, 39 U. C. Q. B. 327.

5. **Requirement of Eviction by Process of Law.** — In an early case in the state of *New York*, that of *Lansing v. Van Alstyne*, cited in 2 Wend. (N. Y.) 563, note, it was said by Savage, C. J., "that to constitute an eviction by a stranger there must be a disturbance of the possession under a paramount title by due process of law." See also *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379. And in certain other *New York* cases it is said that to constitute a breach of the covenant of warranty there must be "actual eviction." *Blydenburgh v. Coheal*, 1 Duer (N. Y.) 176; *Rindskopff v. Farmers' L. & T. Co.*, 58 Barb. (N. Y.) 36; *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120.

In *Waldron v. McCarty*, 3 Johns. (N. Y.) 471, M. gave a deed of land to W., in which he covenanted that he would warrant and defend W. in quiet and peaceable possession of the premises. At the time of the conveyance there was a previous mortgage, and a sale of the premises decreed, and W. afterwards purchased the same at the master's sale, and then brought his action for a breach of the covenant of warranty for peaceful enjoyment; and it was held that an action could not be maintained on the covenant until there had been an eviction or actual ouster by a paramount lawful title.

6. **Abandonment of the Requirement.** — In *England*. — In *Foster v. Pierson*, 4 T. R. 617, the declaration was upon the covenant for quiet enjoyment in a lease, and it was alleged for breach that a third person having lawful right, etc., entered and expelled the plaintiff. The defendant demurred on the ground, among others, that the declaration did not show an eviction "by, or in pursuance of, or under any legal process of law;" but that point was abandoned on the argument, and judgment was rendered for the plaintiff. See also *Wotton v. Hele*, 2 Saund. 181 *b.*, note 10; *Ludwell v. Newman*, 6 T. R. 458; *Hodgson v. East India Co.*, 8 T. R. 278.

7. **Same — In the United States.** — The *New York* case of *Lansing v. Van Alstyne*, cited in 2 Wend. (N. Y.) 563, note (see second note

Many cases are found wherein the necessity of eviction by process of law is expressly denied,¹ the established rule being that there may be either an actual eviction, or such a disturbance of the possession, sometimes called a constructive eviction, as is tantamount to an eviction.²

(c) **What Constitutes a Constructive Eviction** — *aa. IN GENERAL.* — While it is comparatively easy to determine what amounts to an actual eviction, it is a matter of great difficulty to determine what facts are essential to a virtual or constructive eviction. Indeed, this difficulty is so great "that it may almost be said that where no actual legal eviction has taken place, no general rule applicable to all cases can be laid down, and that each particular case must be determined on its own merits."³

bb. POSSESSION OF LAND BY THIRD PERSON AT TIME OF CONVEYANCE — (*aa*) *Under Paramount Title.* — It is frequently contended that the possession of the premises by a third person under paramount title amounts to an eviction of the grantee *eo instante*, which entitles him to recover on his covenants of warranty and for quiet enjoyment.

In England. — That this constitutes a breach of the covenant for quiet enjoyment, was early decided in England, where the covenant of warranty is practically unknown.⁴

supra), has since been *overruled* (*Greenvault v. Davis*, 4 Hill (N. Y.) 643), and it is no longer the law in New York that to constitute an eviction there must be a disturbance of the possession by legal process. *Cowdrey v. Coit*, 44 N. Y. 382.

In the early *California* case of *Norton v. Jackson*, 5 Cal. 262, *Heydenfeldt, J.*, in delivering the opinion of the court, said that eviction by process of law is requisite to enable an action to be maintained on the covenant of warranty. This statement is, however, purely a dictum, for there had been no eviction, either actual or constructive, the purchaser still being in possession under the title of his covenantor. See *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456, in which case the necessity of an eviction by process of law is denied.

New Jersey. — The case of *Stewart v. Drake*, 9 N. J. L. 139, has sometimes been cited as supporting the proposition that to constitute a breach of the covenants for quiet enjoyment and of warranty, there must be a disturbance in or deprivation or cessation of the possession, by the prosecution and operation of legal measures. But the belief that this was decided in this case evidently arose from a mistake in the reporter's headnotes, which, as is said by *Depue, J.*, in the later case of *Kellog v. Platt*, 33 N. J. L. 328, is not warranted by the opinion of the court. The rule laid down in the opinion is that to constitute a breach there must be a lawful eviction or a disturbance of the possession.

1. Cases Denying the Necessity of Eviction by Process of Law. — *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Thomas v. Stickle*, 32 Iowa 71; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; *Kellog v. Platt*, 33 N. J. L. 328; *Greenvault v. Davis*, 4 Hill (N. Y.) 643; *Cowdrey v. Coit*, 44 N. Y. 382; *Hyman v. Boston Chair Mfg. Co.*, 58 N. Y. Super. Ct. 282; *Parker v. Dun*, 2 Jones L. (47 N. Car.) 203; *Hodges v. Latham*, 98 N. Car. 239, 2 Am. St. Rep. 333; *Randolph v. Meek, Mart. & Y. (Tenn.)* 58; *Cassidy's Succession*, 40 La. Ann. 827, which case turns on the law in *Texas*.

2. Either Actual or Constructive Possession

Sufficient — *Connecticut.* — *Mitchell v. Warner*, 5 Conn. 497; *King v. Kilbride*, 58 Conn. 109.

Illinois. — *Moore v. Vail*, 17 Ill. 185; *Brady v. Spurck*, 27 Ill. 478; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385; *Claycomb v. Munger*, 51 Ill. 373; *Scott v. Kirkendall*, 88 Ill. 465, 30 Am. Rep. 562.

Iowa. — *Funk v. Cresswell*, 5 Iowa 65.

Louisiana. — *Coxe's Succession*, 15 La. Ann. 514.

Massachusetts. — *Hamilton v. Cutts*, 4 Mass. 349, 3 Am. Dec. 222.

Mississippi. — *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360.

New Jersey. — *Carter v. Denman*, 23 N. J. L. 260; *Stewart v. Drake*, 9 N. J. L. 139; *Kellog v. Platt*, 33 N. J. L. 328.

North Carolina. — *Coble v. Wellborn*, 2 Dev. L. (13 N. Car.) 388.

Pennsylvania. — *Stewart v. West*, 14 Pa. St. 338; *McGrew v. Harmon*, 164 Pa. St. 115.

Vermont. — *Clark v. Conroe*, 38 Vt. 469.

Mississippi. — In *Dyer v. Britton*, 53 Miss. 270, *Simrall, C. J.*, in delivering the opinion of the court, said: "The decisions in this state hold that, in order to sustain an action on the covenant of general warranty, there must be either an actual eviction by judicial process, or a surrender of possession to a valid subsisting paramount legal title, asserted against the covenantor; or that there must be a holding of the grantee out of possession, by such title, so that he could not enter. *Dennis v. Heath*, 11 Smed. & M. (Miss.) 218, 49 Am. Dec. 51; *Witty v. Hightower*, 12 Smed. & M. (Miss.) 481; *Burrus v. Wilkinson*, 31 Miss. 537."

3. *Koerner, J.*, in *Beebe v. Swartwout*, 8 Ill. 162. See also *Scott v. Kirkendall*, 88 Ill. 465, 30 Am. Rep. 562.

4. English Doctrine. — Thus, in the leading case of *Cloake v. Hooper*, *Freem.* 122, 6 Vin. Abr. 427, the action was upon an express covenant for quiet enjoyment. The plaintiff set forth in his declaration that the lands belonged to the king. On demurrer, it was objected that the plaintiff did not allege an entry and so could not be disturbed, but judgment

In United States — Former View. — But in the United States the courts in a number of early cases, arguing that the grantee never having been in possession there can be no eviction, inclined to the view that the possession of the land by the owner of the outstanding paramount title does not amount to a breach of the covenant for quiet enjoyment or of warranty.¹

Abandonment of the View. — But this view was never very firmly established,² and is now generally abandoned. The reason underlying the general rule that there must be an eviction of the grantee in order that there may be a breach of these covenants, does not prevent the inability of the covenantee to obtain possession in consequence of another being in possession under paramount title, being considered an eviction within that rule.³

Present Doctrine. — And on the ground that the covenantee should neither be put to the expense, delay, and trouble of bringing ejectment to get possession, when it would certainly prove unavailing, nor be required to commit an actual trespass against the real owner in order to get possession only to be himself turned out of that possession, it has become a firmly established rule in the United States that if the premises at the time of the conveyance were in the actual possession of another who holds them under a paramount or perfect title, this is in itself an eviction which entitles the grantee to a recovery upon these covenants.⁴

Where the Grantee Sues for Possession. — Especially is this so if the grantee brings an action for the possession but fails for want of title in his grantor.⁵

Where the Grantee Omits to Sue for Possession. — But this step is not necessary; there will, in this case, be a constructive eviction even though the grantee fails to assert his title by suit.⁶

was given for the plaintiff; "for," said the court, "having set forth the title in the patent of the king, the plaintiff shall not be enforced to enter and subject himself to an action by a tortious act." The same principle was adjudged in *Hacket v. Glover*, 10 Mod. 143. And in *Ludwell v. Newman*, 6 T. R. 458, it was decided that a covenant for quiet enjoyment in a lease meant a legal entry and enjoyment, and was broken by a prior lease to another who had taken possession. See also *Hawkes v. Orton*, 5 Ad. & El. 367, 31 E. C. L. 356.

1. Early Cases in the United States. — *Day v. Chism*, 10 Wheat. (U. S.) 452; *Kortz v. Carpenter*, 5 Johns. (N. Y.) 120; *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120; *St. John v. Palmer*, 5 Hill (N. Y.) 600; *Rindskopf v. Farmers' L. & T. Co.* 58 Barb. (N. Y.) 36. See also *Matteson v. Vaughn*, 38 Mich. 373; *Vaughn v. Matteson*, 39 Mich. 759.

Apparently the only authority for this view was the dictum in *Holder v. Taylor*, Hob. 12, that although in the case of an implied covenant for power to lease it was unreasonable to make the lessee enter upon the land, if in the possession of another, and so commit a trespass, yet "if it were an express covenant for quiet enjoying, then perhaps it were otherwise."

2. Early Cases Distinguished. — For an exposition of what was actually decided in the above cited *New York* cases, see the opinion of Earl, C., in *Shattuck v. Lamb*, 65 N. Y. 499. See also *Claffin v. Case*, 53 Kan. 560.

3. Shattuck v. Lamb, 65 N. Y. 499. See also *Scriver v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224.

4. Approved Rule. — See the cases cited in the two succeeding notes.

5. Rule Applied where Grantee Sues for Posses-

sion. — *Cummins v. Kennedy*, 3 Litt. (Ky.) 118, 14 Am. Dec. 45; *Barnett v. Montgomery*, 6 T. B. Mon. (Ky.) 327; *Shattuck v. Lamb*, 65 N. Y. 499; *Grist v. Hodges*, 3 Dev. L. (14 N. Car.) 200; *Pitkin v. Leavitt*, 13 Vt. 379.

6. Rule Applied where Grantee Does Not Sue for Possession — *United States*. — *Duval v. Craig*, 2 Wheat. (U. S.) 45. See *Noonan v. Lee*, 2 Black. (U. S.) 499; *Peters v. Bowman*, 98 U. S. 56.

Alabama. — *Banks v. Whitehead*, 7 Ala. 83.

Arkansas. — See *Abbott v. Rowan*, 33 Ark. 593; *Dillahunt v. Little Rock, etc.*, R. Co., 59 Ark. 629.

California. — See *Playter v. Cunningham*, 1 Cal. 229.

Colorado. — *Tierney v. Whiting*, 2 Colo. 620.

Illinois. — See *Jones v. Warner*, 81 Ill. 343; *Moore v. Vail*, 17 Ill. 185.

Indiana. — *Small v. Reeves*, 14 Ind. 163.

Kentucky. — *Pryse v. McGuire*, 81 Ky. 608.

Maine. — *Curtis v. Deering*, 12 Me. 499.

Minnesota. — *Fritz v. Pusey*, 31 Minn. 368.

Mississippi. — *Witty v. Hightower*, 12 Smed. & M. (Miss.) 478. See *Dennis v. Heath*, 11 Smed. & M. (Miss.) 206, 49 Am. Dec. 51.

Missouri. — *Murphy v. Price*, 48 Mo. 247; *Blondeau v. Sheridan*, 81 Mo. 545.

Nebraska. — *Heyn v. Ohman*, 42 Neb. 693.

New York. — See *Gardner v. Keteltas*, 3 Hill (N. Y.) 330, 38 Am. Dec. 637.

North Carolina. — *Grist v. Hodges*, 3 Dev. L. (14 N. Car.) 198; *Hodges v. Latham*, 98 N. Car. 239, 2 Am. St. Rep. 333.

Tennessee. — *Randolph v. Meek*, Mart. & Y. (Tenn.) 58; *Miller v. Bentley*, 5 Sneed (Tenn.) 671.

Vermont. — *Park v. Bates*, 12 Vt. 381, 36 Am. Dec. 347; *Clark v. Conroe*, 38 Vt. 469; *Smith v. Scribner*, 59 Vt. 96.

(bb) *Without Title*.—Where the Grantee Does Not Have the Title.—There is authority for the view that even the possession of a third person without title is a breach of the covenant of warranty, where the grantee in consequence of the want of title in his grantor has no title to the land. It is held that since a grantee, to whom a warranty deed has been given by a grantor who has neither title nor possession, may be prevented from occupying the land in consequence of the possession of another equally without title, the covenant of warranty is broken if the land is in the possession of a third person merely claiming title.¹

Where the Title Is in the Grantee.—Where, however, the grantor himself has and conveys to his grantee a valid title, it would seem that the covenant is not broken by the possession of a third person, unless it is under a paramount title.² And it has been held that where a lessee is clothed with the title by virtue of a lease containing a covenant for quiet enjoyment, it is not the duty of the lessor, if the premises are wrongfully held by a third person, to take the steps necessary to put his lessee into possession; the covenant for quiet enjoyment only implies a legal right to enter, and is not broken simply because the premises are at the time of the lease in the possession of a third person who is not shown to be in under superior title.³

cc. **SUBSEQUENT ENTRY, WHERE THE LAND REMAINS VACANT, BY THIRD PERSON**—(aa) *By Trespasser*.—Of course if the grantee of vacant land by a conveyance transferring a good title does not exercise his unquestionable right of entering into possession, but allows the possession of an adverse claimant to ripen into title, it cannot be claimed that the covenantee has lost the land by reason of an outstanding paramount title, and he is not entitled to a recovery on the covenant of warranty.⁴

(bb) *By the Owner of a Paramount Title*.—But the grantee is under no obligation to his grantor to enter into possession of the land for the purpose of avoiding the consequences of an existing defect in the title.⁵ And if the premises

Virginia.—*Sheffey v. Gardiner*, 79 Va. 313; *Jones v. Richmond*, 88 Va. 231.

West Virginia.—*Rex v. Creel*, 22 W. Va. 373; *Moreland v. Metz*, 24 W. Va. 119, 49 Am. Rep. 246.

Grantor Withholding Possession.—It has been held that the grantor, by refusing to allow his grantee to enter and enjoy the premises conveyed, and by maintaining an adverse interest in himself, commits a breach of his covenant of warranty. *Jones v. Timmons*, 21 Ohio St. 596.

A conveyed an estate to B, in fee, with a covenant for quiet enjoyment, and also covenanted to surrender part of the estate conveyed, on the happening of a certain event. It was held that this latter clause did not authorize A to hold until the event happened, but that B was entitled to immediate possession. *Grimsley v. White*, 3 Mo. 257.

1. See *Pitkin v. Leavitt*, 13 Vt. 379.

Possession of Third Person Not Shown to Have Title.—In *Caldwell v. Kirkpatrick*, 6 Ala. 60, 41 Am. Dec. 36, it was held that the covenant of warranty is broken where the grantor at the time of the conveyance has neither the title nor the possession of the premises, but a third person is in possession, claiming title and right of possession, although it is not shown that such third person has any title to the land.

2. **Possession by Third Person under Mere Claim of Right.**—*Noonan v. Lee*, 2 Black. (U. S.) 499; *Peters v. Bowman*, 98 U. S. 56; *Andrus v. St. Louis Smelting, etc., Co.*, 130 U. S. 643; *Hoppes v. Cheek*, 21 Ark. 585; *Phelps v. Saw-*

yer, 1 Aik. (Vt.) 150. See *McLennan v. Prentice*, 85 Wis. 427; *Carr v. Dunn*, 9 U. C. Q. B. 246.

Possession by Grantor's Tenant.—The covenant of warranty is not broken by the occupancy of the land by the vendor's tenant. *Kellum v. Berkshire L. Ins. Co.*, 101 Ind. 455.

3. **Covenantor Not Bound to Place Lessee in Possession.**—*Playter v. Cunningham*, 21 Cal. 229; *Gazzolo v. Chambers*, 73 Ill. 75; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330, 38 Am. Dec. 637. *Contra*, *Coe v. Clay*, 5 Bing. 440, 15 E. C. L. 492; *Jenks v. Edwards*, 11 Exch. 775; *Field v. Herrick*, 14 Ill. App. 181.

4. **Entry on Land, where It Remains Vacant, by Trespasser.**—*Clafin v. Case*, 53 Kan. 560; *Rindskopf v. Farmers' L. & T. Co.*, 58 Barb. (N. Y.) 36; *Phelps v. Sawyer*, 1 Aik. (Vt.) 150. See *Jenkins v. Hopkins*, 8 Pick. (Mass.) 350.

5. **Grantee Not Bound to Take Possession.**—Thus the fact that if a grantee who failed to receive a good title from his grantor had taken possession of the land at the time of the conveyance to him, he would have acquired title by adverse possession, does not relieve the grantor from liability on the covenant of warranty. *Graham v. Dyer*, (Ky. 1895) 29 S. W. Rep. 346.

And in *Winslow v. McCall*, 32 Barb. (N. Y.) 241, it was held that the fact that the grantee might, by taking immediate possession, have prevented the mortgagee from becoming mortgagee in possession until the grantee should resort to legal proceedings, will not affect the right of the latter under the covenant.

at the time of the conveyance are vacant, *e. g.*, wild and uncultivated lands, and the grantee, who takes no possession at the time, is afterwards prevented from taking possession by the entry of one having a superior title, there is a breach of the covenants of warranty and for quiet enjoyment.¹

dd. YIELDING TO PARAMOUNT TITLE OR INTEREST—(*aa*) *General Principles.*—Even where the covenantee is in possession of the land there may be a breach of the covenants without a technical eviction.

Right to Surrender Possession or Purchase Title.—If an outstanding title or interest against which the covenantee can offer no successful resistance is hostilely asserted, he may resort to one of two courses, and, for the same reasons of justice and good government which control in the cases discussed in the two preceding sections, there will be such a constructive eviction if either course is adopted as amounts to a breach of the covenants of warranty and for quiet enjoyment.

Surrender of Possession.—He may yield the possession of the land to one who claims it under a paramount title, without resisting him by force or by litigation, and recover upon these covenants.²

Purchase of or Taking Lease under the Paramount Title.—Or, if the paramount title or interest is so asserted that he must yield to it, the covenantee may, though he is under no obligation to do so,³ buy in or lease of the true owner, and this

1. Entry where Land Remains Vacant, by Owner of Paramount Title.—*Allis v. Nininger*, 25 Minn. 525; *Brown v. Allen*, 57 Hun (N. Y.) 219, 88 Hun (N. Y.) 402; *St. John v. Palmer*, 5 Hill (N. Y.) 599; *Winslow v. McCall*, 32 Barb. (N. Y.) 241; *Hodges v. Latham*, 98 N. Car. 239, 2 Am. St. Rep. 333; *Steiner v. Baughman*, 12 Pa. St. 106.

It is provided by the *Colorado* statute of 1861 that no right of action shall exist upon a covenant of warranty against the warrantor until the party menacing the possession of the grantee, his heirs, personal representatives, or assigns, shall have commenced legal proceedings to obtain possession of the premises in question, and the grantor, after notice, shall have refused to defend, at his own cost, the premises in such action. This statute has been construed to be applicable only when the possession of the grantee is menaced. Thus, when the possession is not obtained under the deed, the statute does not apply, but the adverse possession of another is regarded as an eviction at the date of the grant. And the case is not different when the holder of the adverse title has, by any means, obtained possession of the premises, although subsequently to the date of the deed on which the action is brought. So long as the premises are held adversely and the covenantee has not possession, no action can be brought against him and therefore he is not within the terms of the statute. *Tierney v. Whiting*, 2 Colo. 620.

2. Yielding Possession of the Land—*Canada.*—See *Beck v. Barlow*, 6 New Brun. 465.

Alabama.—*Dupuy v. Roebuck*, 7 Ala. 484; *Gunter v. Williams*, 40 Ala. 561; *Copeland v. McAdory*, 100 Ala. 553.

Connecticut.—*Sterling v. Peet*, 14 Conn. 254. *Georgia.*—*M'Dowell v. Hunter*, Dudley (Ga.) 4.

Illinois.—*Beebe v. Swartwout*, 8 Ill. 162; *Moore v. Vail*, 17 Ill. 185; *Claycomb v. Munger*, 51 Ill. 378.

Indiana.—*McClure v. McClure*, 65 Ind. 482; *Wilson v. Peelle*, 78 Ind. 384.

Massachusetts.—*Hamilton v. Cutts*, 4 Mass. 349, 3 Am. Dec. 222; *Burrage v. Smith*, 16 Pick. (Mass.) 56.

Michigan.—*Mason v. Kellogg*, 38 Mich. 132.

Minnesota.—*Allis v. Nininger*, 25 Minn. 525; *Wagner v. Finnegan*, 65 Minn. 115.

Mississippi.—*Green v. Irving*, 54 Miss. 450. 28 Am. Rep. 360. See *Burrus v. Wilkinson*, 31 Miss. 537.

Missouri.—*Lambert v. Estes*, 99 Mo. 604.

Nebraska.—*Cheney v. Straube*, 35 Neb. 521.

New York.—*Simers v. Salsus*, 3 Den. (N. Y.) 214; *Fowler v. Poling*, 6 Barb. (N. Y.) 165; *Gray, C.*, in *Cowdrey v. Coit*, 44 N. Y. 382; *Home L. Ins. Co. v. Sherman*, 46 N. Y. 370. See *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Cooper v. Watson*, 10 Wend. (N. Y.) 202.

North Carolina.—*Herrin v. McEntyre*, 1 Hawks (8 N. Car.) 410. See *Hodges v. Latham*, 98 N. Car. 239, 2 Am. St. Rep. 333.

Oregon.—*Brown v. Corson*, 16 Oregon 388.

Pennsylvania.—*Steiner v. Baughman*, 12 Pa. St. 106; *Knepper v. Kurtz*, 58 Pa. St. 480.

Tennessee.—*Callis v. Cogbill*, 9 Lea (Tenn.) 137.

Texas.—*Westrope v. Chambers*, 51 Tex. 178. See *Peck v. Hensley*, 20 Tex. 673.

But compare *Smoot v. Coffin*, 4 Mackey (D. C.) 407.

In the case of *Hunt v. Amidon*, 4 Hill (N. Y.) 345, 40 Am. Dec. 283, the chancellor said that the grantee had no right to give up voluntarily to a stranger claiming by title paramount. But in the case of *Fowler v. Poling*, 6 Barb. (N. Y.) 165, it is said that this remark of the chancellor was *obiter* and that he was evidently mistaken.

3. Covenantee Not Bound to Purchase Paramount Title.—The refusal of the covenantee to buy in the paramount title or incumbrance, even when offered to him upon moderate terms, is no waiver of a covenant for quiet enjoyment and cannot bar him of a recovery

will be considered such an eviction as constitutes a breach of the covenant of warranty or for quiet enjoyment.¹

thereon after eviction. *Miller v. Halsey*, 14 N. J. L. 48. See *Clarke v. McNulty*, 3 S. & R. (Pa.) 364.

1. Buying in the Paramount Title or Interest — *England*. — *Jones v. Morris*, 3 Exch. 742; *Graham v. Allsopp*, 3 Exch. 186; *Taylor v. Zamira*, 6 Taunt. 524; *Sapsford v. Fletcher*, 4 T. R. 511; *Pope v. Biggs*, 9 B. & C. 245, 17 E. C. L. 368; *Hickman v. Machin*, 4 H. & N. 720.

Canada. — *Fairbairn v. Hilliard*, 27 U. C. Q. B. 111; *McClure v. Grafton*, 19 U. C. C. P. 119. See *Hodgins v. Hodgins*, 13 U. C. C. P. 146; *Hunter v. Johnson*, 14 U. C. C. P. 123.

United States. — *Schnelle, etc., Lumber Co. v. Barlow*, 34 Fed. Rep. 853 (decided under the law of *Missouri*).

Alabama. — *Davenport v. Bartlett*, 9 Ala. 179; *Lewis v. Harris*, 31 Ala. 689.

Arkansas. — *Collier v. Cowger*, 52 Ark. 322; *Dillahunt v. Little Rock, etc., R. Co.*, 59 Ark. 629.

California. — *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456.

Georgia. — *Amos v. Cosby*, 74 Ga. 793.

Illinois. — *Harding v. Larkin*, 41 Ill. 413; *McConnell v. Downs*, 48 Ill. 271; *Claycomb v. Munger*, 51 Ill. 373.

Indiana. — *Dunkleberger v. Whitehall*, 70 Ind. 214; *Mooney v. Burchard*, 84 Ind. 285.

Iowa. — *Royer v. Foster*, 62 Iowa 321; *Eversole v. Early*, 80 Iowa 601.

Kentucky. — *Hanson v. Buckner*, 4 Dana (Ky.) 254, 29 Am. Dec. 401; *Nolan v. Feltman*, 12 Bush (Ky.) 119.

Maine. — *Donnell v. Thompson*, 10 Me. 170, 25 Am. Dec. 216; *Kelly v. Low*, 18 Me. 244; *Cole v. Lee*, 30 Me. 392.

Massachusetts. — *Sprague v. Baker*, 17 Mass. 586.

Minnesota. — *Ogden v. Ball*, 40 Minn. 94.

Missouri. — *Maguire v. Riffin*, 44 Mo. 512.

Montana. — *King v. Merk*, 6 Mont. 172.

New Jersey. — *Kellog v. Platt*, 33 N. J. L. 328.

New York. — *Tucker v. Cooney*, 34 Hun (N. Y.) 227; *Petrie v. Folz*, 54 N. Y. Super. Ct. 223.

Ohio. — *King v. Kerr*, 5 Ohio 154, 22 Am. Dec. 777; *Lane v. Fury*, 31 Ohio St. 574; *Mathews v. Rentz*, 2 Am. L. Rec. 371, 5 Ohio Dec. 72.

Pennsylvania. — *Hauck v. Single*, 10 Phila. (Pa.) 551; *Brown v. Dickerson*, 12 Pa. St. 372.

Texas. — *Clark v. Mumford*, 62 Tex. 531.

Vermont. — *Drury v. Shumway*, 1 D. Chip. (Vt.) 110, 1 Am. Dec. 704; *Turner v. Goodrich*, 26 Vt. 707.

Virginia. — *Jones v. Richmond*, 88 Va. 231.

The cases of *Hannah v. Henderson*, 4 Ind. 174; *Reasoner v. Edmundson*, 5 Ind. 393; and *Mason v. Cooksey*, 51 Ind. 519, are not in conflict with this doctrine, as in none of them had the plaintiff purchased the paramount title.

In *Nebraska* it has been held, in *Anderson v. Buchanan*, 20 Neb. 272, that a grantee who compromises an action brought against him by the claimant of a paramount title cannot recover on his covenant for quiet enjoyment the amount paid to compromise the action. Whether he could have recovered had he

bought in the paramount title after a judgment against him, in a suit of which his grantor had been notified, was not decided, but perhaps the language in *Real v. Hollister*, 20 Neb. 112, was intended to forbid recovery even in such a case.

The cases of *Vanmetre v. Griffith*, 4 Dana (Ky.) 92, and *Morgan v. Boone*, 4 T. B. Mon. (Ky.) 297, 16 Am. Dec. 153, which hold that the covenantee who buys in the paramount title cannot sue on the covenant, but only as for money paid to the covenantor's use, rest upon a misconception of the measure of damages in such cases of constructive eviction, and cannot be regarded as authorities against the doctrine stated in the text. See *Rawle on Covenants for Title* (5th ed.), § 147.

New York Cases. — As has been shown in a former part of this article (see *supra*, this title and division, the subdivision *Necessity of Eviction by Process of Law*), the early New York cases strenuously insisted on what was called an actual eviction. And in *Waldron v. M'Carty*, 3 Johns. (N. Y.) 471, where the covenantee had bought in the premises at a foreclosure sale under a mortgage prior to his conveyance, it was held that he was not entitled to maintain an action on the covenant for quiet enjoyment, there having been no breach. In *Ingersoll v. Hall*, 30 Barb. (N. Y.) 392, it was held that the mere purchase of an outstanding title subject to a life estate in the premises, by a grantee whose title is also subject to that life estate, the owner of which outstanding title had given notice of his right and of his intention to enforce the same, is not an eviction.

There are, however, other and later cases in this state which either incline to the view or actually decide that the covenants of warranty and for quiet enjoyment are broken when the covenantee has bought in a paramount title or interest which has been hostilely asserted. In *Hunt v. Amidon*, 4 Hill (N. Y.) 345, 40 Am. Dec. 283, an action by the covenantee's vendee, who had bought the property at a foreclosure sale under a prior mortgage for money paid to the covenantee's use, was sustained. And in *Cowdrey v. Coit*, 44 N. Y. 382, the grantee in a deed containing covenants of warranty and for quiet enjoyment became himself the purchaser on the foreclosure of a prior mortgage, and then sold his bid to a third person, surrendering to him his possession on his obtaining the sheriff's deed, and it was held to be an eviction and available as a defense to an action on a bond for the purchase money. The court said that it was immaterial whether the grantee or the third person took the sheriff's deed; there was in equity an eviction. The defendant was dispossessed under a title paramount to his own, and there was a failure of the consideration of the bond. This proposition was said to be authorized by the case of *Hunt v. Amidon*, 4 Hill (N. Y.) 345, 40 Am. Dec. 283. And in *Petrie v. Folz*, 54 N. Y. Super. Ct. 223, an action on a covenant of warranty by a covenantee who had satisfied a judgment in ejectment which had been re-

Conveyance of or Retention of the Land under "Occupying Claimants' Acts." — The statutes of some states provide that, after a judgment against an occupying claimant, the successful plaintiff may either convey the land to the claimant on payment of its value without the improvements, or he may take the land on paying for the improvements. Either course is held equivalent to an eviction of an occupying claimant, entitling him to an action on his covenant of warranty.¹

(bb) *Necessity of a Hostile Assertion of Outstanding Title.* — **General Rule.** — But while the covenantee may, in a proper case, surrender possession or buy in the paramount title or interest, the mere fact that such title or interest is outstanding does not authorize him to do so. He must act in good faith toward his covenantor, and make the most of whatever title he has acquired, until the resistance to the paramount title ceases to be a duty to himself or his covenantor. He is not justified in abandoning possession without demand or claim by the person holding the real title; he may take this step only when the paramount title is hostilely asserted.²

covered against her, Sedgwick, C. J., said: "There was no actual eviction, there being no actual disturbance of possession. If, however, to maintain her possession, it was necessary to quiet the outstanding title, and she was obliged to buy it in, she could recover from the covenantor the amount she was obliged to pay, if she could also prove that the outstanding title was valid and could be enforced by legal ejectment." In the still later case of *Tucker v. Cooney*, 34 Hun (N. Y.) 227, affirmed in 102 N. Y. 719, an action to foreclose a mortgage for part of the purchase money of the land conveyed to the defendants by warranty deed, the defendants showed that there had been a sale of the real estate under an order of the surrogate, and that he had purchased the land at such sale. It was held that the sale of the land under the order of the surrogate and the purchase thereof by the defendants was such a constructive eviction as to constitute a breach of the covenant of warranty contained in the deed, and furnished a defense to the foreclosure of the mortgage given to secure the price of the land thereby conveyed. Merwin, J., in delivering the opinion of the court, said of the case of *Waldron v. McCarty*, 3 Johns. (N. Y.) 471, above cited, that if that case is an authority against the idea of a constructive eviction properly pleaded, "it certainly would not be followed at this day."

As tending to show that this is the rule which would probably be applied by the New York courts at the present day, it should be remembered that it has been decided in other New York cases that the covenantee may voluntarily surrender possession to one having paramount title and then maintain his action for breach of the covenant of warranty or for quiet enjoyment.

North Carolina Cases. — In *Coble v. Wellborn*, 2 Dev. L. (13 N. Car.) 388, it was held that where there had been a recovery in ejectment against the grantee upon paramount title and before the issuing of a writ of possession, or any actual disturbance of his possession, the defendant in the ejectment purchased from the plaintiff, there was no breach of the covenant for quiet enjoyment. See *Grist v. Hodges*, 3 Dev. L. (14 N. Car.) 198; *Cowan v. Silliman*, 4 Dev. L. (15 N. Car.) 46. But in a later case, *Jackson v. Hanna*, 8 Jones L. (53 N. Car.) 188,

it was held that where the grantor's widow had recovered a sum certain in lieu of dower and the grantee paid the amount so recovered, there was an eviction which entitled him to an action upon the covenant for quiet enjoyment. In the opinion of the court delivered by Manly, J., it is said that the case differed from that of *Coble v. Wellborn*, 2 Dev. L. (13 N. Car.) 388, in the important particular that in the latter case "the purchase was voluntary and for the sake of peace, there being no actual coercion or enforcement of the superior title."

Mississippi. — It has been held in Mississippi that where the covenantee purchases in an outstanding paramount title he may maintain assumpsit for the money so expended, but there is no breach of the covenant of warranty which entitles him to sue in covenant. *Dyer v. Britton*, 53 Miss. 270; *Burrus v. Wilkinson*, 31 Miss. 537; *Witty v. Hightower*, 12 Smed. & M. (Miss.) 481; *Kirkpatrick v. Miller*, 50 Miss. 521.

Taking Lease under the Paramount Title. — Since all connection with his former title is as thoroughly dissolved where the covenantee remains in possession, by taking a lease under the paramount title as when he buys it in, it follows, as a necessary corollary to the doctrine which authorizes him to purchase the paramount title, that he will have a remedy upon the covenants of warranty and quiet enjoyment if he, instead of purchasing that title, takes a lease thereunder. *Rawle on Covenants for Title* (5th ed.), par. 145; *Foss v. Van Driele*, 47 Mich. 201; *Poyntell v. Spencer*, 6 Pa. St. 254. See *McClure v. McClure*, 65 Ind. 482.

1. Exercising the Privileges Secured by "Occupying Claimants' Acts." — *Mason v. Kellogg*, 38 Mich. 132; *Ogden v. Ball*, 40 Minn. 94; *King v. Merk*, 6 Mont. 172; *King v. Kerr*, 5 Ohio 154, 22 Am. Dec. 777 (explained in *Johnson v. Nyce*, 17 Ohio 66, 49 Am. Dec. 444).

2. Hostile Assertion of the Title Necessary — *Alabama.* — *Dupuy v. Roebuck*, 7 Ala. 488; *Hester v. Hunnicutt*, 104 Ala. 282.

Illinois. — *Moore v. Vail*, 17 Ill. 185.

Indiana. — *Mason v. Cooksey*, 51 Ind. 519; *Axtel v. Chase*, 83 Ind. 546.

Iowa. — *Funk v. Cresswell*, 5 Iowa 89; *Wilson v. Irish*, 62 Iowa 260.

Kentucky. — *Huff v. Cumberland Valley Land Co.* (Ky. 1895) 30 S. W. Rep. 660.

Where the Paramount Title Is in the United States. — It has, however, been asserted that an exception to this rule exists where the paramount title is in the United States.¹

Where the Paramount Title Is in a State. — And whether or not a hostile assertion is necessary in case the paramount title is in a state will, it seems, depend upon whether the state has subjected itself to the operation of the statute of limitations.² Where the state has not subjected itself to the operation of the statute, and consequently the possession of the grantee cannot ripen into title by the lapse of time, it seems that he may voluntarily abandon possession without eviction or hostile demand.³ But it has been said that where the title to land owned by a state may be acquired by adverse possession, then, in order to justify a surrender of possession by the covenantee, there must have been a hostile assertion by the state of its title.⁴

(cc) *Necessity of a Surrender or Purchase* — **General Rule.** — To amount to a breach of the covenants it is not alone sufficient that there has been a hostile assertion

Massachusetts. — *Sprague v. Baker*, 17 Mass. 586; *Kramer v. Carter*, 136 Mass. 504.

Minnesota. — *Ogden v. Ball*, 40 Minn. 94.

Mississippi. — *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; *Dennis v. Heath*, 11 Smed. & M. (Miss.) 206, 49 Am. Dec. 51.

Missouri. — *Shelton v. Pease*, 10 Mo. 473; *Caldwell v. Bower*, 17 Mo. 564; *Morgan v. Hannibal, etc., R. Co.*, 63 Mo. 129.

New Jersey. — *Kellog v. Platt*, 33 N. J. L. 328.

New York. — *Brown v. Allen*, 88 Hun (N. Y.) 401, 152 N. Y. 647.

Pennsylvania. — *McGrew v. Harmon*, 164 Pa. St. 122.

Washington. — *Morgan v. Henderson*, 2 Wash. Ter. 367.

Thus in *Patton v. McFarlane*, 3 P. & W. (Pa.) 419, the purchase money never having been paid to the commonwealth, the covenantee voluntarily paid it, though no claim had been made, and it was held that he could not recover on his covenant of warranty, as his possession had never been disturbed or threatened.

McCoy v. Lord, 19 Barb. (N. Y.) 18, is even a stronger case. Part of the land conveyed had been sold for taxes prior to the conveyance, and was redeemed by the covenantees without any request from the covenantor, on the last day allowed for redemption. It was held that the covenant for quiet enjoyment was not broken, as there had been no eviction, and that, as there was no covenant against incumbrances, the plaintiffs had no right to pay the taxes and charges voluntarily, and recover from the defendant the amount paid. Had they desired to be able to do so, they should have provided for this by appropriate covenants.

Same — In Case of Outstanding Taxes. — It has been decided that to entitle a covenantee, who has paid taxes which accrued on the land prior to the conveyance, to recover the amount paid in an action on the covenant to warrant and defend, the lien of the taxes must have been actively asserted against the grantee in such a manner as to endanger his title, or at least there must have been some threat that it would be so asserted. *Leddy v. Enos*, 6 Wash. 247. But see *Rinehart v. Rinehart*, 91 Ind. 89; *Funk v. Cresswell*, 5 Iowa 62.

And in a dissenting opinion delivered in the

above cited case of *Leddy v. Enos*, 6 Wash. 247, *Dunbar, C. J.*, said: "Nor do I think that it was the duty of the grantee to stand idly by and see the incumbrances on his land increased by penalties accumulating as delinquent taxes. He rightly made his damages as light as possible by the payment of taxes, and ought not to be made to suffer for doing that which the law in every other character of case would compel him to do."

In *Louisiana* a hostile assertion of an adverse title is apparently not essential to an eviction, and hence, "if a perfect title exists in some third person, whereby it is rendered legally certain that his vendor had no title," this is sufficient ground for an "action of warranty." *McDonold v. Vaughan*, 14 La. Ann. 727; *Robbins v. Martin*, 43 La. Ann. 488.

1. Where Paramount Title Is in the United States. — *Pevey v. Jones*, 71 Miss. 647, 42 Am. St. Rep. 486. But see *Brown v. Corson*, 16 Oregon 388.

2. Where the Paramount Title Is in a State. — See *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360.

3. It was held in *Glenn v. Thistle*, 23 Miss. 42, that a person in possession, under an invalid deed, of land belonging to the United States, might voluntarily abandon it without eviction or hostile demand and maintain suit against his covenantor as upon a legal eviction or ouster. In commenting upon this case, *Chalmers, J.*, in delivering the opinion of the court in the case of *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360, said: "This is the only case we have been able to find where the right of the covenantee to maintain an action was sustained without proof of some assertion of paramount title by the true owner. The decision was rested upon the ground that the United States Government was not compelled to resort to the courts for the dispossession of intruders upon her lands; but under the Acts of Congress of 1807 and 1833, the President might direct the marshal to eject intruders therefrom, and, if necessary therefor, might furnish him with a military force. It is to be observed also that the United States is not bound by statutes of limitation." See *Abbott v. Rowan*, 33 Ark. 593.

4. *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360.

of the paramount title. Where an outstanding paramount title has been asserted against the grantee, as by the bringing of suit and the recovery of judgment in ejectment, there is no breach until he has either surrendered possession to or purchased in that title.¹

Application of the Rule Where Joint Estate Is Asserted. — But in the application of this rule to the case where a third person has by action asserted and established an estate in common to a part of the premises, it is to be remembered that the possession of one tenant in common is the possession of all. The co-tenant who thus establishes his title to an undivided part is thereby, and without an actual ouster of his co-tenant, invested with the possession of that part. It has therefore been held that where the paramount title to an undivided part of the premises has been adjudged to be in a third person, there is a partial breach of the covenant of warranty, although the grantee has not surrendered the actual possession of any portion of the land.²

1. Yielding to Superior Title Necessary — *Georgia*. — *M'Dowell v. Hunter*, Dudley (Ga.) 4.

Illinois. — *Brady v. Spurck*, 27 Ill. 478; *Kirkendall v. Keogh*, 2 Ill. App. 492.

Indiana. — *Axtel v. Chase*, 83 Ind. 546.

Massachusetts. — *Hawes v. Shaw*, 100 Mass. 187.

Minnesota. — *Wagner v. Finnegan*, 54 Minn. 251.

Missouri. — *Pence v. Gabbert*, 63 Mo. App. 302.

New York. — *Kerr v. Shaw*, 13 Johns. (N. Y.) 236; *Wood v. Forncrook* 3 Thomp. & C. (N. Y.) 303; *Home L. Ins. Co. v. Sherman*, 46 N. Y. 370; *Mead v. Stackpole*, 40 Hun (N. Y.) 473; *Boreel v. Lawton*, 90 N. Y. 293, 43 Am. Rep. 170; *Lynch v. Sauer*, 16 Misc. Rep. (N. Y. Supreme Ct.) 1. See *Waldron v. McCarty*, 3 Johns. (N. Y.) 471, and the comments in *Shattuck v. Lamb*, 65 N. Y. 499, on the facts of the case.

Pennsylvania. — *Patton v. McFarlane*, 3 P. & W. 419, explained in *Hauck v. Single*, 10 Phila. (Pa.) 551, wherein it is said that "it is nearly certain that the judgment in this case rested on the want of eviction or ouster;" *Paul v. Witman*, 3 W. & S. (Pa.) 407.

Tennessee. — *Ferriss v. Harshea*, Mart. & Y. (Tenn.) 50, 17 Am. Dec. 782.

But compare *Thiele v. Axell*, 5 Tex. Civ. App. 548.

In *Nebraska* it was at first held in *Real v. Hollister*, 17 Neb. 661, that where the covenantee's title had been annulled by a decree in equity, and a recovery had been had against him in ejectment, proof of his actual eviction from the land was not essential to his recovery on the covenant of warranty; but on a rehearing (*Real v. Hollister*, 20 Neb. 112), the contrary was held, and it was laid down that the covenantee must allege and prove that he has been actually turned out of the premises by legal process based upon a title or some right existing in another at the date of the covenant, or that, such outstanding title having been asserted, he has yielded to it and surrendered the possession thereto; and further, that he was prohibited "from suing on the covenants of his deed while he continues to enjoy the possession obtained under it."

While this rule excludes all cases where possession is retained under the deed containing the covenants sued upon, yet it does not necessarily apply to cases where the covenantee

buys in the paramount title, his possession then being no longer under his original deed. But as to this see *Anderson v. Buchanan*, 20 Neb. 272.

Grantee in Possession Claiming Patent under Bona Fide Purchaser's Act of March 3, 1887. — In the case of *Burr v. Greeley*, 52 Fed. Rep. 926, 10 U. S. App. 409, the plaintiff, who was the *bona fide* purchaser from the defendant of lands granted to a certain railroad company by the Act of July 1, 1862 (12 U. S. Stat. at L. 489), while still in possession of the land and while there was pending in the land department an application by him as a *bona fide* purchaser for a patent under the Act of March 3, 1887 (24 U. S. Stat. at L. 556), which gives preference to such purchasers in case the original pre-emptioner does not perfect his entry within the time fixed by the Secretary of the Interior, as authorized by the act, sued his grantor to recover damages for alleged breach of the covenant of warranty in his deed, on the ground that the patent under which the defendant claimed title was void, because pre-emption claims had attached to the lands in question before the definite location of the road. It was held that the defendant, while still in possession of the lands, claiming and accepting under the act referred to the rights of a *bona fide* purchaser by virtue of his grantor's deed, could not maintain his action for breach of warranty. See *Montgomery v. Northern Pac. R. Co.*, 67 Fed. Rep. 445.

Mississippi Rule. — In Mississippi the covenant of warranty is broken where the vendee has been dispossessed by yielding possession to a paramount title, but not by his purchasing in an outstanding title under which he might have been evicted. *Burrus v. Wilkinson*, 31 Miss. 537; *Witty v. Hightower*, 12 Smed. & M. (Miss.) 478.

Entry to Foreclose Mortgage — Massachusetts. — It has been held in Massachusetts that an entry upon the premises by a mortgagee, made under the provisions of the Rev. Stat., c. 107, §§ 1, 2, or Gen. Stat., c. 140, is, without actual ouster, an eviction for which the covenantee may recover; from the time of such entry the legal possession is that of the mortgagee. *White v. Whitney*, 3 Met. (Mass.) 81; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341.

2. Judgment Against Grantee Establishing Joint Estate in Third Person. — *Wilber v. Buchanan*, 85 Ind. 42; *Wright v. Nipple*, 92 Ind. 310.

ee. SUFFICIENCY OF THE HOSTILE ASSERTION — (*aa*) *In General*. — While it is impossible to lay down any very definite rule as to what will constitute such a hostile assertion of the paramount title as will make it possible for the covenantee to abandon the possession or purchase in the adverse title, and retain his remedy upon the covenant of warranty or for quiet enjoyment, it may be said that there must be some act done under the adverse title, either by entry or by bringing suit, or, at least, that it must be asserted in some way and under such circumstances as shall induce a well-founded belief that it will be enforced.¹

(*bb*) *By Suit or Judgment*. — Where a judgment of eviction, based on the paramount title, is recovered against the covenantee, that in itself is a sufficient assertion of that title,² without the issuing of possessory process.³ Even the bringing of a suit against the covenantee by the owner of the paramount title is sufficient.⁴

(*cc*) *Assertion by Suit or Judgment Not Necessary* — *In General*. — Nor is it even necessary that the adverse title be asserted by judgment or suit.⁵

Demand of Possession. — It seems to be enough that the true owner asserts his title and demands the possession,⁶ especially where the grantee is threatened with an action of ejectment.⁷

Entry under the Paramount Title. — And it has been held that the covenantee may yield the possession where there is an entry on the land under the outstanding paramount title.⁸

1. *Kellog v. Platt*, 33 N. J. L. 328.

2. **Judgment of Eviction.** — *M'Dowell v. Hunter, Dudley* (Ga.) 4; *Woodward v. Allan*, 3 Dana (Ky.) 164; *Hanson v. Buckner*, 4 Dana (Ky.) 254, 29 Am. Dec. 401; *Magwire v. Riggan*, 44 Mo. 512; *Hyman v. Boston Chair Mfg. Co.*, 58 N. Y. Super. Ct. 282.

Grantee Not Obligated to Appeal or Vacate Judgment. — Where an action is brought against the grantee, and his grantor is duly notified to defend, and a judgment of eviction is rendered, the grantee is not bound to appeal, but may yield possession and sue upon the covenants in his deed. *Bever v. North*, 107 Ind. 544. Nor is he obliged to take steps to vacate the judgment. *McConnell v. Downs*, 48 Ill. 271.

3. **Execution Against Grantee Not Necessary** — *Connecticut*. — *Sterling v. Peet*, 14 Conn. 245.

Georgia. — *Leary v. Durham*, 4 Ga. 606.

Illinois. — *Harding v. Larkin*, 41 Ill. 413.

Minnesota. — *Allis v. Nininger*, 25 Minn. 525; *Hersey v. Long*, 30 Minn. 114.

Missouri. — *Tracy v. Greffet*, 54 Mo. App. 562.

Montana. — *King v. Merk*, 6 Mont. 172.

Nebraska. — *Real v. Hollister*, 20 Neb. 112.

Vermont. — *Drury v. Shumway*, 1 D. Chip. (Vt.) 110, 1 Am. Dec. 704; *Williams v. Wetherbee*, 1 Aik. (Vt.) 233.

Canada. — *Trust, etc., Co. v. Covert*, 30 U. C. Q. B. 239.

Contra. — *Ferriss v. Harshea*, Mart. & Y. (Tenn.) 48, 17 Am. Dec. 782. See *Castleman v. Veitch*, 3 Rand. (Va.) 598.

So where the supreme court on appeal from chancery had adjudged a certain mortgage to be a valid incumbrance, older than and paramount to the plaintiff's title under the deed from the defendant, and sent the case with a mandate directing the court of chancery to carry out that decision by decree, it was held that the plaintiff rightly commenced suit on

the covenant at once, without waiting for the court of chancery to act upon and carry out the mandate by a final decree. *Boyd v. Bartlett*, 36 Vt. 9.

4. **Bringing Suit Against Covenantee.** — In *Turner v. Goodrich*, 26 Vt. 709, a suit was brought upon the elder and better title to recover the possession of the covenantee, and before final judgment, the covenantee, to prevent being dispossessed, purchased in the title at a fair rate. It was held that such purchase by way of extinguishment, in connection with the prosecution of the suit, amounted to an eviction sufficient to support an action on the covenant of warranty. See *M'Dowell v. Hunter, Dudley* (Ga.) 4.

Suit to Reform Deed. — A suit brought by the owner of the paramount title to reform the deed under which he holds the land has been held to be a sufficient assertion of that title. *Lane v. Fury*, 31 Ohio St. 574.

5. **Judgment or Suit Against Covenantee Not Necessary.** — *Dugger v. Oglesby*, 99 Ill. 405; *Funk v. Cresswell*, 5 Iowa 89. See *Lane v. Fury*, 31 Ohio St. 574.

6. **Claim of Possession.** — *Temple, J.*, delivering the opinion of the court in *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Ogden v. Ball*, 40 Minn. 94; *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309.

7. *Lambert v. Estes*, 99 Mo. 604.

8. **Entry on Land to Cut Wood.** — Where the land which the defendant had conveyed to the plaintiff by a deed containing a covenant of warranty consisted of a wood-lot, and the agent of the persons who in fact had the paramount title entered and cut wood on the lot, he having the care of the lot and authority to cut wood thereon, it was held that the plaintiff might submit to the paramount title without bringing a fruitless action, and recover of the defendant on this covenant. *Burrage v. Smith*, 16 Pick. (Mass.) 56.

(*dd*) *Sale of Premises*. — A mere sale of the premises and conveyance of the paramount title does not constitute such an assertion of title¹ unless made by the original vendor under a title subsequently acquired,² or by a state,³ or, perhaps, any public sale by order of court.

Sale at Public Auction by Administrator of Owner. — Thus, the sale of land at public auction by the administrator of the owner of the paramount title has been held to constitute such an assertion of the title as justified the covenantee in attending the sale and buying in the land.⁴

Execution Sale. — If there is an execution sale of the premises under a judgment prior to the conveyance, the covenantee may yield possession to the execution purchaser or buy in his title.⁵ And it has been held that a sale under an execution upon an attachment levied prior to the conveyance, is equivalent to an eviction and entitles the grantee to an action on his covenant, although he became himself the purchaser at the sale, and remains in possession by virtue of the title acquired by such purchase.⁶

Sale for Taxes. — The enforcement of the lien of taxes accruing prior to his conveyance by sale in due form, unquestionably entitles the grantee, who purchases the land at the tax sale, to recover on the covenant of warranty.⁷

(*ee*) *Levy of Execution on Premises*. — Where an execution against the grantor is lawfully levied on lands in the occupation of the grantee he may, it has been held, recover on the covenant of warranty where he has surrendered possession⁸ or redeemed the land from the lien of the judgment.⁹

(*ff*) *Recording Certificate of Entry by Mortgagee for Condition Broken*. — The recording of a certificate of entry by a mortgagee for condition broken has been held to

1. *Sale by Holder of a Paramount Title*. — *Matteson v. Vaughn*, 38 Mich. 373; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; *Loomis v. Bedel*, 11 N. H. 74.

2. *Sale under Subsequently Acquired Title by Covenantor*. — It has been said that in such case the covenantor would not be allowed to say that there had been no hostile assertion of the true title, because his act would amount to a disaffirmance and annulment of the only title the vendee had. *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360.

3. *Sale by State Owning Paramount Title*. — In the case of *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360, it was held, *Campbell, J., dissenting*, that where the paramount title is in the state, a sale by the state amounts to such a hostile assertion of the paramount title as will justify the covenantee in surrendering possession. In *Brown v. Allen*, 57 Hun (N. Y.) 219, the appropriation by the forest commission of unoccupied land, which had been sold for taxes and bought in by the state, to be held as part of the "forest preserve," under an act of the legislature, was held to be a constructive eviction and to entitle the party thereby evicted to proceed on his covenant.

4. *Administrator's Sale*. — In *Loomis v. Bedel*, 11 N. H. 74, *Tillotson* and *Eastman*, tenants in common, were the true owners of the land. *Stephenson* held a deed from another claimant. No one was in possession. *Tillotson* died, and his administrator, by order of the proper court, sold at public auction the interest of his intestate in the lands. *Stephenson* attended the sale and bought in this interest. About the same time *Eastman*, the other joint owner of the true title, sold to a stranger. Thereupon *Stephenson* brought his action against his covenantor as upon an evic-

tion from the whole. It was held that this suit could be maintained as upon an eviction from the undivided moiety which had belonged to *Tillotson*, because the abandoning by the last administrator or leave to sell was an assertion of his intestate's title, and *Stephenson* had the right to attend the sale and buy it in; but that as to *Eastman's* portion he could not recover, it not being shown that *Eastman* or his vendee had taken any steps to assert his title. It was said that the bare fact that *Eastman* had sold to another was not such hostile assertion of title as warranted an abandonment by *Stephenson* or a suit against his covenantor.

5. *Sale under Prior Judgment*. — Where land held under a lease from the owner was sold under execution levied under a judgment prior to the lease, and deeded by the sheriff to the purchaser, who claimed rent from the date of his deed, it was held that the lessee was entitled to recover of the lessor under the covenant for quiet enjoyment so much of the rent as he was thus obliged to pay to the purchaser. *Kane v. Mink*, 64 Iowa 84. But see *Dennis v. Heath*, 11 Smed. & M. (Miss.) 206, 49 Am. Dec. 51.

Sale under Execution of Grantor's Equity of Redemption. — The purchase, by an assignee of the grantee, of an equity of redemption sold on execution against the grantor, shows a breach of the covenant of warranty. *Whitney v. Dinsmore*, 6 Cush. (Mass.) 124.

6. *Sale under Prior Attachment*. — *Whitney v. Dinsmore*, 6 Cush. (Mass.) 124; *Brown v. Dickerson*, 12 Pa. St. 372.

7. *Tax Sale*. — *Hill v. Bacon*, 110 Mass. 387. Compare *Mead v. Stackpole*, 40 Hun (N. Y.) 473.

8. *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182.

9. *Wyman v. Brigden*, 4 Mass. 150.

constitute a sufficiently hostile assertion of the mortgagee's right.¹

(gg) *Assignment of Dower*. — Where dower has been assigned by metes and bounds, or where it has been assigned as of rents and profits and made a charge upon the land, there is, it would seem, a hostile assertion of the widow's estate.² And where a sum certain is assessed in lieu of dower and made a charge upon the land, the grantee may pay the amount assessed and recover upon the covenant of warranty or for quiet enjoyment.³

(hh) *Assertion of Prior Mortgage — By Foreclosure*. — Where a prior mortgage upon the premises is foreclosed, the grantee may himself become the purchaser at the sale and recover upon the covenants.⁴ And there is a breach of the covenants where the premises are sold under the foreclosure to a third person, to whom a deed is executed and delivered by the sheriff, if the covenantee, upon demand of possession and without waiting to be ejected by legal process, either surrenders the possession⁵ or buys in the title of the purchaser at the sale.⁶ And it has been held that a mortgage foreclosure sale is, in itself, an eviction where the premises are unoccupied.⁷

By Threat of Eviction Thereunder. — It has even been held that if the mortgagee threatens the grantee with eviction if the amount of the mortgage is not paid,

1. *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341.

2. *Assignment by Metes and Bounds or in Rents and Profits*. — *Cuthbert v. Street*, 9 U. C. C. P. 115. See *Tuite v. Miller*, 5 West L. J. (Ohio) 413; *McAlpin v. Woodruff*, 1 Disney (Ohio) 339; *Tuite v. Miller*, 10 Ohio 382; *Johnson v. Nyce*, 17 Ohio 66, 49 Am. Dec. 444.

3. *Assignment in Gross Sum*. — *Jackson v. Hanna*, 8 Jones L. (53 N. Car.) 188; *Lewis v. Lewis*, 5 Rich. L. (S. Car.) 12; *Welsh v. Kibler*, 5 S. Car. 405.

4. *Foreclosure of Prior Mortgage*. — Where the grantee himself became the purchaser, and transferred his bid to a third person to whom he surrendered possession, upon a deed being properly executed to him by the officer conducting the sale, it was held that he was entitled to recover damages against his grantor upon the covenants of warranty and for quiet enjoyment. *Cowdrey v. Coit*, 44 N. Y. 382. *reversing Cowdrey v. Coit*, 3 Robt. (N. Y.) 210.

In a case decided in the *New York Court of Appeals* in 1857, not otherwise reported but by a judicial reference to it in *Curtis v. Bush*, 39 Barb. (N. Y.) 661, it was held that when a third party purchased at a mortgage sale, to whom the grantee of the premises attorned, and then received a deed from the purchaser to whom he had attorned, without a change of possession in fact, there was a complete eviction.

5. *Cheney v. Straube*, 35 Neb. 521; *Cornish v. Capron*, 136 N. Y. 232; *Jenks v. Quinn*, 137 N. Y. 223.

6. Where a mortgage existing upon the land at the time of the execution of the deed with warranty was subsequently foreclosed and a deed executed to the purchaser under the foreclosure sale, it was held that the grantee in the warranty deed might voluntarily yield to the superior title under the foreclosure sale and purchase it for his own protection, and thereupon maintain suit upon his covenant of warranty. *Claycomb v. Munger*, 51 Ill. 373.

Reversal of Judgment of Foreclosure. — In an action brought to recover damages for breach of the covenant to defend title, the facts were

as follows: An action was brought to foreclose a prior mortgage. The defendant was duly notified and required to defend, and judgment of foreclosure was rendered in the action. The covenantor neglected to have the sale stayed by a supersedeas, and the land was sold on the judgment and deeded to the purchaser, who thereupon obtained possession. This was held to constitute a breach of the covenant of warranty, although the judgment of foreclosure was afterwards reversed. *Smith v. Dixon*, 27 Ohio St. 471.

Foreclosure Invalid as to Covenantee. — Where the defendants had conveyed to the plaintiff by a warranty deed certain land which, together with certain other land, was subject to a mortgage which had been given by the defendants' devisor prior to the conveyance to the plaintiff, and the mortgage was foreclosed by proceedings to which the plaintiff was not in fact made a party, although he was a necessary party thereto, it was held that the plaintiff could not voluntarily surrender the premises to the purchaser under the decree of foreclosure, and recover damages upon the covenants in his deed against the defendant. The plaintiff being a necessary party to the foreclosure, the decree as to him was void and the title apparently acquired thereunder a nullity. Then, too, there having been a sale for the amount due on the mortgage of not only the plaintiff's land, but also of the other lands which it covered, the mortgage was thereby satisfied, although the purchaser got title only to the land which was not embraced by the plaintiff's deed. *Ohling v. Luitjens*, 32 Ill. 23.

7. *Foreclosure Sale of Vacant Land*. — Where a vacant lot, subject to a mortgage, was sold by the mortgagor, and the mortgagee foreclosed by proceedings to which the vendees were made parties, obtained a decree of sale and delivery of possession, and bought the property in at the master's sale, this was held, in an action on the covenant, to be an eviction. *St. John v. Palmer*, 5 Hill (N. Y.) 599.

In *Wood v. Forncrook*, 3 Thomp. & C. (N. Y.) 303, however, a foreclosure sale of wild land was held not to constitute an eviction.

the latter may pay off the mortgage and recover on the covenant of warranty.¹

Judgment for Possession Thereunder.—A judgment for possession under a prior mortgage certainly amounts to a hostile assertion.²

Adjudication Establishing Mortgage.—So also, it would seem, does an adjudication in a suit in chancery that a mortgage is a valid incumbrance, though the amount due on the mortgage is not definitely ascertained in the chancery suit.³

(ii) *Where the Paramount Title Is in the United States*—**In General.**—Assuming that the rule requiring a hostile assertion of the paramount title applies when such title is owned by the United States, which, as has been shown, is very doubtful,⁴ it clearly appears from the authorities that a comparatively slight assertion of the adverse title is, in this case, sufficient. Indeed, it has been said that the United States should be considered as always asserting title to their lands.⁵

Liability of the Land to Entry under Pre-emption or Homestead Laws.—And it has been held that where the paramount title is in the United States, there is such an assertion of that title as will authorize the covenantee to submit to it, if the land is subject to entry and settlement⁶ under the provisions of either the pre-emption⁷ or homestead laws.⁸

ff. **EFFECT OF YIELDING ON BURDEN OF PROOF.**—The only difference in law between voluntarily surrendering possession to the owner of the adverse title, or purchasing in that title and waiting to be actually evicted, is that if the covenantee adopts either of the first mentioned courses he takes upon himself the burden of showing that the title was paramount, and that he yielded to the pressure of that title.⁹

1. Threat by Holder of Mortgage to Take Possession.—In *Sprague v. Baker*, 17 Mass. 586, the premises when conveyed were subject to a mortgage, and, after entry by a subsequent grantee, the mortgagee demanded of him payment of the arrears, threatening to sue for possession under the mortgage unless payment was made; whereupon to save the expense of the suit the grantee purchased the right of the mortgagee and took from him a quit-claim deed. This was held to be a sufficient breach to entitle the grantee to maintain his action on the covenant of warranty. But see the comments on this case in *Turner v. Goodrich*, 26 Vt. 707.

In the later case of *Estabrook v. Smith*, 6 Gray (Mass.) 572, 66 Am. Dec. 443, the same court reaffirmed the doctrine of *Sprague v. Baker*, 17 Mass. 586, holding that a claim of paramount title under a mortgage with a threat of eviction if the amount due on it be not paid, constitutes a breach of the covenant to warrant and defend, where the covenantee discharges the mortgage. See also *McGary v. Hastings*, 39 Cal. 300, 2 Am. Rep. 456; *King v. Kilbride*, 58 Conn. 109; *Funk v. Cresswell*, 5 Iowa 62.

2. *King v. Kilbride*, 58 Conn. 109.

3. *Boyd v. Bartlett*, 36 Vt. 9.

4. See *supra*, this title and division, the subdivision *Necessity of a Hostile Assertion of Outstanding Title*.

5. *Dillahunty v. Little Rock, etc.*, R. Co., 59 Ark. 629.

6. **Liability of Land to Entry and Settlement.**—*Dillahunty v. Little Rock, etc.*, R. Co., 59 Ark. 629. But compare *Brown v. Corson*, 16 Oregon 388.

7. **Same—Under Pre-emption Laws.**—In *McGary v. Hastings*, 39 Cal. 367, 2 Am. Rep. 456, the plaintiff purchased with a covenant for

quiet enjoyment, and went into possession of a parcel of land which was a portion of a supposed Mexican grant. A petition for confirmation of the grant was afterwards rejected, and the land became part of the public domain and liable to entry for the purpose of settlement and pre-emption. The plaintiff then, under an Act of Congress which he assisted in getting passed, bought the government title. It was held that there had been such an assertion of the paramount title as authorized the plaintiff to take this step.

8. **Same—Under the Homestead Law.**—In the case of *Kansas Pac. R. Co. v. Dunmeyer*, 19 Kan. 539, it was held that where the title to the land in controversy is in the United States and liable to entry and settlement, under the provisions of the homestead law, that of itself is such a hostile assertion of the paramount title as would authorize the purchaser to voluntarily submit to it. This decision was affirmed in *Herrington v. Clark*, 56 Kan. 644.

9. **Burden of Proof Assumed by Grantee Who Yields Possession or Purchases Title—Alabama.**—*Davenport v. Bartlett*, 9 Ala. 179; *Copeland v. McAdory*, 100 Ala. 553.

Georgia.—*Tuggle v. Hamilton*, 100 Ga. 292.

Illinois.—*Moore v. Vail*, 17 Ill. 190.

Indiana.—*Crance v. Collenbaugh*, 47 Ind. 256.

Iowa.—*Thomas v. Stickle*, 32 Iowa 76; *Richards v. Iowa Homestead Co.*, 44 Iowa 304, 24 Am. Rep. 745.

Louisiana.—*Cassidy's Succession*, 40 La. Ann. 827.

Massachusetts.—*Hamilton v. Cutts*, 4 Mass. 350, 3 Am. Dec. 222; *George v. Putney*, 4 Cush. (Mass.) 355, 50 Am. Dec. 788.

Mississippi.—*Witty v. Hightower*, 12 Smed. & M. (Miss.) 481.

(d) **Disturbance of the Use of the Land.** — The eviction which is necessary to constitute a breach of the covenants for quiet enjoyment or of warranty need not amount to an absolute expulsion of the covenantee from the land; it is enough if there has been a disturbance of the free and uninterrupted use of the land, such, for instance, as the use of an easement over the land.¹

(e) **Eviction from Part of the Land.** — Because the covenantee is evicted from part of the land, even though it be a contiguous tract of wild and unbroken land, there is no eviction from the rest of the land.²

(3) *What Constitutes a Paramount Right* — (a) **General Rule.** — It may be stated as a general rule that any right which, commencing before the deed,³ is not passed by but exists independently of the conveyance, and can be asserted with the effect of rightfully evicting the tenant under the deed, is a superior or paramount right.⁴

(b) **Incumbrances — General Rule.** — A covenant of warranty or for quiet enjoy-

Missouri. — *Morgan v. Hannibal*, etc., R. Co., 63 Mo. 129; *Lambert v. Estes*, 99 Mo. 604. *Nebraska.* — *Snyder v. Jennings*, 15 Neb. 372.

New York. — *Stone v. Hooker*, 9 Cow. (N. Y.) 157; *Greenvault v. Davis*, 4 Hill (N. Y.) 643; *Beyer v. Schultze*, 54 N. Y. Super. Ct. 212.

Oregon. — *Brown v. Corson*, 16 Oregon 388.

Tennessee. — *Callis v. Cogbill*, 9 Lea (Tenn.) 137.

Texas. — *Peck v. Hensley*, 20 Tex. 678; *Westrope v. Chambers*, 51 Tex. 178.

1. *Levitzky v. Canning*, 33 Cal. 299; *Flynn v. White Breast Coal*, etc., Co., 72 Iowa 738; *Butt v. Riffe*, 78 Ky. 352; *Harrington v. Bean*, 89 Me. 470; *Rea v. Minkler*, 5 Lans. (N. Y.) 196; *Scriver v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224; *Russ v. Steele*, 40 Vt. 315.

See *infra*, this title and division, the subdivision *What Constitutes a Paramount Right — Easements*.

Flowing of Land. — The flowing of the land by an adjacent owner is substantially an eviction, and constitutes a breach of the covenants of warranty and for quiet enjoyment. *Wells v. Trenholm*, 7 New Bruns. 371; *Pumpelly v. Green Bay*, etc., Canal Co., 13 Wall. (U. S.) 181; *Harrington v. Bean*, 89 Me. 470; *Smith v. Richards*, 155 Mass. 82; *Scriver v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224.

Land Described as Extending to the Centre of a Street "as to Be Extended." — Where a deed of conveyance describes the land intended to be conveyed as extending to the centre of a street "as to be extended," and refers to a plat on which the street is traced, the grant is subject to the street, and the subsequent use of such street as a public highway does not constitute a breach of a covenant of general warranty. *Cincinnati v. Brachman*, 35 Ohio St. 289.

2. **Partial Eviction.** — A grantee surrendering possession to one claiming part interest in the land cannot abandon the possession altogether and recover full damages upon the covenant of warranty, on the theory that the entry of the disseizor was both for himself and his cotenants. *McGrew v. Harmon*, 164 Pa. St. 115.

Partial Eviction from Wild and Unbroken Land. — Where a patentee of the state conveyed under covenant of general warranty a certain tract of wild and unbroken land to the plaintiff's grantors, and a third person subsequently obtained the patent from the state to one-

quarter of the land and brought ejectment therefor against the plaintiff's grantor, and the title of such third person was held good, it was held that while there was a breach of the covenant as to the particular quarter section, this did not constitute an eviction from the whole. *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 560.

3. **Required to Be the Elder Title.** — A third person may have a valid claim to the premises, *i. e.*, a claim or title against which the grantee can offer no successful resistance, but which, nevertheless, should not be within the protection of the covenant; it may have been derived from the grantee himself after the conveyance. *Woodward v. Allan*, 3 Dana (Ky.) 164; *Curtis v. Deering*, 12 Me. 499. Hence, it is generally laid down by the authorities that it is necessary for the plaintiff, in a suit for covenant broken, to allege and prove that the title under which the eviction was had, was in existence at the date of and before the making of the covenant. *Kirby v. Hansaker*, Cro. Jac. 315; *Stephen v. Pattie*, 3 Bibb (Ky.) 117; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Thielen v. Richardson*, 35 Minn. 509; *Pitkin v. Leavitt*, 13 Vt. 379.

4. *Davis v. Logan*, 5 B. Mon. (Ky.) 341.

Title under Conditional Decree. — Where the covenantor held by a tax title, and the owner of the fee simple title brought suit to have the tax deed canceled, and obtained a decree in his favor conditioned on his repaying to the covenantor, within a certain time, the amount paid out by him in taxes on the property, in default of which the tax title was to be quieted, it was held, in a subsequent action on the covenant, by one claiming under the covenantee, and who had bought in the fee simple title, that this was not a paramount title (the money not having yet been paid as decreed) and that the plaintiff could not recover. *Eversole v. Early*, 80 Iowa 601.

Required to Be Paramount to Any Outstanding Title. — On the ground that a person in possession may defeat a recovery of the land by showing a superior title, either in himself or in a third person (see the title *EVICTON*), it has been considered that the paramount title must, where the covenantee is in possession, be superior not only to that under which the land is held, but to the title of any one else. *Crance v. Collenbaugh*, 47 Ind. 256; *Sheetz v. Longlois*, 69 Ind. 491; *Walker v. Kirshner*, 2 Kan. App. 371.

ment protects the grantee against incumbrances that affect the title, or that the grantee may be compelled to remove in order to the possession and enjoyment of the estate purchased.¹

Application of the Rule. — Hence it has been held that these covenants are broken by an eviction under a prior mortgage upon the land,² or a judgment against the grantor antedating the conveyance to the covenantee, and which is a lien upon the land.³ And a vendor's lien which is afterwards foreclosed constitutes a paramount right within these covenants,⁴ as does also a lien for taxes which accrued prior to the conveyance.⁵

Prior Debts. — It has been held that since a debt which is founded upon no other consideration than natural love and affection is presumed fraudulent and a nullity as to a pre-existing creditor of the grantor,⁶ an eviction of the grantee in such a deed, based upon a prior debt of the grantor, is under paramount title and constitutes a breach of the covenant of warranty contained in the deed.⁷

(c) Right of Dower. — A dower right existing at the time of the conveyance, which has been asserted and become attached to the land, is, so far as it goes, superior and paramount to the title conveyed.⁸

1. Paramount Incumbrances. — *Funk v. Cresswell*, 5 Iowa 66; *Butt v. Riffe*, 78 Ky. 352; *Kenney v. Norton*, 10 Heisk. (Tenn.) 384. See *Ingersoll v. Hall*, 30 Barb. (N. Y.) 392.

Rent. — Where one conveyed land sequestered to the use of the University of Vermont, and covenanted to warrant and defend the same against all lawful claims, this covenant was held to extend to the claim of the university for rent. *Keith v. Day*, 15 Vt. 660.

2. Prior Mortgages. — *King v. Kilbride*, 58 Conn. 109; *Estabrook v. Smith*, 6 Gray (Mass.) 572, 66 Am. Dec. 443; *Tutts v. Adams*, 8 Pick. (Mass.) 547; *Bemis v. Smith*, 10 Met. (Mass.) 194; *Cheney v. Straube*, 35 Neb. 521; *Cornish v. Capron*, 136 N. Y. 232; *Smith v. Dixon*, 27 Ohio St. 471; *Jackson v. McAuley*, 13 Wash. 298. But compare *Woodford v. Leavenworth*, 14 Ind. 311.

3. Prior Judgments. — Thus it has been held that a covenantee may pay the amount of a prior judgment which is a lien upon the land, and under which there has been a levy. *Dunkleberger v. Whitehall*, 70 Ind. 214. And it has been held that there is a breach of the covenant of warranty where the grantee is evicted by virtue of a title derived by the sale under a judgment against the grantor, existing at the time of the conveyance. *Smith v. M'Campbell*, 1 Blackf. (Ind.) 100. See also *Stipe v. Stipe*, 2 Head (Tenn.) 169. Compare *Hannah v. Henderson*, 4 Ind. 174.

4. Vendor's Lien. — *Collier v. Cowger*, 52 Ark. 322; *Kenney v. Norton*, 10 Heisk. (Tenn.) 384.

5. Lien for Taxes. — *Rinehart v. Rinehart*, 91 Ind. 89; *Funk v. Cresswell*, 5 Iowa 62; *Hill v. Bacon*, 110 Mass. 387; *Milot v. Reed*, 11 Mont. 563; *Brown v. Allen*, 57 Hun (N. Y.) 210.

The case of *Rundell v. Lakey*, 40 N. Y. 513, was an action brought to recover the amount of a certain tax assessed against the defendants, and paid by the plaintiff at the request of the defendants, under an agreement that they would refund the amount to him "in case they were legally liable to pay it." On September 1, 1860, the defendants sold and conveyed to the plaintiff, by deed with the usual covenant

for quiet and peaceable possession, a farm in the town of Manchester. The plaintiff took immediate possession. The county and state taxes for that year had been assessed to the defendant. The assessment rolls were completed before August 1st. The annual meeting of the supervisors was held in November, when the tax in question was extended upon the rolls. On the 14th of February, 1861, the plaintiff paid the tax to the collector upon the agreement above stated. It was held, one justice dissenting, that the vendee could maintain an action against the vendors upon the agreement.

6. See the title FRAUDULENT SALES AND CONVEYANCES.

7. *Hanson v. Buckner*, 4 Dana (Ky.) 254, 29 Am. Dec. 401.

8. Dower Right. — *Cuthbert v. Street*, 9 U. C. C. P. 115; *Davis v. Logan*, 5 B. Mon. (Ky.) 341; *Blanchard v. Blanchard*, 48 Me. 174; *Magwire v. Riffin*, 44 Mo. 512; *Jackson v. Hanna*, 8 Jones L. (53 N. Car.) 188; *Tuite v. Miller*, 5 West L. J. (Ohio) 413; *McAlpin v. Woodruff*, 1 Disney (Ohio) 339; *Lewis v. Lewis*, 5 Rich. L. (S. Car.) 12; *Welsh v. Kibler*, 5 S. Car. 405. See also *Tierney v. Whiting*, 2 Colo. 620; *Bostwick v. Williams*, 36 Ill. 65, 85 Am. Dec. 385.

Covenant to Defend Against All Superior Claims.

— It has been held that a covenant in a deed "to warrant and defend against all superior claims, and that in the event of eviction or loss of any part thereof by any paramount right he [the grantor] will refund accordingly, of the purchase money with interest on the same," is broken by a dower right which has attached as a complete right before the deed was made; such right is a superior or paramount title within the meaning of the covenant. *Davis v. Logan*, 5 B. Mon. (Ky.) 341.

Gross Sum Assigned in Lieu of Dower Not a Charge on the Land. — But it has been held that an action cannot be sustained upon a covenant of warranty, on the ground that a claim of dower has been set up, and that a gross sum has been assigned in full of dower, the decree to be enforced by execution, but not constitut-

(d) **Easements.** — An easement in the land may be such a paramount title or interest as to come within the purview of the covenant of warranty or for quiet enjoyment,¹ and these covenants may be broken by the existence and use of an easement² including a right of way, whether public³ or private.⁴

(e) **Outstanding Estate for Years.** — On the ground that the covenant of warranty applies as well to the possession as to the title, it has been held that the dis-possession of the covenantee, though by proceedings which do not involve the title, is a breach of the covenant of warranty.⁵

(f) **Subsequent Conveyance by Covenantor First Recorded.** — Notwithstanding the fact that a title to be paramount must generally be the elder title, it has been held in some of the *United States* that if the covenantee fails to put his conveyance upon record, and a subsequent conveyance is made by the covenantor to a third person, and recorded, the covenantor is liable upon his covenant of warranty.⁶ This view has, however, been criticised by text

ing any charge upon the land. *Johnson v. Nyce*, 17 Ohio 66, 49 Am. Dec. 444. See *supra*, this title and division, the subdivision *Assignment of Dower*.

1. Covenants Extend to Easements and Servitudes. — *Rea v. Minkler*, 5 Lans. (N. Y.) 196; *Scriven v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224. But see *McMullin v. Wooley*, 2 Lans. (N. Y.) 394.

2. Easements and Servitudes Generally. — *Lamb v. Danforth*, 59 Me. 324, 8 Am. Rep. 426; *Harrington v. Beam*, 89 Me. 470; *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Edmunds's Appeal*, (Pa. 1887) 8 Atl. Rep. 31.

Right to Draw Water from Land. — In *Clark v. Conroe*, 38 Vt. 469, the defendant conveyed to the plaintiff, with covenants of seizure and warranty, a tract of land having a spring thereon. Prior to this he had conveyed to another the right to use the water of the spring and of drawing it away by an aqueduct to his premises. It was held that there was a breach of the covenant of warranty. And see *Day v. Adams*, 42 Vt. 510.

Right to Use Wall on Premises as Party Wall. — In *Giles v. Dugro*, 1 Duer (N. Y.) 334, the defendant assigned a lease, covenanting therein that it was free and clear of all former grants, bargains, and incumbrances whatsoever. A prior grant of a privilege of the use of a wall on the premises as a party wall was held a breach of the covenant. The former grant created a paramount right to the extent of the interest granted.

Building Restrictions. — In *Kramer v. Carter*, 136 Mass. 504, W. Allen, J., said of a condition in the deed of a former owner of the land, which provided that no building should ever be erected upon a certain part of the land, that "the easement was not only an incumbrance which worked a present breach of the covenant against incumbrances; it was also a paramount right, which might work a breach of the covenant of warranty. It was an incorporeal hereditament, a part of and taken out of the warranted premises, and annexed and appurtenant to adjoining lands, and forming a part of the estate in them. The covenant of warranty extends to such a right, and the right may be so exercised as to work a breach of the covenant. It is true that it has been called an equitable easement, established by an equitable construction of a deed; but an equitable 'claim or demand' is a 'lawful' one within

the meaning of the covenant. If a paramount right exists which prevents the enjoyment of a part of the premises, it is immaterial whether it was created by a condition construed as a reservation, or by a reservation, or by a covenant or a grant in a deed, and whether it may be established and enforced by a decree in equity or by a judgment at law. If the plaintiff had erected a building upon the land which is subject to the restriction, and the owners of the adjoining tenements had lawfully demolished it, it would have been an eviction, and equally so whether done by an act *in pais*, or by action at law, or by a suit in equity."

3. Public Right of Way. — *Haynes v. Young*, 36 Me. 557; *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272; *Hymes v. Estey*, 116 N. Y. 501, 15 Am. St. Rep. 421, 133 N. Y. 342; *Patterson v. Arthurs*, 9 Watts (Pa.) 152.

Under *Illinois* statutes (Rev. Stat., c. 30, par. 10), providing that no covenant of warranty shall be considered as broken by the existence of a highway on the land conveyed, unless otherwise particularly specified in the deed, it has been held that the maintenance of a gate at the end of a way excludes the presumption that the way was dedicated to the public. *Schmisseur v. Penn*, 47 Ill. App. 278.

4. Private Rights of Way. — *Butt v. Riffe*, 78 Ky. 352; *Rea v. Minkler*, 5 Lans. (N. Y.) 196; *Wilson v. Cochran*, 46 Pa. St. 229; *Russ v. Steele*, 40 Vt. 310.

Right of Way in Railway Company. — *Flynn v. White Breast Coal, etc., Co.*, 72 Iowa 738. But see *Brown v. Young*, 69 Iowa 625.

5. Term of Years. — *Rickert v. Snyder*, 9 Wend. (N. Y.) 415.

6. Subsequent Conveyance Having Priority under Recording Acts. — This seems to have been first held in 1835, in *Curtis v. Deering*, 12 Me. 499. The facts of this case were as follows: D. executed a deed of mortgage with covenant of general warranty to C., March 8, 1830, which C. neglected to have recorded. D., in September, 1832, conveyed the land in fee simple to J. D., Jr., which deed was recorded in March following. In October, 1833, J. D., Jr., conveyed the same in fee to H. and Y. who had no knowledge of the unrecorded mortgage of C. Thereupon C. sued D. upon his covenant of warranty, relying for breach upon the subsequent conveyance to H. and Y., and

writers,¹ and in at least one state rejected by the courts.²

(g) **Subsequent and Apparently Valid Title Obtained from the Government.** — The rule that to constitute a breach of the covenant of warranty the eviction must have been under an elder and valid title seems to have been ignored in certain cases where an apparently valid title was acquired by a third person under a subsequent patent from the government.³

(h) **Rights Acquired under Power of Eminent Domain.** — The entry of the state, in the exercise of the right of eminent domain, is not under such paramount title or right as is contemplated by the covenants of warranty and for quiet enjoyment, and, therefore, does not constitute a breach of those covenants.⁴

it was held that he was liable. The court, Weston, C. J., delivering the opinion, said that "there is no propriety in applying the rule that there should be proof of elder title to evictions founded upon the subsequent acts of the covenantor which cannot be resisted." It was also considered that, as between the mortgage and the deed, the title dated from the time of the registry only, and that, therefore, the latter was the elder title, thus bringing the case within the rule that the covenant extended to older and better titles only. This case was cited with approval in *Maeder v. Carondelet*, 26 Mo. 112, and followed in *Lukens v. Nicholson*, 4 Phila. (Pa.) 22, where a ground-rent had been assigned by a deed, which the assignee did not record, and subsequently mortgaged by the assignor.

And in *Illinois* the courts have laid down the doctrine that where a plaintiff can show an eviction under a paramount title derived from a wrongful subsequent sale by the grantor, then he can maintain an action on the covenant of general warranty. *Jones v. Warner*, 81 Ill. 343; *Dugger v. Oglesby*, 3 Ill. App. 94.

It was held in *Clark v. O'Neal*, 13 La. Ann. 381, that, because under the *Louisiana* Code, art. 2442 [2417], a defect of registering the sale of an immovable could not be pleaded between the parties to the sale, their heirs or assigns, though an unregistered sale was void as against creditors, therefore where the sale of a tract of land had not been registered, and the land had subsequently been sold for the vendor's debt, this did not relieve her of her obligation to warrant the title; and this doctrine was approved in *Boyer v. Amet*, 41 La. Ann. 721.

1. Rawle on Covenants for Title (5th ed.), p. 168, note 5.

2. The doctrine favored in the above cited case of *Curtis v. Deering*, 12 Me. 501, is rejected in the *Ohio* case of *Wade v. Comstock*, 11 Ohio St. 71.

In *Scott v. Scott*, 70 Pa. St. 244, the instrument containing the covenant sued on was held to be a will, but apart from this the court, by Sharswood, J., said: "No authority has been or can be cited to support the position that a deed or will subsequently made by a grantor is itself a breach of the covenant of warranty contained in his conveyance, more especially when such deed or will is a lawful act." See *Foster v. Woodward*, 141 Mass. 160.

3. **Apparently Valid Title under Subsequent Patent.** — In the case of *Yokum v. Thomas*, 15 Iowa 67, an action upon the covenants in a deed, that the grantor "is lawfully seized, that he has a good right to convey, that the prem-

ises are free from incumbrances, and that he will warrant and defend," the facts found were that the grantor had entered the land with a land warrant, and conveyed it to the plaintiff, that afterwards an assignment of the location and warrant was obtained from the grantor by fraud, and that upon the assignment so obtained a patent was procured from the United States. The plaintiff commenced an action in equity to set aside the patent, and was successful. He then sought to recover of his grantor the expenses incurred in prosecuting the action. The court held that the covenants of the deed were broken, basing its conclusion upon the reason that when a fraudulent assignee of the location and warrant "obtained the patent from the United States, the legal title was vested in her, and upon this title she could have brought her action of right, and, notwithstanding the paramount equities of the plaintiff, could have obtained a judgment evicting him from the premises."

And in a later *Iowa* case, that of *Meservy v. Snell*, 94 Iowa 222, the court, basing its decision upon the preceding case, arrived at a similar conclusion. In this case the defendant had acquired title under a swamp land entry, and conveyed the land to the plaintiff with a covenant of warranty. Afterwards the entry was illegally set aside by the United States land office, and muniments of title issued to a third person. An action against the plaintiff being brought to recover the land by such third person, she successfully defended the same by establishing that the defendant's entry was wrongfully canceled. The defendant failed to defend though notified to do so. It was held that there had been a breach of the covenant of warranty, and that the plaintiff was entitled to recover of the defendant her reasonable attorney fee and expenses incurred in the defense. In the opinion delivered in this case by Robinson, J., it is said: "This case and the *Yokum* Case are peculiar, and distinguishable from most others, by the fact that the general government, the source from which the title emanated, with power in the first instance to determine its grantees, had apparently set aside all acts and proceedings by which the first title was created, and had issued muniments of title to another grantee. Following the rule in the *Yokum* Case, we must hold that there was a breach of the covenant of warranty made by the defendant."

4. **Entry by State under Eminent Domain.** — *Illinois.* — *Stevenson v. Loehr*, 57 Ill. 509, 11 Am. Rep. 36.

Kansas. — *Kuhn v. Freeman*, 15 Kan. 426.

(4) *Loss of Appurtenances.* — The covenants of warranty and for quiet enjoyment extend to everything that is appurtenant or incident to the grant to which they relate, and are broken by the loss of any incorporeal right annexed or incident to the land conveyed.¹ In order that the loss of such a right may amount to a breach of these covenants, it must, however, appear that it was a legal appurtenance to the land within the meaning of the deed.²

(5) *Non-existence of Land.* — It has been held that the fact that there is no such land as is described in the deed is not a breach of the covenant of warranty.³

Massachusetts. — *Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122; *Brimmer v. Boston*, 102 Mass. 19; *Boston, etc., Steamboat Co. v. Munson*, 117 Mass. 34.

New Jersey. — *Cooper v. Bloodgood*, 32 N. J. Eq. 209.

New York. — *Folts v. Huntley*, 7 Wend. (N. Y.) 210.

Pennsylvania. — *Frost v. Earnest*, 4 Whart. (Pa.) 86; *Dobbins v. Brown*, 12 Pa. St. 75; *Bailey v. Miltenberger*, 31 Pa. St. 37; *Schuylkill, etc., Imp., etc., Co. v. Schmoele*, 57 Pa. St. 273; *Dyer v. Wightman*, 66 Pa. St. 427; *Peck v. Jones*, 70 Pa. St. 83.

In *Osborn v. Nicholson*, 13 Wall. (U. S.) 655, the court, by Swayne, J., said: "All contracts are inherently subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation, and is not within that provision of the national constitution which forbids a state to pass laws impairing their obligation. The power acts upon the property which is the subject of the contract, and not upon the contract itself."

Act of De Facto Sovereign. — The act of a sovereign *de facto* is equally outside the scope of the covenant. If the sovereignty be eventually recognized as *de jure* also, the act is an act of sovereignty, and lawful; otherwise, it is merely tortious. *Dudley v. Folliott*, 3 T. R. 584; *Watkeys v. De Lancey*, 4 Doug. 354, 26 E. C. L. 400.

1. Appurtenances — Loss of Constitutes a Breach. — *Parker v. Fairbanks*, 1 Russ. & Ches. 285; *Adams v. Conover*, 87 N. Y. 422, 41 Am. Rep. 381; *West v. Stewart*, 7 Pa. St. 123; *Wilson v. Cochran*, 46 Pa. St. 233.

To Illustrate. — A covenant for quiet enjoyment is broken by the loss of a right of way of necessity over the covenantor's other land. *Morris v. Edgington*, 3 Taunt. 24; *Andrews v. Paradise*, 8 Mod. 318.

And where the defendant had conveyed to the plaintiff all his interest in a tract of land together with all his interest in certain mills and his "right to erect dam * * * at said mills, with all and singular the hereditaments and appurtenances thereunto belonging," and had covenanted to warrant and defend all his right, title, and interest in and to the said granted premises with the said hereditaments and appurtenances forever, it was held in an action upon this covenant, that the deed conveyed all the easements appurtenant to the land and mills as they existed at the time of its execution, and that the vendee could maintain an action upon the covenant of warranty for damages from failure of title to, and eviction from, such easements. *Bowling v. Burton*, 101 N. Car. 176.

Where a furnace and gristmill near a canal were leased with a covenant of general warranty, and the agents of the commonwealth cut off the water supply, it was held that, under the circumstances, this constituted a breach of the covenant. *Peters v. Grubb*, 21 Pa. St. 455.

So if the description of the land conveyed is such as to import a warranty that the streets which bound the land exist, a failure to open them is a breach of the covenant. *Trutt v. Spotts*, 87 Pa. St. 339.

But in *Connecticut* the diversion under paramount title, of a stream of water flowing through the land conveyed, was held not to constitute a breach of the covenant of warranty contained in the deed for the land, *Mitchell v. Warner*, 5 Conn. 497. And in *Pennsylvania* the taking of land by the commonwealth for a canal, under a prior grant from the covenantor with release of damages, has been held not to be a breach of the covenant of warranty of the lots through which the canal was laid out. *Dobbins v. Brown*, 12 Pa. St. 75. In this case, had the commonwealth taken the land by eminent domain, the decision would have been manifestly correct, but the injury to the covenantee arose from the fact that the land was taken under the release, as a private citizen might have taken it.

2. Right Lost Must Be Appurtenant to Land. — In a conveyance with covenants of warranty and quiet enjoyment of a dwelling-house, and lot the land was described by metes and bounds "with appurtenances." There was a bathroom and water-closet in the house, with discharge pipes entering into a sewer on adjoining premises owned by a third person. While it appeared by parol evidence that the plaintiff at the time of the conveyance knew of this connection, and while the apparent privilege enhanced the price of the premises, the defendant had no right to use the sewer of the adjoining owner and was subsequently enjoined from such use. In an action to recover damages for the alleged breach of the covenants, it was held that the right to use the sewer was not a legal appurtenance within the meaning of the deed, and that therefore the action was not maintainable. *Green v. Collins*, 86 N. Y. 246, 40 Am. Rep. 531, *reversing* *Green v. Collins*, 20 Hun (N. Y.) 474.

The apparent servitude of passage or right of way is an appurtenance of the property sold, and any sale implies, without its being expressed, a warranty against acts of the vendor, that would prevent or interfere with the full enjoyment of the thing sold. *Bruning v. New Orleans Canal Co.*, 12 La. Ann. 541.

3. Vanderkarr v. Vanderkarr, 11 Johns. (N. Y.) 122.

(6) *Subsequent Acquisition of Title by Grantor.* — If the grantor who does not have title at the time of his conveyance, subsequently and before the grantee has been evicted gets in the outstanding paramount title, the title so acquired inures to the benefit of the grantee¹ and prevents a recovery by him upon the covenant of warranty or for quiet enjoyment.² But it has been held that after his eviction under title paramount the grantee cannot be compelled to accept such after-acquired title in satisfaction of these covenants in his deed, or in mitigation of damages for a breach thereof.³

5. Covenant Against Incumbrances — *a. FORCE AND EFFECT.* — A covenant against incumbrances, in an ordinary deed of conveyance, extends to all adverse claims or liens on the estate conveyed whereby the same may be defeated wholly or in part, whether the claims be uncertain, contingent, or otherwise.⁴

b. WHAT CONSTITUTES A BREACH — (1) *Of the Usual Covenant* — (a) **General Rule.** — An unqualified covenant against incumbrances, which is the usual form of the covenant, is broken if there is outstanding, at the time of the conveyance, an older and better title or an incumbrance diminishing the value or enjoyment of the land.⁵

(b) **Eviction Not Necessary.** — While the amount of damages recoverable depends upon whether or not the covenantee has been evicted,⁶ the covenant against incumbrances differs from the covenants of warranty and for quiet enjoyment in the particular that an eviction or dispossession of the grantee is not necessary to its breach; the mere existence of an incumbrance at the time of the conveyance is sufficient to constitute a breach of this covenant.⁷

(2) *Where the Covenant Is for Quiet Enjoyment Against Incumbrances.* — If, however, the covenant extends to quiet enjoyment against incumbrances, or, what will amount to the same thing, is a warranty against incumbrances, then it is broken only by an entry, or expulsion from the premises, or some disturbance in the possession, consequent upon the existence of an outstanding incumbrance.⁸

(3) *What Constitutes an Incumbrance* — (a) **Definition.** — An incumbrance, within the meaning of the covenant against incumbrances, has been defined to be every right to or interest in the land, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance.⁹

1. See the title **ESTOPPEL.**

2. **Acquisition of Title by Grantor** — **Prior to Eviction of Grantee.** — *Claycomb v. Munger*, 51 Ill. 373; *Middlebury College v. Cheney*, 1 Vt. 336; *Cross v. Martin*, 46 Vt. 14; *McLennan v. Prentice*, 85 Wis. 427.

3. **Same** — **After Eviction of Grantee.** — *Nichol v. Alexander*, 28 Wis. 118; *McInnis v. Lyman*, 62 Wis. 191.

4. **Force and Effect of Covenant Against Incumbrances.** — *Shearer v. Ranger*, 22 Pick. (Mass.) 447; *Tibbetts v. Leeson*, 148 Mass. 102.

5. **General Rule as to What Constitutes Breach of the Usual Covenant.** — *Anderson v. Knox*, 20 Ala. 156; *Andrews v. McCoy*, 8 Ala. 920, 42 Am. Dec. 669; *Thomas v. St. Paul's M. E. Church*, 86 Ala. 138; *Copeland v. McAdory*, 100 Ala. 553; *Clark v. Swift*, 3 Met. (Mass.) 390; *Prescott v. Trueman*, 4 Mass. 629, 3 Am. Dec. 249; *Buren v. Hubbell*, 54 Mo. App. 617; *Corbett v. Wrenn*, 25 Oregon 305; *Potter v. Taylor*, 6 Vt. 676; *Eaton v. Lyman*, 30 Wis. 41.

6. See *infra*, this title, the division **Damages.**

7. **Eviction Not Necessary.** — *Copeland v. McAdory*, 100 Ala. 553; *Anderson v. Knox*, 20 Ala. 156; *Tufts v. Adams*, 8 Pick. (Mass.) 547; *Kramer v. Carter*, 136 Mass. 504; *Streeper v.*

Abeln, 59 Mo. App. 485; *Chapman v. Kimball*, 7 Neb. 399; *Garrison v. Sandford*, 12 N. J. L. 261; *Funk v. Voneida*, 11 S. & R. (Pa.) 109, 14 Am. Dec. 617; *Eaton v. Lyman*, 30 Wis. 41.

8. *Cuthbert v. Street*, 9 U. C. C. P. 115; *Kennedy v. Solomon*, 14 U. C. Q. B. 623; *Anderson v. Knox*, 20 Ala. 156. See *Streeper v. Abeln*, 59 Mo. App. 485.

9. **Incumbrances Defined.** — 1 Inst. 4, b. *United States.* — *Farrington v. Tourtelott*, 39 Fed. Rep. 738.

Alabama. — *Copeland v. McAdory*, 100 Ala. 553.

Connecticut. — *Mitchell v. Warner*, 5 Conn. 497; *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638.

Iowa. — *Barlow v. McKinley*, 24 Iowa 69.

Maine. — *Herrick v. Moore*, 19 Me. 313.

Massachusetts. — *Prescott v. Trueman*, 4 Mass. 630, 3 Am. Dec. 249; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335.

Nebraska. — *Chapman v. Kimball*, 7 Neb. 399.

New Jersey. — *Carter v. Denman*, 23 N. J. L. 260.

New York. — *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432.

(b) **Easement** — *aa. GENERAL RULE.* — It is a well-established general rule that the covenant against incumbrances is broken by an outstanding easement of any kind.¹

bb. RIGHT OF WAY — **GENERAL RULE.** — As a **General Rule**, which, however, is not without exceptions in some jurisdictions, a right of way, whether public or private, over the land conveyed, is an incumbrance the existence of which constitutes a breach of the covenant against incumbrances.²

Private Way. — Unquestionably, the existence of a private right of way over the land conveyed is a breach of the covenant.³

Pennsylvania. — *Lafferty v. Milligan*, 165 Pa. St. 534.

An incumbrance is defined to be a right or interest in a third person in land to the diminution of its value. *Fritz v. Pusey*, 31 Minn. 368; *Mackey v. Harmon*, 34 Minn. 168.

Right to Partition. — Pending a petition under a law of the state of *Ohio* which provided that if it should appear on a petition of tenants in common of land for partition that the same could not be divided without prejudice to the whole property, a writ might issue to the sheriff to sell the whole at auction and divide the proceeds among the tenants in common, one of the tenants in common conveyed his purparty, covenanting against incumbrances. The whole land being afterwards sold by the sheriff under an order of the court pursuant to the state law, the grantor was held liable for a breach of his covenant. *Chapel v. Bull*, 17 Mass. 213.

Adverse Equitable Claims. — An adverse equitable claim to the land has been held not to be an incumbrance. *Marple v. Scott*, 41 Ill. 50.

Flooding of Land by Grantor Before the Conveyance. — Where the owner of land built a dam and flowed it, and then conveyed the land with a covenant against incumbrances, it was held that this was not an incumbrance within the meaning of the covenant. *Kidder v. George*, 18 N. H. 511.

1. Easements Constitute Incumbrances. — *Copeland v. McAdory*, 100 Ala. 553; *Mitchell v. Warner*, 5 Conn. 497; *Teague v. Whaley*, (Ind. App. 1898) 50 N. E. Rep. 41; *Pilcher v. Atchison*, etc., R. Co., 38 Kan. 516, 5 Am. St. Rep. 770; *Kramer v. Carter*, 136 Mass. 504; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432; *McMullin v. Wooley*, 2 Lans. (N. Y.) 394; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432.

In *Roberts v. Levy*, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 311, it was held that a covenant entered into between the owners of adjoining city lots for themselves and all claiming under them to the effect that all buildings erected upon the lots would be set back a specified distance from the street on which the lots fronted, constituted an incumbrance on the lots to which it applied; and if subsequently conveyed by deed containing the usual covenant against incumbrances, a breach of the latter covenant arises the instant the deed is executed.

Right to Flow Land. — An easement consisting of a right to flow land constitutes a breach of the covenant against incumbrances. *Patterson v. Sweet*, 3 Ill. App. 550; *Medler v. Hiatt*, 8 Ind. 171; *Isele v. Arlington Five Cents Sav. Bank*, 135 Mass. 142. See *Fitch v. Seymour*, 9 Met. (Mass.) 462.

Right to Dam a Stream. — And the covenant

has been held to be broken by the fact that a third person has a right to dam a stream running through the land. *Morgan v. Smith*, 11 Ill. 199; *Ginn v. Hancock*, 31 Me. 42.

Right to Make and Maintain an Artificial Watercourse. — So also the right to make and maintain an artificial watercourse over the land has been held to be a breach of the covenant. *Prescott v. White*, 21 Pick. (Mass.) 341, 32 Am. Dec. 266. Compare *Prescott v. Williams*, 5 Met. (Mass.) 429, 39 Am. Dec. 688.

Right to Cut Drainage Ditch. — The existence of a right in a third person to cut a ditch or canal for draining has been held to be a breach of the covenant against incumbrances. *Smith v. Sprague*, 40 Vt. 43.

Right to Take Water from Land. — The right to pass over the land and take water from a spring on it is an incumbrance. *Mitchell v. Warner*, 5 Conn. 497; *Morgan v. Smith*, 11 Ill. 194; *Blake v. Everett*, 1 Allen (Mass.) 250; *Harlow v. Thomas*, 15 Pick. (Mass.) 68; *Wetherbee v. Bennett*, 2 Allen (Mass.) 428. See *Wilson v. Cochran*, 46 Pa. St. 233; *Russ v. Steele*, 40 Vt. 310.

In *McMullin v. Wooley*, 2 Lans. (N. Y.) 394, it was held that the right to take water by means of a pipe laid beneath the ground from a spring on the premises conveyed constituted a breach of the covenant against incumbrances.

Right to Cut Timber on the Land. — Where there is an existing right in a third person to cut timber on the land conveyed, the covenant against incumbrances is broken. *Cathcart v. Bowman*, 5 Pa. St. 317; *Spurr v. Andrew*, 6 Allen (Mass.) 420.

Right to Use Stairway on Land. — The right of the owner of adjoining premises to use in common a stairway which is part of the premises conveyed has been held to be an incumbrance. *McGowen v. Myers*, 60 Iowa 256. But compare *Nemmett v. McKeen*, 112 Pa. St. 315.

2. De Rochemont v. Boston, etc., R. Co., 64 N. H. 500.

3. Private Way an Incumbrance. — *Mitchell v. Warner*, 5 Conn. 497; *Schmisser v. Penn*, 47 Ill. App. 278; *Blake v. Everett*, 1 Allen (Mass.) 248; *Wetherbee v. Bennett*, 2 Allen (Mass.) 428; *Harlow v. Thomas*, 15 Pick. (Mass.) 68. See *Rea v. Minkler*, 5 Lans. (N. Y.) 196; *Russ v. Steele*, 40 Vt. 310.

Covenant in Deed by Heirs to Save Grantee Harmless from Claims Against Estate. — The existence of a right of way across the premises conveyed by the widow and sole heir of the deceased owner is not a breach of a covenant in a deed to save the grantee harmless from liens arising out of claims against the estate. *Marsh v. Fish*, 66 Vt. 213.

Highway. — But there is some conflict in the authorities as to whether or not the existence of a public way over the land amounts to a breach of the covenant against incumbrances. In some states it has been held that the covenant is not broken by the fact that there is, at the time of the conveyance, a public road or highway open and in use upon the land.¹ But in other states where this question has arisen for determination it has been answered in the affirmative.² And this view is, perhaps, grounded upon the better reason.³ Cer-

1. Rule that Highway Opened and in Use Is Not a Breach. — *Iowa.* — *Harrison v. Des Moines*, etc., R. Co., 91 Iowa 114.

Pennsylvania. — *Patterson v. Arthurs*, 9 Watts (Pa.) 152; *Wilson v. Cochran*, 46 Pa. St. 229. See *McClenahan v. Curwin*, 3 Yeates (Pa.) 373; *Memmert v. McKeen*, 112 Pa. St. 315.

Virginia. — *Jordan v. Eve*, 31 Gratt. (Va.) 1; *Deacons v. Doyle*, 75 Va. 258. See *Trice v. Kayton*, 84 Va. 217, 10 Am. St. Rep. 836.

Wisconsin. — See *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85; *Bennett v. Keehan*, 67 Wis. 154.

And in *Desvergers v. Willis*, 56 Ga. 515, 21 Am. Rep. 289, it was held that a public road on land purchased by one who knows of its existence at the time of the purchase does not constitute a breach of a covenant against incumbrances.

New York Cases. — It was held in the New York case of *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272, that it is not a breach of the covenants that the grantor was the lawful owner of the land, was well seized and had full power to convey, that part of the land was a public highway and was used as such. *Spencer, J.*, delivering the opinion of the court, said: "It must strike the mind with surprise, that a person who purchases a farm through which a public road runs at the time of purchase and had so run long before, who must be presumed to have known of the existence of the road and who chooses to have it included in his purchase, shall turn round on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased and what must have enhanced the value of the farm. It is hazardous little to say that such an attempt is unjust and inequitable and contrary to the universal understanding of both vendors and purchasers. If it could succeed, a floodgate of litigation would be opened, and for many years to come this kind of action would abound. These are serious considerations; and this court ought, if it can consistently with law, to check the attempt in the bud." While there was not in the deed under consideration in this case any covenant against incumbrances, *Earl, J.*, in delivering the opinion of the court, in the case of *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432, after quoting from the case as above, said that "the ratio decidendi is equally applicable to such a covenant; and since that decision it has always been understood in this state that such a covenant is not broken by the existence of a highway." And, in *Jordan v. Eve*, 31 Gratt. (Va.) 1, it is said that while the deed under consideration in the case of *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272, contained no covenant against incumbrances, the reason-

ing of the court is broad enough to apply to covenants of every description. And see *Neeson v. Bray*, (Buffalo Super. Ct.) 19 N. Y. Supp. 841.

Reason for the Rule. — In the above-cited case of *Patterson v. Arthurs*, 9 Watts (Pa.) 152, *Kennedy, J.*, said: "Although a public highway, no doubt, is, in many instances, an injury instead of a benefit to the holder or owner of the land upon which it is located, and therefore tends to lessen its value in the estimation of a purchaser, yet it is fair to presume that every purchaser, before he closes his contract for his purchase of land, has seen it and made himself acquainted with its locality and the state and condition of it; and, consequently, if there be a public road or highway open and in use upon it, he must be taken to have seen it, and to have fixed in his own mind the price that he was willing to give for the land, with a reference to the road. * * * The existence of the highway could not be regarded as an incumbrance that came within the meaning of the parties when they used the term 'incumbrances,' in their contract; and hence an action of covenant could not be sustained on account of it for a breach of the covenant against incumbrances." See also *Farrington v. Tourtelott*, 39 Fed. Rep. 738.

2. Rule that Existence of Highway Constitutes a Breach. — *Alabama.* — *Copeland v. McAdory*, 100 Ala. 553.

Connecticut. — *Hubbard v. Norton*, 10 Conn. 431.

Illinois. — *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290.

Indiana. — *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731, overruling *Scribner v. Holmes*, 16 Ind. 142.

Maine. — *Haynes v. Young*, 36 Me. 557; *Herrick v. Moore*, 19 Me. 313; *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426.

Massachusetts. — *Kellogg v. Ingersoll*, 2 Mass. 101; *Parish v. Whitney*, 3 Gray (Mass.) 516; *Harlow v. Thomas*, 15 Pick. (Mass.) 66; *Sprague v. Baker*, 17 Mass. 586.

Missouri. — *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Purcell v. Hannibal*, etc., R. Co., 50 Mo. 504.

New Hampshire. — *Prichard v. Atkinson*, 3 N. H. 335; *Haynes v. Stevens*, 11 N. H. 28.

Vermont. — *Butler v. Gale*, 27 Vt. 739; *Clark v. Conroe*, 38 Vt. 469.

But Viewing Premises and Staking Out a Road over the Same by selectmen of a town does not constitute an incumbrance thereon until a location is filed and accepted. *Shute v. Barnes*, 2 Allen (Mass.) 598.

3. Reason for the Rule. — The reason for the rule is well stated in *Kellogg v. Ingersoll*, 2 Mass. 101, which was an action for a breach of the covenant against incumbrances. The breach assigned was the existence "of a pub-

tainly, where the road is not opened and in use, so that the covenantee has no opportunity to learn by examination of the land that there is a public right of way over it, the existence of the highway should be deemed a breach of the covenant.¹

Where Land Is Described as Bounded by Centre of Street. — But where the land conveyed is bounded by the centre of a public road, and is so described in the grantee's deed, so that knowledge of the fact is brought home to him without resort to oral or other extraneous evidence, he must accept the land *cum onere*, and will not be allowed to complain that the existence of the highway is a breach of his covenant against incumbrances.²

Right of Way for a Railroad. — A right of way for a railroad has been declared to be an incumbrance within the covenant against incumbrances, without regard to whether a highway is or is not such an incumbrance.³ And in the jurisdictions where the existence of a public way, though opened and in use at the time of the conveyance, is held to be a breach of that covenant, there can be no doubt but that a right of way which a railroad company has over the land is an incumbrance, the existence of which works a breach of the covenant.⁴ But where the courts hold that a public way, which, at the time of the conveyance, visibly affects the physical condition of the land, is not an incumbrance, it might also be held that the existence of a right of way by a railroad, which has been constructed and is in operation at the time of the conveyance, does not constitute a breach of the covenant against incumbrances.⁵

cc. PARTY WALL. — The covenant against incumbrances is usually held to be broken by the existence of the easement of a party wall.⁶ Where the party wall stands wholly upon the conveyed premises, the existence of the right to its use by an adjoining proprietor unquestionably constitutes a breach of the covenant against incumbrances.⁷ And though it has been said that a party wall standing equally upon the land of adjoining proprietors, and whose central line is, throughout, coincident with the line of division between their respective

lic town road or way, duly laid out by the town of A. for the use of all its inhabitants," and it was held that the breach was well assigned; that the existence of the road was an incumbrance. *Parsons, C. J.*, said: "It is legal obstruction to the purchaser to exercise that dominion over the land to which the lawful owner is entitled. An incumbrance of this nature may be a great damage to the purchaser, or the damage may be very inconsiderable or merely nominal. The amount of damages is a proper subject of consideration for the jury who may assess them, but it cannot affect the question whether a public town road is in legal contemplation an incumbrance of the land over which it is laid." See also the opinion by *Redfield, C. J.*, in *Butler v. Gale*, 27 Vt. 739.

1. Application of the Rule where the Highway Is Not Opened and in Use. — *Herrick v. Moore*, 19 Me. 313; *Trice v. Kayton*, 84 Va. 217, 10 Am. St. Rep. 836. See *People's Sav. Bank v. Alexander*, (Pa. 1886) 3 Cent. Rep. 388.

2. Where Deed Describes Land as Bounded by Centre of Street. — *Holmes v. Danforth*, 83 Me. 139.

Lands were described in the deed as extending to the centre of a street which was to be made, and with reference to a plat on which the proposed street was traced. It was held that the grant was subject to the street, and that the subsequent use of the street as a highway did not constitute a breach of the cove-

nant against incumbrance. *Cincinnati v. Brachman*, 35 Ohio St. 289.

3. Right of Way for Railroad Held an Incumbrance. — *Barlow v. McKinley*, 24 Iowa 69.

4. Farrington v. Tourtelott, 39 Fed. Rep. 738 (a case arising in *Missouri*); *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Quick v. Taylor*, 113 Ind. 540; *Kellogg v. Malin*, 62 Mo. 429. See *Pilcher v. Atchison*, etc., R. Co., 38 Kan. 516, 5 Am. St. Rep. 770.

5. Right of Way for a Railroad Held Not an Incumbrance. — *Smith v. Hughes*, 50 Wis. 627. See *Bacharach v. Von Eiff*, 74 Hun (N. Y.) 533.

6. Party Wall an Incumbrance. — A person who bought land in 1864 began suit for the removal of a party wall, and the defendant agreed to pay a thousand dollars, which was entered as a decree. In 1881 the land was sold again, without notice of the easement given to the purchaser. It was held that the decree legalized the encroachment, and that the purchaser could recover for breach of the covenant against incumbrances. *Edmunds's Appeal*, (Pa. 1887) 8 Atl. Rep. 31.

In a case between lessor and lessee the right of the adjoining owner to use a party wall was held a breach of the covenant against incumbrances. *Giles v. Dugro*, 1 Duer (N. Y.) 331. See *O'Neil v. Van Tassel*, 137 N. Y. 297.

7. Mohr v. Parmelee, 43 N. Y. Super. Ct. 320; *Schaeffer v. Miehlings*, 13 Misc. Rep. (N. Y. Super. Ct.) 520.

premises, constitutes no incumbrance upon the land of either,¹ the law has, with reason, been declared to be otherwise; it has been held that the covenant against incumbrances is broken by the existence in the owner of adjoining premises of a right to a party wall of this description.²

(c) **Taxes — General Rule.** — Unpaid taxes which constitute a lien upon the land at the time of the conveyance are an incumbrance within the covenant.³

Must Be a Valid Tax. — But in order to come within the meaning of the covenant against incumbrances the tax must be a lawful tax legally levied.⁴

Illegal Assessment where Liability to Reassessment Exists. — But even an illegal assessment has been held to operate as an incumbrance when the grantee has been put to expense in removing it from the land, and when he has become liable to a reassessment.⁵

1. **Party Wall on Dividing Line Between Lots.** — *Hendricks v. Stark*, 37 N. Y. 106, 93 Am. Dec. 549. See *Mohr v. Parmelee*, 43 N. Y. Super. Ct. 320; *Musgrave v. Sherwood*, 54 How. Pr. (N. Y. Supreme Ct.) 338.

2. One Hurlburt and the defendant Harmon, owning adjoining lands, executed a written instrument under seal, wherein it was agreed that Hurlburt might build a stone or brick wall on the dividing line between the lots, one-half of the wall and its footings to stand upon Hurlburt's lot and one-half on Harmon's. Hurlburt erected a wall upon the dividing line mentioned in accordance with the terms of the agreement. Subsequently Harmon conveyed his lot to the plaintiff by a deed containing a covenant against incumbrances. Harmon, being sued for a breach of this covenant in consequence of the existence of the party-wall agreement, contended, and the trial court found, that, as Harmon acquired for himself, his heirs and assigns, an easement appurtenant to his land in so much of Hurlburt's land as the wall would cover, which easement was like and equal to that acquired by Hurlburt in Harmon's land, "the mutual easement appurtenant to each parcel was beneficial to each," and hence did not constitute a legal incumbrance. But upon appeal the Supreme Court of *Minnesota* rejected this view of the law, and held that the covenant against incumbrances was broken. The court defined an incumbrance to be a right or interest in a third person in the land to the diminution of its value, and declared the easement in the plaintiff's land in favor of and appurtenant to Hurlburt's to be such a right of interest. "The existence of the incumbrance does not depend upon the extent or amount of the diminution in value. If the right or interest of the third person is such that the owner of the servient estate has not so complete and absolute an ownership and property in his land as he would have if the right or interest spoken of did not exist, his land is, in law, diminished in value and encumbered. It follows that in the case at bar the existence of the right in plaintiff's land conferred upon and as appurtenant to Hurlburt's land was an incumbrance, and that therefore the covenant against incumbrances in Harmon's deed to plaintiff Mackey is broken." *Mackey v. Harmon*, 34 Minn. 168.

This case was cited with approval, and a similar decision rendered, in the *Nebraska* case of *Burr v. Lamaster*, 30 Neb. 688, 27 Am. St. Rep. 428.

Under Statutes Authorizing the Erection of

Party Walls on Dividing Lines. — Under a statute of the state of *Iowa* which confers the right to one who is about to erect a building contiguous to the lot of another to construct one-half of the wall on his neighbor's lot, and gives the latter the right to make use of the wall as a party wall upon the payment of one-half of the expense of constructing the same, it has been held that where the owner of a vacant lot on which rests one-half of a neighbor's wall conveys the same with a covenant of warranty against incumbrances, the existence of such wall is not a breach of the covenant. *Bertram v. Curtis*, 31 Iowa 46.

3. **Taxes Constitute an Incumbrance** — *United States*. — *Fuller v. Jillette*, 9 Biss. (U. S.) 206.

Illinois. — *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Cheney v. City Nat. Bank*, 77 Ill. 562; *Almy v. Hunt*, 48 Ill. 45.

Indiana. — *Kirkpatrick v. Pearce*, 107 Ind. 520.

Massachusetts. — *Foley v. Haverhill*, 144 Mass. 352; *Smith v. Carney*, 127 Mass. 179.

Nebraska. — *Reid v. Colby*, 26 Neb. 469.

Pennsylvania. — *Parker v. Rawle*, 148 Pa. St. 208.

Tennessee. — *Plowman v. Williams*, 6 Lea (Tenn.) 268.

Vermont. — *Cummings v. Holt*, 56 Vt. 384.

Wisconsin. — *Mitchell v. Pillsbury*, 5 Wis. 407; *Daggett v. Reas*, 79 Wis. 60.

Canada. — *Haynes v. Smith*, 11 U. C. Q. B. 57.

Succession Tax. — That the land is subject to a collateral inheritance tax due the commonwealth has been held to be a breach of the covenant against incumbrances. *Large v. McClain*, (Pa. 1886) 7 Atl. Rep. 101.

4. **Must Be Valid Tax Legally Levied.** — *Loneragan v. Baber*, 59 Ark. 15; *Barker v. Hobbs*, 6 Ind. 385; *Robinson v. Murphy*, 33 Ind. 482; *Cook v. Fuson*, 66 Ind. 521; *Kirkpatrick v. Pearce*, 107 Ind. 520; *Balfour v. Whitman*, 89 Mich. 202; *Mitchell v. Pillsbury*, 5 Wis. 407; *La Banque Ville Marie v. Morrison*, 25 Can. Sup. Ct. Rep. 289.

Illegal Tax Sale. — The fact that a portion of the land conveyed has been illegally sold for taxes is not a breach of the covenant against incumbrances. *Cummings v. Holt*, 56 Vt. 384.

Recorded Tax Deed Which Passes No Title. — Nor does the existence of a recorded tax deed which is invalid and passes no title to the premises constitute a breach of the covenant. *Tibbetts v. Leeson*, 148 Mass. 102.

5. **Existence of Assessment and Liability to Reassessment.** — Where the grantor had cove-

Must Be an Existing Lien Antedating the Conveyance — General Rule. — To constitute an incumbrance within the covenant, the tax must exist and be a lien upon the premises at the time of the conveyance.¹

Existence of Tax Assessments. — Where the lien of taxes attaches on the land at the time of their assessment, the covenant against incumbrances is broken if there is, at the time of the conveyance, an assessment of taxes against the land.² But except where the lien of taxes takes effect at the time of their assessment, it is immaterial whether the assessment is made before or after the conveyance. Thus where the mere assessment of taxes does not create a lien, the existence of an assessment at the time of the conveyance does not work a breach of the covenant.³ On the other hand, if the taxes are assessed or extended against the land after the conveyance, but the lien relates back and

nanted against incumbrances, he was held liable for sewer assessments. It was held that though the assessment was illegal, if the grantee was liable to reassessment he could recover "the reasonable expenses paid by him" to remove the incumbrance. The grantee has his action for breach of the covenant. *Coburn v. Litchfield*, 132 Mass. 449.

And in the case of *Cadmus v. Fagan*, 47 N. J. L. 549, there was a covenant against incumbrances in a deed conveying land. A municipal assessment for benefits was vacated, but a reassessment was subsequently made against the land, which the grantee had to pay. The court held that he could recover the amount of the assessment under the covenant.

1. Must Be a Lien at the Time of the Conveyance — *Indiana*. — *Langsdale v. Nicklaus*, 38 Ind. 289.

Iowa. — *Ingalls v. Cooke*, 21 Iowa 560.

Nebraska. — *Reid v. Colby*, 26 Neb. 469.

New Jersey. — *Bradley v. Dike*, 57 N. J. L. 471.

New York. — *Barlow v. Saint Nicholas Nat. Bank*, 63 N. Y. 399, 20 Am. Rep. 547; *McLaughlin v. Miller*, 124 N. Y. 510, *affirming* 57 Hun (N. Y.) 430.

Pennsylvania. — *Stutt v. Building Assoc.*, 12 Pa. Co. Ct. Rep. 344; *Gheen v. Harris*, 170 Pa. St. 644.

Vermont. — *Pierce v. Brew*, 43 Vt. 292; *Cummings v. Holt*, 56 Vt. 384.

Canada. — *La Banque Ville Marie v. Morrison*, 25 Can. Sup. Ct. Rep. 289.

As to the Time When the Lien of a Tax Attaches, see the title TAXATION.

2. Where Lien Dates from Time of Assessment.

— An assessment made under the provisions of the *Ohio* Act of March 29, 1867 (64 Ohio Laws 80), being a lien from the time it is made, an action will lie on a covenant "against all claims whatsoever," if there is an unpaid road assessment on the land. *Craig v. Heis*, 30 Ohio St. 550.

3. Where the Lien Attaches Subsequently to the Assessment. — City lots were conveyed with covenant against all "charges, estates, judgments, assessments, taxes, liens, and incumbrances, of what nature or kind soever." Prior to the conveyance the city had ordered the construction of a sidewalk in front of the lots, and had adopted an ordinance levying an assessment on them for it, but no lien attached prior to the sale. The grantee had to pay the assessment, and the grantor was held

not liable upon his warranty. *Tull v. Royston*, 30 Kan. 617.

Where an assessment for street improvements does not become a charge upon the abutting land until at least the assessment has been legally ascertained and established, the existence of such an assessment is not a breach of the covenant against incumbrances contained in a deed executed after the completion of the work, but before the apportionment of the tax. *Langsdale v. Nicklaus*, 38 Ind. 289; *Dowdney v. New York*, 54 N. Y. 186; *Harper v. Dowdney*, 47 Hun (N. Y.) 227, *affirmed* in 113 N. Y. 644; *People v. Gilon*, 24 Abb. N. Cas. (N. Y. Supreme Ct.) 125, 18 Civ. Pro. Rep. (N. Y.) 112; *McLaughlin v. Miller*, 124 N. Y. 510, *affirming* 57 Hun (N. Y.) 430.

In *Lathers v. Keogh*, 109 N. Y. 583, the parties entered into a contract for the purchase and sale of certain real estate, the conveyance to be made August 23, 1883, by warranty deed, "free and clear of all incumbrances," except certain specified mortgages. Prior to the making of the contract an assessment of the property for the tax for the year 1883 had been made, but the calculation of the tax was not made until thereafter, and the tax was not confirmed until August 29, which, upon the defendant's refusal, the plaintiff was compelled to pay. In an action to recover the amount so paid it was held that the tax was not a charge or incumbrance upon the property which the defendant was bound to pay under the covenant in his deed, no lien or incumbrance existing by reason thereof before the amount of the tax had been ascertained in the manner prescribed by law.

Where the statutes provide that the lien of taxes shall take effect at a specified date after their assessment, the covenant against incumbrances in a deed executed after an assessment has been made, but before the date fixed for the attachment of the lien, is not broken in consequence of the tax assessment. *Tull v. Royston*, 30 Kan. 617; *Bradley v. Dike*, 57 N. J. L. 471.

Entry of Land on Assessment Roll. — In *New York* the entry of land on an assessment roll does not, it has been held, constitute an incumbrance on the land; the assessment or subsequent levy of the tax is not a breach of a covenant against incumbrances contained in a deed of the land executed after the completion of the assessment roll, but before the levy of the tax. *Barlow v. Saint Nicholas Nat. Bank*, 63 N. Y. 399, 20 Am. Rep. 547.

takes effect as of an earlier date, the existence of such unpaid taxes will be a breach of the covenant.¹

Taxes Not Payable until After Conveyance.—If the taxes become a lien on the land prior to the conveyance, that lien constitutes a breach of the covenant against incumbrances, although the taxes do not become due and payable until after the execution of the deed.²

Amount of Tax Not Ascertained.—An incumbrance is not necessarily a lien determinate in amount, and an assessment on account of a local improvement will constitute a breach of the covenant against incumbrances contained in a deed executed after the assessment becomes a lien upon the land but before the amount has been determined.³

Taxes Collectible Otherwise than by Sale of Land.—The existence of unpaid taxes which are a lien upon the premises, is none the less an incumbrance because the taxes may be collected otherwise than by sale of the land.⁴ But if, under any exceptional provision of law the tax is not a lien upon the land, its existence will not work a breach of the covenant against incumbrances.⁵

(d) **Mortgage.**—An outstanding unsatisfied mortgage on the land is, of course,

1. **Where Lien of Taxes Subsequently Imposed Relates Back Prior to Conveyance.**—See *Hill v. Bacon*, 110 Mass. 387; *Kirkpatrick v. Pearce*, 107 Ind. 520.

In *Blackie v. Hudson*, 117 Mass. 181, it was held, under the *Massachusetts* statutes of 1866, c. 174, and 1868, c. 276, that the liability to an assessment of the expenses of widening a street was an incumbrance thereon from the time of the order of widening, and a breach of a covenant in a deed which was delivered before the assessment was made but after the order for widening was passed.

In *Carr v. Dooley*, 119 Mass. 295, it was held that, under the *Massachusetts* General Statutes, c. 48, par. 5, providing that assessments for sewers and drains shall constitute a lien on the real estate assessed "for one year after they are laid," an assessment by the mayor and aldermen of a city of the expenses of laying a sewer in a street of the city, upon land abutting thereon and benefited thereby, is an incumbrance thereon from the time of the order for its construction, and is a breach of the covenant against incumbrances in a deed of the premises delivered after such order but before the assessment was laid. See *Smith v. Carney*, 127 Mass. 179; *Flynn v. Bourneuf*, 143 Mass. 277, 58 Am. Rep. 135.

The case of *Hutchins v. Moody*, 30 Vt. 656, 34 Vt. 433, was an action of covenant on a deed executed on the 12th of May, 1853. The real estate was set in the grand list to its then owner, at the first of April preceding its conveyance. The taxes were rated and assessed upon it against him after the conveyance, and the court held that while there would be no breach of the covenant against incumbrances until such taxes became legally fixed upon the land so as to be a definite burden upon it which the grantee might remove by payment, yet that where the taxes thus became legally fixed upon the estate the burden would properly be referred to and date from the time of the date of the list. A similar decision was made in the case of *Peters v. Myers*, 22 Wis. 602.

Under a *Michigan* statute (Howell's Statutes, c. 40), imposing a ditch tax on lands benefited by drainage, it was held that taxes assessed

thereunder became a lien as soon as they became a charge on the land by the assessment of benefits made by the drain commissioner, and that a covenant against incumbrances made after such assessment of benefits, but before the supervisor had extended the tax, was broken as soon as made. *Lindsay v. Eastwood*, 72 Mich. 338.

Where the statutes declare that the lien of taxes assessed against property benefited by a street improvement shall attach from the completion of the improvement, a covenant against incumbrances in a deed of such property, executed after completion of improvements and the levying of an assessment, is broken as soon as made, by reason of the fact that the land is liable for the payment of taxes not yet ascertained and which are afterwards to be assessed. *Hartshorn v. Cleveland*, 52 N. J. L. 473.

2. **Taxes Falling Due After Conveyance.**—*Cochran v. Guild*, 106 Mass. 29, 8 Am. Rep. 296; *Davis v. Bean*, 114 Mass. 358; *Campbell v. McClure*, 45 Neb. 608; *Long v. Moler*, 5 Ohio St. 271.

3. **Ascertainment of Amount of Assessment Not Necessary.**—*Lafferty v. Milligan*, 105 Pa. St. 534. Compare *Corbett v. Taylor*, 23 U. C. Q. B. 454.

And in *Missouri* it has been held that the lien of the assessment of benefits for street improvement and of the judgment thereunder attaches as of the date of the approval of the ordinance, and constitutes an incumbrance for which the covenantor must answer to the covenantee who discharges such lien, although the amount of such lien was not ascertained until after the making of the covenant. *Barnhart v. Hughes*, 46 Mo. App. 318.

4. *Cochran v. Guild*, 106 Mass. 29, 8 Am. Rep. 296.

5. *Moore v. Hynes*, 22 U. C. Q. B. 107. See *Cumberland v. Kearns*, 18 Ont. Rep. 151.

In *Connecticut* taxes are not a lien on the land taxed, if the owner has other property sufficient to pay them. One sued upon a covenant against incumbrances, alleged to have been broken by the existence of a tax lien on the land, was allowed to show that he held other property sufficient to meet the taxes. *Briggs v. Morse*, 42 Conn. 258.

an incumbrance within the covenant.¹

(e) **Judgment or Attachment Lien.**—There is a breach of the covenant against incumbrances if the land is subject to the lien of a judgment² or attachment.³

(f) **Lease.**—The covenant against incumbrances is broken if there is outstanding a prior unexpired lease.⁴

Executory Agreement.—But where there is no present demise but an executory agreement for a lease, dependent for its effect upon some act of the lessor which he has not performed, the covenant is not broken.⁵

Attornment of Tenant or Apportionment of Rent.—It is apprehended that the existence of an outstanding term in or lease of the granted premises will not operate as a breach of the covenant against incumbrances where there is an attornment of the tenant to the purchaser, or an apportionment of rent between the parties.⁶

(g) **Right of Dower.**—A right of dower, whether inchoate or otherwise, has been held to be an incumbrance.⁷

(h) **Vendor's Lien.**—The covenant is broken if the land is subject to a vendor's lien.⁸

(i) **Building Agreement and Restriction on Use of the Land — Building Restriction.**—The fact that the land sold is subject to a building restriction constitutes a breach of the covenant against incumbrances.⁹

1. Mortgages Constitute Incumbrances—Arkansas.—*Brooks v. Moody*, 25 Ark. 452.

California.—*Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440.

Indiana.—*Reasoner v. Edmundson*, 5 Ind. 393.

Maine.—*Bean v. Mayo*, 5 Me. 94; *Freeman v. Foster*, 55 Me. 508.

Massachusetts.—*Tufts v. Adams*, 8 Pick. (Mass.) 547; *Wyman v. Ballard*, 12 Mass. 304.

New Jersey.—*Stewart v. Drake*, 9 N. J. L. 139; *Garrison v. Sandford*, 12 N. J. L. 261.

Oregon.—*Corbett v. Wrenn*, 25 Oregon 305.

Pennsylvania.—*Funk v. Voneida*, 11 S. & R. (Pa.) 109, 14 Am. Dec. 617.

Vermont.—*Richardson v. Dorr*, 5 Vt. 9.

Advancement to Covenantee by Grantor of Sum Necessary to Discharge Mortgage.—A purchaser whose vendor has covenanted against incumbrances, and paid him money expressly to take up an outstanding mortgage, is bound to apply it in favor of his own subsequent purchasers, who take with similar covenants. He is liable to refund the money paid by one of them to redeem it. *Twitchell v. Drury*, 25 Mich. 393.

2. Judgment Lien an Incumbrance.—*Holman v. Creagmiles*, 14 Ind. 177; *Jenkins v. Hopkins*, 8 Pick. (Mass.) 346; *Wyatt v. Dunn*, 93 Mo. 459; *Hall v. Dean*, 13 Johns. (N. Y.) 105.

3. Attachment Lien an Incumbrance.—*Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638; *Harlow v. Thomas*, 15 Pick. (Mass.) 69; *Norton v. Babcock*, 2 Met. (Mass.) 510; *Johnson v. Collins*, 116 Mass. 392.

4. Outstanding Lease an Incumbrance—Iowa.—*Van Wagner v. Van Nostrand*, 19 Iowa 422.

Kansas.—*Clark v. Fisher*, 54 Kan. 403; *Smith v. Davis*, 44 Kan. 362.

Massachusetts.—*Batchelder v. Sturgis*, 3 Cush. (Mass.) 201.

Michigan.—*Edwards v. Clark*, 83 Mich. 246.

Minnesota.—*Fritz v. Pusey*, 31 Minn. 368.

Missouri.—*Buren v. Hubbell*, 54 Mo. App. 617.

New Jersey.—*Demars v. Koehler*, (N. J. 1897) 38 Atl. Rep. 808.

Pennsylvania.—*Cross v. Noble*, 67 Pa. St. 74.

Rhode Island.—*Porter v. Bradley*, 7 R. I. 538.

South Carolina.—*Grice v. Scarborough*, 2 Spears L. (S. Car.) 649, 42 Am. Dec. 391.

See *Edwards v. Gale*, 52 Me. 360. But see *supra*, this title and division, the subdivision *General Principles*.

Illegal Refusal of Lessee to Surrender Possession.—But an illegal refusal of a lessee to surrender possession is not within the covenants of a deed from the lessor. *Noyes v. Rockwood*, 56 Vt. 647.

5. Executory Agreement for a Lease.—*Weld v. Traip*, 14 Gray (Mass.) 330.

6. Kellum v. Berkshire L. Ins. Co., 101 Ind. 455; *Haldane v. Sweet*, 55 Mich. 196; *Demars v. Koehler*, (N. J. 1897) 38 Atl. Rep. 808.

Assignment of Outstanding Leases to Covenantee.—Where, at the execution of the conveyance, the vendor made an assignment of two prior leases of the premises to the purchaser, and notified the tenants to pay the rent to him, the existence of the leases was held to be no breach. *Pease v. Christ*, 31 N. Y. 141.

7. Right of Dower an Incumbrance.—*Porter v. Noyes*, 2 Me. 22, 11 Am. Dec. 30; *Runnells v. Webber*, 59 Me. 488; *Bigelow v. Hubbard*, 97 Mass. 195; *Sturtevant v. Phelps*, 16 Gray (Mass.) 50; *Shearer v. Ranger*, 22 Pick. (Mass.) 447; *Ward v. Ashbrook*, 78 Mo. 515; *Heimburg v. Ismay*, 35 N. Y. Super. Ct. 35; *McAlpin v. Woodruff*, 11 Ohio St. 120.

It has been held that an outstanding dower interest is a breach of the covenant against incumbrances, even though it become consummate only after the deed, and by a change of law as to the mode of assignment. *Walker v. Deaver*, 79 Mo. 664.

8. Thomas v. St. Paul's M. E. Church, 86 Ala. 138.

9. Building Restriction an Incumbrance.—*Halle v. Newbold*, 69 Md. 265; *Kramer v. Carter*, 136 Mass. 504; *Locke v. Hale*, 165 Mass. 20; *Foster v. Foster*, 62 N. H. 46; *Matter of Whitlock*, 32 Barb. (N. Y.) 48; *Roberts v. Levy*, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 311; *Anonymous*, 2 Abb. N. Cas. (N. Y. Super. Ct.) 56; *Docter v. Darling*, 68 Hun (N. Y.) 70.

Obligation to Erect and Maintain Fence.—And the covenant has been held to be broken where the land sold is subject to a covenant that a certain fence should be erected and maintained.¹

Restriction upon the Use of the Land.—A restriction against the use of the land for certain purposes constitutes an incumbrance,² unless the restriction is against nuisances.³

(4) **Subsequent Acts and Events.**—Since this covenant, like the covenants of seizin and of right to convey, is broken, if at all, as soon as it is made, acts done or events occurring after the conveyance will not amount to a breach.⁴

Mortgage Given by Grantor After the Conveyance.—Hence, a mortgage on the premises given by the grantor after the conveyance to the covenantee is not a breach of the covenant against incumbrances.⁵

6. Covenant for Further Assurance—*a.* **IN GENERAL.**—This is a covenant to do such further acts for the purpose of perfecting the covenantee's title as the latter may reasonably require,⁶ and it is broken when such a request is made and refused.⁷

b. **ACTS WHICH MAY BE REQUIRED**—**General Principles.**—In determining whether a particular act comes within the meaning of the covenant for further assurance, the covenant will always be considered in connection with the other covenants of the deed and with the nature of the estate conveyed.⁸ It

1. Obligation to Fence, an Incumbrance.—*Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550. See also *Blain v. Taylor*, 19 Abb. Pr. (N. Y. Supreme Ct.) 228. But compare *Parish v. Whitney*, 3 Gray (Mass.) 516.

Condition to Erect Dwelling-house Within Specified Time.—It has been held that it is not a breach of the covenant against incumbrances, that the grantor holds the land upon condition to erect a dwelling-house thereon within a certain time. *Estabrook v. Smith*, 6 Gray (Mass.) 572, 66 Am. Dec. 443.

2. Restriction on Use of Land an Incumbrance.—See *Floyd v. Clark*, 7 Abb. N. Cas. (N. Y. C. Pl.) 136.

For example, where the land sold was subject to a covenant that no ardent spirits should be sold therefrom, it was held that the covenant against incumbrances was broken. *Hatcher v. Andrews*, 5 Bush (Ky.) 561.

3. "No greater restriction is imposed in that case than such as the law imposes, and subject to which all property is held." *Floyd v. Clark*, 7 Abb. N. Cas. (N. Y. C. Pl.) 136, wherein it was held that a condition that a city lot shall not be used as a cemetery is not an incumbrance on the title.

4. *Copeland v. McAdory*, 100 Ala. 553; *Foster v. Woodward*, 141 Mass. 160.

5. *Foster v. Woodward*, 141 Mass. 160.

6. Force and Effect.—For example, to levy a fine or to discharge a judgment or other incumbrance. *King v. Jones*, 5 Taunt. 418.

In *Davis v. Tollemache*, 2 Jur. N. S. 1181, Vice-Chancellor Stuart says: "The covenant for further assurance in a deed is a covenant intended to give full effect and operation to the estate and interest conveyed by the deed."

In *Cochran v. Pascault*, 54 Md. 1, it is said that this covenant "relates both to the title of the vendor and to the instrument of conveyance to the vendee, and operates as well to secure the performance of all acts necessary for supplying any defect in the former as to remove all objections to the sufficiency and

security of the latter." But see *Armstrong v. Darby*, 26 Mo. 517, wherein Napton, J., in delivering the opinion of the court, said: "If the covenant for further assurance * * * applies to any defect of title in the vendor, whether such defect can be supplied by the vendor or not, it is greatly more comprehensive than any other covenant for title, and may be said to render most of them totally superfluous. Why insert a covenant against incumbrances if the covenant for further assurance requires the vendor to buy up an outstanding mortgage or judgment and convey to the purchaser? Of what avail is the covenant of indefeasible seizin if all incumbrances must be removed under the covenant for further assurance?"

A covenant that if the grantor should obtain title from the United States, he would convey the same with warranty was a covenant for further assurance, under which the covenantor could be compelled to convey his after-acquired title. *Lamb v. Burbank*, 1 Sawy. (U. S.) 227.

Covenant for Further Assurance in Quit-Claim Deed.—The effect of a quit-claim deed in passing the title is not destroyed by a covenant for further assurance inserted therein. *Wholey v. Cavanaugh*, 88 Cal. 132.

7. Breach.—*Smoot v. Coffin*, 4 Mackey (D. C.) 407; *Fields v. Squires*, *Deady* (U. S.) 366.

Where a vendor covenanted to procure a reconveyance to himself of such portions of the land described in the deed as he might have conveyed to others, or to convey other lands of equal value, etc., it was held that the vendor must procure such conveyance within a reasonable time; and eight years is not a reasonable time for the purpose. *Vance v. Pena*, 41 Cal. 686.

8. What Acts May Be Required.—*Zabriskie v. Baudendistel*, (N. J. 1890) 20 Atl. Rep. 163.

For example, if they are general, extending to all paramount titles and incumbrances, then this covenant will be construed as general also; but if they are limited to defects of title

has been said that in a covenant to do all "reasonable acts" for further assurance, "a reasonable act means such an act as the law requires."¹

Must Be Lawful. — The act must, of course, be lawful.²

Must Be Necessary. — And since the law will not require an unnecessary act, the act must be necessary.³

Grantee's Title Must Be Imperfect. — Hence, no further act can be required unless the grantee's title is shown to be imperfect.⁴

Must Be Practicable. — The act required must be practicable.⁵

Levy of a Fine. — In *England*, a covenant to do all lawful and reasonable acts for further assurance is held to include the levying of a fine, though not named.⁶

Removal of Incumbrances. — It has been said that the vendor may, under this covenant, be called upon for the removal of a judgment or other incumbrance.⁷ But this statement is, perhaps, too general.⁸ The proposition has been limited to the case of an incumbrance created by the grantor.⁹

c. REQUIRING FURTHER ASSURANCE — Usual Mode. — The usual mode of requiring further acts is for the purchaser to submit to the grantor a draft of the intended assurance, with the opinion of counsel as to its necessity and propriety, and a tender of the vendor's necessary costs.¹⁰

or incumbrances created by the vendor, then the covenant is so likewise. This is clear from the fact that the purpose of this covenant is to enable a grantee to call upon his grantor to remedy defects in the title or remove incumbrances, the existence of which defects or incumbrances has been covenanted against.

The statement in 2 Sugd. Vend. (14th ed.) 612, that "if the title prove bad and the defect can be supplied by the vendor," the covenant for further assurance may be resorted to, must be understood as referring to cases where this covenant stands alone or where the other covenants are limited. See Rawle Covenants (5th ed.), § 104.

Thus in *Armstrong v. Darby*, 26 Mo. 517, it was held that the implied covenant against incumbrances being restricted to those done or suffered by the grantor, he could not, under the implied covenant for further assurance, be required to discharge a mortgage created by his grantor.

If the estate or interest conveyed be limited, then, though the covenants be general, their operation is necessarily restricted, and the covenant for further assurance cannot require the conveyance of a greater estate. Thus a tenant in tail who mortgaged all the property to which he was entitled "in possession, reversion, remainder, or expectancy, or otherwise howsoever," with a covenant for further assurance, could not be compelled to execute a disentailing deed. *Davis v. Tollemache*, 2 Jur. N. S. 1181. See also *Taylor v. Dabar*, 1 Ch. Ca. 274; *Smith v. Baker*, 1 Y. & Coll. 223.

1. Wood, B., in *Warn v. Bickford*, 9 Price 43.

2. **Act Must Be Lawful.** — Lord Cairns, in *Heath v. Crealock*, L. R. 10 Ch. 31.

3. **Act Required to Be Necessary.** — *Warn v. Bickford*, 9 Price 43.

Requiring Duplicate Deed. — In *England* a duplicate of the deed to the covenantee is sometimes required under this covenant. *Trapper v. Allington*, 1 Eq. Cas. Abr. 166.

But a new deed of covenant to produce title deeds is outside the scope of a covenant for further assurance. *Fain v. Ayers*, 2 Sim. & S. 533.

4. *Kramer v. Ricke*, 70 Iowa 535; *Guwynn v. Thomas*, 2 Gill & J. (Md.) 420.

The case of *Kramer v. Ricke*, 70 Iowa 535, was a case of an agreement "to clear title," apparently equivalent to a covenant for further assurance.

5. **Act Must Be Practicable.** — As to illness, lunacy, or death of the covenantor, whereby the act required ceases to be reasonable or practicable, see *Anonymous*, Moo. 124; *Nash v. Ashton*, T. Jones 195, *Skinner* 42; *Pet's Case*, 1 Leon. 304.

Requiring Levy of Fine where Wife Refuses to Join. — It was formerly held that a covenantor could, as a matter of course, be required to levy a fine, and that if his wife refused to join, he could be imprisoned till she consented. *Boulney v. Curteys*, Cro. Jac. 251; *Middlemore v. Goodale*, Cro. Car. 503; *Hall v. Hardy*, 3 P. Wms. 189. But this was long ago doubted, and is wholly repugnant to modern ideas. *Outram v. Round*, 4 Vin. Abr. 203; *Emery v. Wase*, 8 Ves. Jr. 505; 2 *Story's Eq.* (13th ed.), §§ 731-735.

6. *Innes v. Jackson*, 16 Ves. Jr. 366; *King v. Jones*, 5 Taunt. 418, 1 Marsh. 107.

7. **Incumbrance — Requiring Removal of.** — *Heath, J.*, in *King v. Jones*, 5 Taunt. 427, 1 Marsh 107, *affirmed* in *Jones v. King*, 4 M. & S. 188.

8. Mr. Rawle intimates that the proposition that the purchaser may require a judgment or other covenant to be removed must be taken with some qualification. See Rawle on Covenants for Title, § 104.

9. *Colby v. Osgood*, 29 Barb. (N. Y.) 339.

In *Missouri* the statutory covenant for further assurance has been held to apply only to such incumbrances as were created by the covenantor or over which he had control, and not to those arising collaterally by the acts of others. *Armstrong v. Darby*, 26 Mo. 517; *Koenig v. Branson*, 73 Mo. 634; *Walker v. Deaver*, 79 Mo. 664; *Luther v. Brown*, 66 Mo. App. 227.

10. *Dart. Vend.* (6th ed.) 888; 2 *Sugd. Vend.* (14th ed.) 614.

Before bringing an action on a covenant for

Time of Making Request. — The request must not be unreasonably delayed, and if there is by the covenant a time limited within which acts of further assurance are to be done, the purchaser must make the request within the time named.¹

Sufficiency of the Request. — It is sufficient if the purchaser makes a general request,² even if the assurance is to be such as shall satisfy his counsel.³

d. SUFFICIENCY OF DEED EXECUTED IN PURSUANCE OF THE COVENANT. — A deed executed in pursuance of this covenant need not itself contain covenants of title, unless this be expressly covenanted for.⁴

7. Time of Breach — Covenant of Seizin. — While the courts of our different states do not agree as to the force and effect of the covenant of seizin, and, as a consequence, do not always agree as to what constitutes a breach of the covenant, yet with one exception⁵ they seem to be agreed that the covenant of seizin is a covenant *in presenti*, so that if broken at all it is broken at the time when it is made.⁶

further assurance, the grantee must notify the grantor of the kind of assurance devised, or tender the same, giving a reasonable time for consideration. *Miller v. Parsons*, 9 Johns. (N. Y.) 336.

Where the Covenant Is to Make "Such Further Assurance as Counsel Shall Advise," the purchaser must tender the intended assurance to the covenantor. *Higginbottom's Case*, 5 Coke 19 *b*; *Bennet's Case*, Cro. Eliz. 9. Here the purchaser himself, though learned in the law, cannot advise. *Rosewell's Case*, 5 Coke 19 *b*. And the counsel is the purchaser's counsel. *Higginbottom's Case*, 5 Coke 19 *b*.

1. *Nash v. Ashton*, T. Jones 195, *Skinner* 42.

2. **General Request Sufficient.** — *Pudsey v. Newsam*, Yelv. 44, 1 Brownl. 84, Moo. 682.

3. *Baker v. Bulstrode*, 2 Lev. 95, T. Raym. 232, reported differently in 1 Mod. 104.

4. **Deed Executed in Pursuance of the Covenant.** — "Where the conveyance is really a further assurance, the purchaser must be supposed to have already obtained all such covenants for title as he was entitled to." 2 Sugd. Vend. (14th ed.) 615.

This differs from the case of an agreement to convey "by reasonable assurance," which would now be held to mean a deed with the usual covenants. It was formerly held, however, that such "assurance" might be without covenants, and even without a seal. *Shep. Touch.* 168; *Coles v. Kinder*, Cro. Jac. 571; *Wye's Case*, 2 Leon. 130; *Pudsey v. Newsam*, Yelv. 44; *Lassels v. Catterton*, 1 Mod. 67.

5. **Ohio.** — According to the construction which has been adopted in Ohio if the grantor does not have seizin at the time of making the conveyance, the covenant is at once broken. *Innes v. Agnew*, 1 Ohio 386; *Wetzell v. Richcreek*, 53 Ohio St. 62. So far the doctrine in that state agrees with the doctrine of actual seizin as it is elsewhere understood. But the similarity stops here. In the other states which have adopted the covenant of seizin the covenant is satisfied by a seizin on the part of the grantor at the time of the conveyance; if he has seizin at that time, no seizin can subsequently occur by the dispossession of the grantee in consequence of the assertion of an outstanding superior title. In Ohio, however, the covenant will be broken whenever the grantee is evicted by the holder of a para-

mount title. See *supra*, this title and division, the subdivision *Covenant of Seizin*.

6. **Covenant of Seizin Broken if at All, When Made** — *United States*. — *Pollard v. Dwight*, 4 Cranch (U. S.) 430; *Le Roy v. Beard*, 8 How. (U. S.) 451.

Alabama. — *Anderson v. Knox*, 20 Ala. 156; *Sayre v. Sheffield Land, etc., Co.*, 106 Ala. 440.

Arkansas. — *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Abbott v. Rowan*, 33 Ark. 593; *Benton County v. Rutherford*, 33 Ark. 640.

Connecticut. — *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Mitchell v. Warner*, 5 Conn. 497.

Illinois. — *Brady v. Spurck*, 27 Ill. 478; *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269; *Baker v. Hunt*, 40 Ill. 264, 89 Am. Dec. 346; *Frazer v. Peoria County*, 74 Ill. 282; *Jones v. Warner*, 81 Ill. 343; *Tone v. Wilson*, 81 Ill. 529; *Clapp v. Herdman*, 25 Ill. App. 509.

Indiana. — *Reasoner v. Edmundson*, 5 Ind. 393; *Bottorf v. Smith*, 7 Ind. 673; *Craig v. Donovan*, 63 Ind. 513; *Jackson v. Green*, 112 Ind. 342.

Iowa. — *Brandt v. Foster*, 5 Iowa 295; *Camp v. Douglas*, 10 Iowa 586; *Zent v. Picken*, 54 Iowa 535; *Mitchell v. Kepler*, 75 Iowa 207.

Kansas. — *Kansas L. & T. Co. v. Love*, 4 Kan. App. 188.

Kentucky. — *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271, 15 Ky. L. Rep. 70.

Maine. — *Cushman v. Blanchard*, 2 Me. 266, 11 Am. Dec. 76; *Hacker v. Storer*, 8 Me. 232; *Fairbrother v. Griffin*, 10 Me. 95.

Massachusetts. — *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Bickford v. Page*, 2 Mass. 455; *Caswell v. Wendell*, 4 Mass. 108; *Twambly v. Henley*, 4 Mass. 441.

Michigan. — *Matteson v. Vaughn*, 38 Mich. 373; *Vaughn v. Matteson*, 39 Mich. 758; *Sherwood v. Landon*, 57 Mich. 219; *Christy v. Farlin*, 49 Mich. 319.

Minnesota. — *Allen v. Allen*, 48 Minn. 462. *Mississippi*. — *Peters v. Bowman*, 98 U. S. 56, a case arising in Mississippi.

Missouri. — *Tapley v. Labeaume*, 1 Mo. 552. *New Hampshire*. — *Morrison v. Underwood*, 20 N. H. 369; *Dickey v. Weston*, 61 N. H. 23.

Covenant of Right to Convey. — The covenant that the grantor has a good right to convey, like the covenant of seizin, is a covenant *in præsenti*, and is broken, if at all, as soon as it is made.¹

Covenants of Warranty and for Quiet Enjoyment. — Since there can be no breach of the covenants of warranty and for quiet enjoyment before there is an eviction of the grantee, the breach of these covenants takes place at the time of the eviction.²

Where the Breach Is by the Entry of the True Owner on Vacant Land. — It has been held that where the land conveyed is vacant, and the covenants are broken by the subsequent entry of the true owner, the breach occurs when the true owner takes, or at least claims, the possession.³

Covenant Against Incumbrances. — The covenant against incumbrances as found in *England* and the *United States* respectively is not, it appears, precisely the same. In *England* that covenant is prospective in operation, being usually connected with the covenant for quiet enjoyment, as that the purchaser "shall enjoy," etc., "and that free of all incumbrances." But in the *United States* the covenant is expressed in the present tense, as that the premises "are free from all incumbrances." Since, then, it is a covenant *in præsenti*, it is broken, if at all, at the time of the conveyance.⁴

New Jersey. — *Lot v. Thomas*, 2 N. J. L. 386, 2 Am. Dec. 354.

New York. — *Bingham v. Weiderwax*, 1 N. Y. 509; *Mott v. Palmer*, 1 N. Y. 564; *Fowler v. Poling*, 2 Barb. (N. Y.) 303; *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; *M'Carty v. Leggett*, 3 Hill (N. Y.) 134; *Hamilton v. Wilson*, 4 Johns. (N. Y.) 72, 4 Am. Dec. 253; *Morris v. Phelps*, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323; *Abbott v. Allen*, 14 Johns. (N. Y.) 248; *Mygatt v. Coe*, 124 N. Y. 212, reversing 44 Hun (N. Y.) 31.

North Carolina. — *Wilson v. Forbes*, 2 Dev. L. (13 N. Car.) 30.

Pennsylvania. — *Wilson v. Cochran*, 46 Pa. St. 229.

South Carolina. — *Pringle v. Witten*, 1 Bay (S. Car.) 256, 1 Am. Dec. 612; *Johnson v. Veal*, 3 McCord L. (S. Car.) 449; *Mackey v. Collins*, 2 Nott & M. (S. Car.) 186.

Tennessee. — *Ingram v. Morgan*, 4 Humph. (Tenn.) 66, 40 Am. Dec. 626.

Texas. — *Westrope v. Chambers*, 51 Tex. 178.

Vermont. — *Garfield v. Williams*, 2 Vt. 327; *Pierce v. Johnson*, 4 Vt. 247; *Williams v. Wetherbee*, 1 Aik. (Vt.) 233; *Catlin v. Hurlburt*, 3 Vt. 407; *Clement v. Rutland Bank*, 61 Vt. 298.

Washington. — *Rombough v. Koons*, 6 Wash. 558.

Missouri. — The covenant of indefeasible seizin which, under the provisions of the Missouri statute, is implied from the use of the words "grant, bargain, and sell," is broken at once if the grantor at the time of his conveyance has neither title nor possession. *Adkins v. Tomlinson*, 121 Mo. 487. But this covenant has been construed to be more than a covenant in the present tense, and it has often been held that it runs with the land to the extent that if the covenantee takes any estate, however defeasible, or if possession accompanies the deed, and though title pass, yet in either event the covenant runs with the land and inures to the subsequent grantee upon whom the loss falls. *Dickson v. Desire*, 23

Mo. 151; *Chambers v. Smith*, 23 Mo. 174; *Magwire v. Riffin*, 44 Mo. 512; *Jones v. Whitsett*, 79 Mo. 188; *Allen v. Kennedy*, 91 Mo. 324. See *infra*, this title, the division *Covenants Running with the Land*.

1. Covenant of Right to Convey Broken when Made. — *Spoor v. Green*, L. R. 9 Exch. 99; *Brady v. Spurck*, 27 Ill. 478; *Baker v. Hunt*, 40 Ill. 264, 89 Am. Dec. 346; *Mitchell v. Kepler*, 75 Iowa 207; *Scantlin v. Allison*, 12 Kan. 85; *Chapman v. Holmes*, 10 N. J. L. 20; *Westrope v. Chambers*, 51 Tex. 178.

2. Covenants of Warranty and for Quiet Enjoyment Broken at Time of Eviction — United States. — *Flowers v. Foreman*, 23 How. (U. S.) 149.

Illinois. — *Moore v. Vail*, 17 Ill. 185.

Maine. — *Heath v. Whidden*, 24 Me. 383.

Maryland. — *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480.

Mississippi. — *Burrus v. Wilkinson*, 31 Miss. 537.

Missouri. — *Blondeau v. Sheridan*, 81 Mo. 545.

Nebraska. — *Kern v. Klocke*, 21 Neb. 529; *Cheney v. Straube*, 35 Neb. 524.

North Carolina. — *Mizzell v. Ruffin*, 118 N. Car. 69.

Pennsylvania. — *Stewart v. West*, 14 Pa. St. 336.

South Carolina. — *Welsh v. Kibler*, 5 S. Car. 405.

Texas. — *Eustis v. Cowherd*, 4 Tex. Civ. App. 343; *Alvord v. Waggoner*, (Tex. Civ. App. 1895) 29 S. W. Rep. 797; *Jones v. Paul*, 59 Tex. 41.

Vermont. — *Pierce v. Johnson*, 4 Vt. 247; *Wilder v. Davenport*, 58 Vt. 642.

3. Moore v. Vail, 17 Ill. 185; *Allis v. Nininger*, 25 Minn. 525; *Brown v. Allen*, 88 Hun (N. Y.) 402.

4. Covenant Against Incumbrances Broken when Made — Alabama. — *Thomas v. St. Paul's M. E. Church*, 86 Ala. 138; *Copeland v. McDady*, 100 Ala. 553.

Illinois. — *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1.

Massachusetts. — *Clark v. Swift*, 3 Met. 1.

Covenant for Further Assurance. — The covenant for further assurance is broken when a proper request for the further assurance is made and is refused.¹

IV. COVENANTS RUNNING WITH THE LAND — 1. Definitions — Covenants Running with the Land. — A covenant is said to run with the land when either the liability to perform it or the right to enforce it passes to the assignee of the land.²

Covenants Running with the Reversion. — A covenant is said to run with the reversion when the right of enforcement or the liability to performance passes to the assignee of the reversion.³

Real Covenants. — Covenants which run with the land are real covenants, and the fact that the covenant runs with the land is said to be a consequence of its character as a real covenant.⁴

2. Creation — a. IN GENERAL. — Where the covenant is of such a character or nature that it may run with the land, no particular form of words is necessary in its creation in order that it may so run.⁵

Covenant Must Be a Real Covenant. — The covenant, however, must be one which from its character and nature may run with the land; otherwise it cannot, even by the express agreement of the parties, be so annexed to the land as to run therewith.⁶

Real Covenant May by Agreement Be Prevented from Running. — And, on the other hand, though the covenant be one which may run with the land, yet if it be clearly the agreement of the parties that it shall not so run, it will not be annexed to and run with the land.⁷

(Mass.) 390; *Wyman v. Ballard*, 12 Mass. 304; *Kramer v. Carter*, 136 Mass. 504.

Missouri. — *Buren v. Hubbell*, 54 Mo. App. 617; *Winningham v. Pennock*, 36 Mo. App. 688.

Nebraska. — *Chapman v. Kimball*, 7 Neb. 399; *Cheney v. Straube*, 35 Neb. 521; *Campbell v. McClure*, 45 Neb. 608; *Bellamy v. Chambers*, 50 Neb. 146.

New Jersey. — *Stewart v. Drake*, 9 N. J. L. 139; *Garrison v. Sandford*, 12 N. J. L. 261.

New York. — *Barlow v. Saint Nicholas Nat. Bank*, 63 N. Y. 399, 20 Am. Rep. 547; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432.

Wisconsin. — *Eaton v. Lyman*, 30 Wis. 41.

1. Fields v. Squires, Deady (U. S.) 388; *Zabrickie v. Baudendistel*, (N. J. 1890) 20 Atl. Rep. 163.

2. Definition — Covenants Running with the Land. — *Dorsey v. St. Louis*, etc., R. Co., 58 Ill. 65; *Scheidt v. Belz*, 4 Ill. App. 431; *Wiggins Ferry Co. v. Ohio*, etc., R. Co., 94 Ill. 83; *Savage v. Mason*, 3 Cush. (Mass.) 505; *Shaber v. St. Paul Water Co.*, 30 Minn. 182; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 471.

In *Flaniken v. Neal*, 67 Tex. 629, *Gaines, J.*, in speaking of covenants running with the land, said: "By this is meant that it is a covenant which accompanies a conveyance of the land and passes from one purchaser to another through each successive link in the chain of title."

3. Covenants Running with the Reversion. — *Dorsey v. St. Louis*, etc., R. Co., 58 Ill. 65; *Scheidt v. Belz*, 4 Ill. App. 431.

Covenants in leases afford the greater part of the latter covenants, and will be discussed under the titles LANDLORD AND TENANT AND LEASES.

4. See supra, this title, *Introductory — Definitions.*

Real Covenants. — In *Brew v. Van Deman*, 6

Heisk. (Tenn.) 433, *Deaderick, J.*, in speaking of real covenants, said: "A covenant real is that whereby an obligation to pass something real is created, as lands or tenements, or the obligation of which is so connected with the realty that he who has the latter is entitled to the benefit of or liable to perform the other."

5. No Particular Form of Words Required. — *Trull v. Eastman*, 3 Met. (Mass.) 124, 37 Am. Dec. 126; *Brown v. McKee*, 57 N. Y. 684; *Masury v. Southworth*, 9 Ohio St. 341. See also *supra*, this title, *Creation and Construction.*

6. Covenant Must Be a Real Covenant. — *Ackroyd v. Smith*, 10 C. B. 164, 70 E. C. L. 164; *Doughty v. Bowman*, 11 Q. B. 444, 63 E. C. L. 444; *Fresno Canal, etc., Co. v. Dunbar*, 80 Cal. 530; *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 146; *Glenn v. Canby*, 24 Md. 127; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461; *Brewer v. Marshall*, 18 N. J. Eq. 337, 19 N. J. Eq. 537, 97 Am. Dec. 679; *Masury v. Southworth*, 9 Ohio St. 348. See also *Mygatt v. Coe*, 147 N. Y. 456; and the title BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 6.

Covenant Imposing Burden. — In *Masury v. Southworth*, 9 Ohio St. 341, *Gholson, J.*, said: "However clearly and strongly expressed may be the intent and agreement of the parties that the covenant shall run with the land, yet if it be of such a character that the law does not permit it to be attached, it cannot be attached by the agreement of the parties, and the assignee would take the estate clear of any such covenant."

7. Real Covenant May by Agreement Be Disconnected from Land. — *Fresno Canal, etc., Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112; *Masury v. Southworth*, 9 Ohio St. 348.

Intention of Parties. — In *Mohr v. Parmelee*, 43 N. Y. Super. Ct. 320, it was said that the criterion for determining whether a covenant

b. WITH WHAT ESTATE COVENANTS MAY RUN—(1) *Capacity of Covenants to Run with Incorporeal Hereditaments*.—It has been broadly stated that the capacity of covenants to run with incorporeal hereditaments is the same as the capacity to run with corporeal hereditaments.¹

Covenants Imposing Burdens.—A covenant imposing burdens may run not only with lands and tenements, but may also run with incorporeal hereditaments, so that an assignee thereof will be bound by covenants imposing burdens upon its use.²

Covenant Conferring Benefits.—Where an incorporeal hereditament is appurtenant to land also granted, such hereditament and the covenants for its protection will run with the land to which it is appurtenant.³

(2) *Covenant Can Only Be Annexed to an Interest in Realty*.—A covenant real cannot be annexed to an interest not arising out of realty so as to run therewith.⁴

c. PRIVACY OF ESTATE—(1) *Covenants Imposing Burdens*.—In order that a covenant imposing a burden on the land of the covenantor may run with the land and bind his heirs and assigns, it is a well-settled rule that the covenantee must have such an interest in that land as to amount to a privity of estate between the parties to the covenant.⁵

of such a nature that it might run with the land, did so or not, was the intention of the parties, and where the deed expressed such an intention such covenants would bind not only the original parties but their subsequent grantees.

1. Covenants May Run with Incorporeal Hereditaments.—*Scott v. Lunt*, 7 Pet. (U. S.) 596; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 397; *Hazlett v. Sinclair*, 76 Ind. 488; *Conduitt v. Ross*, 102 Ind. 166; *Bertram v. Curtis*, 31 Iowa 46; *Van Rensselaer v. Read*, 26 N. Y. 558; *Van Rensselaer v. Smith*, 27 Barb. (N. Y.) 147. See also *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278; *Demarest v. Willard*, 8 Cow. (N. Y.) 211. See, however, *Wheelock v. Thayer*, 16 Pick. (Mass.) 68, wherein it was held that a conveyance merely of a privilege of drawing water from a pond was not a conveyance of land, and therefore that covenants in the conveyance in respect to such right did not run with the water right so as to inure to the benefit of a subsequent grantee of such right. See also *Lawrence v. Whitney*, 115 N. Y. 470; *Wheeler v. Schad*, 7 Nev. 204.

Rent.—The legal right of action on a covenant for the payment of rent reserved on conveyance in fee passes to the assignee of the rent. *Van Rensselaer v. Read*, 26 N. Y. 558; *Scott v. Lunt*, 7 Pet. (U. S.) 605. See also *Streaper v. Fisher*, 1 Rawle (Pa.) 155, 18 Am. Dec. 604; *St. Mary's Church v. Miles*, 1 Whart. (Pa.) 229. See, however, *Van Rensselaer v. Platner*, 2 Johns. Cas. (N. Y.) 24.

2. Covenants Imposing Burdens May Run with Incorporeal Hereditaments.—*Martyn v. Williams*, 1 H. & N. 827; *Bally v. Wells*, 3 Wils. 25; *Egremont v. Keene*, 2 Jones Ir. Exch. 307; *Fitch v. Johnson*, 104 Ill. 111; *Carr v. Lowry*, 27 Pa. St. 257.

In the case of *Bally v. Wells*, 3 Wils. 25, an owner of tithes had demised them by a lease for six years, and the lessee had covenanted for himself and his assigns not to let any of the farmers have any part of the tithes without the consent of the lessor. The lessee

assigned his interest to the defendant, who let the tenants have the tithes without such consent, and thereupon the owner brought an action of covenant against him. A motion was made in arrest of judgment upon the ground that tithes were incorporeal, and that therefore the covenant could not run with them. Judgment was given for the plaintiff. See also *Martyn v. Williams*, 1 H. & N. 827.

The Court of Exchequer in Ireland also held that a lessor of tolls (an incorporeal hereditament) could maintain an action of covenant against the assignee of the lessee for the non-payment of rent. *Egremont v. Keene*, 2 Jones Ir. Exch. 307.

In *Carr v. Lowry*, 27 Pa. St. 257, it was held that where the grantee of a water right covenanted to keep in repair the race by which the water was brought to his mill, the burden of the covenant passed to the person to whom the grantee assigned the mill, and therefore the personal representative of the grantee was not liable for breaches of the covenant after an assignment by the grantee.

3. Easement Appurtenant to Land Granted.—*Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Fitch v. Johnson*, 104 Ill. 111; *Hazlett v. Sinclair*, 76 Ind. 488; *Morse v. Aldrich*, 19 Pick. (Mass.) 449; *Nye v. Hoyle*, 120 N. Y. 195.

4. Ferry Franchise.—In *South Carolina* where a ferry is not an incorporeal hereditament, a covenant for passage toll free cannot be annexed to the ferry so as to bind an assignee. *Morse v. Garner*, 1 Strobb. L. (S. Car.) 514, 47 Am. Dec. 565.

Personal Chattel.—In *Spencer's Case*, 5 Coke 16, it was resolved that where land is demised together with a flock of sheep, a covenant to return the flock would not bind an assignee of the lessor.

5. Privity of Estate Must Exist—Covenant Imposing Burdens—England.—*Keppell v. Bailey*, 2 Myl. & K. 517; *Webb v. Russell*, 3 T. R. 393; *Bally v. Wells*, 3 Wils. 25; *Spencer's Case*, 5 Coke 16; *Prior's Case*, cited in *Spencer's Case*, 5 Coke 17b.

Canada.—*Rowe v. Street*, 8 U. C. C. P. 217.

(2) *Covenants Conferring Benefits.* — The same necessity for a privity of estate between the covenantor and the covenantee has been held to exist in order that covenants conferring benefits upon the land of the covenantee may run with such land and entitle an assignee of the covenantee to take advantage thereof.¹

Covenant by Stranger to Title. — And therefore a covenant by a stranger to the title cannot run with the land though it respects the land and is intended to benefit it.²

d. TIME OF CREATION — **Covenant Must Be Made as a Part of the Conveyance.** — The

Arkansas. — *Ross v. Turner*, 7 Ark. 145, 44 Am. Dec. 531.

Illinois. — *Wiggins Ferry Co. v. Ohio*, etc., R. Co., 94 Ill. 83; *Hord v. Montgomery*, 26 Ill. App. 41.

Indiana. — *Taylor v. Owen*, 2 Blackf. (Ind.) 301, 20 Am. Dec. 115.

Maryland. — *Glenn v. Canby*, 24 Md. 127; *Lynn v. Mount Savage Iron Co.*, 34 Md. 635.

Massachusetts. — *Plymouth v. Carver*, 16 Pick. (Mass.) 183; *Weld v. Nichols*, 17 Pick. (Mass.) 543; *Hurd v. Curtis*, 19 Pick. (Mass.) 462; *Morse v. Aldrich*, 19 Pick. (Mass.) 453; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335, 118 Mass. 156; *Norcross v. James*, 140 Mass. 190; *King v. Wight*, 155 Mass. 444.

Minnesota. — *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461.

Missouri. — *Huling v. Chester*, 19 Mo. App. 607.

Nevada. — *Wheeler v. Schad*, 7 Nev. 204.

New Jersey. — *Brewer v. Marshall*, 18 N. J. Eq. 337.

New York. — *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611; *Scott v. McMillan*, 76 N. Y. 144; *Edwards v. Meader*, (Supreme Ct.) 11 N. Y. Supp. 285. See, however, *Hart v. Lyon*, 90 N. Y. 663.

North Carolina. — *Blount v. Harvey*, 6 Jones L. (51 N. Car.) 186.

Ohio. — *Easter v. Little Miami R. Co.*, 14 Ohio St. 48.

Pennsylvania. — *Provident, etc., Co. v. Fiss*, 48 Leg. Int. (Pa.) 44.

Rhode Island. — *Middletown v. Newport Hospital*, 16 R. I. 319.

Texas. — *Nalle v. Paggi*, (Tex. 1888) 9 S. W. Rep. 205.

West Virginia. — *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527. See also *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427.

In *Plymouth v. Carver*, 16 Pick. (Mass.) 183, it was held that where land was granted by a city on condition that the grantee execute a bond to maintain a portion of the highway passing by such land, the covenant in the bond to maintain the highway did not run with the land, as there was no privity of estate between the covenanting parties.

Covenant with Stranger to Title for Transportation of Products of Land. — A covenant by a landowner with a railroad providing that the products of the land shall be transported to market exclusively over the line of the covenantee does not run with the land, as there is no privity of estate between the parties. *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461; *West Virginia Transp. Co. v. Ohio*

River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527. See also *Keppell v. Bailey*, 2 Myl. & K. 517. Such an agreement may, however, be binding in equity upon a subsequent grantor of the land. *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.*, 171 Pa. St. 284.

Covenant with Stranger to Title for Payment of Lien Held by Him. — In *Edwards v. Maeder*, (Supreme Ct.) 11 N. Y. Supp. 285, it was held that a tripartite agreement reciting that the first party had transferred to the third party lands in which the second party had an interest (in the nature of a lien), and that the first party agreed from the rents and use of the lands to pay to the second party the amount of his interest, was not a covenant running with the land so as to bind a subsequent grantee to pay such interest, as there was no privity of estate between the covenantor and covenantee.

Covenant for Nonerection of Mill. — A covenant by the owner of land not to erect or permit the erection of a mill upon the land, made with a stranger to the title, does not run with the land so as to create a burden thereon in the hands of a subsequent grantee. *Harsha v. Reid*, 45 N. Y. 415.

Covenant Between Adjoining Mill Owners. — In *Hurd v. Curtis*, 19 Pick. (Mass.) 459, it was held that a covenant between owners of mills drawing water from the same dam, in respect to the use of the water, did not run with the land, as there was no privity of estate between the parties.

1. Covenants Conferring Benefits. — *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 146; *Hurd v. Curtis*, 19 Pick. (Mass.) 459; *Joy v. Boston Penny Sav. Bank*, 115 Mass. 60; *Cole v. Hughes*, 54 N. Y. 445, 13 Am. Rep. 611. See, however, *Conduitt v. Ross*, 102 Ind. 166; *Dickinson v. Hoopes*, 8 Gratt. (Va.) 353.

2. Covenant by Stranger to Title. — *Mygatt v. Coe*, 124 N. Y. 212; *Nesbit v. Montgomery, Tayl.* (3 N. Car.) 82. See, however, *Sharp v. Waterhouse*, 7 El. & Bl. 816, 90 E. C. L. 816; *Packenham's Case*, 42 Edw. III. 3; *Gaines v. Poor*, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; *Shaber v. St. Paul Water Co.*, 30 Minn. 179; *Dickinson v. Hoopes*, 8 Gratt. (Va.) 353.

In *Nesbit v. Brown*, 1 Dev. Eq. (16 N. Car.) 30, it was held that where the grantor in a deed of land reciting that the property granted is the property of the grantor's daughter, covenants to refund the purchase money in case the grantee should be evicted by the daughter, the covenant is a mere personal one, and does not run with the land, and that therefore an assignee of the grantee could come into equity to have the benefit of the grantor's covenant.

covenant must also be made as a part of the conveyance of the land.¹ It need not, however, be incorporated in the deed of conveyance itself,² and need not be executed contemporaneously with the conveyance, provided it is executed as a part of the transaction.³

Agreements Not Under Seal — Parol Agreements. — Agreements not under seal relating to land do not run with the land in the technical sense of covenants running with the land.⁴

c. NAMING ASSIGNS OF COVENANTOR — (1) *Covenants Relating to Thing in Esse.* — Where a covenant capable of running with the land relates to a thing *in esse*, the assigns of the covenantor are bound though they be not bound by the express words of the covenant; that is, though the covenantor does not covenant on the part of himself, his heirs and assigns.⁵

(2) *Covenants Relating to Thing Not in Esse.* — But where the covenant relates to a thing not *in esse*, it is necessary in order that it shall run with the land so as to bind the assigns of the covenantor that the covenant be on the part of the covenantor, his heirs and assigns, otherwise the assigns will not be bound thereby.⁶

(3) *What Are Covenants Relating to Thing Not in Esse.* — A covenant, to relate to a thing not *in esse*, must relate to the doing of a thing *de novo*, and

1. Covenant Must Be Made as a Part of the Conveyance. — *Wheeler v. Schad*, 7 Nev. 204; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206.

2. Contemporaneous Deed. — *Robbins v. Webb*, 68 Ala. 393, wherein it was held that a covenant in a bond executed contemporaneously with a conveyance of land whereby the purchaser binds himself, his heirs and assigns, not to allow certain buildings to be erected, runs with the land and may be enforced by the assigns of the covenantee taking with notice thereof.

3. Covenant Executed After Conveyance. — In *Morse v. Aldrich*, 19 Pick. (Mass.) 449, it was held that a covenant by the grantee of a mill-pond and a parcel of land, executed after the conveyance, whereby he covenanted with the grantor to draw off the water in the pond a certain number of days during the year, ran with the land.

4. Agreements Not Under Seal. — *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698; *Guilfoos v. New York Cent.*, etc., R. Co., 69 Hun (N. Y.) 593; *Wilkins v. Irvine*, 33 Ohio St. 138.

Parol Agreement for Removal of Fences. — In *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698, it was held that a parol agreement for the removal of a fence on the line of a railroad did not run with the land so as to bind the assignee of the covenantor.

5. Covenant Relating to Thing in Esse — Assigns Need Not Be Named. — *Spencer's Case*, 5 Coke 16, 1 Smith's L. Cas. 68; *Cockson v. Cock*, Cro. Jac. 125; *Gilmer v. Mobile*, etc., R. Co., 79 Ala. 569, 58 Am. Rep. 623; *Pittsburg*, etc., R. Co. v. *Reno*, 22 Ill. App. 470, affirmed in 123 Ill. 273; *Winfield v. Henning*, 21 N. J. Eq. 188; *Denman v. Prince*, 40 Barb. (N. Y.) 213; *Hartung v. Witte*, 59 Wis. 285.

Covenant for Title. — *Kingdon v. Nottle*, 1 M. & S. 355; *Redwine v. Brown*, 10 Ga. 311; *Bradford v. Long*, 4 Bibb (Ky.) 225; *Smith v. Perry*, 26 Vt. 279.

Covenant to Maintain Existing Switch Connections. — In *Pittsburg*, etc., R. Co. v. *Reno*, 22 Ill. App. 470, affirmed in 123 Ill. 273, it was

held that a covenant to maintain existing switch connections with the land of the grantor ran with the land though the assigns of the grantor were not named.

6. Covenant Relating to Thing Not in Esse — Assigns Must Be Named — *England*. — *Cockson v. Cock*, Cro. Jac. 125; *Doughty v. Bowman*, 11 Q. B. 444, 63 E. C. L. 444. Compare *Bally v. Wells*, 3 Wils. 25; *Minshull v. Oakes*, 2 H. & N. 793.

Illinois. — *Hansen v. Meyer*, 81 Ill. 321.
Maryland. — *Lynn v. Mount Savage Iron Co.*, 34 Md. 603.

New Jersey. — *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 506.

New York. — *Tallman v. Coffin*, 4 N. Y. 134; *Thompson v. Rose*, 8 Cow. (N. Y.) 269.

Ohio. — *Newburg Petroleum Co. v. Weare*, 44 Ohio St. 604; *Hickey v. Lake Shore*, etc., R. Co., 51 Ohio St. 40, 46 Am. St. Rep. 545.

Tennessee. — *Bream v. Dickerson*, 2 Humph. (Tenn.) 126.

Texas. — *Gulf*, etc., R. Co. v. *Smith*, 72 Tex. 122.

Wisconsin. — *Cook v. Milwaukee*, etc., R. Co., 36 Wis. 45; *Hartung v. Witte*, 59 Wis. 285.

Spencer's Case. — In *Spencer's Case*, 5 Coke 16, it was resolved that "when the covenant doth extend to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee although he be not bounden by express words. But when the covenant doth extend to a thing which is not in being at the time of the demise made, the same cannot be appurtenant or annexed to a thing which hath no being. As if the lessee covenanteth to repair the houses demised to him during the term, the same is parcel of the contract, and extendeth to the support of the thing demised, and therefore is *quodammodo* annexed and appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant. But in the case at bar the covenant doth concern a thing

covenants of this class do not include covenants for the reparation of an existing thing.¹

3. Particular Covenants Running with the Land — *a. COVENANTS IMPOSING BURDENS* — (1) *Covenant May Relate to Thing Not in Esse.* — A covenant in which the assigns of the covenantor are specially named, though it is for a thing not *in esse* at the time, may run with the land so as to bind the assigns of the covenantor, when it affects the nature of the thing demised or if it affects the mode of enjoyment of it.²

which was not *in esse* at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being." And it was held that where the lessee covenants to build a wall upon the property demised, the covenant will not run with the land so as to bind the assigns, unless they are bound by the terms of the covenants.

Intention of Parties — **Effect.** — In *Masury v. Southworth*, 9 Ohio St. 341, it was held that a covenant relating to a thing not *in esse* might run with the land though the assigns of the covenantor were not expressly named, provided that by equivalent words, or a clear intent shown by the whole instrument, it appeared that such was the intention of the parties.

Covenant as to Use of Building to Be Erected. — A covenant that buildings to be erected on the land shall not be used for certain purposes does not run with the land when the assigns of the covenantor are not named. *Wilson v. Hart*, L. R. 1 Ch. 463.

Conveyance to Nontrading Corporation. — In *Dorsey v. St. Louis*, etc., R. Co., 58 Ill. 65, it was held that a covenant by a railroad company to fence the right of way granted need not name its assigns to run with the land and bind them, as, the corporation being without authority to convey the right of way, a subsequent act of the legislature authorizing it to do so would not sever the covenant from the land.

1. Covenants Held Not to Relate to Things Not in Esse. — *Cockson v. Cock*, Cro. Jac. 125; *Conover v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247; *Hartung v. Witte*, 59 Wis. 285.

Covenant as to Location of Future Buildings. — A covenant that buildings erected on the lot shall be set back a certain distance from the boundary of the lot does not relate to a thing not *in esse*. *Winfield v. Henning*, 21 N. J. Eq. 188.

A Covenant to Repair is not a covenant relating to a thing not *in esse*. *Windsor's Case*, 5 Coke 24.

Covenant for Reparation of Easement of Way. — In *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 489, it was held that a covenant by a grantee to construct a bridge over a canal to be cut across an easement of way reserved by the grantor over the way granted was not a covenant relating to a thing not *in esse*, as it provided for the reparation of the right of way when destroyed. See also *Aikin v. Albany*, etc., R. Co., 26 Barb. (N. Y.) 289.

Covenant Not to Plough. — A covenant not to plough a certain portion of the land does not

relate to a thing not *in esse*. *Cockson v. Cock*, Cro. Jac. 125.

Covenant to Build New Wall. — A covenant by a lessee to build a new wall on the demised premises relates to a thing not *in esse* and must expressly bind his assigns. *Spencer's Case*, 5 Coke 16.

A Covenant to Build and Maintain a Fence relates to a thing not *in esse*. *Hartung v. Witte*, 59 Wis. 294.

2. Covenant Relating to Thing Not in Esse May Run with the Land — *England.* — *Easterby v. Sampson*, 6 Bing. 644, 19 E. C. L. 188, 17 E. C. L. 428, 9 B. & C. 505; *Congleton v. Pattison*, 10 East 135; *Jourdain v. Wilson*, 4 B. & Ald. 266, 6 E. C. L. 478.

Georgia. — *Howard Mfg. Co. v. Water Lot Co.*, 53 Ga. 689.

New Jersey. — *Conover v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247.

New York. — *Moxley v. New Jersey*, etc., R. Co., 66 Hun (N. Y.) 632, 49 N. Y. St. Rep. 363.

North Carolina. — *Norfleet v. Cromwell*, 64 N. Car. 1.

Ohio. — *Hickey v. Lake Shore*, etc., R. Co., 51 Ohio St. 40, 46 Am. St. Rep. 545; *Masury v. Southworth*, 9 Ohio St. 341; *Easter v. Little Miami R. Co.*, 14 Ohio St. 48.

Pennsylvania. — *Carr v. Lowry*, 27 Pa. St. 257; *Fisher v. Lewis*, 3 Pa. L. J. 73.

See, however, *Cook v. Milwaukee*, etc., R. Co., 36 Wis. 45; *Hartung v. Witte*, 59 Wis. 295.

Illustrations — **Covenant to Insure.** — A covenant to insure, the proceeds of the insurance to be used in rebuilding upon the land, runs with the land. *Thomas v. Vonkapff*, 6 Gill & J. (Md.) 372; *Masury v. Southworth*, 9 Ohio St. 341.

Covenant by Grantor to Build and Maintain Fence. — The burden of a covenant by the grantor and his assigns to build and maintain a fence on each side of a right of way conveyed to a railway company will run with the land retained by the covenantor. *Hazlett v. Sinclair*, 76 Ind. 488; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Blain v. Taylor*, 19 Abb. Pr. (N. Y. Supreme Ct.) 228; *Easter v. Little Miami R. Co.*, 14 Ohio St. 48; *Hickey v. Lake Shore*, etc., R. Co., 51 Ohio St. 40, 46 Am. St. Rep. 545; *Cincinnati*, etc., R. Co. v. *Bosworth*, 46 Ohio St. 81.

Covenant by Grantee to Build and Maintain Fences. — And also a similar covenant by a grantee to build and maintain the division fences will run with the land conveyed. *Toledo*, etc., R. Co. v. *Burgan*, 9 Ind. App. 604; *Midland R. Co. v. Fisher*, 125 Ind. 19; *Lake Erie*, etc., R. Co. v. *Power*, 15 Ind. App. 179; *Toledo*, etc., R. Co. v. *Cosand*, 6 Ind. App.

(2) *Covenant Must Affect Quality, Value, or Mode of Enjoyment of Estate.* — Covenants, in order to run with the land, must, however, relate to the interest or estate so that their performance or nonperformance will affect the quality, value, or mode of enjoyment of the estate.¹

222; *Countryman v. Deck*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 110; *Dey v. Prentice*, 90 Hun (N. Y.) 27; *Moxley v. New Jersey, etc., R. Co.*, 66 Hun (N. Y.) 632, 49 N. Y. St. Rep. 363; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550.

In *Walsh v. Barton*, 24 Ohio St. 28, it was held that where the parties to a conveyance contemplate a subdivision of the land conveyed into town lots, the burden of a covenant by the grantee to maintain division fences does not run with lots not abutting on the line of the proposed fence. See also *Bronson v. Coffin*, 118 Mass. 156.

Covenant to Maintain Farm Crossing and Cattle Guards. — A covenant by a railroad company to maintain farm crossings and cattle guards is similar to a covenant to maintain fences, and will bind a successor of the railroad company. *Lake Erie, etc., R. Co. v. Priest*, 131 Ind. 413.

Covenant to Erect Station. — A covenant by the grantee in a grant of a right of way for a railroad, to erect a station near the grantor's house, runs with the right of way so as to bind the successors of the grantee. *Gilmer v. Mobile, etc., R. Co.*, 79 Ala. 569, 58 Am. Rep. 623. See also *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492.

Covenant for Erection of Improvements. — A covenant by a railroad company in the grant of its right of way, to erect certain improvements, binds its successor. *Dorsey v. St. Louis, etc., R. Co.*, 58 Ill. 65.

Covenant for Easement of Way over Land Retained by Grantor. — A covenant in a deed conveying a lot in a platted addition, that the grantee shall have full ingress and egress through the streets and alleys laid down in the plat, runs with the land retained by the grantor. *Baltimore v. White*, 62 Md. 362.

1. **Performance of Covenant Must Affect the Quality, Value, or Enjoyment of Estate** — *England.* — *Spencer's Case*, 5 Coke 16; *Ackroyd v. Smith*, 10 C. B. 164, 70 E. C. L. 164.

Illinois. — *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 94 Ill. 83.

Indiana. — *Conduitt v. Ross*, 102 Ind. 166; *Wells v. Benton*, 108 Ind. 585; *Indianapolis Water Co. v. Nulte*, 126 Ind. 377.

Missouri. — *Miller v. Noonan*, 83 Mo. 343.

New Jersey. — *Conover v. Smith*, 17 N. J. Eq. 51, 86 Am. Dec. 247.

North Carolina. — *Nesbit v. Montgomery, Tayl.* (3 N. Car.) 82.

Tennessee. — *Bream v. Dickerson*, 2 Humph. (Tenn.) 126.

Virginia. — *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676.

In *Brewer v. Marshall*, 18 N. J. Eq. 337, the grantor conveyed one of several tracts of land and covenanted in the deed not to sell any marl from the other tracts, and in a suit by the grantee against a subsequent grantee of one of the other tracts to enjoin him from selling marl therefrom, the suit being predicated on the ground that the covenant ran with the

tract retained by the grantor, an injunction was refused. This decision was *affirmed*, but on a different course of reasoning, in *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679. See the title BUILDING RESTRICTIONS, etc., vol. 5, p. 6.

Spencer's Case. — In *Spencer's Case*, 5 Coke 16, 1 Smith's L. Cas. 68, it was resolved that although the covenant be for the covenantor, his heirs and assigns, "yet if the thing to be done be mere collateral to the land, and doth not touch or concern the thing demised in any sort," the assignee of the covenantor shall not be bound; and as an illustration of this principle the cases were instanced where the covenant was to build a house on the land of the lessor which was no parcel of the land demised, or where the lessee covenanted to pay a collateral sum to the lessor or a stranger.

Covenant for Nonemployment of Certain Persons on Land. — In *Congleton v. Pattison*, 10 East 130, it was held that a covenant by the lessee in a lease whereby he agreed not to hire certain persons to work in a mill upon the land did not run with the land, as it did not affect the quality or value or the mode of enjoyment of the estate granted.

Covenant Not Affecting Land Out of Which Easement Is Created. — In *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 94 Ill. 83, wherein a ferry company granted a right of way to a railroad company over land which was a distinct property from the ferry franchise, a covenant by the railroad company to employ the ferry company exclusively in the transportation of its passengers across the river is for the benefit of the ferry, and therefore does not bind an assignee of the railroad company.

Covenant to Pay Judgment Not a Lien on Estate Granted. — In *Wells v. Benton*, 108 Ind. 585, it was held that a covenant by the grantee to pay judgments which were not liens on the estate conveyed did not run with the land, as it had no relation to the interest or estate granted, and the act to be performed did not concern such estate.

Covenant to Pay Mortgage. — A covenant in a mortgage to pay the mortgage debt does not run with the land so as to bind personally a subsequent grantee, though the covenant is in the name of the covenantor, his heirs or assigns. *Glenn v. Canby*, 24 Md. 127. See also *Campbell v. Johnston*, 4 Dana (Ky.) 177. See, however, *Wilcox v. Campbell*, 35 Hun (N. Y.) 254.

Covenant to Share Expense of Maintaining Water Supply. — Where, in the grant of land together with a certain amount of water power, the grantee covenants to share the expense of maintaining the water supply, his covenant runs with the land so as to bind his assigns. *Maxon v. Lane*, 102 Ind. 361; *Nye v. Hoyle*, 120 N. Y. 195; *Wooliscroft v. Norton*, 15 Wis. 198. See also *Weill v. Baldwin*, 64 Cal. 476.

And a similar covenant by the grantor would

Facts of Particular Case to Be Considered. — Whether a covenant affects the quality, value, or mode of enjoyment of the estate, must be determined by the facts of each particular case.¹

(3) *Restrictive Covenants.* — Where the necessary privity of estate exists between the covenantor and the covenantee, as in case of landlord and tenant, or where only a subordinate estate in the land is conveyed, covenants restricting the use of the premises for trade or building purposes run with the land so as to bind an assignee of the covenantor.²

Equitable Relief. — Courts of equity, however, irrespective of whether a privity of estate exists or whether the covenants run with the land, upon equitable grounds enforce such covenants against purchasers with notice.³

run with the land retained by him. *Bean v. Stoneman*, 104 Cal. 49.

Covenant to Issue Pass Over Railroad. — In *Dickey v. Kansas City, etc., Rapid Transit R. Co.*, 122 Mo. 223, it was held that a covenant by a railroad company in the grant of its right of way, to issue a perpetual pass to the grantor, did not run with the right of way so as to bind the successor of the covenantor.

Covenant for Maintenance of Grantor. — A covenant by the grantee for the maintenance of the grantor does not run with the land, being merely personal. *Harkins v. Doran*, (Pa. 1888) 15 Atl. Rep. 928. See also *Divan v. Loomis*, 68 Wis. 150, wherein it was held that the burden of the covenant for support could not be shifted to a subsequent grantee without the consent of the covenantee. Still however, such a covenant may impose a charge on the lands in the hands of a subsequent grantee, and where such subsequent grantee fails to support the original grantor, such grantor has been allowed to recover the possession of the land during his lifetime. *Martin v. Martin*, 44 Kan. 295.

1. **Covenants Held to Affect the Quality, etc., of the Estate Conveyed.** — *Cockson v. Cock*, Cro. Jac. 125; *Hurst v. Rodney*, 1 Wash. (U. S.) 375; *Thomas v. Vonkapff*, 6 Gill & J. (Md.) 372; *Astor v. Miller*, 2 Paige (N. Y.) 68; *Lattimer v. Livermore*, 72 N. Y. 174; *Norman v. Wells*, 17 Wend. (N. Y.) 146; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Worthington v. Hewes*, 19 Ohio St. 66; *Crawford v. Witherbee*, 77 Wis. 419.

Covenant to Maintain Fence. — The burden of a covenant to maintain fences around the land granted affects the land granted in the conduct or management thereof so as to run with the land. *Dey v. Prentice*, 90 Hun (N. Y.) 27; *Hartung v. Witte*, 59 Wis. 204.

Covenant Not Affecting the Quality, etc., of the Estate — Covenant to Reconvey. — A general covenant on the part of the grantee to reconvey is personal only and does not run with the land. *Van Doren v. Robinson*, 16 N. J. Eq. 256. See also *Maynard v. Polhemus*, 74 Cal. 141.

Covenant as to Terminus of Road. — A covenant by a railroad company not to change the location of its line does not run with the grant of its right of way so as to bind its successor. *Lynn v. Mount Savage Iron Co.*, 34 Md. 603.

Covenant to Permit Grantor to Cultivate Land Not Needed for Right of Way. — A covenant by a railroad company to permit the grantor to cultivate the land not needed for its road

runs with the land so as to bind the successor of the grantee. *Gilmer v. Mobile, etc., R. Co.*, 79 Ala. 569, 58 Am. Rep. 623, 85 Ala. 422.

Covenant as to Drainage. — A covenant by a railroad company to drain the water on a particular side of the right of way granted binds its successor. *Peden v. Chicago, etc., R. Co.*, 73 Iowa 328, 5 Am. St. Rep. 680.

Covenant for Forfeiture. — In *Ruddick v. St. Louis, etc., R. Co.*, 116 Mo. 25, 38 Am. St. Rep. 570, it was held that a covenant by a railroad company, the grantee of a right of way, for forfeiture, on its failure to furnish the grantor with passes over its road, ran with the land so as to bind its successor.

2. **Trade Restrictions.** — *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274; *Clement v. Burtis*, 121 N. Y. 708, 31 N. Y. St. Rep. 902; *Snyder's License*, 2 Pa. Dist. Rep. 785.

Building Restrictions. — *Wilkinson v. Rogers*, 10 Jur. N. S. 5; *Winfield v. Henning*, 21 N. J. Eq. 188; *Barron v. Richard*, 3 Edw. Ch. (N. Y.) 96; *Clement v. Burtis*, 121 N. Y. 708, 31 N. Y. St. Rep. 902.

Covenant Against Sale of Liquor. — In *Gilmer v. Mobile, etc., R. Co.*, 79 Ala. 569, 58 Am. Rep. 623, a covenant by a railway company in the grant of its right of way, not to permit the sale of liquor on the premises, was held to run with the land and bind its successor. The decision was based on the ground that the imposition of the restriction and the reservation of a right to cultivate the land conveyed created a sufficient privity of estate.

Affecting Easement Granted. — In *Dexter v. Beard*, (Supreme Ct.) 7 N. Y. Supp. 11, it was held that a covenant by the grantee of a right of way, that the right of way shall not be built upon, runs with the land.

3. **Equitable Enforcement.** — *Hodson v. Copard*, 29 Beav. 4; *Feilden v. Slater*, L. R. 7 Eq. 523; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461; *Bricker v. Grover*, 10 Phila. (Pa.) 91; *Middletown v. Newport Hospital*, 16 R. I. 319. See also the title BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 2.

Covenant by Grantor. — A covenant by a grantor in the conveyance of a portion of a tract, to leave open a certain space in the land retained, though not strictly a covenant running with the land, is equivalent to a grant of an easement of way in such strip entitling the grantee to its use unobstructed, which right will be enforced in equity against the grantor's assigns. *Brew v. Van Deman*, 6 Heisk. (Tenn.) 433.

b. COVENANTS CONFERRING BENEFITS — (1) *In General*. — A covenant conferring an immediate, permanent, and beneficial effect on the use to which land of the covenantee is designed to be applied may run with the land benefited so as to be enforceable by an assignee of the covenantee.¹

Covenantee Must Be Owner of Land to Be Benefited. — To enable such a covenant, however, to run with the land, the covenantee must, at the time the covenant is entered into, be the owner of the land to be benefited thereby.²

(2) *Subject of Covenant*. — In order, however, that the benefits of a covenant may run with the land benefited, it is necessary that the covenant affect the quality, value, or mode of enjoyment of the estate independent of collateral circumstances; that is, that the covenantee shall be interested in the performance of the covenant as owner of the land.³

1. Covenants Conferring Benefits — *England*. — *Vyvyan v. Arthur*, 1 B. & C. 410, 8 E. C. L. 175; *Campbell v. Lewis*, 3 B. & Ald. 392, 5 E. C. L. 322; *Spencer v. Boyes*, 4 Ves. Jr. 370; *Lewis v. Campbell*, 8 Taunt. 715, 4 E. C. L. 253. *Compare Raymond v. Fitch*, 5 Tyr. 985.

Arkansas. — *St. Louis, etc., R. Co. v. O'Baugh*, 49 Ark. 418.

Illinois. — *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230; *Pittsburg, etc., R. Co. v. Reno*, 22 Ill. App. 470.

Indiana. — *Hazlett v. Sinclair*, 76 Ind. 488; *Scott v. Stetler*, 128 Ind. 385.

Iowa. — *Peden v. Chicago, etc., R. Co.*, 73 Iowa 328, 5 Am. St. Rep. 680.

Kentucky. — *Gaines v. Poor*, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; *Kentucky Cent. R. Co. v. Kenney*, 82 Ky. 154.

Maryland. — *Baltimore v. White*, 62 Md. 362.

Minnesota. — *Shaber v. St. Paul Water Co.*, 30 Minn. 179.

New Jersey. — *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 489; *Brewer v. Marshall*, 18 N. J. Eq. 337; *National Union Bank v. Segur*, 39 N. J. L. 173; *Coudert v. Sayre*, 46 N. J. Eq. 386.

New York. — *Allen v. Culver*, 3 Den. (N. Y.) 284; *Watertown v. Cowen*, 4 Paige (N. Y.) 510, 27 Am. Dec. 80; *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Avery v. New York Cent., etc., R. Co.*, 106 N. Y. 142; *Whitney v. Richardson*, 59 Hun (N. Y.) 601.

Ohio. — *Cincinnati, etc., R. Co. v. Bosworth*, 46 Ohio St. 81.

Pennsylvania. — *Dunbar v. Jumper*, 2 Yeates (Pa.) 74.

West Virginia. — *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427.

Particular Covenants the Benefit of Which Runs with the Land. — In *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230, a covenant by the grantor in a deed conveying land with water power, to keep the dam in repair, was held to run with the land conveyed so as to entitle an assignee of such land to sue thereon.

Covenant for Access to Land. — A covenant providing for access to the land runs with the land. *Avery v. New York Cent., etc., R. Co.*, 106 N. Y. 143. See also *Dailey v. Beck*, *Bright* (Pa.) 107.

Covenant to Fence Right of Way. — The benefit of a covenant by the grantee of a right of way for a railroad to fence the right of way will run with the land retained by the covenantor. *Lake Erie, etc., R. Co. v. Power*, 15 Ind. App. 179; *Toledo, etc., R. Co. v. Cosand*,

6 Ind. App. 222; *Midland R. Co. v. Fisher*, 125 Ind. 19; *Cincinnati, etc., R. Co. v. Bosworth*, 46 Ohio St. 81. *Compare Gulf, etc., R. Co. v. Smith*, 72 Tex. 122.

To Maintain Division Fences. — And also a covenant to maintain division fences will run with the land. *Hazlett v. Sinclair*, 76 Ind. 488.

Covenant as to Manner of Construction of Road-bed of Railway. — In *St. Louis, etc., R. Co. v. O'Baugh*, 49 Ark. 418, it was held that a covenant by a railway company to build its tracks above the overflow ran with the land benefited and entitled a widow as temporary owner to sue for breach thereof. See also *Peden v. Chicago, etc., R. Co.*, 73 Iowa 328, 5 Am. St. Rep. 680, wherein it was held that a covenant by a railway company in the grant of its right of way, to drain the surface water in a certain way, inured to the benefit of a subsequent grantee of the land retained by the grantor.

2. Covenantee Must Be Owner of Land Benefited. — *Shaber v. St. Paul Water Co.*, 30 Minn. 179.

In *Spencer's Case*, 5 Coke 18, 1 Smith's L. Cas. 68, it was said that it was adjudged in 2 Hen. IV. 6, *b*, that where a covenant was made to say divine service in the chapel of another, there the assignee shall not have an action of covenant, for the covenant in such case cannot be annexed to the chapel, because the chapel does not belong to the covenantee.

3. Collateral Benefits to Land Insufficient. — *Lyford v. North Pac. Coast R. Co.*, 92 Cal. 93; *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 94 Ill. 83; *Brewer v. Marshall*, 18 N. J. Eq. 337.

Collateral Covenants — Meaning of Term. — In *Vernon v. Smith*, 5 B. & Ald. 1, 7 E. C. L. 3, *Best, J.*, said: "By the terms 'collateral covenants' which do not pass to the assignee are meant such as are beneficial to the lessor, without regard to his continuing the owner of the estate." See also *Vyvyan v. Arthur*, 1 B. & C. 410, 8 E. C. L. 175.

Covenant for Payment of Money. — In *Graber v. Duncan*, 79 Ind. 565, it was held that a covenant by the grantor to pay certain taxes upon the land conveyed was a personal contract with the grantee, and not a covenant running with the land, and therefore an accord and satisfaction thereof to the grantee while he holds the title discharges the contract so that his assignee cannot recover for its breach. See also *Chaplain v. Briscoe*, 5 Smed. & M. (Miss.) 198; *Mason v. Rogers*, 109 Pa. St. 319.

In *Cincinnati v. Springer*, 23 Cinc. Wkly. L. Bul. 250, however, a covenant that the amount of the condemnation money for a strip of land retained by the grantor, joining the lot con-

Not Necessarily for Performance of Act on the Land. — The covenant, however, need not be for the performance of an act upon the land if the thing covenanted for be for the benefit of the same and tends to increase its value in the hands of the holder.¹

c. COVENANTS AS TO QUANTITY. — A covenant that the tract conveyed contains a specific quantity of land stands on the same footing with a covenant of seizin, and is broken, if at all, as soon as made, and does not run with the land.²

d. COVENANTS OF WARRANTY — (1) *In General*. — The covenant of warranty is universally treated in all common-law states as a covenant *in futuro*, and it is a well-settled rule that such a covenant, until there has been a breach thereof, runs with the land.³

veyed, should, when the strip was condemned, go to the grantee, was held to be a covenant running with the land so as to entitle the heirs of the grantee to the benefit thereof.

Party-wall Agreement. — In *Huling v. Chester*, 19 Mo. App. 607, it was held that though a party-wall agreement between adjoining landowners, whereby one was to erect the party wall and the other to pay one-half the cost thereof whenever he might use the same, conveyed an easement so as to create the necessary privity of estate, still the benefit of the covenant did not run with the land of the person entitled to receive the money, as it was not to be paid for the benefit of his land. See also *Crater v. McCormick*, 4 Colo. 196; *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 146; *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287, *distinguished* in *Conduitt v. Ross*, 102 Ind. 166; *Joy v. Boston Penny Sav. Bank*, 115 Mass. 60; *Hart v. Kucher*, 5 S. & R. (Pa.) 1; *Kenny v. Mackenzie*, 12 Ont. App. 346. See also the title PARTY WALLS.

1. **Act Not to Be Performed on Land.** — *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 146; *Shaber v. St. Paul Water Co.*, 30 Minn. 179; *Norman v. Wells*, 17 Wend. (N. Y.) 136.

In *Shaber v. St. Paul Water Co.*, 30 Minn. 179, the benefit of a covenant between the owner of land upon a creek, embracing a water privilege, and a water company proposing to divert water from a lake out of which the creek flowed, covenanting for the maintenance of a certain stage or volume of water in the lake so that the quantity flowing into the creek should not be diminished, was held to run with the land of the covenantee.

In *Norman v. Wells*, 17 Wend. (N. Y.) 136, it was held that the benefit of a covenant by the lessor of a mill site, not to establish any other mill upon the stream to be used for the purpose of the mill leased, ran with the land and entitled an assignee to sue thereon.

As to covenants restricting the uses of land and their equitable enforcement, see the title BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 2.

2. **Covenant as to Quantity.** — *Salmon v. Vallejo*, 41 Cal. 481, wherein it was also held that the fact that there was no proof, until long after the conveyance, by which the breach could be established, was immaterial as regards the question whether the covenant ran with the land. See *infra*, this title, *By and Against Whom Enforceable — When Broken upon Delivery of Deed*.

3. **Covenant of Warranty Runs with the Land — United States.** — *Peters v. Bowman*, 98 U. S. 59.

Alabama. — *Claunch v. Allen*, 12 Ala. 159; *Gunter v. Williams*, 40 Ala. 561.

Arkansas. — *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Ross v. Turner*, 7 Ark. 132, 44 Am. Dec. 531.

California. — *Blackwell v. Atkinson*, 14 Cal. 470.

Connecticut. — *Abby v. Goodrich*, 3 Day (Conn.) 435; *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233; *Butler v. Barnes*, 60 Conn. 170; *Mitchell v. Warner*, 5 Conn. 497.

Georgia. — *Leary v. Durham*, 4 Ga. 593; *Redwine v. Brown*, 10 Ga. 311.

Illinois. — *Brady v. Spurck*, 27 Ill. 482; *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277; *Claycomb v. Munger*, 51 Ill. 373; *Wead v. Larkin*, 54 Ill. 489, 5 Am. Rep. 149.

Indiana. — *Clark v. Redman*, 1 Blackf. (Ind.) 381; *Worley v. Hineman*, 6 Ind. App. 240; *Blair v. Allen*, 55 Ind. 409; *McClure v. McClure*, 65 Ind. 483.

Kentucky. — *Lot v. Parish*, 1 Litt. (Ky.) 393; *Cummins v. Kennedy*, 3 Litt. (Ky.) 118, 14 Am. Dec. 45; *Bradford v. Long*, 4 Bibb (Ky.) 225; *Reed v. Hornback*, 4 J. J. Marsh. (Ky.) 377; *Pence v. Duvall*, 9 B. Mon. (Ky.) 48; *Thomas v. Bland*, 91 Ky. 1.

Maine. — *Fairbrother v. Griffin*, 10 Me. 91; *Donnell v. Thompson*, 10 Me. 174, 25 Am. Dec. 216; *Brown v. Staples*, 28 Me. 497, 48 Am. Dec. 504; *Allen v. Little*, 36 Me. 170; *Crooker v. Jewell*, 29 Me. 527; *Wilson v. Widenham*, 51 Me. 566.

Massachusetts. — *White v. Whitney*, 3 Met. (Mass.) 81; *Wyman v. Ballard*, 12 Mass. 306; *Sprague v. Baker*, 17 Mass. 586.

Mississippi. — *White v. Presley*, 54 Miss. 313.

Missouri. — *Davis v. Burns*, 1 Mo. 264; *Dickson v. Desire*, 23 Mo. 151; *Chambers v. Smith*, 23 Mo. 174; *Magwire v. Riggan*, 44 Mo. 512.

Nebraska. — *Real v. Hollister*, 17 Neb. 661.

New Hampshire. — *Haynes v. Stevens*, 11 N. H. 28; *Fletcher v. Chamberlin*, 61 N. H. 438; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Chandler v. Brown*, 59 N. H. 370.

New Jersey. — *Carter v. Denman*, 23 N. J. L. 260; *Chapman v. Holmes*, 10 N. J. L. 20.

New York. — *Kane v. Sanger*, 14 Johns. (N. Y.) 89; *Rindskopf v. Farmers' L. & T. Co.*, 58 Barb. (N. Y.) 36; *Town v. Needham*, 3 Paige (N. Y.) 546, 24 Am. Dec. 246; *Greenvault v. Davis*, 4 Hill (N. Y.) 643; *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120; *Suydam v. Jones*,

(2) *Louisiana Rule*. — In Louisiana, however, a remote grantee cannot sue upon a covenant of warranty in a deed to his grantor, unless he has taken an express subrogation of his vendor's right of action in warranty.¹

e. COVENANTS OF SEIZIN, FOR RIGHT TO CONVEY, AND AGAINST INCUMBRANCES. — Covenants of seizin, for right to convey, and against incumbrances, are, according to the doctrines of most jurisdictions, broken as soon as made, and do not, therefore, run with the land. These covenants will be treated in another place in this title.²

f. COVENANTS FOR QUIET ENJOYMENT. — The covenant for quiet enjoyment is a covenant *in futuro*, and until breach will run with the land.³

g. COVENANTS FOR FURTHER ASSURANCES. — The covenant for further assurances runs with the land, and an action thereon may be brought by the owner of the land at the time when the damages from a breach thereof accrue.⁴

10 Wend. (N. Y.) 180, 25 Am. Dec. 552; Withy v. Mumford, 5 Cow. (N. Y.) 137; Garlock v. Closs, 5 Cow. (N. Y.) 143, note; Fowler v. Poling, 2 Barb. (N. Y.) 300.

North Carolina. — Markland v. Crump, 1 Dev. & B. L. (18 N. Car.) 94, 27 Am. Dec. 230; Williams v. Beeman, 2 Dev. L. (13 N. Car.) 483; Lewis v. Cook, 13 Ired. L. (35 N. Car.) 196.

Ohio. — Williams v. Holcomb, 4 Cinc. Wkly. L. Bul. 1147; King v. Kerr, 5 Ohio 156, 22 Am. Dec. 777.

Pennsylvania. — Le Ray de Chaumont v. Forsythe, 2 P. & W. (Pa.) 507; Whitehill v. Gotwalt, 3 P. & W. (Pa.) 313.

South Carolina. — M'Crary v. Brisbane, 1 Nott & M. (S. Car.) 104, 9 Am. Dec. 676.

Tennessee. — Lawrence v. Senter, 4 Sneed (Tenn.) 52; Pile v. Benham, 3 Hayw. (Tenn.) 176; Galliher v. Galliher, 10 Lea (Tenn.) 23; Kenney v. Norton, 10 Heisk. (Tenn.) 384; Hopkins v. Lane, 9 Verg. (Tenn.) 79.

Texas. — Flaniken v. Neal, 67 Tex. 629. See also Cassidy's Succession, 40 La. Ann. 827 (announcing the rule in Texas).

Vermont. — Williams v. Wetherbee, 1 Aik. (Vt.) 233; Russ v. Steele, 40 Vt. 310; Clark v. Winchell, 53 Vt. 408; Wilder v. Davenport, 58 Vt. 642; Tillotson v. Prichard, 60 Vt. 94, 6 Am. St. Rep. 95.

Implied Warranty in Partition. — The implied warranty in the partition of land, however, only runs in favor of the tenants and their heirs, and not in favor of a purchaser of the land. Jones v. Bigstaff, 95 Ky. 395, 44 Am. St. Rep. 245. See also Sawyers v. Cator, 8 Humph. (Tenn.) 280, 47 Am. Dec. 608.

Express Warranty in Partition. — When, however, deeds in partition between cotenants contain express covenants of warranty, they will run with the land. Nunnally v. White, 3 Metc. (Ky.) 584.

Covenantor Not in Possession. — In Worley v. Hineman, 6 Ind. App. 240, it was held that where mortgaged and situated in another state is sold with covenants of warranty, such covenant will run with the land though the grantor did not have possession of the land, provided he was in a position to give possession to the covenantee.

Covenant Broken. — Of course the covenant of warranty becomes a mere chose in action after breach, and will no longer run with the land. Moore v. Merrill, 17 N. H. 75, 43 Am. Dec. 593; Peters v. Bowman, 98 U. S. 56.

1. *Louisiana Rule*. — Cassidy's Succession, 40

La. Ann. 827; Vannoright v. Foreman, 1 Martin N. S. (La.) 352; Davison v. Chabres, 6 Martin N. S. (La.) 321; Smith v. Wilson, 11 Rob. (La.) 522; Chambliss v. Miller, 15 La. Ann. 713; Filhiol v. Cobb, 36 La. Ann. 793.

2. See *infra*, this title, *By and Against Whom Enforceable — When Broken upon Delivery of Deed*.

3. **Covenant for Quiet Enjoyment — Arkansas**. — Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 338; Ross v. Turner, 7 Ark. 132, 44 Am. Dec. 531.

Connecticut. — Butler v. Barnes, 60 Conn. 170.

Georgia. — Redwine v. Brown, 10 Ga. 311.

Indiana. — Martin v. Baker, 5 Blackf. (Ind.) 232; Fisher v. Parry, 68 Ind. 469.

Kansas. — Scoffins v. Grandstaff, 12 Kan. 470.

Maine. — Heath v. Whidden, 24 Me. 383; Wilson v. Widenham, 51 Me. 566.

Michigan. — May v. Specht, 1 Mich. 187.

New Jersey. — Carter v. Denman, 23 N. J. L. 260.

New York. — Fowler v. Poling, 2 Barb. (N. Y.) 300.

North Carolina. — Markland v. Crump, 1 Dev. & B. L. (18 N. Car.) 94, 27 Am. Dec. 230.

South Carolina. — Jeter v. Glenn, 9 Rich. L. (S. Car.) 374.

Wisconsin. — Schwallback v. Chicago, etc., R. Co., 69 Wis. 202, 2 Am. St. Rep. 740.

4. **Covenant for Further Assurances**. — King v. Jones, 5 Taunt. 418; Middlemore v. Goodale, Cro. Car. 503; Bennett v. Waller, 23 Ill. 97; Collier v. Gamble, 10 Mo. 467; Roberts v. Levy, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 311; Ernst v. Parsons, 54 How. Pr. (N. Y. Supreme Ct.) 163; Colby v. Osgood, 29 Barb. (N. Y.) 339.

Nominal Breach. — In King v. Jones, 5 Taunt. 418, it was held that the covenant for further assurances upon request ran with the land in favor of the heir who was evicted, though the covenantor neglected to levy a fine on a request by the purchaser in his lifetime, and that the heir could sue upon the request by the purchaser and the refusal made to him. See also Spoor v. Green, L. R. 9 Exch. 117; Platt v. Grand Trunk R. Co., 11 Ont. Rep. 246.

It would seem, however, that in the American jurisdictions which hold that a technical breach of a covenant prevents it running with the land, the refusal to levy the fine at the request of the purchaser would have been such a breach as would have prevented the covenant from running with the land.

4. **COVENANTS OF NON-CLAIM, AND FOR AFTER-ACQUIRED TITLE TO INURE.** — A covenant of non-claim, that is, that neither the covenantor nor those claiming under him will ever claim any interest in the land conveyed, runs with the land.¹

4. **Covenant as a Grant of an Easement.** — A covenant relating to land, though it may not run with the land in the technical sense of the word, may, however, operate as a grant of an easement or impose a servitude upon the land of the covenantor which will bind his land in the hands of subsequent purchasers.²

5. **Covenant May Create Lien.** — And a covenant relating to land and imposing a burden thereon, though not running with the land, may create a lien thereon, enforceable against the land in the hands of a subsequent purchaser taking with notice of the covenant.³

6. **Conflict of Laws.** — In determining whether a covenant runs with the land the *lex rei sitæ* governs;⁴ but in determining whether a deed contains a certain covenant the *lex loci contractus* governs.⁵

V. BY AND AGAINST WHOM ENFORCEABLE — 1. **Remote Grantors and Grantees** — *a.* **IN GENERAL.** — At common law choses in action could not be transferred so as to enable the assignee to maintain an action thereon in his own name, but covenants real were an exception to the rule, and passed with the legal title to the land, vesting in the owner for the time being the right of action for a breach thereof.⁶ But such covenants could not pass to assignees as independent contracts; by their connection with an estate in land, and not otherwise, they became transmissible with it.⁷

1. **Covenant of Non-claim.** — *White v. Erskine*, 10 Me. 306; *Fairbanks v. Williamson*, 7 Me. 96; *Trull v. Eastman*, 3 Met. (Mass.) 121, 37 Am. Dec. 126; *Kimball v. Blaisdell*, 5 N. H. 533, 22 Am. Dec. 476.

Remote Grantee May Set Up Covenant of Non-claim as Estoppel. — In *Fairbanks v. Williamson*, 7 Me. 96, it was held that where land is conveyed with a covenant that neither the grantor nor his heirs shall claim any estate in the land conveyed, the covenant, though not a technical warranty, is a covenant real which runs with the land, and may be set up by a subsequent grantee to estop the grantor or those claiming under him from claiming the land. But when the covenantor had neither the title nor the possession of the land, the covenant could not be transferred to the assignee of the grantee so as to enable him to derive any benefit from it. *Pike v. Galvin*, 29 Me. 187.

2. **Covenant May Operate as a Grant of an Easement.** — *Willoughby v. Lawrence*, 116 Ill. 11; *Mackey v. Harmon*, 34 Minn. 168; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 472; *Brewer v. Marshall*, 18 N. J. Eq. 337; *Mott v. Oppenheimer*, 135 N. Y. 312; *Norfield v. Cromwell*, 64 N. Car. 1; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 633, 46 Am. Rep. 527.

For a discussion of this subject see the title **EASEMENTS**.

3. **Covenant May Create Lien.** — *Fresno Canal, etc., Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112. In this case an owner of land agreed to take water from an irrigation company and pay annual amounts therefor, the agreement stipulating that the covenants therein should run with the land. It was held that the contract was a lien on the land which was en-

forceable against subsequent purchasers with notice.

In *Des Moines, etc., R. Co. v. Wabash, etc., R. Co.*, 135 U. S. 576, it was held that an agreement for the arrangement of traffic between two companies, providing that damages for the breach of the agreement shall be a continuing lien upon the lines of the two parties, will not constitute a lien running with the several railroad lines.

4. **Lex Rei Sitæ.** — In *Fisher v. Parry*, 68 Ind. 465, it was held that in determining whether a covenant runs with the land so as to entitle a subsequent grantee to sue for a breach thereof the *lex rei sitæ* governs. See also *Cassidy's Succession*, 40 La. Ann. 827.

5. **Lex Loci Contractus.** — In *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Rep. 650, it was held that the *lex rei sitæ* did not govern in determining whether a deed containing the words "grant, bargain, sell, and convey," implied a covenant of seizin, and hence that a deed executed in Indiana conveying land situated in Missouri did not contain a covenant of seizin.

6. *Lydick v. Baltimore, etc., R. Co.*, 17 W. Va. 427.

7. **Covenants Pass by Connection with Estate.** — Originally, the common law did not permit the assignment of things in action, and it followed that a covenant, regarded from the direction of a contract, could not pass beyond the covenantor. But the old warranty seems to have been viewed rather as an incident of than as pertaining to the estate conveyed, and was attached to that estate. It could not pass to assignees as an independent contract, but by its connection with an estate in land became transmissible with it. Out of that peculiarity sprang the necessity of privity of estate to enable the subsequent assignee to vouch, or call

Personal Covenant Broken in Covenantee's Lifetime. — The right of action on a personal covenant broken in the lifetime of the covenantee passes to the personal representative, and does not run with the land.¹

Assignee Named — Thing Not in Esse. — A covenant in which the assignee is specifically named, though it were for a thing not *in esse* at the time, yet, being specifically named, would bind him, if it affected the nature, quality, or value of the thing demised, independently of collateral circumstances, or if it affected the mode of enjoying it.²

Deed Poll. — According to the accepted doctrine, a stipulation in a deed poll does not constitute a technical covenant running with the land, because the grantee seals nothing. It is rather a mere personal obligation imposed upon and assumed by the grantee, and binds him and his legal representative as an implied contract entered into with the grantor, an obligation which, if enforceable at all against purchasers, is to be enforced against them in a court of equity alone.³ In a few jurisdictions, however, it is held that a covenant contained in a deed poll binds the grantee, his heirs and assigns, if the covenant relates to the premises conveyed.⁴

b. WHAT CONVEYANCE WILL TRANSFER COVENANT TO ASSIGNEE —
(1) *In General.* — Covenants which run with the land will pass to the grantee under any conveyance which is sufficient to transfer the title to the land from the vendor to him,⁵ and it is not necessary that they be mentioned in the

on his predecessor for protection. But it was an element of the doctrine that neither the heir nor the assignee of the grantee could take advantage of the warranty, unless expressly named. *Mygatt v. Coe*, 142 N. Y. 86. See also *Ely v. Hergesell*, 46 Mich. 325.

Covenant Cannot Be Severed from Estate. — In *Lewis v. Cook*, 13 Ired. L. (35 N. Car.) 193, it was held that where covenants of warranty running with the land are contained in a conveyance purporting to be in fee, the tenant in fee in possession cannot by any assignment sever the covenants so as to make them independent of the estate. In this case a remote grantee, after the levy of an execution upon the land, conveyed the land with an express assignment of covenants in warranty in previous deeds, and it was claimed that this express assignment of the covenants was effective as against a purchaser at a subsequent sale under the execution. In this case the court, in denying the claim, said: "This cannot be so. The incident cannot be passed without the principal. If the principal does not pass, how can the incident pass? They are inseparable. Can the substance pass without the shadow, or the shadow without the substance? There is no authority or reason to support the proposition that a covenant annexed to an estate and running with it can be severed and assigned so as to be passed by itself or retained by itself, and thereby give an independent cause of action."

1. Right of Action on Broken Personal Covenant Passes to Representative. — *Morley v. Polhill*, 2 Vent. 56; *Lucy v. Levington*, 2 Lev. 26; *Smith v. Simonds*, Comb. 64; *Shields v. Delo*, 145 Pa. St. 393.

Thus it has been held that the executor of a lessor may sue the lessee for a breach of the covenant to repair committed in the lifetime of the lessor. *Morley v. Polhill*, 2 Vent. 56; *Ricketts v. Weaver*, 12 M. & W. 723.

The executor of a lessor may maintain an action against the lessee for a breach of the covenant not to cut trees on the demised prem-

ises during the term, where trees have been cut down but not removed before the death of the lessor. *Raymond v. Fitch*, 2 C. M. & R. 588, 5 Tyr. 985.

2. Covenant Affecting Quality, etc., of Estate — Assignee Named. — Lord Ellenborough, in *Congleton v. Pattison*, 10 East 130. See also *supra*, this title, *Covenants Running with the Land — Naming Assigns of Covenantor; Covenant Must Affect Quality, Value, or Mode of Enjoyment of Estate*.

3. Deed Poll. — *Parish v. Whitney*, 3 Gray (Mass.) 516; *Maine v. Cumston*, 98 Mass. 317; *Martin v. Drinan*, 128 Mass. 515; *Kennedy v. Owen*, 136 Mass. 199. See also *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633. See also *supra*, this title, *Creation and Construction — Execution — Acceptance of Deed Poll*.

A stipulation in a deed poll on the part of the grantee to maintain fences between the land granted and adjoining land of the grantor is not a covenant running with the land. *Kennedy v. Owen*, 136 Mass. 199.

4. Haggerty v. Lee, 50 N. J. Eq. 464, 54 N. J. L. 580.

5. Conveyance Transferring Title to Land Transfers Covenant. — *Chandler v. Brown*, 59 N. H. 370; *Le Ray de Chaumont v. Forsythe*, 2 P. & W. (Pa.) 507. See also *St. Louis, etc., R. Co. v. O'Baugh*, 49 Ark. 418; *Thomas v. Bland*, 91 Ky. 1; *Reed v. Hornback*, 4 J. J. Marsh. (Ky.) 377; *Brown v. Staples*, 28 Me. 497, 48 Am. Dec. 504; *Crooker v. Jewell*, 29 Me. 527.

Covenants of warranty for quiet enjoyment may be assigned as well by a release and quitclaim as by deed of bargain and sale, or by lease and release. *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120.

The grantee in a deed of conveyance cannot claim the benefit of any covenants in the deeds of those from whom he takes, except those for quiet enjoyment and warranty, which run with the land. *Barry v. Guild*, 126 Ill. 439.

A covenant of warranty passes to the grantee, even by a deed of release. *Wilson v.*

instrument of conveyance or in any way be expressly assigned.¹

(2) *Quitclaim and Sheriff's Deeds.*—A purchaser at a sheriff's sale or under a quitclaim deed has a right to enforce covenants which run with the land.²

Widenham, 51 Me. 566; *Brown v. Staples*, 28 Me. 497, 48 Am. Dec. 504; *Crooker v. Jewell*, 29 Me. 527.

A covenant of warranty passes to a trustee under a deed of trust, and from him to his grantee. *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277; *Rash v. Jenne*, 26 Oregon 169.

Sale under Deed of Trust.—A sale by a trustee under a deed of trust given to secure the purchase money will carry covenants of warranty running with the land. *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277; *Marbury v. Thornton*, 82 Va. 702.

Where the owner of land conveys it with covenants of warranty to one in trust for himself, and upon a sale procures his grantee to make a deed to the purchaser with covenants only against the grantor's own acts, the purchaser cannot rely on the covenants in the first deed, for the presumption is that he got such a title as he bought. *Barry v. Guild*, 126 Ill. 439.

All Claiming under Covenantor Bound.—Covenants running with the land bind and affect all persons claiming or occupying under the covenantor. *Duffy v. New York, etc., R. Co.*, 2 Hilt. (N. Y.) 496.

A covenant for quiet and peaceable possession is binding on a subsequent grantee of the covenantor. *Schwallback v. Chicago, etc., R. Co.*, 69 Wis. 292, 2 Am. St. Rep. 749.

A covenant for further assurances passes to the grantee of the covenantor. *Colby v. Osgood*, 29 Barb. (N. Y.) 339.

In *Brady v. Spurck*, 27 Ill. 482, it was held that any deed which would convey the land would convey the covenants running with the land.

A Deed Without Warranty will carry the covenants running with the land.

Georgia.—*Redwine v. Brown*, 10 Ga. 311.

Kentucky.—*Cummins v. Kennedy*, 3 Litt. (Ky.) 122; *Reed v. Hornback*, 4 J. J. Marsh. (Ky.) 375; *Hunt v. Orwig*, 17 B. Mon. (Ky.) 73, 66 Am. Dec. 144; *Thomas v. Bland*, 91 Ky. 1.

Massachusetts.—*Hodges v. Saunders*, 17 Pick. (Mass.) 470.

Pennsylvania.—*Le Ray de Chaumont v. Forsythe*, 2 P. & W. (Pa.) 513.

Tennessee.—*Hopkins v. Lane*, 9 Verg. (Tenn.) 79.

Texas.—*Flaniken v. Neal*, 67 Tex. 633.

In *Beardsley v. Knight*, 4 Vt. 471, wherein a grantee under a deed with covenants of warranty conveyed the land to the plaintiff by a deed not under seal, which therefore did not carry the legal estate, it was held that the covenants of warranty in the previous deeds did not pass to the plaintiff. See, however, *Brady v. Spurck*, 27 Ill. 478.

1. Need Not Be Expressly Assigned.—*Countryman v. Deck*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 110; *Jacques v. Short*, 20 Barb. (N. Y.) 269.

2. Purchaser at Sheriff's Sale—Quitclaim Deed—*United States.*—*Peters v. Bowman*, 98 U. S. 56.

Alabama.—*Claunch v. Allen*, 12 Ala. 159.

Georgia.—*Redwine v. Brown*, 10 Ga. 311.

Kentucky.—*Thomas v. Bland*, 91 Ky. 1.

Massachusetts.—*White v. Whitney*, 3 Met. (Mass.) 81; *Cornell v. Jackson*, 3 Cush. (Mass.) 506.

Mississippi.—*White v. Presly*, 54 Miss. 313.

Missouri.—*Dickson v. Desire*, 23 Mo. 151; *Chambers v. Smith*, 23 Mo. 174.

New Hampshire.—*Fletcher v. Chamberlin*, 61 N. H. 438.

New Jersey.—*Carter v. Denman*, 23 N. J. L. 270.

New York.—*Town v. Needham*, 3 Paige (N. Y.) 546, 24 Am. Dec. 246; *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120; *Jenks v. Quinn*, 137 N. Y. 223; *Kellogg v. Wood*, 4 Paige (N. Y.) 578.

North Carolina.—*Lewis v. Cook*, 13 Ired. L. (35 N. Car.) 196; *Markland v. Crump*, 1 Dev. & B. L. (18 N. Car.) 94, 27 Am. Dec. 230.

Pennsylvania.—*Whitehill v. Gotwalt*, 3 P. & W. (Pa.) 313.

South Carolina.—*M'Crary v. Brisbane*, 1 Nott & M. L. (S. Car.) 104, 9 Am. Dec. 676.

Texas.—*Flaniken v. Neal*, 67 Tex. 629; *Saunders v. Flaniken*, 77 Tex. 662.

See also *Campbell v. Burley*, 19 U. C. Q. B. 204.

In *Hayes v. New York Gold Min. Co.*, 2 Colo. 273, it was held that a covenant of warranty would pass by a sheriff's sale where the breach was after the sale, but before the execution of the sheriff's deed.

Where a purchaser of a portion of mortgaged premises assumes and agrees to pay as part of the purchase price the whole mortgage debt, the grantee of the remaining portion of the land under a quitclaim deed may enforce the covenant if he loses his land by the foreclosure of the mortgage. *Wilcox v. Campbell*, 106 N. Y. 325, *affirming* 35 Hun (N. Y.) 254.

Foreclosure Sale.—A purchaser at a foreclosure sale is entitled to the benefit of covenants which run with the land. *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277; *Ely v. Hergesell*, 46 Mich. 325; *Security Bank v. Holmes*, 65 Minn. 531; *Lawton v. St. Paul Permanent Loan Co.*, 56 Minn. 353; *Mygatt v. Coe*, 142 N. Y. 78; *Andrews v. Wolcott*, 16 Barb. (N. Y.) 21; *Town v. Needham*, 3 Paige (N. Y.) 546, 24 Am. Dec. 246.

Where the mortgagee, upon a foreclosure of the mortgage and sale of the mortgaged premises, purchases the property for the amount of the debt, interest, and cost, he cannot afterwards maintain an action upon the covenants of warranty contained in the mortgage, unless the sale and satisfaction of the judgment shall be set aside. *Todd v. Johnson*, 51 Iowa 192; *Corbin v. Reed*, 43 Iowa 459.

A purchaser under a mortgage is entitled to the benefit of all such covenants as run with the land. *Ely v. Hergesell*, 46 Mich. 325.

Power of Sale in Mortgage.—A conveyance by the mortgagee under a power of sale contained in a mortgage will carry the covenants for title running with the land. *Gunter v. Williams*, 40 Ala. 568.

c. **PRIVITY OF ESTATE NECESSARY** — (1) *In General*. — It is not sufficient that the covenant is concerning land, but to make it run with the land there must be a privity of estate between the covenanting parties, and the covenant must have relation to an interest created or conveyed, in order that the covenant may pass to the grantee of the covenantee.¹

Where Covenantor Has Title but Not Possession. — A conveyance by one having a legal title, though not in actual possession, carries with it the right of possession, and the grantee, upon taking possession, may avail himself of the covenant of warranty.²

Covenantor Having Mere Equitable Interest. — If at the time of conveyance the covenantor had an equitable interest in the land, he is bound by his covenants, though the legal title was in another, and he joined in the deed merely to release his equitable interest.³

(2) *Where No Interest in Land Passes*. — Where one party covenants with another in respect to land, and at the same time and as a part of making the covenant neither parts with nor receives any title or interest in the land, nor creates an easement or a right in the nature of an easement for the benefit of the land, such a covenant is at best but a mere personal contract.⁴

1. *England*. — *Webb v. Russell*, 3 T. R. 393; *Keppell v. Bailey*, 2 Myl. & K. 517.

Illinois. — *Wiggins Ferry Co. v. Ohio*, etc., R. Co., 94 Ill. 83.

Indiana. — *Wells v. Benton*, 108 Ind. 585; *Conduitt v. Ross*, 102 Ind. 166; *Indianapolis Water Co. v. Nulte*, 126 Ind. 377.

Maryland. — *Donelson v. Polk*, 64 Md. 501. *Massachusetts*. — *Hurd v. Curtis*, 19 Pick. (Mass.) 462.

New York. — *Durnherr v. Rau*, 135 N. Y. 219; *Nye v. Hoyle*, 120 N. Y. 195; *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611; *Denman v. Prince*, 40 Barb. (N. Y.) 213.

Ohio. — *Newburg Petroleum Co. v. Weare*, 44 Ohio St. 604.

Pennsylvania. — *Harkins v. Doran*, (Pa. 1888) 15 Atl. Rep. 928.

South Carolina. — *Morse v. Garner*, 1 Strobb. L. (S. Car.) 514, 47 Am. Dec. 565.

Wisconsin. — *Wright v. Sperry*, 21 Wis. 331.

Where a railroad company entered into a contract with a husband and wife, by the terms of which they were to convey a right of way to the company along a designated line over the separate property of the wife, and the company agreed to construct the road within two years, to maintain a depot and cattle-guards, and to carry the husband and wife and the members of their family as passengers free of charge during the lifetime of either of them, it was held to be a personal covenant upon which the husband could not maintain an action without an express assignment thereof from his wife, although he had become the sole owner of the land. *Lyford v. North Pac. Coast R. Co.*, 92 Cal. 93.

Covenant to Pay Taxes. — A stipulation in a deed of conveyance of real estate that the grantor shall pay certain taxes thereon is a personal contract with the grantee, and not a covenant running with the land; and an accord and satisfaction thereof to the grantee while he holds title discharges the contract, so that his vendee cannot recover for its breach. *Graber v. Duncan*, 79 Ind. 565.

Covenant to Provide Support. — Where an aged man conveyed land for the consideration that his grantee would care for him and support

him during life, it was held that the covenant was a personal one, and that the grantee could not shift the burden to a third person by conveying the land to him against the covenantee's will. *Divan v. Loomis*, 68 Wis. 150. To the same effect is *Harkins v. Doran*, (Pa. 1888) 15 Atl. Rep. 928.

2. *Wead v. Larkin*, 54 Ill. 489, 5 Am. Rep. 149; *Brady v. Spurck*, 27 Ill. 478; *Worley v. Hineman*, 6 Ind. App. 240; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Chandler v. Brown*, 59 N. H. 370.

Covenantor Need Not Be in Possession. — In *Worley v. Hineman*, 6 Ind. App. 240, it was held that where the owner of mortgaged lands conveys with general covenant of warranty, his covenant will run with the land though he did not have possession thereof at the time of the conveyance, provided he was in a position to give possession. See also *Chandler v. Brown*, 59 N. H. 370; *Allen v. Kennedy*, 91 Mo. 324; *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95.

Of course where conveyances by a grantor out of possession are void as against public policy, the covenantor must be in possession, as well in order to convey any estate in the land as to enable his covenants to run with the land. *Randolph v. Kinney*, 3 Rand. (Va.) 397.

3. *Palmer v. Wall*, 128 Mass. 475. See also *Fisk v. Cathcart*, 3 Colo. App. 374.

Equity of Redemption. — A grant by a mortgagor of his equity of redemption with covenants of warranty is so far a conveyance of the land that the covenants of warranty, etc., are annexed to it and pass to the assigns of the grantee. *White v. Whitney*, 3 Met. (Mass.) 81.

4. **Conveyance of Land or Interest Therein Essential**. — *Fresno Canal*, etc., Co. v. *Dunbar*, 80 Cal. 530; *Hord v. Montgomery*, 26 Ill. App. 41; *Indianapolis Water Co. v. Nulte*, 126 Ind. 373; *Savage v. Mason*, 3 Cush. (Mass.) 500; *Wheelock v. Thayer*, 16 Pick. (Mass.) 68; *Morse v. Aldrich*, 19 Pick. (Mass.) 449; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Norcross v. James*, 140 Mass. 188; *King v. Wight*, 155 Mass. 447.

Thus a covenant concerning land made

Sufficiency of Estate Acquired or Retained by Covenantor to Create Privity of Estate. — Where the covenantor acquires or retains an interest in the land of the covenantor, though merely an easement, a privity of estate is created between the parties, and the covenant will run so as to bind the land of the covenantor in which the easement is created.¹

(3) *Mutuality of Estate Not Necessary.* — But, to carry the covenant of warranty to subsequent grantees, it is not necessary that privity of estate within the meaning of the feudal law, that is, mutuality, should exist between the covenantor and the covenantor or his successors in interest.²

after the title has passed from the covenantor to the covenantor does not bind subsequent purchasers. *Wheeler v. Schad*, 7 Nev. 204.

Covenants of warranty and quiet enjoyment entered into jointly by the owner of the fee and her husband, who is a stranger to the title and does not assume any title in himself or right to convey, do not run with the land as against him, and are not available in favor of a subsequent grantee who holds no assignment of the cause of action arising from a breach of the covenants. *Mygatt v. Coe*, 124 N. Y. 212.

The liability of the assignee of a term to the original lessor, or those claiming under him, grows out of the privity of estate, and continues only so long as such privity of estate exists. *Donelson v. Polk*, 64 Md. 501.

When the assignee of a term severs his relation to the land, he puts an end to his liability for any future breaches of the covenants contained in the lease, whether such covenants be expressed or implied. *Donelson v. Polk*, 64 Md. 501.

A covenant to build a house on the land of a third person is a mere personal covenant, but a covenant to build a house or a new wall on the land demised will run with the land demised and bind the assignee on account of the privity of estate between the contracting parties. *Spencer's Case*, 5 Coke 16, 1 Smith L. Cas. 63.

1. Acquisition or Conveyance of Subordinate Interest Creates Privity of Estate — *England*. — *Sharp v. Waterhouse*, 7 El. & Bl. 816, 90 E. C. L. 816; *Holmes v. Buckley*, Pre. Ch. 39.

Alabama. — *Gilmer v. Mobile*, etc., R. Co., 79 Ala. 569, 58 Am. Rep. 623.

California. — *Weill v. Baldwin*, 64 Cal. 476.

Indiana. — *Conduitt v. Ross*, 102 Ind. 166; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254.

Iowa. — *Bertram v. Curtis*, 31 Iowa 46.

Massachusetts. — *Savage v. Mason*, 3 Cush. (Mass.) 500; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *King v. Wight*, 155 Mass. 444.

New York. — *Weyman v. Ringold*, 1 Bradf. (N. Y.) 54; *Duffy v. New York*, etc., R. Co., 2 Hilt. (N. Y.) 496; *Nye v. Hoyle*, 120 N. Y. 195.

Ohio. — *Easter v. Little Miami R. Co.*, 14 Ohio St. 48.

Pennsylvania. — *Horn v. Miller*, 136 Pa. St. 640.

Vermont. — *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550.

West Virginia. — *Lydick v. Baltimore*, etc., R. Co., 17 W. Va. 427.

In *Nye v. Hoyle*, 120 N. Y. 195, it was held that an agreement between riparian owners for

the creation of a new water privilege and the construction of a canal across their lands conveyed an easement in the lands of the respective parties, and thereby created a privity of estate between them, so that their covenants would run with the land.

Right of Way. — The conveyance of a right of way is sufficient to create a privity of estate so as to render a covenant on the part of the grantor to fence the right of way a covenant running with the land retained by him. *Easter v. Little Miami R. Co.*, 14 Ohio St. 48; *Lydick v. Baltimore*, etc., R. Co., 17 W. Va. 427.

Grant of a Portion of the Mineral in the Land. — A grant of a portion of the mineral in the land is sufficient to create a privity of estate so that a covenant by the grantor to raise and render to the grantee a certain portion of the coal raised will run with the land. *Crawford v. Witherbee*, 77 Wis. 419.

Grantor's Covenant to Maintain Division Fence. — Where a grantor conveys a portion of a tract of land and covenants to maintain a fence between the land conveyed and that retained by him, an easement in the land retained is created in favor of the covenantor, thereby creating a privity of estate between the covenantor and the covenantor in respect to the land retained, so that the obligation of the covenant to maintain the fence runs with the land retained. *Bronson v. Coffin*, 118 Mass. 156.

Easement Retained in Land Conveyed. — In *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 489, the owner of a tract of land conveyed a portion thereof, reserving an easement of way over and a river landing place on the land conveyed; and the grantee covenanted to maintain a bridge across a raceway to be constructed over the land conveyed, so as to give access by the grantor to the landing. It was held that the covenant ran with the land so as to bind assignees of the grantee.

2. Privity of Estate in Feudal Sense Not Necessary. — *Mygatt v. Coe*, 124 N. Y. 220; *Van Rensselaer v. Read*, 26 N. Y. 558.

But unless there is either mutuality or succession of interest, the covenant will not run with the land and pass to the remote grantee. *Bally v. Wells*, 3 Wils. 29; *Donelson v. Polk*, 64 Md. 501; *Mygatt v. Coe*, 124 N. Y. 220; *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611.

Where the relation of tenure is created by a grant, all the covenants of the grantee for himself and his assignees which affect the land granted will be a charge upon it, and bind every one to whom it may subsequently come by assignment. *Wiggins Ferry Co. v. Ohio*, etc., R. Co., 94 Ill. 83.

(4) *Benefits and Burdens Inseparably Connected.*—While privity of estate is ordinarily necessary to a covenant running with the land to which it relates, it has been said that justice will require that the right to enjoy such contracts should extend to all who have a beneficial interest in their fulfilment, and when the benefit and the burden of covenants securing mutual rights are so inseparably connected that each is necessary to the existence of the other, both must go together.¹

(5) *Where neither Title nor Possession Passes with the Deed.*—If the grantor has no title and is not seized of the land when he makes his deed of conveyance, his covenant of warranty does not attach to the land and run with it, and he, therefore, is not liable to an action by an assignee of his grantee for a breach of such covenant.²

1. Benefit and Burden Inseparably Connected.—In *Horn v. Miller*, 136 Pa. St. 654, the court said: "To the general rule that between the covenantor and covenantee there must be such privity of estate as would formerly have given rise to the rule of tenure, there are in this state, and perhaps in some of the other states, well recognized exceptions. Covenants capable of running with an assignment of a present estate in land may, it seems, have that capacity in certain cases, although no estate passes between the covenantor and covenantee at the time of covenant made. The obligation of contracts is, in general, limited to the parties making them; where privity of contract is dispensed with, there must ordinarily be privity of estate; but justice sometimes even requires that the right to enjoy such contracts should extend to all who have a beneficial interest in their fulfilment, not to impose a burden upon an ignorant and innocent third person, but to enable purchasers of land to avail themselves of the benefit to which they are in justice entitled. The character of a covenant of this kind must depend upon the effect of the entire agreement of which it is a part, and, where the benefit and the burden are so inseparably connected that each is necessary to the existence of the other, both must go together; the liability to the burden will be a necessary incident to the right to the benefit. See note to *Spencer's Case*, 1 Smith L. Cas. 113. It was upon this ground that, in *Coleman v. Coleman*, 19 Pa. St. 100, 57 Am. Dec. 641, a covenant entered into by the owners of the estate that a part only should be divided, and a part 'remain together and undivided as a tenancy in common,' was held to run with the land, and to bind not only the contracting parties, but their heirs and assigns, although not named in the contract, and therefore to constitute a bar to an action of partition upon the part undivided instituted by the heirs at law of one of the parties. Although there was not, in any proper sense, as to the undivided mine hills, a privity of estate between the tenants in common, yet, as the covenant pertained to and was attached to the realty, providing for the manner of its future enjoyment, it was styled a real covenant; and, being for the mutual benefit and advantage of all, it was held to run with the land."

Covenant by Stranger.—In *Dickinson v. Hoomes*, 8 Gratt. (Va.) 353, there is a *dictum* of Moncre, J., to the effect that it is unnecessary that there should be any privity of estate between the covenantor and the remote

grantees of the covenantee in order that an action may be maintained upon the covenant, and he declares that he can see no reason why such covenants as those of warranty and quiet enjoyment "should not run with the land as well when they are made by a stranger as when they are made by the donor." Compare *Nesbit v. Montgomery*, Tayl. (3 N. Car.) 82, Conf. Rep. (3 N. Car.) 318.

2. Grantor Without Title or Possession.—*Martin v. Gordon*, 24 Ga. 533; *Slater v. Rawson*, 1 Met. (Mass.) 450; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Devore v. Sunderland*, 17 Ohio 52, 49 Am. Dec. 442. See also *Noke v. Awder*, Cro. Eliz. 436; *Hacker v. Storer*, 8 Me. 228; *Randolph v. Kinney*, 3 Rand. (Va.) 394; *Burtner v. Keran*, 24 Gratt. (Va.) 42.

But although no estate passes by the deed, and the remote grantee is without remedy on the covenant of warranty, yet in favor of the immediate grantee the covenant of warranty is a covenant in gross, and binds the warrantor. *Martin v. Gordon*, 24 Ga. 533; *Randolph v. Kinney*, 3 Rand. (Va.) 394; *Burtner v. Keran*, 24 Gratt. (Va.) 42.

In *Indiana* it is held that it is no defense to an action of a remote grantee on the covenant of general warranty that the defendant was not in possession and did not put his grantee in possession of the land at the time of the conveyance. *McClure v. McClure*, 65 Ind. 485.

Covenant by Stranger to Title.—In *Nesbit v. Montgomery*, Tayl. (3 N. Car.) 82, *reconsidered* and *affirmed* in Conf. Rep. (3 N. Car.) 318, a father conveyed land belonging to his daughter, who was under age, covenanting for quiet enjoyment and for further assurances, to be executed by the daughter when she should become of age, and it was held that the covenant by the father for quiet enjoyment did not run with the land so as to entitle the subsequent grantee, who was afterwards evicted, to recover thereon.

The Payment of Taxes Is Not an Act of Possession, and is not evidence of a possessory title. *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95; *Reed v. Field*, 15 Vt. 672.

Warranty Deed from Husband and Wife, of Wife's Land.—In *Mygatt v. Coc*, 124 N. Y. 212, it appeared that the defendant and his wife joined in a deed of real estate, which had been conveyed to her and which was in her possession. The deed contained a joint covenant on the part of the defendant and his wife that she was lawfully seized of an estate in fee, and also joint covenants of warranty and quiet

(6) *Mere Seizin in Fact Sufficient.* — If a person, having a mere seizin in fact, makes a deed with full covenants, and the grantee afterwards sells and conveys the premises, the covenants of warranty and for quiet enjoyment pass with the land, and upon eviction by paramount title a right of action upon the covenants will accrue to the assignee.¹

enjoyment. On this state of facts, the second division of the Court of Appeals held that the husband had no possession of the land, and that his warranty did not run with the land, and was not available in favor of a subsequent grantee who held no assignment of the cause of action arising from the breach of the covenant. (Bradley, Haight, and Brown, JJ., dissenting.) After a second trial, the case came before the Court of Appeals. The findings of fact were that at the date of the conveyance to Mrs. Fisher, the defendant's vendee, neither Coe (the defendant) nor his wife had a valid title to the land; that he was in possession, and his wife occupied the premises with him; that she had color of title, but he not even that; that the two assumed as joint grantors to convey the land to Mrs. Fisher; that Coe delivered possession to her, which was the only estate which either grantor had or which they could convey, and that Coe shared in the purchase money paid for the grant. Under this state of facts, it was held that Coe was not a stranger to the title, that his possession was a sufficient estate to carry with it his warranty, and that the plaintiffs might maintain their action. *Mygatt v. Coe*, 142 N. Y. 86. The case was again tried, and the plaintiffs had judgment, which was affirmed by the general term, and was a third time appealed to the Court of Appeals. There it appeared that the defendant's wife, Almira S. Coe, purchased the property in question for a valuable consideration and took the deed in her own name from a party then in possession, as she supposed, under a good title. She immediately went into possession, and with her husband lived in the house until the conveyance to Nancy Fisher, who also went into possession, and conveyed the same subject to the plaintiffs' mortgage, and her remote grantee, one Leavitt, was ejected by a judgment of the court, which adjudged that at the time of the deed of the defendant and his wife to Mrs. Fisher title paramount was in the heirs of one Howell. Under this state of facts it was held that possession of the land at the time of the conveyance was in the wife, and not in the husband. O'Brien, J., said: "The presumption is that the legal possession follows the ownership of the land. Hence, it was necessary to show that the wife, by some act or agreement on her part, express or implied, had surrendered to the husband some interest in the property or dominion over it which necessarily took from her at least some right or incident ordinarily pertaining to the absolute ownership of real estate. The husband could acquire no estate capable of sale or conveyance, not even the lowest known to the law, without abridging to the same extent that of the wife. Whatever interest he gained she must have lost. The legal possession of land which is sufficient to carry the covenants upon a conveyance must be a right or interest in the nature of property, valid, at all events, against all extra-

neous intrusion, and capable of the same kind of transfer and devolution as other property. It is difficult to conceive how two persons can have such a possession of the same thing at the same time. The wife in this case certainly acquired such a possession upon the conveyance to her, and there was no evidence to warrant the conclusion that she had in any way transferred it to the husband." *Mygatt v. Coe*, 147 N. Y. 463. Upon the next trial of the case, the plaintiffs again had judgment, and on appeal to the Appellate Division, *Mygatt v. Coe*, 12 N. Y. App. Div. 245, the judgment in favor of the plaintiffs was reversed and the complaint was dismissed upon the merits, from which decision the plaintiffs again appealed to the Court of Appeals, where the judgment was affirmed, and it was settled that the rule that the covenant of a stranger to the title is personal to the covenantee and incapable of transmission by a mere conveyance of the land, applies, in the absence of special facts and circumstances, to covenants of a husband in a deed by his wife of her own land, joined in by him; and that when possession of realty, to which the wife holds the legal title, has once been delivered to her, it is not lost or impaired, in the absence of any question of fraud, by permitting her husband to exercise acts of care, management, or agency with respect to the property, or by his occupancy of it, as the head of the family, for the family residence. *Mygatt v. Coe*, 152 N. Y. 457.

1. *Seizin in Fact Sufficient.* — *Real v. Hollister*, 20 Neb. 112; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Fowler v. Poling*, 2 Barb. (N. Y.) 300, 6 Barb. (N. Y.) 165.

In *Mygatt v. Coe*, 142 N. Y. 87, Finch, J., said: "It is certainly the law of this state that one in possession of land merely, without other actual title, has an estate in the land which he may transfer to a grantee, and which is sufficient to carry with it his covenant of warranty down the line of succession. That was explicitly held in *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 124, and I have found no case in this state to the contrary, and no reason to doubt the soundness of the doctrine." To the same effect is *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593.

Where a person enters on woodland, claiming title, and cuts wood and does other acts thereon as owner, and no other person enters into possession or disputes his title, he thereby becomes seized of the land as against every one but the true owner, though his acts do not constitute a disseizin of such owner; and if he conveys the land by a deed his possessory title passes to his grantee, and the covenant of warranty in such deed runs with the land, and he is answerable thereon to his grantee's assignee who is ousted by the true owner. *Slater v. Rawson*, 6 Met. (Mass.) 439, 1 Met. (Mass.) 450.

Case of Noke v. Awder. — *Noke v. Awder*, Cro. Eliz. 436, has often been cited to the proposition that the covenantor must have a legal

Where Possession or a Defeasible Title Passes.—If possession, or a defeasible title without possession, passes with the deed, the covenant runs with the land and inures to the benefit of the person on whom the loss falls.¹

Plaintiff's Immediate Grantor in Possession.—It has been held that if the plaintiff's immediate grantor had possession at the time of the execution of the deed, it is no defense that the defendant, the remote grantor, was not in possession at the time of making his conveyance.²

d. WHEN BROKEN UPON DELIVERY OF DEED—(1) *Rule in United States.*—According to the weight of authority in the United States a covenant against incumbrances is broken at once, if broken at all, and does not pass to the grantee, the devisee, or heirs of the original purchaser. It is a mere right

estate in the land in order that the covenants in the conveyance may run with the land. This case, however, goes no further than holding that the covenantor must have some estate, and though recognized in later cases as authority for the first proposition (*Green v. James*, 6 M. & W. 656; *Whitton v. Peacock*, 2 Bing. N. Cas. 411, 29 E. C. L. 375; *Andrew v. Pearce*, 4 B. & P. 162; *Pargeter v. Harris*, 7 Q. B. 708, 53 E. C. L. 708; *Webb v. Russell*, 3 T. R. 393), was undoubtedly *overruled* in *Cuthbertson v. Irving*, 4 H. & N. 742. In the *United States* the case of *Noke v. Awder*, Cro. Eliz. 436, has professedly been recognized in *Nesbit v. Montgomery*, Tayl. (3 N. Car.) 82, and *Martin v. Gordon*, 24 Ga. 533. In these cases, however, the proposition that the covenantor must have a legal estate was not directly involved, as in the former case the deed of the covenantor showed upon its face that he neither had nor claimed any interest in the land, and in the latter the court merely states that the covenant would not run with the land because the covenantor had no title, still it did not appear that he did have possession.

Conveyance of Vacant Land.—In *Wead v. Larkin*, 54 Ill. 489, 5 Am. Rep. 149, it was held that the covenant of warranty would run with the land, though the covenantor had neither title nor possession, if the land at the time of the conveyance was vacant and the covenantee afterwards took possession thereof under his conveyance. In this case the court also intimated that the covenant would have passed with the conveyance by the covenantee even though he had not taken possession of the land.

1. Possession by Covenantor Sufficient to Enable Covenant to Run with Land—*Maine.*—*Wilson v. Widenham*, 51 Me. 566.

Massachusetts.—*Slater v. Rawson*, 6 Met. (Mass.) 439.

Missouri.—*Chambers v. Smith*, 23 Mo. 174; *Dickson v. Desire*, 23 Mo. 151.

Nebraska.—*Real v. Hollister*, 20 Neb. 112.

New Hampshire.—*Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593.

New York.—*Fowler v. Poling*, 2 Barb. (N. Y.) 300, 6 Barb. (N. Y.) 165; *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120; *Mygatt v. Coe*, 124 N. Y. 212.

North Carolina.—*Lewis v. Cook*, 13 Ired. L. (35 N. Car.) 195.

Ohio.—*Backus v. McCoy*, 3 Ohio 211, 17 Am. Dec. 585.

Vermont.—*Morton v. Thompson*, 69 Vt. 432.

Virginia.—*Randolph v. Kinney*, 3 Rand.

(Va.) 396; *Dickinson v. Hooime*, 8 Gratt. (Va.) 406.

See also *Booth v. Starr*, 1 Conn. 248, 6 Am. Dec. 233; *Withy v. Mumford*, 5 Cow. (N. Y.) 137; *Garlock v. Closs*, 5 Cow. (N. Y.) 143 note; *Markland v. Crump*, 1 Dev. & B. L. (18 N. Car.) 94, 27 Am. Dec. 230.

In *Hacker v. Storer*, 8 Me. 233, *Parris, J.*, said that "when the covenant of seizin is broken nothing passes by the deed, and, the substratum having failed, the covenant of warranty cannot descend to the heir or vest in the assignee. It cannot run with the land, for none having been conveyed there is none for it to run with." The question in this case as to the right of a remote grantee to sue on the covenant of warranty arose on the construction of the pleadings. In the declaration the plaintiff had alleged a breach of the covenant of seizin, and thereby repudiated the idea of possession in the covenantor, as in *Maine* possession alone is sufficient to support this covenant; and was prevented, by the rule of pleading against a departure, from alleging a possessory title. This case, therefore, is not authority for the proposition that a possessory title in the covenantor is not sufficient to enable his covenant of warranty to run with the land.

Possession under claim of title is an estate sufficient to transmit covenants that run with the land. *Slater v. Rawson*, 6 Met. (Mass.) 439; *Morton v. Thompson*, 69 Vt. 432. See also *Fields v. Squires*, *Deady* (U. S.) 366.

An assignee of covenants of warranty and for quiet enjoyment may maintain an action on the covenants where possession is taken under the deed, and there has been a subsequent eviction, although at the time of the execution of the deed the grantor had no title. *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Rep. 650; *Real v. Hollister*, 20 Neb. 112; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *Beddoe v. Wadsworth*, 21 Wend. (N. Y.) 120.

A tenant from year to year who demises by indenture for a term of years, however long, has, by reason of the possibility of his estate continuing longer than the demised term, a reversion with which the benefit of the covenants in the indenture may pass to an assignee during the existence of the tenancy from year to year. *Oxley v. James*, 13 M. & W. 209.

2. Immediate Grantor in Possession—**Remote Grantor Not in Possession at Time of Original Grant.**—*Wead v. Larkin*, 54 Ill. 489, 5 Am. Rep. 149; *McClure v. McClure*, 65 Ind. 482; *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95.

of action, which is not assignable at law, and is available only to the grantee himself, or to his personal representative,¹ and the same rule applies to the covenants of seizin and of right to convey.²

1. Covenant Against Incumbrances — Broken when Made — *Arkansas*. — Brooks v. Moody, 25 Ark. 452; Ross v. Turner, 7 Ark. 132, 44 Am. Dec. 531.

California. — Lawrence v. Montgomery, 37 Cal. 183; Salmon v. Vallejo, 41 Cal. 481.

Colorado. — Fisk v. Cathcart, 3 Colo. App. 374.

Connecticut. — Mitchell v. Warner, 5 Conn. 497; Davis v. Lyman, 6 Conn. 254.

Georgia. — Redwine v. Brown, 10 Ga. 311.

Kansas. — Scoffins v. Grandstaff, 12 Kan. 470.

Maine. — Bean v. Mayo, 5 Me. 94. (Rule changed by statute. See Wilson v. Widenham, 51 Me. 567.)

Massachusetts. — Whitney v. Dinsmore, 6 Cush. (Mass.) 124; Kramer v. Carter, 136 Mass. 504; Smith v. Richards, 155 Mass. 79; Ladd v. Noyes, 137 Mass. 151; Wyman v. Ballard, 12 Mass. 305; Clark v. Swift, 3 Met. (Mass.) 390.

Michigan. — Davenport v. Davenport, 52 Mich. 587.

New Jersey. — Stewart v. Drake, 9 N. J. L. 139; Carter v. Denman, 23 N. J. L. 260; Garrison v. Sandford, 12 N. J. L. 261.

New York. — Fowler v. Poling, 2 Barb. (N. Y.) 300.

North Carolina. — Markland v. Crump, 1 Dev. & B. L. (18 N. Car.) 101, 27 Am. Dec. 230.

North Dakota. — Bowne v. Wolcott, 1 N. Dak. 497.

Tennessee. — Kenney v. Norton, 10 Heisk. (Tenn.) 384.

Covenant Broken when Made Does Not Run with Land. — When a covenant in a conveyance of real estate is broken the instant it is made, it does not run with the land. The obligation is merely personal, and is limited to the parties to the covenant, and confers no right of action upon subsequent purchasers of the estate. Hubbard v. Norton, 10 Conn. 433; Mitchell v. Warner, 5 Conn. 503; Davis v. Lyman, 6 Conn. 255; Ballard v. Child, 34 Me. 355; Chapman v. Kimball, 7 Neb. 399; Davidson v. Cox, 10 Neb. 150; Kenney v. Norton, 10 Heisk. (Tenn.) 384; Galliher v. Galliher, 10 Lea (Tenn.) 23.

Where the act to be performed is single and indivisible, nonperformance exposes the offending party to the penalties of an entire breach; and suit therefor must be brought by the parties then interested in the performance of the defendant's covenant. Atwood v. Norton, 27 Barb. (N. Y.) 638.

Outstanding Mortgage. — In Davis v. Lyman, 6 Conn. 252, it was held that a covenantee under a deed with covenant against incumbrances could recover for breach of the covenant against incumbrances consisting of an outstanding mortgage, though previous to the commencement of the action he had conveyed the land to a third person who had released the covenantor from all claims.

2. Covenants of Seizin and Right to Convey — *United States*. — Le Roy v. Beard, 8 How. (U. S.) 451.

Arkansas. — Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 338; Pate v. Mitchell, 23 Ark. 590, 79 Am. Dec. 114.

California. — Salmon v. Vallejo, 41 Cal. 481; Lawrence v. Montgomery, 37 Cal. 188.

Connecticut. — Mitchell v. Warner, 5 Conn. 497; Mitchell v. Hagen, 4 Conn. 495, 10 Am. Dec. 169; Davis v. Lyman, 6 Conn. 249; Hubbard v. Norton, 10 Conn. 433; Hartford, etc., Ore Co. v. Miller, 41 Conn. 112.

Georgia. — Redwine v. Brown, 10 Ga. 311.

Illinois. — Brady v. Spurck, 27 Ill. 478; King v. Gilson, 32 Ill. 348, 83 Am. Dec. 269; Jones v. Warner, 81 Ill. 343. But see *infra*, this section, *English Rule Followed in Some American Jurisdictions*.

Indiana. — Craig v. Donovan, 63 Ind. 517. But see *infra*, this section, *English Rule Followed in Some American Jurisdictions*.

Kansas. — Dale v. Shively, 8 Kan. 276; Scoffins v. Grandstaff, 12 Kan. 470.

Maine. — Hacker v. Storer, 8 Me. 228; Ballard v. Child, 34 Me. 355.

Massachusetts. — Bickford v. Page, 2 Mass. 455; Ladd v. Noyes, 137 Mass. 151; Bartholomew v. Candee, 14 Pick. (Mass.) 167; Thayer v. Clemence, 22 Pick. (Mass.) 490.

Nebraska. — Real v. Hollister, 20 Neb. 112.

New Hampshire. — Haynes v. Stevens, 11 N. H. 35; Moore v. Merrill, 17 N. H. 75, 43 Am. Dec. 593; Andrews v. Davison, 17 N. H. 413, 43 Am. Dec. 606.

New Jersey. — Chapman v. Holmes, 10 N. J. L. 20; Carter v. Denman, 23 N. J. L. 260.

New York. — Bingham v. Weiderwax, 1 N. Y. 509; Mott v. Palmer, 1 N. Y. 564; Mygatt v. Coe, 124 N. Y. 212, (Supreme Ct.) 49 N. Y. St. Rep. 781; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 370; Hamilton v. Wilson, 4 Johns. (N. Y.) 72, 4 Am. Dec. 253; Abbott v. Allen, 14 Johns. (N. Y.) 248; M'Carty v. Leggett, 3 Hill (N. Y.) 134; Blydenburgh v. Cothéal, 1 Duer (N. Y.) 176; Fowler v. Poling, 2 Barb. (N. Y.) 303.

North Dakota. — Bowne v. Wolcott, 1 N. Dak. 497.

Tennessee. — Kenney v. Norton, 10 Heisk. (Tenn.) 384; Galliher v. Galliher, 10 Lea (Tenn.) 23.

Vermont. — Clement v. Rutland Bank, 61 Vt. 298.

But in this state, the covenant against incumbrances runs with the land for the benefit of him who suffers the substantial damages. Cole v. Kimball, 52 Vt. 643.

The covenant of seizin is a personal covenant, and a cause of action for a breach thereof survives to the personal representative of the covenantee and is not transmitted to the heir. Lowry v. Tillyer, 31 Minn. 500; Kimball v. Bryant, 25 Minn. 496.

Such a covenant cannot be assigned, so as to enable the assignee to maintain an action thereon. Lewes v. Ridge, Cro. Eliz. 863; Chapman v. Holmes, 10 N. J. L. 20; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 370; Clement v. Rutland Bank, 61 Vt. 298.

For the breach of such covenants the cove-

Conveyance as an Assignment of Covenant in Præsent. — It has been held that though covenants *in præsent*, or covenants *in futuro* which have been broken, do not run with the land, yet the right of action for a breach thereof is assignable, and a conveyance of the land by the covenantee before enforcement of his remedy for such breach will be presumed, in the absence of anything to the contrary, to carry the right of action for such breach.¹

(2) *English Rule Followed in Some American Jurisdictions.* — In England it is admitted that the covenant of seizin, if broken at all, is technically broken at the time of the delivery of the deed, yet it is held that a failure or defect of title constitutes a continuing breach, and that the right of action passes to the grantee's successor in title, upon whom the loss finally falls.² And this rule has been adopted in a number of American jurisdictions.³

nantee may maintain an action after he has conveyed the land. *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *Bingham v. Weiderwax*, 1 N. Y. 509; *Clement v. Rutland Bank*, 61 Vt. 298.

In case of the death of the covenantee before action, the right of action passes to his personal representative, and not to his heirs. *Hamilton v. Wilson*, 4 Johns. (N. Y.) 72, 4 Am. Dec. 253.

A covenant of seizin is broken by the record of a tax deed to a third person. *Daggett v. Reas*, 79 Wis. 60.

These cases follow the doctrine of *Noke v. Awder*, Cro. Eliz. 373, 436, which has long since been abandoned in England. See *Cuthbertson v. Irving*, 4 H. & N. 755.

1. Conveyance an Assignment of Action for Breach of Covenant of Seizin. — *Kimball v. Bryant*, 25 Minn. 496; *Allen v. Kennedy*, 91 Mo. 324; *Ernst v. Parsons*, 54 How. Pr. (N. Y. Supreme Ct.) 163; *Cole v. Kimball*, 52 Vt. 639. See also *Colby v. Osgood*, 29 Barb. (N. Y.) 339; *Roberts v. Levy*, 3 Abb. Pr. N. S. (N. Y. C. Pl.) 311; *Coleman v. Bresnaham*, 54 Hun (N. Y.) 619.

Covenant of Warranty. — In *Allen v. Kennedy*, 91 Mo. 324, it was held that the right of action for a previous breach of a covenant of warranty would pass by a warranty deed.

Covenant Against Incumbrances. — It has been intimated that this rule would not apply to the right of action for breach of a covenant against incumbrances. *Winningham v. Pennock*, 36 Mo. App. 693. See, however, *Coleman v. Bresnaham*, 54 Hun (N. Y.) 619.

2. English Rule. — *Kingdon v. Nottle*, 1 M. & S. 355, 4 M. & S. 53; *King v. Jones*, 5 Taunt. 418, 4 M. & S. 188. See also *Cuthbertson v. Irving*, 4 H. & N. 755.

In *Kingdon v. Nottle*, 1 M. & S. 355, it was held that the personal representative could not maintain an action for breach of the covenant of seizin, though the same was broken during the lifetime of the testator; and in a subsequent action on the same covenant by the devisee it was held that the action might be maintained. *Kingdon v. Nottle*, 4 M. & S. 57, where Lord Ellenborough, C. J., said: "Here the covenant passes with the land to the devisee, and has been broken in the time of the devisee, for so long as the defendant has not a good title, there is a continuing breach; and it is not like a covenant to do an act of solitary performance, which not being done the covenant is broken once for all, but

is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require. Here, according to the letter, there was a breach in the testator's lifetime, but according to the spirit, the substantial breach is in the time of the devisee, for she has thereby lost the fruit of the covenant in not being able to dispose of the estate."

In *Raymond v. Fitch*, 2 C. M. & R. 598, Lord Abinger, C. B., said: "The rule that the executor may sue upon every covenant with his testator broken in his lifetime has been directly qualified by the decisions in the two cases of *Kingdon v. Nottle*, 1 M. & S. 355, 4 M. & S. 53, followed by that of *King v. Jones*, 5 Taunt. 418, 1 Marsh. 107, in which cases it was held that where there are covenants real, that is, which run with the land and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial damage has taken place since his death, the real representative, and not the personal, is the proper plaintiff. These cases go no further, and they do not apply to the present; for there is no doubt but that the covenant in question is purely collateral, and does not run with the land; for the trees being excepted from the demise, the covenant not to fell them is the same as if there had been a covenant not to cut down trees growing upon an adjoining estate of the lessor."

3. Jurisdictions in United States Adopting English Rule—Illinois. — A remote grantee of lands may maintain an action in his own name against the original grantor, on a covenant in the deed of the latter that the land is free from incumbrances, where the substantial breach of the covenant occurs after the assignment, and the whole actual damages are sustained by the assignee; although in such case the covenant is nominally broken on the execution of the deed, the rule of the common law that chases in action are not assignable does not apply. *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1.

Indiana. — *Martin v. Baker*, 5 Blackf. (Ind.) 232.

Under the Indiana Code it is held that an action for a breach of covenant must be prosecuted in the name of the real party in interest, and that the real party in interest is the person entitled to the money recovered as damages. *Sinker v. Floyd*, 104 Ind. 292.

Whoever derives the right to the land through the covenantee, and ultimately sustains damages in consequence of the covenantor's want

Covenant Against Incumbrances Coupled with Covenant in Futuro. — And it has also been held that the covenant against incumbrances may be so coupled with a covenant *in futuro* as to run with the land.¹

of title, may sue him for damages for breach of the covenant of seizin. *Coleman v. Lyman*, 42 Ind. 289.

The heir may maintain an action for breach of the covenant of seizin where he has acquired the land and has ultimately sustained the damages. *Wright v. Nipple*, 92 Ind. 313; *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Coleman v. Lyman*, 42 Ind. 289.

The covenant in a deed against incumbrances runs with the land, and where the remote grantee is compelled to discharge the incumbrance to protect his title, he may sue the covenantor thereon. *Dehority v. Wright*, 100 Ind. 382.

In *Scott v. Stetler*, 128 Ind. 385, it was held that in a deed conveying a mill site, "together with the mill and all privileges and easements thereto belonging," the implied covenant that the grantor had the right to maintain the dam at the height it was when the conveyance was made, ran with the land.

Iowa. — *Schofield v. Iowa Homestead Co.*, 32 Iowa 318, 7 Am. Rep. 197; *Boon v. McHenry*, 55 Iowa 202.

In *Schofield v. Iowa Homestead Co.*, 32 Iowa 318, 7 Am. Rep. 197, Beck, J., said: "We are fully aware of the discord of authorities upon this question, and that a great majority of the American cases hold the covenant to be *in presenti*, and that it is broken, if at all, when the deed is delivered, and that the claim for damages thereby becomes personal in its nature to the grantee, and is not transferred by a conveyance to a subsequent grantee. But in England the rule prevails that the covenant runs with the land, and recovery for a breach thereof may be had by the assignee of the grantee in the deed."

Missouri. — *Allen v. Kennedy*, 91 Mo. 324. In this case the court said: "As to the covenant of seizin of an indefeasible estate in fee simple, the claim is that this covenant, if broken at all, is always broken when made, and does not run with the land. Whatever may be the rule elsewhere, with us it is more than a covenant in the present tense. It is rather a covenant of indemnity, and it has often been held that it runs with the land to the extent that if the covenantee takes any estate, however defeasible, or if possession accompanies the deed, though no title pass, yet, in either event, this covenant runs with the land and inures to the subsequent grantee, upon whom the loss falls." *Citing* *Dickson v. Desire*, 23 Mo. 151; *Chambers v. Smith*, 23 Mo. 174; *Magwire v. Riffin*, 44 Mo. 512; *Jones v. Whitsett*, 79 Mo. 188. See also *Vancourt v. Moore*, 26 Mo. 92; *Walker v. Deaver*, 79 Mo. 664; *Blondeau v. Sheridan*, 81 Mo. 545; *Wyatt v. Dunn*, 93 Mo. 459; *Schnelle, etc., Lumber Co. v. Barlow*, 34 Fed. Rep. 853.

Where the incumbrance is a mortgage, judgment, or tax lien, and is of a kind that does not affect the possession of the covenantee, he may pay off the same and free the premises; and covenants against this class of incumbrances run with the land and remain

alive in the hands of the subsequent grantee, who may be compelled to extinguish the pre-existing incumbrances; for it is the substantial breach which occurs for which he may sue on his covenant for the damages he has sustained. *Buren v. Hubbell*, 54 Mo. App. 624; *Winningham v. Pennock*, 36 Mo. App. 688; *Barnhart v. Hughes*, 46 Mo. App. 318; *Dickson v. Desire*, 23 Mo. 151.

Where the incumbrance is of such a character that it cannot be extinguished, such, for example, as an easement or servitude, an existing lien, or the like, the entire damages are at once to be ascertained and assessed to the covenantee, according to the injury arising from its continuance, and in such case the breach extinguishes the covenant and renders it incapable of running with the land. The covenant is turned into a mere right of action, which can be taken advantage of only by the covenantee or his personal representative, and passes to neither an heir, a devisee, nor a subsequent purchaser. *Buren v. Hubbell*, 54 Mo. App. 624; *Blondeau v. Sheridan*, 81 Mo. 545; *Taylor v. Heitz*, 87 Mo. 660; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426, 62 Mo. 429.

Where, however, the grantor had neither title nor possession, and therefore nothing passed to the grantee, the covenant of seizin does not pass to an assignee of the land. *Chambers v. Smith*, 23 Mo. 179.

Ohio. — *Hall v. Plaine*, 14 Ohio St. 417; *Devore v. Sunderland*, 17 Ohio 52, 49 Am. Dec. 442; *Betz v. Bryan*, 39 Ohio St. 320.

In *Ohio*, the question whether covenants of seizin and covenants against incumbrances run with the land depends upon possession. When the covenantor is in possession claiming title, these covenants run with the land, but when the covenantor is not in possession and the title is defective, they are broken as soon as made, and never attach to the land, being in the nature of personal covenants. *Backus v. McCoy*, 3 Ohio 211, 17 Am. Dec. 585; *Foote v. Burnet*, 10 Ohio 331, 36 Am. Dec. 90.

In *Betz v. Bryan*, 39 Ohio St. 320, it was held that where the grantee took possession of the land and conveyed before he was ousted, though after a verdict in ejectment had been rendered against him in an action by the adverse claimant, the covenant ran with the land to his assignee, and the grantee could not sue thereon.

South Carolina. — *M'Crary v. Brisbane*, 1 Nott & M. L. (S. Car.) 104, 9 Am. Dec. 676.

Vermont. — In Vermont the covenant against incumbrances runs with the land and can be enforced for the benefit of the person holding the legal title. *Cole v. Kimball*, 52 Vt. 639.

Wisconsin Rule. — It seems that the English rule also prevails in Wisconsin. *Mecklen v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Eaton v. Lyman*, 33 Wis. 40, per Dixon, C. J. See, however, *Pillsbury v. Mitchell*, 5 Wis. 17.

1. Covenant Against Incumbrances Coupled with Covenant in Futuro. — In *Ernst v. Parsons*, 54 How. Pr. (N. Y. Supreme Ct.) 163, and *Colby v. Osgood*, 29 Barb. (N. Y.) 339, cove-

(3) *Statutes Modifying Rule* — **Statutes Requiring Real Party in Interest to Sue.** — The American rule was founded on the purely technical ground that a chose in action could not be transferred, and therefore could not pass with the land, so as to vest in the assignee any right to sue upon it. But since the removal of this technicality by statutes providing that all actions shall be brought in the names of the real parties in interest, the courts have been disposed to hold that covenants of seizin and against incumbrances may be sued upon by the parties who ultimately sustain damages by their breach;¹ but if the vendee dies before enforcing his remedy for the breach, and without having conveyed the land to another, the cause of action survives to his personal representative, and does not descend to his heirs; for in such case there is no assignment to carry the cause of action with the land.²

Express Statutory Provisions — Covenant of Seizin. — In a number of the states the technical rule that the covenant of seizin does not run with the land has been changed by statutes which expressly provide that such a covenant shall run with the land and inure to the benefit of subsequent purchasers.³

Covenant Against Incumbrances. — And the rule in a number of the jurisdictions which formerly held that a covenant against incumbrances did not run with the land has been changed by statute, and an assignee is now authorized to sue upon a covenant against incumbrances contained in a deed from a remote grantor.⁴

e. **COVENANT OF WARRANTY — GRANTEE AT TIME OF BREACH MAY SUE.** — A covenant of general warranty, being one of those which run with the land, is intended for the benefit of the ultimate grantee in whose time it is

nants against incumbrances were held to be so coupled with covenants for further assurances as to run with the land. And in *Andrews v. Appel*, 22 Hun (N. Y.) 429, such a covenant was held to be so coupled with a covenant for quiet enjoyment as to run with the land. See also *Budd v. Marshall*, 42 L. T. N. S. 793, cited in 22 Alb. L. J. 257.

1. Statutes Giving Right of Action to Real Party in Interest — Minnesota. — In Minnesota, where choses in action are made assignable by statute, it is held that the covenant of seizin is broken by the delivery of the deed; but if the vendee conveys the land to another, who brings his action upon the covenant, the cause of action passes with the deed to his vendee without the necessity of express assignment thereof. *Kimball v. Bryant*, 25 Minn. 498; *Allen v. Allen*, 48 Minn. 462. And the same rule applies to covenants against incumbrances. *Security Bank v. Holmes*, 65 Minn. 531; *Hawthorne v. City Bank*, 34 Minn. 382, construing Minn. Gen. Stat. 1878, c. 40, § 35. See also *Fasler v. Beard*, 39 Minn. 32.

New York. — *Boyd v. Belmont*, 58 How. Pr. (N. Y. C. Pl.) 514; *Ernst v. Parsons*, 54 How. Pr. (N. Y. Supreme Ct.) 163; *Andrews v. Appel*, 22 Hun (N. Y.) 429; *Colby v. Osgood*, 29 Barb. (N. Y.) 339; *Coleman v. Bresnahan*, 54 Hun (N. Y.) 622. See also *Sinker v. Floyd*, 104 Ind. 291; *Hall v. Plaine*, 14 Ohio St. 417.

2. Lowry v. Tillyen, 31 Minn. 500.

3. Statutory Modification — Colorado. — Mills's Anno. Stat. 1891, § 436, provides that the covenant of seizin shall be held to run with the land and to inure to the benefit of all subsequent purchasers and incumbrancers.

Maine. — Rev. Stat. 1883, p. 697, § 18, authorizes a remote grantee to sue on the covenant of seizin in the deed to his grantor,

in case of his eviction, upon his filing a release of the covenants in the deed to him. *Wilson v. Widenham*, 51 Me. 566. See also *Littlefield v. Pinkham*, 72 Me. 375.

In *Ballard v. Child*, 34 Me. 355, it was held that Rev. Stat., c. 115, §§ 16, 17, giving to a remote grantee the right to sue for breach of the covenant of seizin in the deed of a remote grantor, applied only to cases where there was an eviction, and therefore he could not sue thereon where neither seizin nor possession passed by the deed.

North Dakota. — In *Bowne v. Wolcott*, 1 N. Dak. 497, it was held that under Comp. Laws, section 3444, providing that "the only covenants which run with the land are those specified in this title;" section 3445, providing that every covenant shall run with the land "which is made for the direct benefit of the property;" and section 3446, providing that "the last section includes covenants of warranty for quiet enjoyment and for further assurance," the covenant of seizin does not run with the land.

4. Statutory Modification — Colorado. — Mills's Anno. Stat. 1891, § 436.

Georgia. — Rev. Stat. 1882, p. 672, § 2702.

Maine. — Rev. Stat. 1883, p. 697, § 18; *Trask v. Wilder*, 50 Me. 450; *Dinsmore v. Savage*, 68 Me. 193.

Massachusetts. — Pub. Stat., c. 126, § 18.

In *Carter v. Peak*, 138 Mass. 439, it was held that Mass. Pub. Stat., c. 126, § 18, authorizing the assignee to sue for breach of a covenant against incumbrances contained in the deed to his grantor, where the incumbrance "appears of record," did not apply to a lien for unpaid taxes which only appeared in the records of the city or town, but applied only where the incumbrance was of record in the registry of deeds.

broken, and he may maintain an action thereon in his own name.¹

f. RIGHT OF ACTION FOR COVENANT BROKEN DOES NOT PASS TO SUBSEQUENT GRANTEE.—Covenants may run with the land, but damages arising from broken covenants do not; nor do they inure to subsequent grantees of the title.² He in whose time the covenant is broken, whether the grantee or one who claims and holds under him, is the proper person to bring an action for a breach of covenant.³

1. Grantee at Time of Breach May Maintain Action—*Georgia*.—Leary *v.* Durham, 4 Ga. 593.

Illinois.—Claycomb *v.* Munger, 51 Ill. 373; Brady *v.* Spurck, 27 Ill. 478.

Kentucky.—Lot *v.* Parish, 1 Litt. (Ky.) 393.

Maine.—Brown *v.* Staples, 28 Me. 497, 48 Am. Dec. 504; Crooker *v.* Jewell, 29 Me. 527; Allen *v.* Little, 36 Me. 170.

Massachusetts.—Wyman *v.* Ballard, 12 Mass. 305.

Missouri.—Davis *v.* Burns, 1 Mo. 264.

New Hampshire.—Chandler *v.* Brown, 59 N. H. 370; Moore *v.* Merrill, 17 N. H. 75, 43 Am. Dec. 503; Russ *v.* Perry, 49 N. H. 547.

New York.—Withy *v.* Mumford, 5 Cow. (N. Y.) 137; Suydam *v.* Jones, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552; Kellogg *v.* Wood, 4 Paige (N. Y.) 578.

Ohio.—King *v.* Kerr, 5 Ohio 154, 22 Am. Dec. 777.

Tennessee.—Mette *v.* Dow, 9 Lea (Tenn.) 93; Kenney *v.* Norton, 10 Heisk. (Tenn.) 384; Galliher *v.* Galliher, 10 Lea (Tenn.) 23; Hopkins *v.* Lane, 9 Verg. (Tenn.) 79.

Texas.—Flaniken *v.* Neal, 67 Tex. 629.

Vermont.—Smith *v.* Perry, 26 Vt. 279; Tillotson *v.* Prichard, 60 Vt. 94, 6 Am. St. Rep. 95; Williams *v.* Wetherbee, 1 Aik. (Vt.) 233; Wilder *v.* Davenport, 58 Vt. 642.

Virginia.—Marbury *v.* Thornton, 82 Va. 702.

Although a covenant of warranty running to the grantee, his heirs and assigns, can be sued upon by the assignee in his own name, still it does not operate as a letter of credit, offering a new covenant to any one who will take the land on the faith of it. Abbott *v.* Hills, 158 Mass. 397; Saunders *v.* Saunders, 154 Mass. 337; Columbia Falls Brick Co. *v.* Glidden, 157 Mass. 175.

In trespass to try title the plaintiff as well as the defendant may vouch in his warrant or as a party defendant, and recover on his covenants of warranty if he loses the land. McCreary *v.* Douglass, 5 Tex. Civ. App. 492. See also Johns *v.* Hardin, 81 Tex. 37; Thiele *v.* Axell, 5 Tex. Civ. App. 548.

2. Right of Action for Broken Covenant Does Not Pass with Land—*United States*.—Peters *v.* Bowman, 98 U. S. 56.

Alabama.—Claunch *v.* Allen, 12 Ala. 159.

Illinois.—Barry *v.* Guild, 28 Ill. App. 39.

Indiana.—Junction R. Co. *v.* Sayers, 28 Ind. 318; Wilson *v.* Peelle, 78 Ind. 384.

Maine.—Allen *v.* Little, 36 Me. 170; Crooker *v.* Jewell, 29 Me. 527.

Massachusetts.—Ladd *v.* Noyes, 137 Mass. 151; Shelton *v.* Codman, 3 Cush. (Mass.) 318; Smith *v.* Richards, 155 Mass. 79.

Nebraska.—Davidson *v.* Cox, 10 Neb. 150.

New Jersey.—Gerzebek *v.* Lord, 33 N. J. L. 240.

New York.—Mirick *v.* Bashford, 38 Barb. (N. Y.) 191.

Pennsylvania.—Dailey *v.* Beck, Bright. (Pa.) 107; Provident L., etc., Co. *v.* Fiss, 147 Pa. St. 232.

South Carolina.—Hammond *v.* Port Royal, etc., R. Co., 16 S. Car. 567.

A covenant for quiet enjoyment, after breach, does not run with the land, and it has been held that a mortgage in fee made subsequent to a breach of the covenant does not prevent the mortgagor from suing on the covenants in his chain of title. Cuthbert *v.* Street, 9 U. C. C. P. 386.

A covenant broken ceases to run with the land. It would not go to the heir for the same reason that it could no longer follow the land into the hands of a devisee or grantee. Beddoe *v.* Wadsworth, 21 Wend. (N. Y.) 123; Markland *v.* Crump, 1 Dev. & B. L. (18 N. Car.) 94, 27 Am. Dec. 230.

An action on a covenant of warranty may be maintained by the person evicted though he has conveyed the land before bringing his action. Clement *v.* Rutland Bank, 61 Vt. 298.

Heir Cannot Sue for Damages Accruing in Lifetime of His Ancestor.—In Frink *v.* Bellis, 33 Ind. 135, 5 Am. Rep. 193, it was held that the heir could not sue on a covenant against incumbrances in a deed to his ancestor when the damages accrued in the lifetime of the ancestor. See also Winningham *v.* Pennock, 36 Mo. App. 688.

Inchoate Dower.—In Walker *v.* Deaver, 5 Mo. App. 136, affirmed in 79 Mo. 664, it was held that an outstanding inchoate right of dower was not such a substantial breach of the covenant against incumbrances as would stop the running of the covenant with the land.

Tax Lien.—In Winningham *v.* Pennock, 36 Mo. App. 688, it was held that the breach of the covenant against incumbrances which will stop the running of the covenant with the land must be a substantial breach, and not merely a nominal one, and that in case of a lien for taxes, which is removed by a subsequent grantee, the covenant runs with the land.

3. Grantee at Time of Breach Proper Plaintiff.—Fairbrother *v.* Griffin, 10 Me. 95; Donnell *v.* Thompson, 10 Me. 174, 25 Am. Dec. 216; Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480; Davidson *v.* Cox, 10 Neb. 150; Chapman *v.* Kimball, 7 Neb. 399; Dailey *v.* Beck, 6 Pa. L. J. 383.

The person who is the owner and in possession at the time of the breach is the proper person to maintain an action upon a covenant of warranty. Richard *v.* Bent, 59 Ill. 38, 14 Am. Rep. 1; Lot *v.* Parish, 1 Litt. (Ky.) 393; Nunnally *v.* White, 3 Metc. (Ky.) 584; Bradford *v.* Long, 4 Bibb (Ky.) 225; Allen *v.* Little, 36 Me. 170; Fairbrother *v.* Griffin, 10 Me. 95; White *v.* Whitney, 3 Met. (Mass.) 81; Chandler

g. WHEN A GRANTOR MAY SUE AFTER ASSIGNMENT — (1) In General. — When the assignment is made before breach and contains no warranty or covenant on which the assignor can be made answerable, the right of action on the covenants made by a previous grantor will vest exclusively in the assignee, and cannot be enforced by the assignor, because in such case the assignor can sustain no loss, as he is as much a stranger to the cause of action as if he had never owned or conveyed the land.¹

(2) *When an Intermediate Grantor May Sue.* — To enable an intermediate grantor to recover for a breach of a covenant which runs with the land, it must appear not only that he is liable to his assignee, but that he has discharged the liability before bringing his action.² But when he has made satisfaction for the breach to his own grantee, then the right of suing the original grantor is in him alone.³

v. Brown, 59 N. H. 372; *Chase v. Weston*, 12 N. H. 413; *Williams v. Wetherbee*, 1 Aik. (Vt.) 233; *Russ v. Steele*, 40 Vt. 310; *Jones v. Richmond*, 88 Va. 231.

For the breach of covenant running with the land, the owner for the time being must sue. *Kane v. Sanger*, 14 Johns. (N. Y.) 89. And he does not lose his right of action by conveying the land before action brought. *Thompson v. Shattuck*, 2 Met. (Mass.) 615.

In *Platt v. Grand Trunk R. Co.*, 11 Ont. Rep. 246, *Proudfoot, J.*, said: "In the case of such covenants as run with the land, where only a formal breach takes place in the life of an intestate, the remedy for damages accruing after his death passes to the heir or devisee; but where not only the breach has taken place, but damages have been incurred in the lifetime of the intestate, the remedy for these damages passes to the personal representative."

Breach After Covenantor's Death — Representative Not Liable. — The personal representative is not liable for the breach of a covenant running with the land which occurred after the decease of the covenantor. *Kershaw v. Supplee*, 1 Rawle (Pa.) 131; *Quain's Appeal*, 22 Pa. St. 510; *Church v. Wells*, 24 Pa. St. 249; *Carr v. Lowry*, 27 Pa. St. 257; *Williams's Appeal*, 47 Pa. St. 283.

1. Grantor's Right to Sue After Assignment. — *Claunch v. Allen*, 12 Ala. 159; *Fairbrother v. Griffin*, 10 Me. 91; *Bickford v. Page*, 2 Mass. 460; *Niles v. Sawtell*, 7 Mass. 444; *Kane v. Sanger*, 14 Johns. (N. Y.) 89; *Keith v. Day*, 15 Vt. 660.

A release by the original covenantor after the title has passed from him to another will not relieve the covenantor from his liability on his covenant. *Middlemore v. Goodale*, Cro. Car. 503.

2. Intermediate Grantor — Connecticut. — *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233.

Georgia. — *Redwine v. Brown*, 10 Ga. 311.

Illinois. — *Claycomb v. Munger*, 51 Ill. 373.

Maine. — *Allen v. Little*, 36 Me. 170.

Massachusetts. — *Wheeler v. Sohler*, 3 Cush. (Mass.) 222.

Missouri. — *Vancourt v. Moore*, 26 Mo. 98.

New Hampshire. — *Chase v. Weston*, 12 N. H. 413.

New York. — *Baxter v. Ryerss*, 13 Barb. (N. Y.) 267; *Suydam v. Jones*, 10 Wend. (N. Y.) 184, 25 Am. Dec. 552; *Withy v. Mumford*, 5 Cow. (N. Y.) 137.

North Carolina. — *Markland v. Crump*, 1 Dev. & B. L. (18 N. Car.) 94, 27 Am. Dec. 230. *Pennsylvania.* — *Le Ray de Chaumont v. Forsythe*, 2 P. & W. (Pa.) 514.

Vermont. — *Smith v. Perry*, 26 Vt. 279.

The assignee of a covenant of warranty and for quiet enjoyment who has been legally damaged by the ouster of his tenant may maintain an action against the original covenantor; but he must first make satisfaction to the party evicted upon his own covenant; until then he has no cause of action. *Baxter v. Ryerss*, 13 Barb. (N. Y.) 267.

Where there have been several conveyances of land with covenants of warranty and an eviction of the last covenantee, an intermediate covenantee who has not been damaged is not entitled to recover against a prior covenantor. *Booth v. Starr*, 1 Conn. 244, 6 Am. Dec. 233.

A judgment in favor of several of the subsequent grantees against the original grantor upon covenants in his deed is a bar to any action by an intermediate grantee. *Brady v. Spurck*, 27 Ill. 478.

3. Intermediate Grantor — Right After Making Satisfaction. — *Williams v. Wetherbee*, 1 Aik. (Vt.) 233; *Russ v. Steele*, 40 Vt. 310.

In *Booth v. Starr*, 1 Conn. 246, 6 Am. Dec. 233, *Swift, J.*, said: "A covenant real is annexed to some estate in land; it runs with the land, and binds not only heirs and executors, but assignees. Every assignee may, for a breach of such covenant, maintain an action against all or any of the prior warrantors, till he has obtained satisfaction. This results from the nature of the covenant; for each covenantor covenants with the covenantee and his assigns; and as the lands are transferable, it was reasonable that covenants annexed to them should be transferred. As every covenantor in the various conveyances becomes liable for a breach of covenant to his covenantee and his assignees, it follows of course that notwithstanding his conveyance of the land, he must, when subjected to pay damages for a breach of the covenant to his covenantee or his assignee, have a right of action for indemnity against his covenantor. This demonstrates that the rights and liabilities of the various parties to a covenant real continue notwithstanding a conveyance of the land to which it is attached; and that any of them can sustain a proper action when injured by a breach of it."

Action by Intermediate Grantor on Covenant Broken when Made. — The fact that a grantee of land has reconveyed it does not defeat his right to maintain an action on the covenant of seizin, where that covenant, if broken at all, was broken when made, and became and was an unassignable chose in action, upon which no one could sue but the grantee or his personal representative;¹ and the same is true in the case of a covenant against incumbrances.²

Two Actions: By Intermediate Grantee on Covenant of Seizin, by Remote Grantee on Warranty. — Hence it may happen that a grantor is liable to a suit by the immediate grantee for a breach of the covenant of seizin, and also to a suit by a remote grantee for a breach of the covenant of warranty, in which case the court should protect his rights by attaching conditions to the judgment or by staying execution.³ In such a case, where the immediate grantee succeeded in his action for a breach of the covenant against incumbrances, the court restricted his recovery to nominal damages, inasmuch as the remote grantee, who was evicted, had a right of action on his covenant of warranty for the recovery of his actual damages.⁴

h. AGAINST SEVERAL WARRANTORS IN THE CHAIN OF TITLE. — The last grantee with warranty may maintain an action against the first or any intermediate warrantor,⁵ and he may bring simultaneous actions against all the warrantors for the breach of a covenant which runs with the land, but he may have only one satisfaction of judgment.⁶

Cumulative Effect of Successive Warranties. — Warranties contained in the instrument by which land is successively conveyed from one party to another will accumulate in the hands of the last taker in whose time the covenants are broken.⁷

But One Who Conveys by Quitclaim is not liable on his covenantor's covenant of warranty.⁸

Tax Deed. — The right of action for a breach of warranty does not pass by a tax deed, as the title it conveys is not derivative, but new and independent, and is derived from the sovereign power under which the tax is levied.⁹

i. IMPOSITION OF BURDENS UPON LAND. — Whenever a covenant relates to land and charges it with a burden, its obligation will bind every subsequent assignee of the land. This is subject only to the qualification that the burden of covenants does not attach to land in the absence of privity of estate; with

The immediate grantee of the warrantor cannot maintain an action on a special covenant of warranty where he has conveyed the land to another before breach of the covenant. *Fairbrother v. Griffin*, 10 Me. 91; *Wheeler v. Sohler*, 3 Cush. (Mass.) 219. But if he has been obliged to settle with his grantee for the breach, he may in turn sue his grantor. *Lane v. Woodruff*, 1 Kan. App. 241; *Niles v. Sawtell*, 7 Mass. 444; *Wheeler v. Sohler*, 3 Cush. (Mass.) 219; *Kern v. Klocke*, 21 Neb. 529.

1. *Clement v. Rutland Bank*, 61 Vt. 298.

2. *Wyman v. Ballard*, 12 Mass. 303.

Mortgage Foreclosed. — In *Guerin v. Smith*, 62 Mich. 369, it was held that the covenant against incumbrances did not run with the land when the incumbrance, a mortgage, had been foreclosed by advertisement and the time for redemption had expired before the conveyance of the land by the grantee.

3. *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95.

4. *Wyman v. Ballard*, 12 Mass. 303.

5. **Last Grantee May Sue Remote Grantor.** — *Lawrence v. Senter*, 4 Sneed (Tenn.) 52.

At common law and under the laws of Texas an evicted purchaser may sue a remote vendor for recovery of his purchase price with-

out first exercising his recourse against his immediate vendor. *Cassidy's Succession*, 40 La. Ann. 827, applying the Texas laws to a deed of lands lying in that state.

6. **Simultaneous Actions Against Prior Warrantors.** — *Wilson v. Taylor*, 9 Ohio St. 595, 75 Am. Dec. 488; *King v. Kerr*, 5 Ohio 154, 22 Am. Dec. 777; *Foote v. Burnet*, 10 Ohio 317, 36 Am. Dec. 90.

7. **Successive Warranties Accumulate for Last Grantee.** — *Redwine v. Brown*, 10 Ga. 311; *Claycomb v. Munger*, 51 Ill. 373; *Hunt v. Orwig*, 17 B. Mon. (Ky.) 73, 66 Am. Dec. 144; *Wheeler v. Sohler*, 3 Cush. (Mass.) 222; *Withy v. Mumford*, 5 Cow. (N. Y.) 137; *Le Ray de Chaumont v. Forsythe*, 2 P. & W. (Pa.) 514; *Clark v. Winchell*, 53 Vt. 408.

8. **Grantor by Quitclaim Deed.** — *Hunt v. Middlesworth*, 44 Mich. 448.

In an action for the purchase money the defense of failure of title cannot be set up if the defendant's deed be but a quitclaim, or contains covenants against the acts of the covenantor. *Barry v. Guild*, 126 Ill. 444; *Niles v. Harmon*, 80 Ill. 396; *Sandford v. Travers*, 40 N. Y. 140.

9. *Bellogs v. Litchfield*, 83 Iowa 36; *Crum v. Cotting*, 22 Iowa 411.

this qualification, the cases show that every right which can arise or be created out of land by a grant or reservation may be made the subject of an appropriate covenant, which will bind the land as well as the parties, and may be enforced by and against subsequent assignees and purchasers. The material points in every such inquiry are whether the parties meant to charge the land, and whether the burden is one that can be imposed consistently with policy and principle.¹

j. **RIGHT TO CLAIM AFTER-ACQUIRED TITLE.** — Where one has made a conveyance of land by a deed containing a covenant of warranty, a title subsequently acquired will be transferred to the grantee, or the grantor and those claiming under him will be estopped from denying it;² and if a quitclaim deed contains a covenant for further assurances, a title subsequently acquired by the grantor will inure to the benefit of the grantee the same as if the deed had contained a covenant of warranty.³ But under a quitclaim deed containing merely a covenant of special warranty against the lawful claims and demands of all persons claiming by, through, or under the grantor, a title or interest subsequently acquired by the grantor does not inure to the benefit of the grantee;⁴ and where one has made a conveyance of land by a deed containing no covenants of warranty, an after-acquired title will not inure to or be transferred to the grantee, nor will the grantor be estopped to set up his title subsequently acquired, unless by doing so he be obliged to deny or contradict some fact alleged in the former conveyance.⁵

k. **GROUND-RENT COVENANTS.** — Where a conveyance in fee contains a stipulation for the payment of ground rent, such covenant is a personal one, and the assignee of the rent cannot maintain an action against the covenantor to enforce the covenant. In such case there exists between the parties neither privity of contract nor privity of estate. The rent is reserved out of the original estate, and is not a rent charge granted by the owner of the fee.⁶ A ground-rent covenant does not survive against executors or administrators, except as to the rents which accrue in the lifetime of the covenantor. Rents which accrue after his death are not payable out of his personal estate.⁷ His personal representative may, however, be sued for breaches of such covenant occurring after his death, but the judgment will be restricted to the land bound by the covenant.⁸

1. *Provident L., etc., Co. v. Fiss*, 147 Pa. St. 236.

See generally, upon this subject, the titles **BUILDING RESTRICTIONS**, etc., vol. 5, p. 2; **EASEMENTS; FENCES; PARTY WALLS; PRIVATE WAYS; WATERCOURSES**. See also *supra*, this title, *Covenants Running with the Land—Covenants Imposing Burdens*.

2. **Subsequently Acquired Title Inures to Grantee.** — *Pike v. Galvin*, 29 Me. 183. See also *Phelps v. Kellogg*, 15 Ill. 131.

A vendor with warranty cannot avoid his warranty by purchasing a paramount title, even though he has the title placed in the name of a third person. *Wheeler v. McBain*, 43 La. Ann. 859.

3. **Quitclaim Deed With Covenant for Further Assurances.** — *Bennett v. Waller*, 23 Ill. 97.

4. **Quitclaim Deed With Special Warranty.** — *Bennett v. Davis*, 90 Me. 457.

5. **Deed Without Covenants — No Estoppel as to After-acquired Title.** — *Pike v. Galvin*, 29 Me. 183 [*overruling Fairbanks v. Williamson*, 7 Me. 96]; *Partridge v. Patten*, 33 Me. 483, 54 Am. Dec. 633; *Loomis v. Pingree*, 43 Me. 314; *Harriman v. Gray*, 49 Me. 537; *Read v. Fogg*, 60 Me. 481; *Bennett v. Davis*, 90 Me. 461.

6. **Assignee of Ground Rent Cannot Enforce.** —

Milnes v. Branch, 5 M. & S. 411; *Randall v. Rigby*, 4 M. & W. 130.

7. **Death of Covenantor — Survival.** — *Quain's Appeal*, 22 Pa. St. 510; *Hunt's Appeals*, 105 Pa. St. 138.

8. **Personal Representative Liable for Breaches in Lifetime.** — *Gardiner v. Painter*, 3 Phila. (Pa.) 365; *Quain's Appeal*, 22 Pa. St. 510; *Williams's Appeal*, 47 Pa. St. 283; *Rushton v. Lippincott*, 119 Pa. St. 20.

Though a covenant in a ground-rent deed is personal on the part of the covenantor, yet as to arrears of rent accruing after his decease, the landlord is restricted to the realty out of which it issues, and is not entitled to payment out of money in the hands of the executors. *Williams's Appeal*, 47 Pa. St. 283.

Where a grantee covenants for himself, his executors and administrators, to pay a rent in fee, an action lies against his personal representative for the rent although the land goes to his heirs. *Van Rensselaer v. Platner*, 2 Johns. Cas. (N. Y.) 17.

In *Scott v. Lunt*, 7 Pet. (U. S.) 596, it was said to be firmly established that on a covenant to pay rent reserved by the deed granting real estate subject to the rent, the personal representatives of the covenantor were liable

7. COVENANTS EXECUTED BY ONE PERSON ON BEHALF OF ANOTHER. —

A principal is bound by the covenants in a deed of land executed by his agent under the authority of a valid power of attorney expressly authorizing him to make them.¹

Persons Executing Covenant Personally Bound. — But as a general rule, a covenant signed and sealed by one person in behalf of another will bind the person executing it, unless he can show a clear intent that it should not, or unless a personal responsibility is expressly excluded.²

Illustrations. — Thus, a guardian is personally liable on his covenants of warranty contained in a deed of his ward's real estate, though it was sold under a license from the probate court.³ and at common law a deed made by a trustee as such will in its warranty clause bind the maker of it personally. As he cannot bind the trust estate, the law will charge him personally with the covenant.⁴ So, also, executors and administrators who sell their decedents' real estate under a license or order of court are personally liable on their covenants of warranty.⁵

m. COVENANTS MADE BY ONE PERSON FOR THE BENEFIT OF ANOTHER. —

Where a covenant is made by one person for the benefit of another, an action at law thereon must be brought in the name of the party to whom the covenant was made, and not in the name of him for whose benefit it was made;⁶ but where the effect of the covenant is to give a beneficial right to a stranger to the contract, he may enforce such right by a suit in equity.⁷

for the nonpayment of the rent after an assignment, although there might also be a good remedy against the assignee.

1. Execution by Agent. — *Le Roy v. Beard*, 8 How. (U. S.) 451; *Bronson v. Coffin*, 118 Mass. 156; *Peters v. Farnsworth*, 15 Vt. 155, 40 Am. Dec. 671.

Covenants of warranty are not binding on the principal, unless the power of attorney expressly authorizes his agent to make them. *Nixon v. Hyserott*, 5 Johns. (N. Y.) 58.

2. Covenants Bind Persons Executing. — *Sterling v. Peet*, 14 Conn. 245.

3. Covenant by Guardian. — *Donahoe v. Emery*, 9 Met. (Mass.) 63.

4. Covenant by Trustee. — *Graves v. Mattingly*, 6 Bush (Ky.) 361; *Taylor v. Holter*, 1 Mont. 688.

A trustee is liable on his covenant if he binds himself personally, even though he describes himself as trustee. *Bloom v. Wolfe*, 50 Iowa 286.

In *Georgia* the common-law rule has been changed by statute, and the trustee is no longer personally liable on his covenants of warranty, unless it be plain from the deed itself that such was the intention of the parties. *Shacklett v. Ransom*, 54 Ga. 353.

5. Covenants by Execution and Administrators. — *Vincent v. Morrison*, 1 Ill. 227; *Aven v. Beckom*, 11 Ga. 2; *Sumner v. Williams*, 8 Mass. 207, 5 Am. Dec. 83; *Porter v. Jeffries*, 40 S. Car. 92.

6. Covenant for Benefit of Another — Action Must Be in Covenantee's Name. — *Stroecker v. Grant*, 16 S. & R. (Pa.) 237.

It is a settled rule that, although a covenant be expressed in the instrument for the benefit of a third person, an action at law can be brought in the name of one of the parties only, and not in the name of such third person. *Tweedle v. Atkinson*, 1 B. & S. 393, 101 E. C. L. 393; *Chesterfield, etc., Colliery Co. v. Hawkins*, 3 H. & C. 690; *Smith v. Emery*, 12

N. J. L. 60; *National Union Bank v. Segur*, 39 N. J. L. 176.

Execution under Assumed Name. — One who, under an assumed name, executes a conveyance of land containing a covenant of warranty, is bound thereby. *Preiss v. Le Poidevin*, 19 Abb. N. Cas. (Brooklyn City Ct.) 123.

Substitution of New Grantee After Delivery. — The substitution of the name of a third person as grantee in a deed after its delivery, although it be done by consent of both grantor and grantee, will not enable such substituted grantee to maintain an action upon the covenants contained in the deed. *Hilmert v. Christian*, 29 Wis. 104.

Effect of Mortgage as Assignment of Covenant. — Where a grantee of land with covenant of warranty mortgages the land, he thereby assigns the covenant, to the extent of the sum due on the mortgage; and if he is afterwards evicted, and sues on the covenant, this sum shall be deducted from his damages. *Tufts v. Adams*, 8 Pick. (Mass.) 547.

Life Estate with Remainder — All Entitled to Remedy Must Join. — Where the title which the covenant was intended to assure became vested in one for life, with remainder to his children, the covenant being single, all those entitled to the remedy upon it must join in the action. *McClure v. Gamble*, 27 Pa. St. 288.

Devises of Grantee — Joinder Against Grantor. — The devisees of different portions of a tract of land who have been evicted by one having a paramount title may join in an action against the heirs of their devisors' grantor. *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480.

7. Beneficial Right in Third Party — Enforcement in Equity. — *In re Empress Engineering Co.*, 16 Ch. Div. 125; *Touche v. Metropolitan R. Warehousing Co.*, L. R. 6 Ch. 671; *Gandy v. Gandy*, 30 Ch. Div. 57; *Moot v. Gibson*, 21 Ont. Rep. 248.

II. REFORMATION OF DEED BEFORE BRINGING ACTION AT LAW.—Where, in the progress of negotiations for the sale of land, it is staked out by the vendor on what are believed to be the true lines, but through mistake there is an encroachment on the land of an adjoining owner, and the deed of conveyance describes the land as bounded by the lines of such adjoining owner, the vendee or those claiming under him may apply to a court of equity to have the deed reformed so as to correspond to the lines as pointed out, in order that an action at law may be brought to recover damages for a breach of the covenant of warranty.¹

o. DIVISIBILITY OF COVENANTS.—Covenants running with the land are susceptible of division, so that if the land be conveyed in parcels to several persons each grantee may maintain an action upon the covenants to recover for the land in which he has an interest.² And in such a case each grantee is exclusively liable for a breach of any covenant which relates to his part alone.³

p. ASSIGNEE SUCCEEDS ONLY TO POSITION OF COVENANTEE.—The assignee cannot maintain an action on a covenant by the original covenantor where by reason of matter apparent of record in his chain of title the grantee himself could not have recovered. The assignee occupies no better position than the covenantee through whom he claims.⁴ He stands as successor to the original covenantee, and takes the original covenant with all its manifest infirmities.⁵

2. Heirs—**a. LIABILITY**—**Bound Only So Far as Assets Descend.**—The heir is liable on his ancestor's covenants of warranty so far, and so far only, as assets have descended to him from the ancestor's estate.⁶

1. Right to Reformation of Deed to Maintain Action on Covenants.—*Butler v. Barnes*, 60 Conn. 170; *Broadway v. Buxton*, 43 Conn. 282. See also *Bush v. Hicks*, 60 N. Y. 298.

2. When Covenants Divisible.—*Badeley v. Vigurs*, 4 El. & Bl. 71, 82 E. C. L. 71; *Schofield v. Iowa Homestead Co.*, 32 Iowa 321, 7 Am. Rep. 197; *Kane v. Sanger*, 14 Johns. (N. Y.) 89; *Johnson v. Blydenburgh*, 31 N. Y. 427; *Williams v. Beeman*, 2 Dev. L. (13 N. Car.) 483; *McClure v. Gamble*, 27 Pa. St. 288; *Mette v. Dow*, 9 Lea (Tenn.) 93; *Whitzman v. Hirsh*, 87 Tenn. 513. See also *Fields v. Squires*, 9 Fed. Cas. No. 4, 776; *Mischke v. Baughn*, 52 Iowa 528; *Dougherty v. Duvall*, 9 B. Mon. (Ky.) 57; *Jackson v. Turner*, 5 Leigh (Va.) 119.

Where a mortgage upon a tract of land to secure payment of a sum of money at certain dates contained an agreement that the mortgagor should plat the land into one hundred lots of uniform size, and that the mortgagee should release any of the lots, when thus platted, upon payment of a specified sum for each lot, and the mortgage also contained the usual condition that in case of default in any of the covenants or conditions of the mortgage, the mortgagee might sell the premises, and out of the proceeds retain the amount due on the mortgage, it was held that the covenant as to partial releases ran with the land and inured to the benefit of the grantee of the mortgagor who purchased one of the lots into which the land was platted, and that the right to a release was not terminated by a default in the payment of the sum secured by the mortgage, but continued in force until the mortgagee had fully executed the power by the sale of the mortgaged premises. *Vawter v. Crofts*, 41 Minn. 14.

In *Keyes v. O'Brien*, 20 U. C. Q. B. 12, it was held that an assignee of part of the land conveyed by a deed containing a covenant of seizin could sue upon the covenant and recover damages in proportion to his interest.

Grantee of Life Estate.—In *Clark v. Robertson*, 8 U. C. Q. B. 370, it was held that it was only the assignee of the fee who could represent the covenantee, and that therefore the devisee of a life estate could not sue on the covenant.

3. Astor v. Miller, 2 Paige (N. Y.) 68.

4. Silverman v. Loomis, 104 Ill. 137.

5. Assignee Succeeds to Covenantor's Rights Only.—*Abbott v. Hills*, 158 Mass. 397; *Norcross v. James*, 140 Mass. 188. See also *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277; *Goodell v. Bennett*, 22 Wis. 505.

But the assignee is not affected by any latent equities existing between the original parties. *Suydam v. Jones*, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552.

6. Heir Liable Only to Extent of Assets.—*Buckle v. Nightingale*, 1 Stra. 665; *Brook v. Bulkeley*, 2 Ves. 498; *Jones v. Franklin*, 30 Ark. 631; *Blair v. Allen*, 55 Ind. 409.

Lands Descended in Another State are not assets in the state of *Massachusetts* by which the heir of a covenantor may be charged. *Austin v. Gage*, 9 Mass. 395.

Receipt of Personalty under Will Probated in Another State.—And the receipt of personal property under the will of the warrantor admitted to probate in another state will not cast the burden of the covenant upon the heir. *Julian v. Boston*, etc., R. Co., 128 Mass. 555.

Covenantor's Personal Estate Exonerates Heirs.—The heirs and devisees of the covenantor to whom lands of the decedent have passed by descent or devise are not liable on the decedent's covenants.

Heirs of Heirs Bound. — And a covenant which runs with the land and binds the heirs binds also the heirs of heirs, and so *ad infinitum*.¹

Claim for Covenant Broken — Presentation in Administration. — Where the lands as well as the personal property of a deceased person are liable for his debts, a claim for damages for a breach of the decedent's covenants should, if possible, be presented in the course of administration; and it seems that no personal action will lie against the heirs, in such case, unless an administration has been taken out and a breach has occurred after the estate has been settled.²

b. RIGHT TO ENFORCE — Breach After Covenantor's Death — Heirs May Sue. — The heirs of a covenantor have a right to the benefit of a covenant running with the land of their ancestor, and may maintain an action for a breach thereof which occurs after his death.³

dent's covenants where his personal estate is sufficient to pay his liabilities. *Woods v. Ely*, 7 S. Dak. 471.

Both Heir and Representative Bound. — The covenant of warranty is a covenant real which binds the heir in regard to assets real by descent, and the administrator in regard to personal assets. *Booth v. Starr*, 5 Day (Conn.) 275, 5 Am. Dec. 149; *Mitchell v. Warner*, 5 Conn. 517.

Heirs Jointly Liable. — The heirs of a covenantor are jointly liable in an action brought against them on the covenant, and a verdict against them should be *in solido*. *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480.

Heirs with Assets Precluded from Claiming Land. — While in the *United States* personal covenants of warranty in deeds, enforceable only in covenant and sounding in damages, have superseded the warranty of the common law, yet such covenants, in analogy to the ancient rule respecting warranties under similar circumstances, preclude the heirs of the grantor who hold assets equal in value by reason of inheritance from the warranting ancestor, from claiming the land. *Carson v. New Bellevue Cemetery Co.*, 104 Pa. St. 575.

Whether Covenantor Must Covenant for Heirs. — After the death of a covenantor the heirs are not liable for a breach of covenant of warranty unless the deceased expressly covenanted that they should be bound. *McDonald v. McElroy*, 60 Cal. 496.

But see *Morse v. Aldrich*, 19 Pick. (Mass.) 449, where the court, after alluding to the common-law doctrine that the heir is not bound by the covenant of his ancestor unless it be stipulated by the terms of the covenant that it shall be performed by the heir, added: "But this principle is not to be applied to real covenants running with the land granted or demised, and to which the covenants are attached for the purpose of securing to the one party the full benefit of the grant or demise, or to the other party the consideration on which the grant or demise was made. Such covenants are said to be inherent in the land, and will bind the heir or the assignee though not named. For, as he is entitled to all the advantages arising from the grant or demise, it is but reasonable that he should sustain all such burdens as are annexed to the land."

Original Grantor with Special Warranty — Intermediate Grantor with General Warranty. — Where one conveys land with special warranty against his own acts and those of his heirs only, and his grantee afterwards reconveys

with general warranty, the covenants do not cancel each other, and the heirs and personal representatives of the general warrantor will be liable for any breach not embraced in the special warranty of their decedent's grantor, to whom the land was afterwards reconveyed. *Carter v. Long*, 114 N. Car. 187.

1. *Crocker v. Smith*, 10 Ill. App. 376; *Merrill v. Atkin*, 59 Ill. 19.

2. **Heirs Not Liable But Upon Failure of Remedy Against Representatives.** — In *Russ v. Alpaugh*, 118 Mass. 378, 19 Am. Rep. 464, Gray, C. J., said: "By the law of England the grantor was liable to an action on his express covenants, at least when his liability on the warranty was not an adequate remedy. 30 and 31 Edw. I., 255, 257; Rawle on Covenants, 206-210, and notes. And the heir was liable to a personal action on the covenants of his ancestor so far, though so far only, as assets descended from the one to the other. *Buckley v. Nightingale*, 1 Stra. 665; *Brook v. Bulkeley*, 2 Ves. 499; 2 Black. Com. 243. By the law of this commonwealth the lands, as well as the personal property, of a deceased person are liable for his debts, and the remedy of the creditors must ordinarily be sought by action against his executor or administrator, and sale of the real estate, if necessary, under license of court; and the heirs are not liable to a personal action upon his covenants, even if they have received assets, unless administration has been taken out and a breach occurs after the estate has been settled. *Royce v. Burrell*, 12 Mass. 395; *Hall v. Bumstead*, 20 Pick. (Mass.) 2." See also *Julian v. Boston*, etc., R. Co., 128 Mass. 556.

3. **Heirs May Sue for Breach After Covenantor's Death.** — *Robbins v. Webb*, 68 Ala. 393; *Beebe v. Swartwout*, 8 Ill. 162; *Wright v. Nipple*, 92 Ind. 310; *Jones v. Bigstaff*, 95 Ky. 395, 44 Am. St. Rep. 245; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Cincinnati v. Springer*, 23 Cinc. Wkly. L. Bul. 250; *Paul v. Witman*, 3 W. & S. (Pa.) 407; *Dunbar v. Jumper*, 2 Yeates (Pa.) 74; *Shields v. Delo*, 145 Pa. St. 393; *McLaughlin v. Collins*, 138 Pa. St. 198.

A covenant of warranty may be enforced by the assignee or his heirs. *Withy v. Mumford*, 5 Cow. (N. Y.) 137; *Suydam v. Jones*, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552.

The heirs of a covenantor who have been illegally evicted may maintain an action against the remote grantor on the covenant of warranty. *Preiss v. Le Poidevin*, 19 Abb. N. Cas. (Brooklyn City Ct.) 123.

The covenant for quiet enjoyment descends

3. Married Women — a. IN GENERAL. — A married woman is bound by covenants of title only in conveyances of her separate property.¹ Where she joins her husband in a conveyance of his land merely to bar her dower right or to release her homestead right, she is not bound by the covenants in the deed.²

b. IN CONVEYANCE OF HUSBAND'S PROPERTY. — Where a wife joins her husband in a deed of his land, she is not a party to the deed, except for the purpose of releasing her dower in the estate conveyed, and she is not estopped by the covenants in the deed from setting up a subsequent title acquired by her own means.³

Conveyance to Vendee's Wife Without Her Consent. — And where a vendee of land has

to the heirs. *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Heath v. Whidden*, 24 Me. 383; *Carter v. Denman*, 23 N. J. L. 260; *Markland v. Crump*, 1 Dev. & B. L. (18 N. Car.) 94, 27 Am. Dec. 230.

And the same is true of a covenant of warranty. *Cassidy's Succession*, 40 La. Ann. 827; *Hopkins v. Lane*, 9 Yerg. (Tenn.) 79; *Marbury v. Thornton*, 82 Va. 702.

The heir, and not the personal representative of the deceased covenantee, may enforce a covenant to convey land. *Thrower v. McIntire*, 4 Dev. & B. L. (20 N. Car.) 359, 34 Am. Dec. 382.

The heir may maintain an action for a breach of the covenant for further assurances made with his ancestor. *Jones v. King*, 4 M. & S. 188.

If a covenant real be broken in the lifetime of the obligee, his personal representative may maintain an action thereon. *Abney v. Brownlee*, 2 Bibb (Ky.) 170; *Hatcher v. Galloway*, 2 Bibb (Ky.) 180. But if a breach does not occur until after his death, the right of action will belong to his heirs. *Abney v. Brownlee*, 2 Bibb (Ky.) 170; *Hatcher v. Galloway*, 2 Bibb (Ky.) 180.

In a grant of land necessary to a mill, a covenant by the grantee to yield and pay to the grantor and the lawful heirs of his body the privilege of grinding certain grain in the mill, toll free, is a covenant which runs with the land and may be enforced by the heirs after the death of the grantor. *Dunbar v. Jumper*, 2 Yeates (Pa.) 74.

Where one of several joint devisees loses by a paramount title a part of the estate devised, he is entitled to contribution from the other devisees, and this implied warranty of title passes to his heir; but it does not pass to one to whom he sells the devised land, and therefore, where such a purchaser loses the land by a paramount title, he cannot look to his vendor's codevisees for contribution. *Jones v. Bigstaff*, 95 Ky. 395, 44 Am. St. Rep. 245.

1. Married Woman Bound by Covenants in Conveyance of Separate Property. — *Miller v. Miller*, 140 Ind. 174.

Where the wife joins with her husband in the deed of the fee of land of which she is in whole or in part the owner, she conveys all of her interest therein; but she can only be held liable on her covenants in such deed to the extent of her interest in the land conveyed. *Heinmiller v. Hatheway*, 60 Mich. 391.

Where a married woman, having a separate estate as tenant in common with the complainant, made voluntary partition of the land, and executed a partition deed, in which her husband did not join, and in which she agreed to

warrant and defend the title to the property set apart to the complainant against her own acts and those of the persons under whom she claimed, and the covenant was broken after her death, it was held that the covenant could not be enforced in a legal proceeding, but that in equity it might be enforced against the residue of her separate estate which she then owned and which had descended to her heirs. *Barlow v. Delany*, 36 Fed. Rep. 577, 40 Fed. Rep. 97 (decided under statute of *Missouri*).

A wife who joins with her husband in a warranty deed of his land, the sole consideration for which is the conveyance to her of other land, is jointly liable with him for a breach of the covenants in said deed. *Arthur v. Caverly*, 98 Mich. 82.

Covenant does not lie against a married woman upon the words "grant, bargain, and sell," in a conveyance by herself and husband of her separate property. *Hardy v. Mills*, 13 W. N. C. (Pa.) 79.

2. Wife Joining in Conveyance to Bar Dower. — *Strawn v. Strawn*, 50 Ill. 33; *Huvey v. Smith*, 22 Mich. 170; *Kitchell v. Mudgett*, 37 Mich. 81; *Carley v. Fox*, 38 Mich. 387; *Dun v. Dietrich*, 3 N. Dak. 3; *Freiberg v. De Lamar*, 7 Tex. Civ. App. 263; *Baird v. Patillo*, (Tex. Civ. App. 1894) 24 S. W. Rep. 813.

Where a wife joins her husband in a fraudulent conveyance of his land, she is not bound by the covenant, nor deprived of her interest in the land as a widow after the conveyance has been adjudged fraudulent. *Miller v. Miller*, 140 Ind. 174; *Whitney v. Marshall*, 138 Ind. 472; *Mattill v. Baas*, 89 Ind. 220; *Ketchum v. Schickelanz*, 73 Ind. 137.

Where a husband has a freehold estate in the land of his wife, and joins her in a deed with a covenant of general warranty, the husband is bound thereby, and the wife is not. *Sine v. Fox*, 33 W. Va. 521.

Under the statutes in force in *Illinois* in 1868, a deed made by a married woman with covenants of warranty had no more force or effect to bind her or her heirs than a quitclaim deed. Such a deed would pass whatever title she had in the lands conveyed, but neither she nor her heirs could be held liable upon any covenants contained in the deed. *Botsford v. Wilson*, 75 Ill. 132.

3. Wife Joining to Bar Dower May Set Up Subsequently Acquired Title. — *Gonzales v. Hukil*, 49 Ala. 260, 20 Am. Rep. 282; *Blain v. Harrison*, 11 Ill. 384; *Strawn v. Strawn*, 50 Ill. 38; *Snoddy v. Leavitt*, 105 Ind. 357; *Miller v. Miller*, 140 Ind. 174; *Raymond v. Holden*, 2 Cush. (Mass.) 270; *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378.

a conveyance made to his wife without her knowledge or consent, she is not bound by the covenants contained in the deed.¹

4. Remaindermen Not Bound by Covenants of Life Tenants. — Where a tenant for life assumes to convey the estate in fee simple with covenants of warranty, the remaindermen are not bound by the covenants, though they are the heirs of the grantor. In such case they do not derive their title by descent from the owner of the life estate; they take by purchase.² Thus, where an estate for years is terminated by the death of the lessor, who is a tenant for life, the remaindermen are not bound by a covenant for quiet enjoyment contained in the lease, though they are the children of the life tenant. They take by purchase and not by descent.³

Where Heir of Life Tenant Not Remainderman. — But the heir of the life tenant is bound by the warranty unless he can in some way connect himself with the outstanding remainder or reversion.⁴ Thus where, after conveyance in fee simple by the life tenant, the remainderman dies, leaving the life tenant his sole heir, the heirs of the life tenant are barred by his warranty, for they claim by descent from him and not from the remainderman.⁵

1. Conveyance to Vendee's Wife Without Her Consent. — An assumption of a mortgage contained in a deed made to a married woman without her knowledge or consent, and never delivered to her, does not bind her. *Culver v. Badger*, 29 N. J. Eq. 74.

Although a married woman may enter into engagements in respect to her separate property, there is nothing in the marital relation which authorizes a husband without his wife's knowledge or assent in this way to create an estate in her and charge her personally with covenants in respect to it, of the very existence of which she remains in ignorance. *Munson v. Dyett*, 56 How. Pr. (N. Y. Supreme Ct.) 333.

Where a mortgage for a loan by a husband is placed in the wife's name without her knowledge, and subsequently the wife, at the request of the husband, assigns the mortgage to one who knows that the wife has no interest in it or in the money loaned, there is no warranty of title upon which the wife may be held liable if the mortgage fails. *Moore v. Joyce*, 161 Pa. St. 138.

2. Covenant by Life Tenant — Remainderman Not Bound. — All warranties made by a tenant for life, descending or coming to any person in remainder or reversion, are void and of no effect. Stat. 4 Anne, c. 16, § 21. See also *Moore v. Parker*, 12 Ired. L. (34 N. Car.) 129; *Flynn v. Williams*, 1 Ired. L. (23 N. Car.) 513.

A suit to enforce a deed in fee simple made by the owner of a life estate cannot be maintained against the remaindermen, although they are the heirs of the grantor and the conveyance by the latter contained covenants of general and special warranty. In such case the remaindermen do not derive their title from the owner of the life estate, either by descent or purchase. *Barlow v. Delaney*, 86 Mo. 583; *Foot v. Clark*, 102 Mo. 394; *Chauvin v. Wagner*, 18 Mo. 531.

In *Nicholson v. Hemsley*, 3 Har. & M. (Md.) 409, it was held that where a husband and wife conveyed land of which the wife was seized as tenant in tail by a deed of general warranty, such covenant of warranty did not bind the wife or her heirs, notwithstanding the inheritance by the heirs of real estate from the warrantor.

In *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480, it appeared that land was devised to a married woman for life, with a limitation over to her child if one should be born alive. Subsequently the life tenant and her husband conveyed the land in fee with covenants of warranty, and her son, after reaching his majority, was successful in ejectment against their remote grantees, though he was *en ventre sa mere* at the time his parents conveyed the land.

A deed from a father with full covenants of warranty does not bar, estop, or rebut his heirs, even to the extent of assets received by descent from him, to assert against the grantee an independent title derived by inheritance from their mother, unless, perhaps, when administration has been taken out upon his estate, a breach of the covenant occurred after his estate had been settled. *Russ v. Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464.

Rule Changed by Statute. — But in *Kentucky* it is provided by statute that if the claimant has received any estate, real or personal, by gift, advancement, devise, descent, or distribution from the vendor, such claimant shall be barred of recovery to the extent of the value of the estate so derived. *Gudgell v. Tydings*, (Ky. 1889) 10 S. W. Rep. 466.

3. Coakley v. Chamberlain, 38 How. Pr. (N. Y. Super. Ct.) 483.

4. Southerland v. Stout, 68 N. Car. 446.

5. Where Heirs of Life Tenant Claim by Descent from Heir. — In *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297, it appeared that the life tenant during the lifetime of the remainderman conveyed the estate by deed in fee simple, and that the remainderman, who was his son, died during the lifetime of the life tenant, and it was held that the grantor and those claiming under him were estopped by this deed. The court said: "The principle deducible from these authorities seems to be, that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms

Covenants by Heir Apparent. — A release with covenants of warranty by an heir apparent of his estate in expectancy will bar his claim by descent upon the death of his ancestor;¹ but where one conveys by warranty deed his interest in his ancestor's land, and dies before the death of his ancestor, his covenants are not binding on his heirs in respect to such land, because they do not inherit it from him, but directly from the remote ancestor;² though it has been held that a covenant by an heir expectant that he will convey the estate which shall come to him by descent or otherwise is valid, if made with the consent of the ancestor and for a sufficient consideration, and without any advantage being taken of the covenantor.³

VI. RELEASE AND DISCHARGE OF LIABILITY ON COVENANTS — 1. **Discharge by Express Agreement** — *a.* **IN GENERAL.** — The liability of the covenantor on the covenants in his deed, being based on a contractual obligation, may, of course, be discharged by a proper agreement between the parties; and therefore the covenantee may, while he is still the owner of the land, release the covenantor from all liability on the covenants, though the covenants are such as run with the land.⁴ §

or by necessary implication — the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title as between parties and privies. The reason is that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it."

1. **Release by Heir Apparent with Warranty Binding.** — *Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651; *Trull v. Eastman*, 3 Met. (Mass.) 121, 37 Am. Dec. 126.

2. **Where Heir After Warranting Dies Before Ancestor.** — *Abbig v. Dodge*, 127 Ind. 31; *Jerauld v. Dodge*, 127 Ind. 600, 25 N. E. Rep. 186.

And where a testator devised his land to his wife for life, with a limitation over to his sons in fee, and, if any of the sons should die leaving lawful issue before the death of their mother, said issue should take the deceased father's share, and one of the contingent remaindermen conveyed his interest in the land, with covenants of general warranty, and died before his mother's death, it was held that his issue were not bound by the covenant, because they took by purchase, and not by descent. *Whitesides v. Cooper*, 115 N. Car. 576.

3. **Covenant to Convey by Heir with Ancestor's Consent.** — *Fitch v. Fitch*, 8 Pick. (Mass.) 480; *Trull v. Eastman*, 3 Met. (Mass.) 123, 37 Am. Dec. 126.

4. **Release by Covenantee while Owner of the Land** — *Connecticut.* — *Clark v. Johnson*, 5 Day (Conn.) 373.

Georgia. — *Martin v. Gordon*, 24 Ga. 535.

Maine. — *Littlefield v. Getchell*, 32 Me. 390; *Brown v. Staples*, 28 Me. 503, 48 Am. Dec. 504, citing with approval *Middlemore v. Goodale*, Cro. Car. 503.

Mississippi. — *Cooper v. Granberry*, 33 Miss. 117.

New Hampshire. — *Sargent v. Gutterson*, 13 N. H. 473.

New York. — *Van Hoesen v. Benham*, 15 Wend. (N. Y.) 164; *Cunningham v. Knight*, 1 Barb. (N. Y.) 405.

Pennsylvania. — *Rhines v. Baird*, 41 Pa. St. 256; *Susquehanna, etc., R., etc., Co. v. Quick*, 61 Pa. St. 339.

Tennessee. — *Pile v. Benham*, 3 Hayw. (Tenn.) 176.

See, however, *Abby v. Goodrich*, 3 Day (Conn.) 433, wherein it was held that a release by the grantee or his assigns does not release the grantor from liability on covenants which run with the land so as to render him a competent witness in an action by the former against a third person involving the title to the land. This case was overruled by *Clark v. Johnson*, 5 Day (Conn.) 373.

Release by Remote Grantee. — In *Cunningham v. Knight*, 1 Barb. (N. Y.) 405, the court said that a release by a remote grantee, under a deed with covenants of warranty, would release the original grantor from liability on his covenant. In this case the objection was raised that such a release would not relieve the grantor of such remote grantee from liability on his covenants, and therefore would not release the original grantor from liability to the grantor of the remote grantee. But the court said that the release would be a defense of which the grantor of the remote grantee could avail himself in an action by such remote grantee.

Release by Husband of Covenants in Deed to Wife. — In *Ford v. Walsworth*, 19 Wend. (N. Y.) 334, it was held that the husband could release the grantor in a deed with covenant of quiet enjoyment to the wife, from liability on a breach of the covenant which occurred during the life of the husband. In this case it was said, however, that the release might leave the grantor open to the operation of his covenants in case of breach after the death of the husband.

Construction of Release. — In *White v. Furtzwangler*, 81 Ga. 66, the defendant conveyed land with an irrigation ditch to the plaintiff, with covenants of warranty. Afterwards the plaintiff released the warranty in so far as it concerned the irrigation ditch, stipulating, however, that he held the vendor liable in case

Recording Release.—Where the covenantee, while the owner of the land, releases the covenants in the deed of his grantor, it has been held not to be necessary in order to protect the grantor against an action by a subsequent grantee that the release be recorded.¹

Covenantee Cannot Release After Conveyance.—If the covenant is not annulled or discharged while the covenantee is the owner of the land, and passes with the land to the grantee of the covenantee, it cannot be discharged by the former unless he has been called upon and has paid damages to his grantee for breach of his own covenants.²

b. FORM OF DISCHARGE—(1) *General Rule.*—It is a rule of the common law that a contract under seal can only be released or discharged by an instrument of equal dignity; *unumquodque dissolvitur eodem ligamine quo ligatur.*³ This rule has been applied to the covenants in a deed, and it is consequently held that such covenants cannot be released or discharged by an instrument not under seal.⁴

Covenant Broken.—After the covenant has been broken, however, a distinction is made in some cases, and it is held that it is not necessary that the agreement be under seal to discharge the cause of action.⁵

(2) *Executed Agreement Acted Upon.*—Where the parol agreement for the discharge of the covenant has been acted upon by the parties, so that it would

he was deprived of the use of the ditch by a certain corporation. It was held that the defendant was not liable where the plaintiff was deprived of the use of the ditch by one not a stockholder of the corporation.

1. Recording Release.—In *Littlefield v. Getchell*, 32 Me. 390, wherein it was held that it was not necessary to record the release, Shepley, C. J., said: "The registry of conveyances was designed to exhibit the titles to real estate; not the rights of action which grantees might acquire by the covenants contained in the deeds of conveyance." See also *Pile v. Benham*, 3 Hayw. (Tenn.) 176.

Release Subject of Record.—In *Susquehanna, etc., R., etc., Co. v. Quick*, 61 Pa. St. 339, it was held that a release of the covenants in a deed was the subject of record as a deed concerning land. In this case the court said that perhaps it might be important that the release should be recorded to protect the warrantor against the suit of a subsequent purchaser without actual notice of the release.

2. Effect of Conveyance by Covenantee on His Right to Release the Covenant.—*Brown v. Staples*, 28 Me. 503, 48 Am. Dec. 504; *Crooker v. Jewell*, 29 Me. 530; *Chase v. Weston*, 12 N. H. 413.

Covenant of Seizin.—In those jurisdictions in which it is held that the covenant of seizin does not run with the land, the covenantee may, of course, even after he has conveyed the land, release the covenantor from liability on such covenant. *Prescott v. Hobbs*, 30 Me. 345.

3. See the title **RELEASE**.

4. Release of Covenant Must Be Sealed.—*West v. Blakeway*, 2 M. & G. 729, 40 E. C. L. 598; *Brown v. Staples*, 28 Me. 503, 48 Am. Dec. 504; *Suydam v. Jones*, 10 Wend. (N. Y.) 184, 25 Am. Dec. 552.

Covenant for Further Assurances.—In *Kaye v. Waghorne*, 1 Taunt. 428, it was held, in an action on a covenant for further assurances, that accord and satisfaction, made before breach of the covenant, could not be pleaded in bar of the action on the covenant. See also

the title **ACCORD AND SATISFACTION**, vol. I, p. 409.

Covenant Against Incumbrances.—In *Heath v. Whidden*, 29 Me. 108, it was held that a receipt not under seal, though in full of all demands, will not discharge the liability on a covenant against incumbrances, as to which there had been merely a nominal breach, by reason of an outstanding incumbrance.

Covenant to Pay Purchase Money.—In *Kendal v. Talbot*, 1 A. K. Marsh. (Ky.) 321, it was held that a covenant to pay the purchase money, without stating the time of payment, is a contract for immediate payment, and that a defeasance modifying the manner of payment must, to be operative, be of equal dignity.

Agreement for Arbitration.—A mere agreement to decide by arbitration a controversy arising out of breach of the covenants of warranty in a deed is no bar to an action therefor, as no one can effectually waive his right to have his suit determined by the courts. *Bozeman v. Gilbert*, 1 Ala. 90.

5. Covenants Broken.—*May v. Taylor*, 6 M. & G. 262, note *a*, 46 E. C. L. 262, note *a*; *Suydam v. Jones*, 10 Wend. (N. Y.) 184, 25 Am. Dec. 552, citing *Snow v. Franklyn*, 1 Lutw. 358. See, however, *Kendal v. Talbot*, 1 A. K. Marsh. (Ky.) 321.

Accord and Satisfaction—What Constitutes.—In *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201, where land conveyed with covenants against incumbrances was subject to a lease at an annual rent of five hundred and seventy-five dollars, it was held that an accord and satisfaction for a breach of the covenant by reason thereof was not sufficiently shown by the fact that at the time of the conveyance the grantee made a mortgage of the estate to secure the payment of ten thousand five hundred dollars, with interest at the rate of five and one-half per cent, and that the grantor at the same time gave to the grantee a written stipulation that until the expiration of the lease the interest on the mortgage should be only five hundred and twenty dollars annually.

be inequitable to enforce the covenant against the covenantor, the covenant will in equity be held to have been discharged.¹

Effect upon Subsequent Grantees. — Such an executed parol transaction will be an effective bar against subsequent grantees with actual or constructive notice,² but is not binding on subsequent grantees without notice.³

2. Discharge by Operation of Law — *a. ESTATE REVESTING IN COVENANTOR* — (1) *In General.* — Where the covenants run with the land, and before a breach thereof the estate reverts in the covenantor, the covenants are discharged.⁴ And the covenants are not revived by a new conveyance.⁵

(2) *Covenants Broken.* — But where the estate does not revert in the covenantor until after the covenants have been broken, he is not discharged from liability on his covenants;⁶ and therefore a reconveyance of the land by the grantee to the grantor without covenants will not prevent his recovery for a breach of the covenant of seizin contained in the conveyance of the premises to him.⁷

1. Executed Parol Agreement. — In *Drury v. Tremont Imp. Co.*, 13 Allen (Mass.) 168, the owner of a large tract of land subject to a mortgage conveyed a portion of the land with covenants of warranty against the mortgage. Afterwards, an offer by the grantee to purchase the residue at a stated price and to assume the mortgage debt was accepted, and a deed executed in which the consideration named was simply the value of the equity of redemption. It was held that though the transaction was not a technical release of the covenant in the first deed, it should be treated as such in equity. See also *Reed v. McGrew*, 5 Ohio 381.

Surrender of Purchase-money Notes to Extent of Incumbrance. — In *Hardin v. Clark*, 32 S. Car. 480, it was held, where the grantor, in a deed with covenants of warranty and against incumbrances, surrenders purchase-money notes to the grantee, to the extent of an outstanding incumbrance, under an agreement that the grantee would discharge the incumbrance, the former redeemed his covenants of warranty to the latter as effectually as if he had paid up the incumbrance; and if the latter diverted the funds furnished him for the purpose of paying the incumbrance, and applied them to his own use, he could not take advantage of his own wrong and hold the grantor liable for any loss incurred by reason of his failure to apply the funds in accordance with the agreement by which he was allowed to retain a portion of the purchase money.

2. Subsequent Grantees with Notice. — *Hardin v. Clark*, 32 S. Car. 480. See, however, *Brown v. Staples*, 28 Me. 497, 48 Am. Dec. 504.

Constructive Notice — What Constitutes — Effect. — In *Hardin v. Clark*, 32 S. Car. 480, it was held that where purchase-money notes are surrendered to the grantee, under an agreement that he should discharge a judgment lien on the property, which constituted a breach of the covenants in the deed, the mere existence of the judgment was constructive notice of the judgment to a subsequent grantee, and of the discharge of the covenant of the original grantor by surrender of the purchase-money notes, so as to render such discharge binding upon him. See, however, *Suydam v. Jones*, 10 Wend. (N. Y.) 181, 25 Am. Dec. 552.

3. Subsequent Grantees Without Notice. — *Ill-*

nois Land, etc., Co. v. Bonner, 91 Ill. 114; *Alexander v. Schreiber*, 13 Mo. 271; *Suydam v. Jones*, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552.

4. Estate Revesting in Covenantor. — *Stevens v. Winship*, 1 Pick. (Mass.) 328, 11 Am. Dec. 178; *Waterbury v. Head*, (Supreme Ct.) 12 N. Y. St. Rep. 361.

Coke, in his Commentaries on Littleton, § 743, says: "When the uncle [the warrantor in the case put] taketh back as large an estate as he had made, the warranty is defeated, because he cannot warrant land to himself."

In *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277, land was conveyed with a general covenant of warranty, and the grantee executed a deed of trust to secure the purchase money. The trustee under the power of sale contained in the deed of trust sold the land and reconveyed to the grantor before breach of the covenants. It was held that the grantor having before any breach of his covenant become re-vested with the estate which he had conveyed, his liability on the covenants was extinguished, and was not revived by a subsequent quitclaim deed thereof to the original grantee.

In *Goodell v. Bennett*, 22 Wis. 565, it was held that where land is conveyed with covenants, and is afterwards ceded by the grantee to the United States, from whom it is repurchased by the grantor, the covenants are extinguished and cannot be set up as an estoppel against the grantor.

Reconveyance by Way of Mortgage, however, does not release or discharge the grantor from liability on his covenants, as the grantor must be reinvested with the same estate that he conveyed. *King v. Kilbride*, 58 Conn. 109; *Resser v. Carney*, 52 Minn. 397; *Lot v. Thomas*, 2 N. J. L. 386.

5. Reconveyance Does Not Revive Covenants. — *Brown v. Metz*, 33 Ill. 339, 85 Am. Dec. 277; *Waterbury v. Head*, (Supreme Ct.) 12 N. Y. St. Rep. 361.

6. Foreclosure of Purchase-money Mortgage. — The purchase by the covenantor on foreclosure of the purchase-money mortgage, and the non-redemption by the covenantee therefrom, will not discharge the covenantor from liability for the breach of his covenant of seizin. *Resser v. Carney*, 52 Minn. 397.

7. Covenant of Seizin. — *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec.

b. MUTUAL COVENANTS — REBUTTER — (1) In General. — Where the deed of reconveyance to the original covenantor contains similar covenants on the part of the original covenantee, the law, to prevent circuity of action, construes such covenants as mutually cancelling each other, so that no action can be maintained by either of the parties¹ or their assigns.²

(2) *Reconveyance by Mortgage with Similar Covenants.* — A reconveyance, however, to the covenantor by way of a purchase-money mortgage containing similar covenants is not a release or discharge of his covenants.³

c. CONVEYANCE OF LAND BY COVENANTEE. — As to covenants which run with the land, a conveyance of the land before a breach of the covenants does not, of course, affect the liability of the covenantor, but an action for a subsequent breach may be maintained by the grantee.⁴

Conveyance After Breach. — But where the covenant has been broken before the conveyance by the covenantee, it is generally held that such conveyance does not affect the right of the covenantee to recover for prior breaches of the covenants,⁵ though it may affect the amount of damages which he would be entitled to recover.⁶

189; *Bennett v. Irwin*, 3 Johns. (N. Y.) 363. See also *Austin v. Moyle*, Noy 118; *Hubbard v. Norton*, 10 Conn. 422.

In *Bennett v. Irwin*, 3 Johns. (N. Y.) 363, the defendant conveyed land to the plaintiff with covenant of seizin, in consideration of \$1,480. Afterwards the plaintiff quitclaimed the land to the defendant for \$1,000. It was held that such reconveyance would not defeat the plaintiff's right to recover the consideration paid by him for breach of the defendant's covenant of seizin. In this case the court said: "I have not met with any cases which show that a release of an estate works an extinguishment of a covenant of seizin previously broken."

1. *Mutual Covenants Cancel Each Other.* — *Silverman v. Loomis*, 104 Ill. 137; *Eveleth v. Crouch*, 15 Mass. 307; *Kellogg v. Wood*, 4 Paige (N. Y.) 578.

Covenants Must Be Coextensive. — In *Birney v. Hann*, 3 A. K. Marsh. (Ky.) 322, 13 Am. Dec. 167, it was held that if two grant lands with covenant of warranty, and the grantee reconveys to one of the grantors with covenant of warranty, the covenants are not extinguished, and the grantee, having satisfied his covenant, would be restored to his right of action against the grantors; the remedy of the grantee against the two grantors, and the remedy of one of the grantors against the grantee, being distinct.

In *Kellogg v. Wood*, 4 Paige (N. Y.) 578, it was held that where A conveys land to B with covenant of warranty, and B afterwards conveys to C with similar covenants, and C conveys to A, the covenants are not merged in equity so as to prevent the covenant by B from passing to a subsequent grantee of A so as to give such grantee an equitable claim against B upon his covenant for an indemnity against the mortgage, where there existed a valid agreement between A and B that the latter should pay off and discharge the mortgage.

Covenants Must Be Mutually Binding. — In *Hobbs v. King*, 2 Metc. (Ky.) 139, it was held that where a husband and wife convey land with covenants of warranty, and the grantee subsequently reconveys to them with similar covenants, and they subsequently reconvey to a third person with warranty, who is evicted, the last grantee may recover on the warranty

in the deed of the first grantee to his grantor, as a *feme covert* is not bound by warranty in a deed in which she unites with her husband, and therefore neither she nor her alienee would be estopped to enforce the liability upon the warranty made to her.

2. *Silverman v. Loomis*, 104 Ill. 137.

3. *Similar Covenants in Mortgage.* — *Hubbard v. Norton*, 10 Conn. 422; *King v. Kilbride*, 58 Conn. 109; *Hardy v. Nelson*, 27 Me. 525; *Brown v. Staples*, 28 Me. 497, 48 Am. Dec. 504; *Smith v. Cannell*, 32 Me. 125; *Harrington v. Bean*, 89 Me. 470; *Sumner v. Barnard*, 12 Met. (Mass.) 459; *Connor v. Eddy*, 25 Mo. 72; *Haynes v. Stevens*, 11 N. H. 28. See also *Randall v. Lower*, 98 Ind. 255; *Watts v. Welman*, 2 N. H. 458.

Reasons for Doctrine. — In *Sumner v. Barnard*, 12 Met. (Mass.) 459, *Dewey, J.*, in denying the right of the covenantor to set up in rebuttal similar covenants made by the covenantee in a purchase-money mortgage, said: "The principle of rebutter is one well known in law, and is to be applied in all proper cases. The present does not seem to us to be one to which it is applicable. It might do injustice to the plaintiff if her covenants could thus be set off and bar a recovery. The defendant holds the plaintiff's notes of hand secured by her mortgage. Various cases might be readily supposed where such a defense ought not to prevail, as in cases of large payments advanced towards the purchase money, and a mortgage to secure only a small residue, and that, by the terms of the contract, to be paid at some remote future day."

4. For a discussion of this subject, see *supra*, this title, *By and Against Whom Enforceable — Remote Grantors and Grantees*.

5. *Conveyance After Breach.* — *Davis v. Lyman*, 6 Conn. 249; *Keith v. Day*, 15 Vt. 668; *Catlin v. Hurlburt*, 3 Vt. 403; *Clement v. Rutland*, 61 Vt. 298. See *supra*, this title, *By and Against Whom Enforceable*.

6. *Damages Recoverable.* — In *Wyman v. Ballard*, 12 Mass. 303, it was held that though the covenantee under a deed with covenants of warranty and against incumbrances could, after a conveyance of the land by him, recover on the covenant against incumbrances, as it

d. EXPIRATION OF ESTATE. — A warranty is coextensive with the estate conveyed, and where the estate ceases the warranty ceases.¹

e. LAPSE OF TIME. — Covenants in a deed are not extinguished by the lapse of time, and though the statute of limitations has run against an action on the covenants, they may still be effective for the purpose of estoppel.²

f. BANKRUPTCY — (1) *In General.* — It is a well-settled rule that a certificate of discharge in bankruptcy proceedings discharges the bankrupt from personal liability on all debts which could have been proved against him,³ and the question arises whether the liability of the grantor on his covenants in a deed is discharged by his discharge in bankruptcy.

(2) *Covenants Broken.* — Where the covenants were broken before the discharge of the covenantor in bankruptcy, his personal liability for such breaches is of course discharged.⁴

(3) *Technical Breach.* — And the same rule applies where there was merely a technical breach of the covenant, which would only have entitled the covenantee to recover nominal damages.⁵

(4) *Covenants Not Broken.* — Where the covenants in the deed were not broken at the time of the covenantor's discharge in bankruptcy, it has also been held that a claim for a subsequent breach is a "contingent demand," and therefore that the covenantor's personal liability therefor is discharged.⁶

was broken when made and therefore did not pass to the grantee, still he could only recover nominal damages, where no actual damage had been caused by the existence of the incumbrance until after his conveyance, as his grantee, who was afterwards evicted by the foreclosure of the incumbrance, would be entitled to recover on the general warranty, as assignee thereof, and if the covenantee was permitted to recover against the covenantor the full value of the incumbrance, then the covenantor might be compelled to pay twice for the same thing.

Covenant of Seizin. — In *Cornell v. Jackson*, 3 Cush. (Mass.) 506, it was held that the covenantee could recover on a covenant of seizin the full amount of the consideration, though he had conveyed away the premises without warranty.

1. Expiration of Estate — Conveyance of Life Estate with Covenants in Fee. — In *Register v. Rowell*, 3 Jones L. (48 N. Car.) 312, a life estate was granted, but the warranty contained words of inheritance warranting the title and the quiet enjoyment of the premises to the grantee, his heirs and assigns, and it was held that the warranty ceased with the life estate granted. See also *Seymour's Case*, 10 Coke 97; *Lewis v. Cook*, 13 Ired. L. (35 N. Car.) 193. See also *supra*, this title, *Creation and Construction — Limitation and Qualification of Covenants — Covenants Restricted to Estate Conveyed*.

2. Covenants Barred by Limitations Effective for Estoppel. — *Cole v. Raymond*, 9 Gray (Mass.) 217. For a general discussion of the operation of covenants by way of estoppel, see the title ESTOPPEL.

3. General Rule. — *Murray v. De Rottenham*, 6 Johns. Ch. (N. Y.) 52. See also the title INSOLVENCY AND BANKRUPTCY.

4. Covenant Broken. — In *Williams v. Harkins*, 55 Ga. 172, land was conveyed with covenants of warranty, to which the grantor held only a bond for title. Prior to his discharge in bankruptcy an execution against the vendor

for the purchase money was levied on the land, and a sale thereof made. The grantee, however, was not ejected until after the grantor's discharge in bankruptcy. It was held that the grantee's claim on the covenant of warranty in the deed existed prior to the discharge of the grantor in bankruptcy and was therefore barred by such discharge.

In *Cunningham v. Scoullar*, 9 New Bruns. 385, land was conveyed with covenant for title, which was broken by an outstanding incumbrance, which the grantee paid. It was held that the claim of the grantee for reimbursement was a claim for liquidated damages, and thereupon the grantor's liability on his covenant was discharged by his certificate, under the Bankruptcy Act, 5 Vict. 43.

5. Technical Breach — Covenant Against Incumbrances. — In *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761, where land was conveyed with covenant of freedom from incumbrances, which was technically broken by an outstanding incumbrance, it was held that the covenantor's discharge in bankruptcy was a bar to a recovery upon the covenant.

Covenant of Seizin. — In *Dow v. Davis*, 73 Me. 288, it was held that the discharge in bankruptcy of the covenantor was a bar to an action on a covenant of seizin, where the eviction took place after the covenantor was declared a bankrupt, but before the order for a final dividend.

6. Covenants Not Broken — Discharge of Liability for Subsequent Breaches. — *Bailey v. Moore*, 21 Ill. 160; *Shelton v. Pease*, 10 Mo. 473. See also *Bush v. Person*, 18 How. (U. S.) 82.

Covenant for Quiet Enjoyment. — In *Jemison v. Blowers*, 5 Barb. (N. Y.) 686, it was held that the personal liability of a covenantor on his covenant for quiet enjoyment, which was broken after the discharge in bankruptcy by the enforcement of an incumbrance, was a contingent demand, and therefore discharged by his discharge in bankruptcy.

Covenant of Warranty. — In *Bates v. West*, 19 Ill. 134, it was also held that a discharge in

There are, however, decisions to the contrary;¹ and even though the personal liability of the covenantor be discharged, still the covenant itself is not absolutely discharged, but may be still asserted against the covenantor for the purpose of estoppel.²

g. SATISFACTION OF JUDGMENT AGAINST PRIOR GRANTOR — EFFECT ON HIS LIABILITY TO IMMEDIATE GRANTEE. — A remote grantee under successive conveyances with covenants running with the land may sue and recover judgment against any or all of his successive grantors;³ and where a judgment against one of such prior grantors is satisfied, it discharges him from all liability to intermediate grantees.⁴

h. RECOVERY OF DAMAGES FOR BREACH — (1) In General. — Where the covenant is not a continuing one, the recovery of damages for a breach thereof, though merely nominal, is a bar to a subsequent action thereon after substantial damages have been sustained.⁵

bankruptcy was a good defense to an action of covenant upon a warranty which was not broken until after the certificate was granted.

In *Parker v. Bradford*, 45 Iowa 311, where land subject to an incumbrance was sold with covenants of warranty, the grantor agreeing to discharge the same, it was held that his discharge in bankruptcy released him from personal liability on the covenants, as the grantee could have proved up in bankruptcy the amount of the incumbrance and received thereon a distributive share of the assets of the estate.

1. Liability Not Discharged. — *Reed v. Pierce*, 36 Me. 460, 58 Am. Dec. 761; *Bennett v. Bartlett*, 6 Cush. (Mass.) 225; *Foster v. Woodward*, 141 Mass. 160; *Bush v. Cooper*, 26 Miss. 599, 59 Am. Dec. 270; *Burrus v. Wilkinson*, 31 Miss. 537; *Burrowes v. De Blaquiere*, 34 U. C. Q. B. 498.

In *Magwire v. Riffin*, 44 Mo. 514, it was held that a demand against a bankrupt upon the covenant of seizin, founded upon a possible claim for dower in the land — the husband of the doweress being alive, or for some other cause the claim not having been presented before discharge — was not such a contingent demand as could have been exhibited against the estate of the bankrupt, and was not barred by his discharge in bankruptcy. The court distinguished this case from *Jamison v. Blowers*, 5 Barb. (N. Y.) 686, and *Shelton v. Pease*, 10 Mo. 473, on the ground that the latter cases were where the land was encumbered by mortgages at the time of the conveyance, and therefore differed materially from liability for dower during the life of the husband.

2. Covenant Still Effective as an Estoppel. — In *Bush v. Person*, 18 How. (U. S.) 82, it was held that where a person mortgaged land with covenants of warranty which at the time were subject to a judgment lien, and afterwards took the benefit of the Bankrupt Act of 1841, and subsequently purchased the property at a sale under the judgment lien, although his personal liability for a subsequent breach of the covenant was discharged, still he was estopped by his covenant from setting up his after-acquired title to defeat the mortgage. The second section of the Bankrupt Act provided that nothing in the act should be construed to destroy or impair any liens, mortgages, etc., which might be valid by the laws of the respective states. *Curtis, J.*, delivering the

opinion of the court, said that though the bankrupt person was released by the act, the debt due from the land continued undischarged. In this particular, beyond all doubt, the discharge by the act differs from a release by the creditor, since if the latter had released the debtor the mortgage would thereby have been released and the charge on the land destroyed. See also *Stewart v. Anderson*, 10 Ala. 504; *Chamberlain v. Meeder*, 16 N. H. 382.

3. King v. Kerr, 5 Ohio 155, 22 Am. Dec. 777. See also *McClure v. McClure*, 65 Ind. 482; *Wilson v. Taylor*, 9 Ohio St. 596, 75 Am. Dec. 488. See also *supra*, this title, *By and Against Whom Enforceable*.

4. Satisfaction of Judgment Obtained by Remote Grantee Bars Action by Intermediate Grantee. — In *Wilson v. Taylor*, 9 Ohio St. 596, 75 Am. Dec. 488, land was conveyed by successive conveyances with covenants of warranty; the last grantee, on eviction, sued and recovered several judgments against each and all of his prior grantors. The judgments against the first and second grantors respectively were paid by each, and it was held that the satisfaction of the judgment against him by the first grantor was a bar to an action over against him by the second grantor to recover the amount paid by him in satisfaction of the judgment against him. See also *McClure v. McClure*, 65 Ind. 482, wherein it was said that the satisfaction of the judgment would probably operate as a discharge *pro tanto* of subsequent warrantors. The court evidently had in mind the line of decisions which permit a remote grantor to recover the amount of the consideration paid by any previous covenantee.

5. Covenant of Seizin. — The recovery of nominal damages for breach of the covenant of seizin, there having been no eviction of the grantee, would be a bar to a subsequent action on the same covenant in case of the subsequent eviction of the grantee. *Ogden v. Ball*, 40 Minn. 94.

Covenant Against Incumbrance. — In *Donnell v. Thompson*, 10 Me. 174, 25 Am. Dec. 216, it was held that a judgment for nominal damages for breach of a covenant against incumbrances by reason of an outstanding incumbrance would be a bar to a subsequent action for damages caused by the assertion of such incumbrance. See also *Harris v. Newell*, 8 Mass. 262, as to the effect of the recovery of

(2) *Continuing Breach*.—Where the covenant is a continuing covenant, successive actions will lie for successive breaches.¹

(3) *Recovery on One of Several Covenants*.—Where the deed contains several covenants, the recovery of damages for breach of one covenant is not necessarily a bar to a recovery on another covenant in case of a subsequent breach thereof.²

i. *FAILURE OF GRANTEE TO RECORD HIS DEED*.—The failure of the grantee to record his deed does not release the grantor from his liability arising out of his covenant of warranty.³

j. *FORECLOSURE OF INCUMBRANCE ASSUMED BY COVENANTEE*.—Where the title to the land is lost by the foreclosure of an incumbrance assumed by the covenantee, the covenant is extinguished.⁴ It is necessary, however, that the title be lost by reason of the foreclosure of the incumbrance assumed.⁵

k. *REFUSAL TO ALLOW COVENANTOR TO DEFEND ACTION BY PARAMOUNT CLAIMANT*.—The refusal of the covenantee to permit the covenantor to defend the action by the claimant of the paramount title to evict the covenantee does not release the covenantor from liability on his covenants;⁶ and *a fortiori* his failure to notify the covenantor of the institution of such action would not have such effect.⁷

VII. DAMAGES—1. *Actions on Covenants in Deeds*—a. *IN GENERAL*.—In discussing the question of damages in the actions on the several covenants, each covenant will be taken up separately and a full discussion made of the question of damages in actions thereon. In searching, however, for the authorities on the question in hand, the practitioner is advised to refer to the discussion of the several covenants for cases on similar questions.

Right to Sue on Covenant Affording Largest Measure of Damages.—The measure of damages for breach of the different covenants in a deed varies, and a grantee in a deed containing several covenants, in case of a breach of all the covenants, may sue upon the covenant which will afford him the largest measure

nominal damages for breach of the covenant of warranty.

1. *Continuing Breach—Covenant to Repair Gate*.—In *Beach v. Crain*, 2 N. Y. 96, 49 Am. Dec. 369, affirming 2 Barb. (N. Y.) 120, wherein the grantee of a right of way covenanted to keep in repair a gate at the terminus of the way, it was held that the covenant was a continuing one, and therefore a judgment for damages by reason of cattle coming upon the premises was not a bar to another action for subsequent damages.

2. *Recovery of Nominal Damages for Breach of Covenant of Seizin No Bar to Action on Covenant for Quiet Enjoyment*.—In *Ogden v. Ball*, 40 Minn. 94, it was held that the recovery of nominal damages for breach of the covenant of seizin, there having been no eviction of the grantee, was not a bar to an action for a subsequent breach of the covenant for quiet enjoyment.

In *Donnell v. Thompson*, 10 Me. 170, 25 Am. Dec. 216, it was held that the recovery of a judgment for nominal damages for breach of a covenant against incumbrances, the covenant not having been asserted so as to entitle the covenantee to substantial damages, was not a bar to a subsequent action on the covenant of warranty for breach caused by the assertion of such incumbrance.

3. *Failure to Record Deed*.—*Boyer v. Amet*, 41 La. Ann. 721, *Clark v. O'Neal*, 13 La. Ann. 381; *Williamson v. Williamson*, 71 Me. 442.

4. *Loss of Title Though Incumbrance Assumed by Covenantee*.—*Fisk v. Cathcart*, 3 Colo. App. 374.

5. *Title Must Be Lost by the Foreclosure*.—In *Bingham v. Weiderwax*, 1 N. Y. 509, it was held that where land to which the grantor had no title was conveyed with covenant of seizin, and the grantee assumed a mortgage thereon, the foreclosure of the mortgage did not defeat the right of the grantee to recover for breach of the covenant of seizin, as the land was lost by reason of the defect of title, and not by reason of the foreclosure of the mortgage.

6. *Boyle v. Edwards*, 114 Mass. 373.

7. *Notice to Defend Suit Unnecessary*.—*Chestnut v. Tyson*, 105 Ala. 149; *Claycomb v. Munger*, 51 Ill. 373; *Rhode v. Green*, 26 Ind. 83; *Blair v. Allen*, 55 Ind. 409; *King v. Kerr*, 5 Ohio 154, 22 Am. Dec. 777.

Effect on Damages Recoverable.—The failure of the covenantee to notify the covenantor of the institution of the action by a paramount claimant may affect the right of the covenantee to recover the expenses of defending the action. *Chestnut v. Tyson*, 105 Ala. 149; *Finton v. Egelston*, 61 Hun (N. Y.) 246. See *infra*, this title, *Damages—Actions on Covenants in Deeds—Expenses of Litigation*.

For a full discussion of the necessity to notify the covenantor of the institution of an action for the eviction of the covenantee, and to permit the covenantor to defend, see *infra*, this title, *Notice to Defend or to Maintain Title*.

of damages.¹ Therefore the damages recoverable in actions on the different covenants should be carefully considered in determining on which covenant recovery shall be sought.

b. COVENANT OF WARRANTY — (1) Total Breach — (a) Consideration. — In an action for breach of a covenant of warranty, in case of a total failure of title the consideration of the conveyance is recoverable,² even though the land has depreciated in value since the conveyance.³

(b) Increased Valuation of Land and Improvements. — Except in some of the *New England* states, where the measure of damages for breach of a covenant of warranty is the value of the land at the time of eviction,⁴ the fact that the land was worth more than the consideration paid for it, or that it has increased in value since the conveyance, either by reason of improvements erected upon it or on account of its natural appreciation, cannot be considered in estimating the damages for breach of the covenant, but the grantee will be limited to the recovery of the consideration paid, with interest.⁵

1. *Sterling v. Peet*, 14 Conn. 245; *Stark v. Olney*, 3 Oregon 89. See, however, *Sumner v. Williams*, 8 Mass. 222, 5 Am. Dec. 83.

2. *Consideration of Conveyance Recoverable — Alabama.* — *Kingsbury v. Milner*, 69 Ala. 502. *Illinois.* — *Wood v. Kingston Coal Co.*, 48 Ill. 356, 95 Am. Dec. 554; *Weber v. Anderson*, 73 Ill. 439.

Indiana. — *Burton v. Reeds*, 20 Ind. 87; *Wilson v. Peelle*, 78 Ind. 384; *Rhea v. Swain*, 122 Ind. 272; *Wright v. Nipple*, 92 Ind. 310.

Kentucky. — *Blackwell v. McBride*, (Ky. Super. Ct.) 14 Ky. L. Rep. 760.

Minnesota. — *Devine v. Lewis*, 38 Minn. 24.

Missouri. — *Matheny v. Stewart*, 108 Mo. 73; *Lambert v. Estes*, 99 Mo. 604.

Nebraska. — *Cheney v. Straube*, 35 Neb. 521.

Ohio. — *Clark v. Parr*, 14 Ohio 118, 45 Am. Dec. 529.

Pennsylvania. — *McClure v. Gamble*, 27 Pa. St. 288; *Hood v. Weaver*, (Pa. 1886) 5 Cent. Rep. 851.

Tennessee. — *McGuffey v. Humes*, 85 Tenn. 26.

Wisconsin. — *Eaton v. Lyman*, 24 Wis. 438.

Where a second grantee, who has not paid all of the purchase money, has recovered from the covenantor the part of the purchase price paid his grantor, his grantor may recover the balance of the price paid by him to the covenantor. *Jackson v. Turner*, 5 Leigh (Va.) 119.

Consideration Agreed to Be Paid. — The fact that the consideration had not been paid, the vendee merely having agreed to pay it, will not prevent a recovery by a subsequent grantee for the amount of the consideration. *Pence v. Duvall*, 9 B. Mon. (Ky.) 48.

Apportionment of Consideration Between Life Tenant and Remainderman. — Where the land conveyed became vested in a life tenant with the remainder to his children, the consideration recovered must be apportioned between the life tenant and the remaindermen, according to the value of their interests. *McClure v. Gamble*, 27 Pa. St. 288.

Rents and Profits — Set-off. — It has been held that the covenantor is not entitled to set off against a recovery of the consideration the value of the rents and profits derived by the grantee from the use and possession of the land. *Rhea v. Swain*, 122 Ind. 272; *Hulse v. White*, 1 N. J. L. 201.

3. *Depreciation of Land — Effect.* — *Boyer v. Amet*, 41 La. Ann. 721; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 8, 4 Am. Dec. 229; *Phillips v. Smith*, 1 Law Repos. (4 N. Car.) 475, 6 Am. Dec. 542.

Rule in Connecticut. — In Connecticut, however, the value of the land at the time of eviction is the measure of damages, and therefore, in case of a depreciation of the land, only its value at the time of eviction is recoverable. *Sterling v. Peet*, 14 Conn. 245.

4. *Increased Value of Land and Improvements — New England Rule — Connecticut.* — *Horsford v. Wright, Kirby* (Conn.) 3, 1 Am. Dec. 8; *Sterling v. Peet*, 14 Conn. 245; *Butler v. Barnes*, 61 Conn. 399.

Maine. — *Sweet v. Patrick*, 12 Me. 9; *Hardy v. Nelson*, 27 Me. 525; *Williamson v. Williamson*, 71 Me. 442.

Massachusetts. — *Estabrook v. Smith*, 6 Gray (Mass.) 572, 66 Am. Dec. 443; *Norton v. Babcock*, 2 Met. (Mass.) 519; *White v. Whitney*, 3 Met. (Mass.) 89; *Gore v. Brazier*, 3 Mass. 543, 3 Am. Dec. 182; *Leprillette v. Rand*, cited in *Gore v. Brazier*, 3 Mass. 545; *Bigelow v. Jones*, 4 Mass. 512; *Ceconi v. Rodden*, 147 Mass. 164.

Vermont. — *Park v. Bates*, 12 Vt. 384, 36 Am. Dec. 347; *Drury v. Shumway*, 1 D. Chip. (Vt.) 110, 1 Am. Dec. 704; *Pitkin v. Leavitt*, 13 Vt. 379; *Smith v. Sprague*, 40 Vt. 43; *Keeler v. Wood*, 30 Vt. 242; *Keith v. Day*, 15 Vt. 660; *Williams v. Wetherbee*, 2 Aik. (Vt.) 329.

5. *General Rule — Increased Valuation Not to Be Considered — United States.* — *Patrick v. Leach*, 1 McCrary (U. S.) 250; *Griffin v. Reynolds*, 17 How. (U. S.) 609.

Alabama. — *Copeland v. McAdory*, 100 Ala. 553.

Arkansas. — *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Carvill v. Jacks*, 43 Ark. 439.

Georgia. — *Davis v. Smith*, 5 Ga. 285, 48 Am. Dec. 279.

Illinois. — *Weber v. Anderson*, 73 Ill. 445.

Indiana. — *Reese v. M'Quilkin*, 7 Ind. 450; *Wood v. Bibbins*, 58 Ind. 392.

Iowa. — *Stewart v. Noble*, 1 Greene (Iowa) 28; *Swafford v. Whipple*, 3 Greene (Iowa) 261, 54 Am. Dec. 498.

Kansas. — *Stebbins v. Wolf*, 33 Kan. 765.

Kentucky. — *M'Millan v. Ritchie*, 3 T. B. Mon. (Ky.) 348, 16 Am. Dec. 107; *Allen v.*

Knowledge on the Part of the Grantor of Intended Improvements.—And this is so even though the vendor was aware that the vendee intended to erect improvements upon the land conveyed.¹

Voluntary Deed.—It is consequently held that for breach of a covenant of warranty in a voluntary deed nominal damages at most can be recovered.²

Stipulations as to Measure of Damages.—A stipulation for the recovery of more than the consideration paid, with interest, has been treated as a penalty, and the recovery limited to the consideration paid, with interest.³

Anderson, 2 Bibb (Ky.) 416; Cox v. Strode, 2 Bibb (Ky.) 279, 5 Am. Dec. 603; Davis v. Hall, 2 Bibb (Ky.) 590; Cummins v. Kennedy, 3 Litt. (Ky.) 123, 14 Am. Dec. 45; Campbell v. Johnston, 4 Dana (Ky.) 182; Booker v. Bell, 3 Bibb (Ky.) 176, 6 Am. Dec. 641; Durbin v. Garrard, 5 T. B. Mon. (Ky.) 318; Crosby v. West, 2 Bibb (Ky.) 568; Marshall v. McConnell, 1 Litt. (Ky.) 424; Grundy v. Edwards, 7 J. J. Marsh. (Ky.) 367, 23 Am. Dec. 409; Robertson v. Lemon, 2 Bush. (Ky.) 304. See, however, Harland v. Eastland, Hard. (Ky.) 600.

Louisiana.—Boyer v. Amet, 41 La. Ann. 721.

Maryland.—Crisfield v. Storr, 36 Md. 150, 11 Am. Rep. 480.

Mississippi.—Phipps v. Tarpley, 31 Miss. 433; White v. Presley, 54 Miss. 313.

Nevada.—Dalton v. Bowker, 8 Nev. 190.

New Hampshire.—Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320; Foster v. Thompson, 41 N. H. 373.

New Jersey.—Stewart v. Drake, 9 N. J. L. 139; Holmes v. Sinnickson, 15 N. J. L. 313; Morris v. Rowan, 17 N. J. L. 304. See, however, Hulse v. White, 1 N. J. L. 201.

New York.—Staats v. Ten Eyck, 3 Cai. (N. Y.) 111, 2 Am. Dec. 254; Pitcher v. Livingston, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229; Bennet v. Jenkins, 13 Johns. (N. Y.) 50.

North Carolina.—Markland v. Crump, 1 Dev. & B. L. (18 N. Car.) 94, 27 Am. Dec. 230; Phillips v. Smith, 1 Law Repos. (4 N. Car.) 475, 6 Am. Dec. 542.

Ohio.—Wade v. Comstock, 11 Ohio St. 83; Clark v. Parr, 14 Ohio 122, 45 Am. Dec. 529; King v. Kerr, 5 Ohio 159, 22 Am. Dec. 777.

Oregon.—Stark v. Olney, 3 Oregon 88; Arrigoni v. Johnson, 6 Oregon 167.

Pennsylvania.—Bender v. Fromberger, 4 Dall. (Pa.) 443; King v. Pyle, 8 S. & R. (Pa.) 166; McClure v. Gamble, 27 Pa. St. 288; Cox v. Henry, 32 Pa. St. 18; McNair v. Compton, 35 Pa. St. 23.

South Carolina.—Henning v. Withers, 3 Brev. (S. Car.) 458, 6 Am. Dec. 589; Singleton v. Bremer, 4 McCord. L. (S. Car.) 12. See, however, Liber v. Parsons, 1 Bay (S. Car.) 19; Guerard v. Rivers, 1 Bay (S. Car.) 265.

Tennessee.—Elliott v. Thompson, 4 Humph. (Tenn.) 99, 40 Am. Dec. 630.

Texas.—Simpson v. Belvin, 37 Tex. 685; Johns v. Hardin, 81 Tex. 37.

Virginia.—Threlkeld v. Fitzhugh, 2 Leigh (Va.) 461; Jackson v. Turner, 5 Leigh (Va.) 126; Click v. Green, 77 Va. 827; Conrad v. Effinger, 87 Va. 59, 24 Am. St. Rep. 646; Stout v. Jackson, 2 Rand. (Va.) 132. See, however, Mills v. Bell, 3 Call (Va.) 326; Humphrey v. McClenachan, 1 Munf. (Va.) 493.

Wisconsin.—Blossom v. Knox, 3 Pin. (Wis.)

262; McInnis v. Lyman, 62 Wis. 191; Conrad v. Grand Grove, etc., 64 Wis. 258.

Covenant to Render Other Lands of Equal Value.—For breach of a covenant to render other lands of equal value in case of the eviction of the grantee from the land conveyed, the measure of damages is the value of the land at the time of the conveyance, and not its value at the time of the eviction. Davis v. Hall, 2 Bibb (Ky.) 590.

Mexican Rule.—The damages under the Mexican law for breach of a covenant of warranty are also measured by the consideration paid, with interest, instead of by the value of the land at the time of eviction. Gerrett v. Gaines, 6 Tex. 435.

1. Knowledge of Vendor of Intended Improvements.—Taylor v. Holter, 1 Mont. 688. See also Phillips v. Reichert, 17 Ind. 120, 79 Am. Dec. 463. See, however, Bunney v. Hopkinson, 27 Beav. 565, wherein a claim was made for the cost of houses erected by the grantee on the land, and the master of the rolls, allowing such claim, said: "I am of opinion that the measure of the damages upon these covenants includes the amount expended in converting the land into the purposes for which it was sold."

2. Voluntary Deed.—Where there was no consideration for the deed, only nominal damages can be recovered. Hanson v. Buckner, 4 Dana (Ky.) 253, 29 Am. Dec. 401; Glenn v. Mathews, 44 Tex. 400.

And it has been held that no recovery at all can be had for breach of the covenant of warranty in a deed of gift. Calcote v. Elkin, (Tenn. 1891) 15 S. W. Rep. 85. See also *Ex p. Hardin*, 34 S. Car. 377, 27 Am. St. Rep. 820, decided under a statute limiting the recovery to the consideration paid, with interest.

New England Rule.—In some of the New England states, however, where the measure of damages is the value of the land at the time of the eviction, this rule does not apply. Comstock v. Son, 154 Mass. 389; Estabrook v. Smith, 6 Gray (Mass.) 572, 66 Am. Dec. 443.

3. Stipulation for Recovery of Double the Purchase Price.—In Nesbit v. Brown, 1 Dev. Eq. (16 N. Car.) 30, it was held that a stipulation for the recovery of double the purchase price in case of eviction would be treated in equity as a penalty, and only the recovery of the consideration, with interest, allowed.

Special Stipulation Limiting the Damages.—In Handley v. Chambers, 4 Bibb (Ky.) 8, it was held that where the consideration expressed in the deed was twenty pounds per hundred acres, but the parties specially covenanted that ten pounds per hundred acres should be the measure of damages, it was held that the latter was the measure of damages for land lost.

Betterment Statutes — Improvements Erected by Covenantor. — Where the vendee, under the betterment statutes, recovers from the person holding the paramount title the value of improvements erected upon the land by the vendor, the vendor is entitled to a deduction therefor from the amount otherwise recoverable by the vendee, viz., the consideration paid, with interest.¹

Where Value at Eviction the Measure — Deduction of Covenantor's Betterments. — And in those states where the measure of damages is the value of the land at the time of eviction, the amount of recovery under such statutes by the covenantor against the evictor for improvements erected by the covenantor is to be deducted from the value of the land.²

(2) *Partial Breach* — (a) **General Rule.** — In case of a partial eviction by reason of the entire failure of title to a portion merely of the land conveyed, the covenantor can recover only such a part of the original purchase price as bears the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole premises.³

1. Improvements Erected by Covenantor — Recovery by Covenantor under Betterment Statutes. — *Booker v. Bell*, 3 Bibb (Ky.) 173, 6 Am. Dec. 641. See also *Ingram v. Walker*, 7 Tex. Civ. App. 74.

In *Mason v. Kellogg*, 38 Mich. 132, it was held that where improved land was sold with warranty, and recovery was had in ejectment by the owner of the paramount title for the value of the naked lot at the time of recovery, the damages recoverable for breach of the warranty could not exceed the value of the naked lot at the time of the conveyance.

Taxes Paid by Covenantor. — In *Stebbins v. Wolf*, 33 Kan. 765, it was held that the vendor of an invalid tax title was entitled to a reduction for taxes paid by him and recovered by the vendee from the evictor. See also *Danforth v. Smith*, 41 Kan. 146.

Covenantor Need Not Assert His Claim for Betterments. — But a grantee is not required to remain in possession for the purpose of litigating with the owner of the paramount title the question of the increased value of the estate, by reason of improvements erected thereon by the covenantor, but may at once surrender the possession, and no deduction will be made from the damages to which he would otherwise be entitled by reason of any such claim of betterments of which he might have availed himself. *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309.

2. Drury v. Shumway, 1 D. Chip. (Vt.) 110, 1 Am. Dec. 704.

3. Partial Eviction — Proportionate Part of Consideration Only Recoverable — Illinois. — *Major v. Dunnivant*, 25 Ill. 262.

Indiana. — *Wright v. Nipple*, 92 Ind. 310.

Iowa. — *McDunn v. Des Moines*, 39 Iowa 286; *Mischke v. Baughn*, 52 Iowa 528.

Kentucky. — *Hunt v. Orwig*, 17 B. Mon. (Ky.) 73, 66 Am. Dec. 144.

Nevada. — *Dalton v. Bowker*, 8 Nev. 190; *Hoffman v. Bosch*, 18 Nev. 360.

New Hampshire. — *Winnipiseogee Paper Co. v. Eaton*, 65 N. H. 13.

New York. — *Giles v. Dugro*, 1 Duer (N. Y.) 331; *Hunt v. Rapple*, 44 Hun (N. Y.) 155; *Hymes v. Van Cleef*, (Supreme Ct.) 15 N. Y. Supp. 341; *Grantier v. Austin*, 66 Hun (N. Y.) 157; *Hymes v. Esty*, 133 N. Y. 347.

North Carolina. — *Dickens v. Shepperd*, 3 Murph. (7 N. Car.) 526.

Ohio. — *King v. Kerr*, 5 Ohio 160, 22 Am. Dec. 777.

Pennsylvania. — *Beaupland v. McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115; *Klemans v. Voetter*, 35 Pa. L. J. 420; *Wacker v. Straub*, 88 Pa. St. 32; *Hood's Appeal*, (Pa. 1886) 7 Atl. Rep. 137.

South Carolina. — *Earle v. Middleton*, Cheves L. (S. Car.) 127; *Wallace v. Talbot*, 1 McCord. L. (S. Car.) 466; *Hunt v. Nolen*, 46 S. Car. 356.

Texas. — *White v. Holley*, 3 Tex. Civ. App. 590; *Gass v. Sanger*, (Tex. Civ. App. 1893) 30 S. W. Rep. 502; *Weeks v. Barton*, (Tex. Civ. App. 1895) 31 S. W. Rep. 1071; *Grant v. Hill*, (Tex. Civ. App. 1894) 30 S. W. Rep. 952; *Mann v. Mathews*, 82 Tex. 98; *McClelland v. Moore*, 48 Tex. 363; *Raines v. Calloway*, 27 Tex. 685; *Saunders v. Flanikean*, 77 Tex. 662.

See, however, *Griffin v. Reynolds*, 17 How. (U. S.) 611.

Action by Remote Grantee. — The rule is the same whether the action is by the original or by a remote grantee. *Dougherty v. Duvall*, 9 B. Mon. (Ky.) 57.

Application of Rule where Land Is of Uniform Value. — Thus, where all of the land conveyed was of the same value, and the grantee was evicted from one-third of it, he can only recover one-third of the consideration. *Wright v. Nipple*, 92 Ind. 310.

Burden of Proof. — The burden is upon the grantee to show the relative value of the land lost, and in the absence of evidence thereof only nominal damages can be recovered. *Mischke v. Baughn*, 52 Iowa 528; *White v. Holley*, 3 Tex. Civ. App. 590.

Value at Time of Conveyance Not of Eviction Regarded. — The value of the two parts should be estimated as of the time of the conveyance, and not the time of eviction. *Dalton v. Bowkey*, 8 Nev. 190. See also *Nelson v. Matthews*, 2 Hen. & M. (Va.) 164, 3 Am. Dec. 620. See, however, *Hymes v. Van Cleef*, (Supreme Ct.) 15 N. Y. Supp. 341.

New England Rule. — In those states, however, where the measure of damages in case of a total breach of the covenant of warranty is the value of the land at the time of eviction, in case of a partial eviction the measure of damages is of course the value, at the time of eviction, of the land lost. *Butler v. Barnes*, 61 Conn. 399; *Boyle v. Edwards*, 114 Mass. 373.

(b) **Where There Are Outstanding Estates.** — Where there is a partial breach of the warranty by reason of an outstanding estate, less than a fee, in the land conveyed, as in case the estate conveyed is subject to a dower estate, the measure of damages is the value of the outstanding estate, estimating the fee by the purchase price.¹

Where Conveyance Carries a Life Estate Never Enjoyed. — But though the deed conveys a life estate, yet where the whole interest was lost without any enjoyment by the vendee, the consideration with interest may be recovered.²

(c) **Breach from Incumbrances.** — The covenant against incumbrances is included in the covenant of warranty, and a breach of the latter covenant may arise from the enforcement of an outstanding incumbrance. In such a case the damages would be the same as in case of a breach of a covenant against incumbrances, and will be treated in a subsequent part of this section.³

(3) **Non-eviction.** — It has been intimated that though the mere existence of a paramount title or incumbrance may be a breach of the covenant to warrant and defend, yet only nominal damages can be allowed where the grantee has not been disturbed in his possession, and has not paid anything to protect his title or to remove any incumbrance therefrom.⁴ And as an actual or constructive eviction is essential to constitute a breach of the covenant of warranty, it would seem that not even nominal damages should be allowed.⁵

Actual Eviction Not Necessary. — To entitle the covenantee to recover substantial damages it is not necessary, however, that there should have been an actual eviction or payment by the grantee to protect his title. For instance,

Value of Improvements on Land. — Of course, where there are improvements on the land lost which passed under the conveyance, they should be taken into consideration in estimating the value of the land. *McDun v. Des Moines*, 39 Iowa 286. In this case there were buildings on the land lost, which passed under the conveyance, and the evictor granted permission to the covenantee to remove the same; the court refused to permit him to recover the value of the buildings, but merely allowed him the cost of removing the same, the amount of damages to them by the removal, a proportionate share of the consideration, and the value of a well on the land lost.

Subsequent Improvements. — Improvements erected on the portion of the land lost subsequent to the conveyance cannot be considered. *Hunt v. Ruplee*, 44 Hun (N. Y.) 155; *Beaupland v. McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115.

1. Outstanding Estate Less than Fee. — *Hill v. Golden*, 16 B. Mon. (Ky.) 554; *Johnson v. Nyce*, 17 Ohio 66, 49 Am. Dec. 444; *Terry v. Drabenstadt*, 68 Pa. St. 400; *Jeter v. Glenn*, 9 Rich. L. (S. Car.) 374. See, however, *Davis v. Logan*, 5 B. Mon. (Ky.) 344. See also cases cited *infra*, this section, *Covenant Against Incumbrances*.

Inchoate Right of Dower. — So long, however, as the right of dower is inchoate, merely nominal damages can be recovered. *Blevins v. Smith*, 104 Mo. 583.

Deducting Value of Life Estate Conveyed. — Under the *South Carolina Act of 1824*, § 4, p. 24, providing that the measure of damages in case of eviction shall be the amount of the purchase money at the time of the alienation, in case the deed conveys a life estate which the grantee actually enjoys, the value of the life estate must be deducted from the damages. *Aiken v. McDonald*, 43 S. Car. 29.

2. *Grist v. Hodges*, 3 Dev. L. (14 N. Car.) 198.

3. See *infra*, this section, *Covenant Against Incumbrances*.

4. **Noneviction.** — *Mason v. Cooksey*, 51 Ind. 519; *Sebrel v. Hughes*, 72 Ind. 186; *Small v. Reeves*, 14 Ind. 163; *Hammerslough v. Hackett*, 48 Kan. 700; *O'Meara v. McDaniel*, 49 Kan. 685; *Crosby v. Horne*, 45 Minn. 249; *Collier v. Gamble*, 10 Mo. 473; *Pence v. Gabbert*, 63 Mo. App. 306. See, however, *Mackey v. Collins*, 2 Nott & M. (S. Car.) 186, 10 Am. Dec. 586.

In *Pence v. Gabbert*, 63 Mo. App. 302, *Ellison, J.*, in delivering the opinion of the court, said: "The rule is that there must be an actual eviction, or something which is equivalent thereto, before substantial damages can be sustained on account of a paramount title; for while the mere existence of the paramount title is a breach of the covenant for which nominal damages can be allowed, yet before substantial damages can be allowed there must be an actual loss of the land the title to which was warranted." See, however, *Harris v. Newell*, 8 Mass. 262, wherein the grantee recovered the consideration paid with interest, though there had been no eviction.

Illustration — Existence of Conditional Mining Lease. — In *Black v. Coan*, 48 Ind. 385, it was held that the mere existence of a mining lease, contingent upon the happening of a future event, does not entitle the grantee to substantial damages.

Decree Foreclosing Mortgage. — In *Brady v. Spurck*, 27 Ill. 478, it was held that the rendition of a decree foreclosing a prior mortgage on the land would only entitle the covenantee to recover nominal damages on the covenant of warranty, it not appearing that there had been a sale under the decree.

5. See *supra*, this title, *Effect and Breach of Covenants*.

it has been held that when there has been an ejectment and a conditional verdict, not complied with, the sum fixed by the jury in the ejectment suit, with interest, may be recovered.¹

(4) *Purchase of Paramount Title by Grantee.* — Under certain circumstances the grantee may buy in the paramount title, and when he does so his recovery on the covenant of warranty, as a general rule, will be limited to the amount necessarily paid by him for that purpose, with interest, including the incidental expenses and reasonable compensation for his trouble.²

Price Paid Must Be Reasonable. — To entitle the covenantee to recover the amount expended in purchasing the paramount title, the price paid must have been reasonable.³

Whether Recovery May Exceed Consideration Paid, with Interest. — In no case can a recovery for the amount so expended exceed the consideration paid to the covenantor, with interest,⁴ except that in the *New England* states where

1. **Substantial Damages Recoverable Without Actual Eviction.** — *Compher's Appeal*, 10 Pittsb. L. J. 296; *Labold v. Southern Hotel Co.*, 54 Mo. App. 567.

In *Hooper v. Sac County Bank*, 72 Iowa 280, it was held that where the grantee after a judgment of eviction had agreed to pay the owner of the paramount title a certain sum out of the damages recovered by him from the covenantor, he could recover the amount so agreed to be paid.

2. **Recovery Limited to Price Paid for Paramount Title, etc.** — *United States.* — *Barlow v. Delaney*, 40 Fed. Rep. 97.

Arkansas. — *Dillahunty v. Little Rock, etc.*, R. Co., 59 Ark. 629; *Collier v. Cowger*, 52 Ark. 322.

Illinois. — *Claycomb v. Munger*, 51 Ill. 377; *Watson v. Woolverton*, 41 Ill. 241; *Clapp v. Herdman*, 25 Ill. App. 509; *Brady v. Spurck*, 27 Ill. 478.

Indiana. — *Worley v. Hineman*, 6 Ind. App. 240; *Morehouse v. Heath*, 99 Ind. 509; *Mooney v. Burchard*, 84 Ind. 285.

Iowa. — *Snell v. Iowa Homestead Co.*, 59 Iowa 701; *Royer v. Foster*, 62 Iowa 321.

Maine. — *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595.

Massachusetts. — *Leffingwell v. Elliott*, 8 Pick. (Mass.) 455, 19 Am. Dec. 343, 10 Pick. (Mass.) 204.

Nebraska. — *Cheney v. Straube*, 35 Neb. 521.

New Hampshire. — *Loomis v. Bedel*, 11 N. H. 74.

New York. — *Petrie v. Folz*, 54 N. Y. Super. Ct. 223.

Pennsylvania. — *Cox v. Henry*, 32 Pa. St. 18.

Texas. — *James v. Lamb*, 2 Tex. Civ. App. 185; *Denson v. Love*, 58 Tex. 468; *McClelland v. Moore*, 48 Tex. 355. *Contra*, *Thiele v. Axell*, 5 Tex. Civ. App. 548.

Wisconsin. — *Bailey v. Scott*, 13 Wis. 618.

Contra. — In *Louisiana*, however, it is held that the fact that the grantee buys in the superior title after eviction does not affect his right to recover the purchase price. *Compare Boyer v. Amet*, 41 La. Ann. 721; *Coxe's Succession*, 15 La. Ann. 514.

Paramount Title Acquired from State. — The rule limiting the recovery to the amount paid for the paramount title applies where the land conveyed was public land and the title was afterwards acquired by the grantee from the

state. *James v. Lamb*, 2 Tex. Civ. App. 185; *McClelland v. Moore*, 48 Tex. 355.

Incidental Expenses and Reasonable Compensation may be included. *Dillahunty v. Little Rock, etc.*, R. Co., 59 Ark. 629; *Watson v. Woolverton*, 41 Ill. 241; *Leffingwell v. Elliott*, 8 Pick. (Mass.) 455, 19 Am. Dec. 343, 10 Pick. (Mass.) 204.

Price Paid for Paramount Title Not Shown. — In *Snell v. Iowa Homestead Co.*, 59 Iowa 701, it was held that where there was no evidence as to the amount paid for the paramount title, only nominal damages could be recovered. See also *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; *McClelland v. Moore*, 48 Tex. 355.

But in *Hunt v. Orwig*, 17 B. Mon. (Ky.) 73, 66 Am. Dec. 144, it was held that in such a case the plaintiff was entitled to recover the full amount of the consideration in the deed to him. "We do not perceive," said the court, "that it was the duty of the plaintiff to disclose the amount [paid by him for the outstanding title] in order to limit his recovery without being called upon to do so. It was, as we take it, in the power of the defendant to show this fact, and he made no effort to do so."

Necessity for Actual Payment. — It is not necessary that the grantee should have actually paid the price for the paramount title, it being sufficient to entitle him to recover the sum from the covenantor that he has agreed to pay the same. *Hooper v. Sac County Bank*, 72 Iowa 280.

3. **Price Paid Must Be Reasonable.** — *Watson v. Woolverton*, 41 Ill. 241; *Clapp v. Herdman*, 25 Ill. App. 509; *Snell v. Iowa Homestead Co.*, 59 Iowa 701; *McClelland v. Moore*, 48 Tex. 355.

Estoppel to Deny Reasonableness of Price. — Where, however, the paramount title is asserted by the covenantor or his heirs who were liable on the covenant, and the price demanded by them is paid by a remote grantee who is reimbursed by his grantor, the heirs cannot in an action by such grantor assert that the amount paid to them was unreasonable. *Barlow v. Delaney*, 40 Fed. Rep. 97.

Burden of Proof. — In *Anderson v. Knox*, 20 Ala. 156, it was held that the grantee must show that the price paid was reasonable, and that it could not be assumed to be reasonable from the bare fact of payment.

4. **Recovery Cannot Exceed Consideration Paid to Covenantor.** — *Collier v. Cowger*, 52 Ark.

the measure of damages is the value of the land at the time of eviction, the amount recoverable would be regulated by the value of the land at the time of eviction, and therefore might exceed the consideration paid to the covenantor.¹

Effect of Rule that Actual Eviction Necessary to Breach.—In some jurisdictions, however, an actual eviction is necessary to constitute a breach of the covenant of warranty, and it is held that the purchase of the paramount title without eviction gives to the grantee no right to recover on the covenant of warranty the amount paid.²

c. COVENANT FOR QUIET ENJOYMENT.—The rules as to the recovery of damages for breach of the covenant for quiet enjoyment are for the most part the same as for breach of the covenant of warranty.

Total Eviction.—Where the covenantee is actually evicted from the premises, the measure of damages is the purchase price paid, with interest; the increased value of the land between the time of purchase and the time of eviction cannot be considered.³

New England Rule.—In some of the New England states, however, as in actions for breach of covenants of warranty, the measure of damages is the value of the land at the time of eviction.⁴

Partial Eviction.—Where the grantor is evicted from a portion of the premises only, he can recover only such a proportion of the whole consideration as the value of the land lost bears to the value of the entire tract.⁵

322; *Brady v. Spurck*, 27 Ill. 478; *Royer v. Foster*, 62 Iowa 321; *Cheney v. Straube*, 35 Neb. 521; *Petrie v. Folz*, 54 N. Y. Super. Ct. 223; *Foot v. Burnet*, 10 Ohio 317, 36 Am. Dec. 90; *Cox v. Henry*, 32 Pa. St. 21; *Eaton v. Lyman*, 24 Wis. 438.

1. Rule in New England.—*Leffingwell v. Elliott*, 10 Pick. (Mass.) 204; *Thayer v. Clemence*, 22 Pick. (Mass.) 490; *Gore v. Brazier*, 3 Mass. 543, 3 Am. Dec. 182.

Voluntary Deed.—In *Estabrook v. Smith*, 6 Gray (Mass.) 572, 66 Am. Dec. 443, it was held that the price paid for the paramount title could be recovered though no consideration was actually paid for the deed from the covenantor.

2. Purchase Before Actual Eviction.—*Burrus v. Wilkinson*, 31 Miss. 537; *Witty v. Hightower*, 12 Smed. & M. (Miss.) 478; *Shelton v. Pease*, 10 Mo. 473. For a full discussion of this question see *supra*, this title, *Effect and Breach of Covenants*.

3. Measure of Damages—Consideration with Interest—California.—*McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456.

Nebraska.—*Cheney v. Straube*, 35 Neb. 521. *New Hampshire.*—*Winnipisecogee Paper Co. v. Eaton*, 65 N. H. 13.

New Jersey.—*Stewart v. Drake*, 9 N. J. L. 139.

New York.—*Kelly v. Dutch Church*, 2 Hill (N. Y.) 105; *Bennet v. Jenkins*, 13 Johns. (N. Y.) 50; *Staats v. Ten Eyck*, 3 Cai. (N. Y.) 111, 2 Am. Dec. 254; *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 149.

North Carolina.—*Williams v. Beeman*, 2 Dev. L. (13 N. Car.) 483; *West v. West*, 76 N. Car. 45.

Pennsylvania.—*Brown v. Dickerson*, 12 Pa. St. 372.

Voluntary Deed.—Where no consideration was paid for the land only nominal damages can be recovered. *West v. West*, 76 N. Car.

45; *Williams v. Beeman*, 2 Dev. L. (13 N. Car.) 483.

Rents and Profits as Set-off.—Where the grantee does not claim interest the covenantee is not entitled to set off the rents and profits received by the grantee. *Wyche v. Ross*, 119 N. Car. 174.

Action by Remote Grantee.—In some jurisdictions it is held that a remote grantee can recover only the consideration paid by him, not exceeding the consideration paid to the original covenantor. *Allen v. Walsh*, 25 Minn. 543.

In other jurisdictions he is permitted to recover the consideration paid to the original covenantor, though it exceeds the consideration paid by the remote grantee. *Brooks v. Black*, 68 Miss. 161, 24 Am. St. Rep. 259. See *infra*, this section, *Action by Remote Grantee*.

4. New England Rule.—*Mitchell v. Warner*, 5 Conn. 522. See also cases cited *supra*, this section, *Covenant of Warranty—Total Breach—Increased Valuation of Land and Improvements*.

In *Hodgins v. Hodgins*, 13 U. C. C. P. 146, it was also held that the measure of damages on a covenant for quiet enjoyment was not to be governed by the consideration money in the conveyance.

5. Partial Eviction—Proportionate Share of Consideration Recoverable.—*Adams v. Conover*, 22 Hun (N. Y.) 424; *Hymes v. Van Cleef*, (Supreme Ct.) 39 N. Y. St. Rep. 810; *Grantier v. Austin*, 66 Hun (N. Y.) 157.

Dower.—Where the breach of the covenant for quiet enjoyment consists in the recovery of a dower interest in the land, the measure of damages is the present value of an annuity equal to the interest on one third of the consideration money received by the covenantor, for the time that the tenant in dower has a probable expectation of life. *Wager v. Schuyler*, 1 Wend. (N. Y.) 554. See also *infra*, this

Purchase of Paramount Title. — And where the covenantee, in order to prevent an eviction, purchases the paramount title, the measure of damages is the sum actually paid therefor in good faith,¹ not exceeding the consideration paid to the covenantor.²

d. COVENANT AGAINST INCUMBRANCES — (1) *Loss of Land by Reason of Incumbrance.* — On breach of a covenant against incumbrances, where the grantee suffers a total loss of the land by reason of the incumbrance changing into a title adverse and indefeasible, it is generally held that the measure of damages is the consideration paid, with interest.³

Loss of Possession. — But where only the possession of the land has been lost, and such circumstances exist as enable the grantee to obtain it by the payment of a certain sum, he can recover only that sum, as otherwise he might recover the consideration money and then obtain the estate by the payment of a smaller sum.⁴

Partial Loss. — Where only a portion of the land is lost, the rule is that a portion of the original consideration may be recovered bearing the same ratio to the whole consideration as the value of the land lost bears to the value of the whole premises.⁵

New England Rule. — In some of the New England states, however, the measure of damages in case of a loss of the land, either total or partial, would be the value of the land at the time of eviction.⁶

section, *Covenant Against Incumbrances*, on the question of damages arising out of incumbrances upon the land.

1. *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Cheney v. Straube*, 35 Neb. 521.

2. *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Cheney v. Straube*, 35 Neb. 521.

3. **Loss of Land by Reason of Incumbrance — Consideration With Interest Recoverable** — *Arkansas.* — *Alexander v. Bridgford*, 59 Ark. 195.

Illinois. — *Ohling v. Luitjens*, 32 Ill. 23; *Willets v. Burgess*, 34 Ill. 494.

Maine. — *Elder v. True*, 32 Me. 104.

Minnesota. — *Sherwood v. Wilkins*, 50 Minn. 152.

Missouri. — *Chinn v. Wagoner*, 26 Mo. App. 678.

New Hampshire. — *Willson v. Willson*, 25 N. H. 235, 57 Am. Dec. 320.

New Jersey. — *Stewart v. Drake*, 9 N. J. L. 139; *Miller v. Halsey*, 14 N. J. L. 48.

New York. — *Jenks v. Quinn*, 61 Hun (N. Y.) 427; *Wilcox v. Campbell*, 106 N. Y. 325; *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 142.

Ohio. — *Lloyd v. Quimby*, 5 Ohio St. 262.

Pennsylvania. — *Patterson v. Stewart*, 6 W. & S. (Pa.) 527, 40 Am. Dec. 586.

Wisconsin. — *Nichol v. Alexander*, 28 Wis. 118.

In *Brown v. Allen*, 73 Hun (N. Y.) 291, however, where the grantee's title failed by reason of the foreclosure of a prior mortgage, after the grantee had removed the most of the standing timber which constituted the chief value of the land, it was held that the grantee could not recover the entire purchase price, but merely such a proportionate part of the purchase price as the value of the land at the time of eviction bore to its value when timbered. This decision was based on the ground that there was only a partial failure of title.

Eviction under Incumbrance Created by Grantee. — In *McGuckin v. Milbank*, 152 N. Y.

297, it was held that only nominal damages could be recovered for breach by reason of an outstanding mortgage, where the eviction was by the foreclosure of a mortgage executed by the grantee, unless it were shown that the property did not bring its full value by reason of the prior incumbrance being taken into consideration by the purchaser.

Must Pay Incumbrance. — In *M'Collum v. Davis*, 8 U. C. Q. B. 150, the court, applying the doctrine that a person is only liable for the natural consequences of his act, held that when the vendee of land allowed it to be sold for lands covenanted against by the grantor, and failed to redeem, he could not as of right recover the value of the land lost.

4. **Loss of Possession.** — *Willson v. Willson*, 25 N. H. 236, 57 Am. Dec. 320.

Entry by Mortgagee Without Foreclosure of Equity of Redemption. — Where the grantee merely loses the possession of the land through an entry by the mortgagee, and the equity of redemption has not been foreclosed, the grantee can only recover the amount of the mortgage, with interest. *Donahoe v. Emery*, 9 Met. (Mass.) 63; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *White v. Whitney*, 3 Met. (Mass.) 81; *Tufts v. Adams*, 8 Pick. (Mass.) 547; *Winslow v. McCall*, 32 Barb. (N. Y.) 241.

5. **Partial Loss — Proportionate Share of Consideration.** — *Alexander v. Bridgford*, 59 Ark. 195; *Major v. Dunnivant*, 25 Ill. 262; *Flynn v. White Breast Coal, etc., Co.*, 72 Iowa 738; *Downie v. Ladd*, 22 Neb. 531; *Giles v. Dugro*, 1 Duer (N. Y.) 331; *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 142; *Brown v. Allen*, 73 Hun (N. Y.) 291.

6. **New England Rule.** — *Elder v. True*, 32 Me. 104; *Donahoe v. Emery*, 9 Met. (Mass.) 63; *White v. Whitney*, 3 Met. (Mass.) 81; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Keith v. Day*, 15 Vt. 660. See, however, *Chapel v. Bull*, 17 Mass. 213; *Jenkins v. Hopkins*, 8 Pick. (Mass.) 346.

(2) *Breach by Outstanding Estate — Outstanding Lease.* — Where the incumbrance is an unexpired term or lease, the general rule, at least in the absence of any special circumstances, is that the measure of damages will be the fair rental value of the land to the expiration of the term. The underlying principle is that the damages should be estimated according to the real injury arising from the existence of the incumbrance, which, in the case supposed, is presumably and ordinarily the value of the use of the premises for the time during which the vendee has been deprived of such use.¹

Outstanding Life Estate. — And where the incumbrance consists of a life estate in the land or a part thereof, as where the grantee has been evicted from one-third of the land by a tenant in dower, the measure of damages has been held to be the interest on one-third of the purchase money for the probable life of the doweress, estimated according to the approved tables of life annuities, or, in other words, the value of the dower interest, estimating the fee by the purchase money.²

(3) *Breach by Existence of Easement.* — Where the breach is caused by a portion of the land being subject to an easement or servitude which cannot be removed, the measure of damages is the difference between the value of the whole tract if the title were good and its value as depreciated by the incumbrance, of course not to exceed the consideration with interest.³

1. Breach by Outstanding Lease — Kansas. — *Clark v. Fisher*, 54 Kan. 403.

Massachusetts. — *Wetherbee v. Bennett*, 2 Allen (Mass.) 428; *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201.

Michigan. — *Edwards v. Clark*, 83 Mich. 246.

Minnesota. — *Fritz v. Pusey*, 31 Minn. 368.

New York. — *Rickert v. Snyder*, 9 Wend. (N. Y.) 416.

Rhode Island. — *Porter v. Bradley*, 7 R. I. 538.

Virginia. — *Bolling v. Lersner*, 26 Gratt. (Va.) 36.

West Virginia. — *Moreland v. Metz*, 24 W. Va. 119, 49 Am. Rep. 246.

Failure to Deliver Possession. — In *Gibbs v. Ely*, 13 Ind. App. 130, where the grantor covenanted to deliver possession to the grantee at a specified future time, the grantee was permitted to recover, for a breach of the covenant to deliver possession, the rental value of the property during the time he was kept out of possession after becoming entitled thereto.

Of course, where the grantee recognizes the tenancy and accepts rent from the lessee, the amount of the rent received must be deducted from the rental value of the land. *Edwards v. Clark*, 83 Mich. 246.

2. Breach by Existence of Life Estate. — *Tierney v. Whiting*, 2 Colo. 620; *Christy v. Ogle*, 33 Ill. 295; *Wager v. Schuyler*, 1 Wend. (N. Y.) 553; *McAlpin v. Woodruff*, 11 Ohio St. 120; *Terry v. Drabenstadt*, 68 Pa. St. 400; *Mills v. Catlin*, 22 Vt. 107.

In *Stuart v. Mathieson*, 23 U. C. Q. B. 135, it was held that a grantee evicted from one-third of the land by a tenant in dower was entitled to recover the full value of the dower as aforesaid.

3. Breach by Existence of Easement — England. — *Sutton v. Baillie*, 65 L. T. 528.

Alabama. — *Clark v. Zeigler*, 79 Ala. 346; *Copeland v. McAdory*, 100 Ala. 553.

Connecticut. — *Hubbard v. Norton*, 10 Conn. 422; *Mitchell v. Stanley*, 41 Conn. 312.

Iowa. — *Kostenbader v. Pierce*, 37 Iowa 645.

Kansas. — *Smith v. Davis*, 44 Kan. 362.

Massachusetts. — *Harlow v. Thomas*, 15 Pick. (Mass.) 69; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Kellogg v. Ingersoll*, 2 Mass. 101; *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201.

Minnesota. — *Mackey v. Harmon*, 34 Minn. 168.

Missouri. — *Williamson v. Hall*, 62 Mo. 405.

New York. — *Giles v. Dugro*, 1 Duer (N. Y.) 331; *Mohr v. Parmelee*, 43 N. Y. Super. Ct. 320.

Wisconsin. — *Walker v. Wilson*, 13 Wis. 522. See, however, *Child v. Stenning*, 11 Ch. Div. 82.

Easement to Flow Land. — In *Harrington v. Bean*, 89 Me. 470, it was held that for breach of a covenant against incumbrances by reason of the land being subject to a right in a third person to flow the land, the measure of damages was the difference between the value of the land without such incumbrance and its value so encumbered, with interest from the time of the conveyance.

Grant of Right to Cut Timber on Part of Land. — And it has been held that where the covenantor had granted the right to enter and cut all the saw timber from a portion of the land, the measure of damages was the diminished value of the entire tract, not to exceed the entire consideration with interest. *Clark v. Zeigler*, 79 Ala. 346. See also *Smith v. Davis*, 44 Kan. 362.

Obligation to Fence. — In *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335, where the land was encumbered by a perpetual obligation to maintain a fence adjacent to a railroad running through the land, the proper measure of damages was held to be a just compensation for the injury resulting therefrom, estimated by the difference in the fair market value of the estate by reason of the existence of such incumbrance.

Easement for Street. — In *Hymes v. Esty*, 133 N. Y. 342, where part of the land was subject to the easement for a public street, the court held that it was error to allow damages as for

Time of Computing the Diminution in Value. — In some of the *New England* states the diminution in the value of the estate arising from the existence of the easement is estimated as of the date of the trial,¹ instead of as of the date of the conveyance, as in the other states, which follow the rule that the consideration paid, with interest, is the measure of damages in case of a total loss of the land, instead of the value of the land at the time of eviction.²

(4) *Incumbrance Not Asserted* — (a) **Money Liens.** — Though the mere existence of an incumbrance may constitute a technical breach of a covenant against incumbrances, so as to entitle the grantee to an action against the covenantor,³ yet it is a well-settled rule, where the incumbrance consists of a mortgage incumbrance, or other money lien, that unless the covenantee has discharged the incumbrance or suffered some actual injury by its assertion, he can only recover nominal damages.⁴

a total failure of title to such portion of the land; the true measure being the diminution, if any, in the value of the property at the time of the eviction, caused by the assertion by the public of its right to the use of the street, with interest and costs. See, however, *Flynn v. White Breast Coal, etc., Co.*, 72 Iowa 738.

Benefits Derived from Easement. — In estimating the depreciation in the value of the land by reason of the easement, as in case of a right of way for a railroad, the benefits accruing to the balance of the land from the existence of the railroad should be considered. *Hubbard v. Norton*, 10 Conn. 422; *Wadhams v. Swan*, 109 Ill. 46; *Williamson v. Hall*, 62 Mo. 405. But not such benefits as were common to other lands in the vicinity not occupied by the railroad, *Williamson v. Hall*, 62 Mo. 405. And not the benefit accruing to adjoining land owned by the grantee. *Koestebader v. Peirce*, 41 Iowa 204.

Breach Only Nominal — Rights Actually Enjoyed by Grantee. — In *Britton v. Ruffin*, 120 N. Car. 87, it was held that where the grantee has cut all the timber on the land conveyed, he can recover only nominal damages for breach of the covenant of warranty by reason of a previous sale of such timber by the grantor.

1. **Time of Computing Diminution in Value — New England Rule.** — *Richmond v. Ames*, 164 Mass. 467, wherein Field, C. J., said: "If the easement is of a permanent nature, the question is, how much at the time of the trial is the plaintiff's estate diminished in value by reason of the existence of the incumbrance?" See also *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201; *Harlow v. Thomas*, 15 Pick. (Mass.) 69; *Wetherbee v. Bennett*, 2 Allen (Mass.) 428.

2. *Copeland v. McAdory*, 100 Ala. 553. See, however, *Hymes v. Esty*, 133 N. Y. 342, wherein the court said, though without due consideration, that the diminution in value at the time of the assertion of the easement should be considered.

3. *Garrison v. Sandford*, 12 N. J. L. 261.

For a discussion of this question, see *supra*, this title, *Effect and Breach of Covenants*.

4. **Incumbrances Not Asserted — Mortgages — Connecticut.** — *Davis v. Lyman*, 6 Conn. 254.

Illinois. — *Brady v. Spurck*, 27 Ill. 478; *Willets v. Burgess*, 34 Ill. 494.

Indiana. — *Reasoner v. Edmundson*, 5 Ind. 393; *Pomeroy v. Burnett*, 8 Blackf. (Ind.) 142; *Marvin v. Applegate*, 18 Ind. 425; *Bundy v. Ridenour*, 63 Ind. 406.

Maine. — *Bean v. Mayo*, 5 Me. 94; *Randell v. Mallett*, 14 Me. 51; *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761; *Copeland v. Copeland*, 30 Me. 446; *Stowell v. Bennett*, 34 Me. 422.

Massachusetts. — *Brooks v. Moody*, 20 Pick. (Mass.) 474; *Comings v. Little*, 24 Pick. (Mass.) 266. See also *Prescott v. Trueman*, 4 Mass. 630, 3 Am. Dec. 249.

Michigan. — *Norton v. Colgrove*, 41 Mich. 544.

Missouri. — *Wyatt v. Dunn*, 93 Mo. 459; *Buren v. Hubbell*, 54 Mo. App. 617.

New Hampshire. — *Smith v. Jeffs*, 44 N. H. 482.

New Jersey. — *Stewart v. Drake*, 9 N. J. L. 141.

New York. — *Soule v. Dixon*, (Supreme Ct.) 1 N. Y. Supp. 697; *Delavergne v. Norris*, 7 Johns. (N. Y.) 358; *De Forest v. Leete*, 16 Johns. (N. Y.) 123; *Stanard v. Eldridge*, 16 Johns. (N. Y.) 254; *Grant v. Tallman*, 20 N. Y. 191, 75 Am. Dec. 384; *McGuckin v. Milbank*, 83 Hun (N. Y.) 473; *Barlow v. Saint Nicholas Nat. Bank*, 63 N. Y. 399, 20 Am. Rep. 547; *Seventy-third St. Bldg. Co. v. Jencks*, 19 N. Y. App. Div. 314.

Pennsylvania. — *Myers v. Brodbeck*, 110 Pa. St. 198.

Vermont. — *Richardson v. Dorr*, 5 Vt. 20.

Wisconsin. — *Noonan v. Hsley*, 21 Wis. 140; *Pillsbury v. Mitchell*, 5 Wis. 17.

See, however, *Funk v. Voneida*, 11 S. & R. (Pa.) 109, 14 Am. Dec. 617; *Gibson v. Boulton*, 3 U. C. C. P. 407; *Empire Gold Min. Co. v. Jones*, 19 U. C. C. P. 245; *Connell v. Boulton*, 25 U. C. Q. B. 444.

Judgments. — *Hall v. Dean*, 13 Johns. (N. Y.) 105; *Reading v. Gray*, 37 N. Y. Super. Ct. 79.

Taxes. — *Briggs v. Morse*, 42 Conn. 258; *Mills v. Saunders*, 4 Neb. 190; *Andrews v. Appel*, 22 Hun (N. Y.) 429; *Pillsbury v. Mitchell*, 5 Wis. 21; *Eaton v. Lyman*, 30 Wis. 41. See, however, *Nesbitt v. Campbell*, 5 Neb. 429; *White v. Stretch*, 22 N. J. Eq. 76; *Union Nat. Bank v. Pinner*, 25 N. J. Eq. 495; *Washer v. Brown*, 5 N. J. Eq. 81.

Mortgage Given as Indemnity. — Where the incumbrance is a mortgage given to indemnify the mortgagee from liability to a third person, there is no foundation except for nominal damages, unless the grantee has discharged the liability of the mortgagee. *Comings v. Little*, 24 Pick. (Mass.) 266.

Loss of Possession of Land. — The mere eviction of the grantee by reason of the incum-

(b) **Incumbrances Not Removable.** — And even in case of incumbrances of such a character that they cannot be extinguished, such as an easement or servitude or an existing lease and the like, it has been held that if the covenantee has not been disturbed in his possession nor suffered any real injury from the incumbrances, he can recover only nominal damages.¹

(5) **Removing Incumbrances** — (a) **By Grantee.** — It is a well-settled rule that when the grantee has extinguished the incumbrance he may recover the amount expended in so doing,² though the payment was not made until after the

brance may entitle him to recover the amount necessary to remove the incumbrance, though the adverse title has not become indefeasible. *Donahoe v. Emery*, 9 Met. (Mass.) 63; *Tufts v. Adams*, 8 Pick. (Mass.) 547; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *White v. Whitney*, 3 Met. (Mass.) 81; *Winslow v. McCall*, 32 Barb. (N. Y.) 241. See, however, *Copeland v. Copeland*, 30 Me. 446; *Stowell v. Bennett*, 34 Me. 422; *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761.

Sale by Vendee for Payment of Taxes. — In *Sandridge v. Hunt*, 40 La. Ann. 766, it was held that when the grantee voluntarily sells the land at public auction, after levy thereon for delinquent taxes, which constituted the breach of the covenant, he can only recover the amount of the taxes, and not damages for failure of the land to bring its full value. *Compare Funk v. Voneida*, 11 S. & R. (Pa.) 109, 14 Am. Dec. 617.

Incumbrance Evidenced Only by Mortgage. — The fact that no other evidence of the debt secured by the mortgage was given does not alter the rule requiring that the covenantee must actually pay off the incumbrance to entitle himself to recover, as even in the absence of other evidence of debt the mortgagor might still be sued on the covenant to pay the money which is implied in every mortgage, and so might be compelled to pay twice. *Stanard v. Eldridge*, 16 Johns. (N. Y.) 254.

Verbal Promise to Pay Mortgage. — The fact that the covenantor has verbally promised to pay the incumbrance does not entitle the covenantee to more than nominal damages when the incumbrance has not been extinguished by him. *Bundy v. Ridenour*, 63 Ind. 406.

1. Incumbrances Not Capable of Being Removed. — *Kellogg v. Malin*, 62 Mo. 429; *Walker v. Deaver*, 79 Mo. 664; *Giles v. Dugro*, 1 Duer (N. Y.) 331; *Rosenberger v. Keller*, 33 Gratt. (Va.) 493.

In *Stearn v. Hesdorfer*, 9 Misc. Rep. (N. Y. C. Pl.) 134, where land with buildings was conveyed with covenant against incumbrances, it was held that only nominal damages could be recovered on account of the buildings encroaching on adjoining land, when the grantee had not paid off or discharged any incumbrance or suffered any actual damage.

In *Black v. Coan*, 48 Ind. 385, it was held that where, prior to the conveyance, the covenantor had executed to another person a mining lease covering the premises, which lease was contingent upon the happening of an event which had not occurred, only nominal damages could be allowed. See, however, *Buren v. Hubbell*, 54 Mo. App. 617.

Dower. — When no attempt has been made to enforce a right of dower in the land, only nominal damages can be recovered on account

of such incumbrances. *Smith v. Ackerman*, 5 Blackf. (Ind.) 541; *Walker v. Deaver*, 79 Mo. 664.

Inchoate Right of Dower. — An incumbrance consisting of an inchoate right of dower can be the foundation for nominal damages only. *Whisler v. Hicks*, 5 Blackf. (Ind.) 100, 33 Am. Dec. 454.

In *Harrington v. Murphy*, 109 Mass. 299, the incumbrance consisting of an inchoate dower right, it was held that the grantee could not recover fees paid to an auctioneer for the sale of the land to a person who refused to complete the purchase on discovering the incumbrance.

Paramount Title. — When the incumbrance consists of a paramount title, only nominal damages can be recovered unless the grantee has purchased such title or been disturbed in his possession. *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 249.

2. Removing Incumbrance — Amount Paid Recoverable — *Arkansas.* — *Alexander v. Bridgford*, 59 Ark. 195; *Collier v. Cowger*, 52 Ark. 322.

Connecticut. — *Mitchell v. Hazen*, 4 Conn. 512, 10 Am. Dec. 169; *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638; *Davis v. Lyman*, 6 Conn. 254.

Georgia. — *Amos v. Cosby*, 74 Ga. 793.

Illinois. — *Schuchmann v. Knoebel*, 27 Ill. 175; *Clapp v. Herdman*, 25 Ill. App. 509.

Indiana. — *Snyder v. Lane*, 10 Ind. 424.

Iowa. — *Knadler v. Sharp*, 36 Iowa 232.

Maine. — *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761.

Massachusetts. — *Comings v. Little*, 24 Pick. (Mass.) 266; *Coburn v. Litchfield*, 132 Mass. 440; *Batchelder v. Sturgis*, 3 Cush. (Mass.) 205; *Estabrook v. Smith*, 6 Gray (Mass.) 572, 66 Am. Dec. 443.

Missouri. — *Henderson v. Henderson*, 13 Mo. 152; *Hillhouse v. Houts*, (Mo.) 1886 6 West. Rep. 833; *Blondeau v. Sheridan*, 81 Mo. 545, 47 Mo. App. 460; *Ward v. Ashbrook*, 78 Mo. 515.

Nebraska. — *Nesbitt v. Campbell*, 5 Neb. 429.

New Hampshire. — *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320.

New Jersey. — *Hartshorn v. Cleveland*, 52 N. J. L. 473.

New York. — *Stanard v. Eldridge*, 16 Johns. (N. Y.) 254; *Hall v. Dean*, 13 Johns. (N. Y.) 105; *Delavergne v. Norris*, 7 Johns. (N. Y.) 358.

Oregon. — *Corbett v. Wrenn*, 25 Oregon 305.

Vermont. — *Cole v. Kimball*, 52 Vt. 639; *Turner v. Goodrich*, 26 Vt. 707.

Wisconsin. — *Noonan v. Ilsley*, 21 Wis. 140; *Pillsbury v. Mitchell*, 5 Wis. 17; *Eaton v. Tallmadge*, 22 Wis. 526.

Apparent Exception. — When a one-fourth un-

action on the covenant was commenced.¹

Amount Paid Must Be Reasonable. — The amount paid for the removal of the incumbrance must, however, have been reasonable in order to entitle the covenantee to recover the payment made.²

Amount Recoverable as Affected by Consideration. — The rule as to the recovery of the amount paid for the removal of the incumbrance is, in most jurisdictions, also subject to the qualification that the amount of the recovery cannot exceed the consideration paid to the covenantor, with interest, though the amount paid to remove the incumbrance was much greater.³

View that Recovery Not Limited by Consideration. — There are, however, decisions which permit a recovery to the extent of the value of the premises at the time of the discharge of the incumbrance, although exceeding the consideration;⁴ and in the *New England* states which hold that the measure of damages for breach of the covenants of warranty and quiet enjoyment is the value of the land at the time of the eviction, this is of course the rule.⁵

Missouri Rule. — In Missouri it is held that the damages recoverable depend solely upon the value of the incumbrance and the amount paid for its removal, without regard to the value of the land or the amount of the consideration

divided interest in land which was subject to an assessment for a public improvement was conveyed to the plaintiff by the defendant with a covenant against incumbrances, and subsequently the plaintiff purchased from others the remaining three-fourths interest and paid off the incumbrance, it was held that he could only recover one-fourth of the amount paid, and not the full amount. *Smith v. Carney*, 127 Mass. 179.

1. Payment After Commencement of Action on Covenant. — *Kelly v. Low*, 18 Me. 244; *Johnson v. Collins*, 116 Mass. 392; *Estabrook v. Smith*, 6 Gray (Mass.) 572, 66 Am. Dec. 443; *Tufts v. Adams*, 8 Pick. (Mass.) 547; *Brooks v. Moody*, 20 Pick. (Mass.) 474; *Leflingwell v. Elliott*, 10 Pick. (Mass.) 204; *Smith v. Jeffs*, 44 N. H. 482; *Jackson v. Hanna*, 8 Jones L. (53 N. Car.) 188.

2. Amount Paid Must Be Reasonable — *Alabama*. — *Clark v. Zeigler*, 79 Ala. 351.

Arkansas. — *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; *Alexander v. Bridgford*, 59 Ark. 195.

Georgia. — *Amos v. Cosby*, 74 Ga. 793.

Iowa. — *Guthrie v. Russell*, 46 Iowa 269, 26 Am. Rep. 135.

Kansas. — *Gilbert v. Rushmer*, 49 Kan. 632.

Maine. — *Cole v. Lee*, 30 Me. 392.

Massachusetts. — *Smith v. Carney*, 127 Mass. 179; *Batchelder v. Sturgis*, 3 Cush. (Mass.) 205; *Chapel v. Bull*, 17 Mass. 213; *Johnson v. Collins*, 116 Mass. 392.

Missouri. — *St. Louis v. Bissell*, 46 Mo. 157; *Henderson v. Henderson*, 13 Mo. 152; *Kellogg v. Malin*, 62 Mo. 429; *Ward v. Ashbrook*, 78 Mo. 515; *Williamson v. Hall*, 62 Mo. 405.

New Hampshire. — *Smith v. Jeffs*, 44 N. H. 482.

New Jersey. — *Hartshorn v. Cleveland*, 52 N. J. L. 473.

Burden of Proof as to Reasonableness. — The burden is upon the grantee to show that the amount paid for the removal of the incumbrance was reasonable. *Anderson v. Knox*, 20 Ala. 156; *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; *Gilbert v. Rushmer*, 49 Kan. 632; *Dickson v. Desire*, 23 Mo. 167.

Sufficiency of Proof. — In *Gilbert v. Rushmer*,

49 Kan. 632, it was held that the testimony of the holder of the incumbrance that the amount he received was the least he would take was insufficient to show that the price paid was reasonable.

3. Recovery Cannot Exceed Consideration and Interest — *Alabama*. — *Clark v. Zeigler*, 79 Ala. 351.

Arkansas. — *Collier v. Cowger*, 52 Ark. 322.

Illinois. — *Brady v. Spurck*, 27 Ill. 483.

Iowa. — *Guthrie v. Russell*, 46 Iowa 269, 26 Am. Rep. 135; *Brandt v. Foster*, 5 Iowa 295. See, however, *Knadler v. Sharp*, 36 Iowa 232.

New Hampshire. — *Willson v. Willson*, 25 N. H. 235, 57 Am. Dec. 320.

Ohio. — *Foote v. Burnet*, 10 Ohio 333, 36 Am. Dec. 90.

Pennsylvania. — *Cox v. Henry*, 32 Pa. St. 21.

Wisconsin. — *Eaton v. Lyman*, 24 Wis. 438.

In *Hawthorne v. City Bank*, 34 Minn. 382, it was held that Gen. Stat. Minn. 1878, c. 40, § 35, providing that the grantor shall be liable for damages sustained in removing the incumbrance, does not change the rule limiting the measure of damages to the consideration with interest.

4. Value of Estate. — *Hartshorn v. Cleveland*, 52 N. J. L. 473; *Utica, etc., R. Co. v. Gates*, 8 N. Y. App. Div. 181, *criticising and distinguishing* *Dimmick v. Lockwood*, 10 Wend. (N. Y.) 142, where the rule is laid down in accordance with the cases cited in the preceding note. The case criticised has, however, been referred to with approval in other New York cases (*Andrews v. Appel*, 22 Hun (N. Y.) 429; *Grant v. Tallman*, 20 N. Y. 191, 75 Am. Dec. 384), and has been frequently approved by courts in other states.

Voluntary Deed. — In *Wilbur v. Warren*, 104 N. Y. 192, *reversing* 40 Hun (N. Y.) 203, it was held that where land encumbered by a mortgage is sold by voluntary deed with the general covenants of warranty, the covenantee cannot recover, on the covenant against incumbrances, interest paid upon the mortgage.

5. New England Rule. — *Kelsey v. Remer*, 43 Conn. 129, 21 Am. Rep. 638; *Johnson v. Collins*, 116 Mass. 392; *Norton v. Babcock*, 2 Met. (Mass.) 510.

paid to the covenantor.¹

Recovery Cannot Exceed Amount Paid for Removal of Incumbrance. — In no case can the recovery by the grantee exceed the amount paid for the removal of the incumbrance.²

(b) **By Covenantor.** — When the incumbrance is discharged by the covenantor the grantee can only recover nominal damages,³ unless before the discharge of the incumbrance he has suffered some actual damage.⁴

e. **COVENANT TO DISCHARGE INCUMBRANCES — Covenant by Grantor.** — The covenant to discharge an incumbrance is to be distinguished from the usual covenant against incumbrances. In the former case there is a breach on failure of the covenantor to discharge the incumbrance within the required time, which entitles the covenantee to recover the amount of the incumbrance, even though he has suffered no actual injury therefrom.⁵

Covenant by Grantee. — This rule applies not only to a covenant by the grantor to discharge an incumbrance, but also to one by the grantee to pay off a mortgage on the land on which the grantor was liable, and in case of a breach of such covenant the grantor may recover the amount of the mortgage debt.⁶

Breach Resulting in Loss of Land. — And where the failure of the covenantor to pay the incumbrance is the proximate cause of the loss of the land to the grantee, though the eviction may not have been under the incumbrance or mortgage, the grantee may recover the purchase price paid for the land.⁷

f. **COVENANT OF SEIZIN — (1) Total Breach — General Rule.** — Where there is a breach of the covenant of seizin, the general rule is that the measure of damages is the consideration paid, with interest.⁸ No recovery can be had

1. Missouri Rule. — *Henderson v. Henderson*, 13 Mo. 152; *St. Louis v. Bissell*, 46 Mo. 157; *Walker v. Deaver*, 79 Mo. 664, 5 Mo. App. 139.

2. Recovery Limited to Amount Paid for Removal of Incumbrance — *Illinois*. — *McDowell v. Milroy*, 69 Ill. 498.

Indiana. — *Burk v. Clements*, 16 Ind. 132.

Maine. — *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761.

Massachusetts. — *Chapel v. Bull*, 17 Mass. 213.

Missouri. — *Edington v. Nix*, 49 Mo. 134; *Williamson v. Hall*, 62 Mo. 405; *Kellogg v. Malin*, 62 Mo. 429.

New York. — *Utica, etc., R. Co. v. Gates*, 8 N. Y. App. Div. 181; *Andrews' v. Appel*, 22 Hun (N. Y.) 429.

Pennsylvania. — *Myers v. Brodbeck*, 110 Pa. St. 198.

Texas. — *Richardson v. Harrison*, 6 Tex. Civ. App. 661; *McClelland v. Moore*, 48 Tex. 355.

Wisconsin. — *Daggett v. Reas*, 79 Wis. 60; *Eaton v. Lyman*, 24 Wis. 438.

3. Discharge of Incumbrance by Covenantor — Nominal Damages. — *Herrick v. Moore*, 19 Me. 313; *Wetherbee v. Bennett*, 2 Allen (Mass.) 428; *Buren v. Hubbell*, 54 Mo. App. 617; *Smith v. Jeffs*, 44 N. H. 482.

4. In *Buren v. Hubbell*, 54 Mo. App. 617, it was held that where the incumbrance consisted of a lease of the coal under the land, and the lessee did not disturb the coal, a tender by the covenantor before action of a release from the lessee will limit the recovery to nominal damages.

In *Bradshaw v. Crosby*, 151 Mass. 237, it was held under Pub. Stat. Mass., c. 126, § 18, providing that a grantee may recover for all damages sustained in removing an incumbrance, that when the incumbrance is dis-

charged by the covenantor before action, the grantee can recover the cost of recording the incumbrance, but not for legal expenses, lost time, etc.

5. Covenant by Grantor to Discharge Incumbrance. — *Lethbridge v. Mytton*, 2 B. & Ad. 772, 22 E. C. L. 181; *Carr v. Roberts*, 5 B. & Ad. 78, 27 E. C. L. 39; *Vane v. Barnard*, Gilb. Eq. Rep. 127; *Leeming v. Smith*, 25 Grant's Ch. (U. C.) 256; *Gardner v. Niles*, 16 Me. 280; *Gennings v. Norton*, 35 Me. 308; *Thomas v. Allen*, 1 Hill (N. Y.) 145; *Hume v. Hendrickson*, 79 N. Y. 127; *Sage v. Truslow*, 88 N. Y. 244; *Port v. Jackson*, 17 Johns. (N. Y.) 239. See, however, *Wilcox v. Musche*, 39 Mich. 101, wherein the grantor sold a portion of a tract of land for \$2,000, covenanting to pay off a mortgage of \$6,500 covering the whole tract, and it was held that, where the balance of the land was ample to satisfy the mortgage, and the grantee had suffered no actual injury, he could recover only nominal damages for failure of the grantor to discharge the incumbrance. See also *Chinn v. Wagoner*, 26 Mo. App. 678.

6. Covenant by Grantee. — *Furnas v. Durgin*, 119 Mass. 506, 20 Am. Rep. 341; *Locke v. Homer*, 131 Mass. 99, 41 Am. Rep. 199; *Bowditch v. Chickering*, 139 Mass. 288; *Sparkman v. Gove*, 44 N. J. L. 252; *Trinity Church v. Higgins*, 48 N. Y. 532.

7. Recovery of Consideration on Loss of Land. — *Chinn v. Wagoner*, 26 Mo. App. 678. See also *Manahan v. Smith*, 19 Ohio St. 391.

8. Consideration with Interest — Canada. — *Stubbs v. Martindale*, 7 U. C. C. P. 52; *McKennon v. Burrows*, 3 U. C. Q. B. O. S. 590; *Clark v. Robertson*, 8 U. C. Q. B. 370; *Gibson v. Boulton*, 3 U. C. C. P. 407; *Hart v. Bown*, 7 Grant's Ch. (U. C.) 97.

Alabama. — *Bibb v. Freeman*, 59 Ala. 612.

for the natural appreciation of the land between the time of the conveyance and the time of the eviction,¹ or from its appreciation by reason of the erection of improvements by the grantee,² or because the land was worth more at the time of the conveyance than the consideration paid therefor.³

(2) *Partial Breach.*—Where there is only a partial breach of the covenant on account of the failure of the covenantor's title to a part of the land conveyed, the measure of damages when all the land is not of the same quality is a part of the consideration, with interest, in the proportion of the value of the land lost to the value of the entire tract, and not in the proportion of the quantity of the land lost to the quantity of the entire tract;⁴ but where the

Arkansas.—*Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338. See also *Benton County v. Rutherford*, 33 Ark. 640.

Connecticut.—*Horsford v. Wright, Kirby* (Conn.) 3, 1 Am. Dec. 8; *Mitchell v. Hazen*, 4 Conn. 496, 10 Am. Dec. 169; *Gilbert v. Bulkley*, 5 Conn. 262, 13 Am. Dec. 57; *Sterling v. Peet*, 14 Conn. 245; *Hartford, etc., Ore Co. v. Miller*, 41 Conn. 112; *Smith v. Pitkin*, 2 Root (Conn.) 46; *Mitchell v. Warner*, 5 Conn. 507. See, however, *Castle v. Peirce*, 2 Root (Conn.) 296.

Illinois.—*Clapp v. Herdman*, 25 Ill. App. 509; *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269; *Weber v. Anderson*, 73 Ill. 439.

Indiana.—*Sheets v. Andrews*, 2 Blackf. (Ind.) 274; *Burton v. Reeds*, 20 Ind. 87; *Lacey v. Marnan*, 37 Ind. 168; *Wilson v. Peelle*, 78 Ind. 388.

Iowa.—*Swafford v. Whipple*, 3 Greene (Iowa) 261, 54 Am. Dec. 498.

Kansas.—*Dale v. Shively*, 8 Kan. 276; *Bolinger v. Brake*, 4 Kan. App. 180.

Kentucky.—*Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271.

Maine.—*Wheeler v. Hatch*, 12 Me. 389; *Montgomery v. Reed*, 69 Me. 510; *Harrington v. Bean*, 89 Me. 474.

Maryland.—*Crisfield v. Storr*, 36 Md. 150, 11 Am. Rep. 480.

Massachusetts.—*Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Caswell v. Wendell*, 4 Mass. 108; *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Nichols v. Walter*, 8 Mass. 243; *Smith v. Strong*, 14 Pick. (Mass.) 128.

Minnesota.—*Burke v. Beveridge*, 15 Minn. 205; *Kimball v. Bryant*, 25 Minn. 496.

Missouri.—*Tapley v. Labeaume*, 1 Mo. 550; *Dickson v. Desire*, 23 Mo. 151; *Walker v. Deaver*, 5 Mo. App. 146.

New Hampshire.—*Parker v. Brown*, 15 N. H. 176; *Nutting v. Herbert*, 35 N. H. 120.

New York.—*Staats v. Ten Eyck*, 3 Cai. (N. Y.) 111, 2 Am. Dec. 254; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229; *Caukins v. Harris*, 9 Johns. (N. Y.) 324; *Bennet v. Jenkins*, 13 Johns. (N. Y.) 50; *Morris v. Phelps*, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323.

North Carolina.—*Wilson v. Forbes*, 2 Dev. L. (13 N. Car.) 30; *Price v. Deal*, 90 N. Car. 290.

Ohio.—*Vail v. Junction R. Co.*, 1 Cinc. Super. Ct. Rep. 571; *Backus v. McCoy*, 3 Ohio 211, 17 Am. Dec. 585; *Clark v. Parr*, 14 Ohio 121, 45 Am. Dec. 529.

Tennessee.—*Park v. Cheek*, 4 Coldw. (Tenn.) 20.

Vermont.—*Blake v. Burnham*, 29 Vt. 437; *Flint v. Steadman*, 36 Vt. 210.

Wisconsin.—*Rich v. Johnson*, 2 Pin. (Wis.) 88, 52 Am. Dec. 144; *McLennan v. Prentice*, 77 Wis. 124; *Daggett v. Reas*, 79 Wis. 60; *McInnis v. Lyman*, 62 Wis. 191; *Conrad v. Grand Grove, etc.*, 64 Wis. 258.

The fact that the grantee has been compelled to pay to his own grantee a larger amount will not affect the amount of his recovery. *Nichols v. Walter*, 8 Mass. 243.

Taxes Paid while in Possession.—The grantee cannot recover in addition to the consideration and interest subsequent taxes paid by him while in possession. *Blake v. Burnham*, 29 Vt. 437; *Daggett v. Reas*, 79 Wis. 60. See, however, *Frazer v. Peoria County*, 74 Ill. 282.

No Consideration.—Where there was no consideration, only nominal damages can be recovered. *Nutting v. Herbert*, 35 N. H. 120.

In *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61, *Parsons, C. J.*, intimated that there might be a different rule as to the measure of damages where the grantee was seized by virtue of the conveyance and subsequently ousted under a paramount title.

Payment of Mortgage Assumed.—In *Bingham v. Weiderwax*, 1 N. Y. 509, is a dictum to the effect that the payment of an outstanding mortgage which the grantee had assumed would entitle the grantee to recover, for breach of the covenant of seizin, the amount of the mortgage in addition to the purchase money paid to the covenantor.

Covenant of Seizin of Life Estate.—In *Martin v. Long*, 3 Mo. 391, the measure of damages for breach of a covenant of seizin of a life estate was held to be the purchase money without interest.

1. **Natural Appreciation.**—*Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Staats v. Ten Eyck*, 3 Cai. (N. Y.) 111, 2 Am. Dec. 254; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229; *Backus v. McCoy*, 3 Ohio 221, 17 Am. Dec. 585.

2. **Improvements.**—*McKinnon v. Burrows*, 3 U. C. Q. B. O. S. 590; *Clark v. Robertson*, 8 U. C. Q. B. 370; *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229; *Backus v. McCoy*, 3 Ohio 221, 17 Am. Dec. 585; *Bender v. Fromberger*, 4 Dall. (Pa.) 441; *Weiting v. Nissley*, 13 Pa. St. 655; *Conrad v. Grand Grove, etc.*, 64 Wis. 258.

3. **Benefit of Contract.**—*Marston v. Hobbs*, 2 Mass. 439, 3 Am. Dec. 61; *Wilson v. Forbes*, 2 Dev. L. (13 N. Car.) 39; *Weiting v. Nissley*, 13 Pa. St. 655.

4. **Partial Breach—Proportionate Share of Consideration Recoverable—England.**—*Gray v. Briscoe*, Noy 142.

land is all of the same quality, the amount recoverable may be determined by the quantity of the land lost.¹

Time of Estimating Relative Value of Land Lost. — The value of the two tracts should be estimated as of the time of the conveyance.²

Estate Conveyed, Though Not That Covenanted For. — And where the deed conveys an estate, though not that covenanted for, it is to be considered in measuring the damages.³

Alabama. — *Bibb v. Freeman*, 59 Ala. 612.

Connecticut. — *Hubbard v. Norton*, 10 Conn. 422.

Illinois. — *Weber v. Anderson*, 73 Ill. 439; *Tone v. Wilson*, 81 Ill. 529; *Wadhams v. Innes*, 4 Ill. App. 642.

Indiana. — *Wright v. Nipple*, 92 Ind. 310.

Iowa. — *McNear v. McComber*, 18 Iowa 12.

Kansas. — *Scantlin v. Allison*, 12 Kan. 92; *Scott v. Morning*, 23 Kan. 254; *Bolinger v. Brake*, 4 Kan. App. 180.

Kentucky. — *Cox v. Strobe*, 2 Bibb (Ky.) 273, 5 Am. Dec. 603; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271.

Maine. — *Cushman v. Blanchard*, 2 Me. 266, 11 Am. Dec. 76; *Wheeler v. Hatch*, 12 Me. 389; *Blanchard v. Hoxie*, 34 Me. 376; *Harrington v. Bean*, 89 Me. 474.

Massachusetts. — *Cornell v. Jackson*, 3 Cush. (Mass.) 510.

Missouri. — *Collier v. Gamble*, 10 Mo. 472.

New Hampshire. — *Ela v. Card*, 2 N. H. 175, 9 Am. Dec. 46; *Partridge v. Hatch*, 18 N. H. 494; *Winnipiseogee Paper Co. v. Eaton*, 65 N. H. 13.

New York. — *Staats v. Ten Eyck*, 3 Cai. (N. Y.) 111, 2 Am. Dec. 254; *Morris v. Phelps*, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323; *Guthrie v. Pugsley*, 12 Johns. (N. Y.) 126.

North Carolina. — *Dickens v. Shepperd*, 3 Murph. (7 N. Car.) 526; *Farmers' Bank v. Glenn*, 68 N. Car. 35.

Ohio. — *Vail v. Junction R. Co.*, 1 Cinc. Super. Ct. Rep. 571.

Pennsylvania. — *Lee v. Dean*, 3 Whart. (Pa.) 332; *Beaupland v. McKeen*, 28 Pa. St. 134, 70 Am. Dec. 115; *King v. Pyle*, 8 S. & R. (Pa.) 166.

South Carolina. — *Wallace v. Talbot*, 1 McCord L. (S. Car.) 467.

Tennessee. — *Park v. Cheek*, 4 Coldw. (Tenn.) 27; *Kincaid v. Brittain*, 5 Sneed (Tenn.) 123.

Texas. — *Raines v. Calloway*, 27 Tex. 678.

Wisconsin. — *Messer v. Oestreich*, 52 Wis. 684; *Bartelt v. Braunsdorf*, 57 Wis. 3.

Where land, together with an easement of maintaining a dam at a certain point, is conveyed with covenants of title, and the covenantor has no right to grant the easement, the measure of damages is the value of the easement, and not the purchase money, less the value of the land without the right of maintaining the dam. *Platt v. Grand Trunk R. Co.*, 19 Ont. App. 403.

Improvements on Land to Which Title Failed. — In *Semple v. Whorton*, 68 Wis. 626, it was held that where several tracts are sold for an entire price per acre, and the title to one of the tracts fails, in estimating the value of such tract improvements thereon at the time of the conveyance are to be considered, though the parties at the time of the conveyance had no knowledge of the existence of the improvements.

Expenses of Negotiating Resale. — In *Stearn v. Hesdorfer*, 9 Misc. Rep. (N. Y. C. Pl.) 134, it was held that the expenses of negotiating a resale, which fell through on account of a failure of title of a part of the land, could not be recovered.

Burden of Proof. — As in case of a partial breach of a covenant of warranty, the burden of showing the value of the portion of the land to which the title failed is upon the grantee, otherwise only nominal damages would be recoverable. *Lawless v. Evans*, (Tex. App. 1889) 14 S. W. Rep. 1019.

1. Land All of Same Quality. — *Wilson v. Forbes*, 2 Dev. L. (13 N. Car.) 39.

2. Messer v. Oestreich, 52 Wis. 684.

3. Estate Conveyed, Though Not That Covenanted For. — *Gray v. Briscoe*, Noy 142; *Hartford, etc., Ore Co. v. Miller*, 41 Conn. 112; *Morrison v. McArthur*, 43 Me. 567; *Hunt v. Middlesworth*, 44 Mich. 448; *Kimball v. Bryant*, 25 Minn. 496; *Ogden v. Ball*, 38 Minn. 237; *Huntsman v. Hendricks*, 44 Minn. 423; *Guthrie v. Pugsley*, 12 Johns. (N. Y.) 126.

In *Huntsman v. Hendricks*, 44 Minn. 423, where title failed to the portion of the land lying under the waters of a meandered lake, it was held that the riparian rights accruing to the other portion of the land should be considered. See also *McLennan v. Prentice*, 85 Wis. 427.

Seizin of Undivided Interest. — Where a person seized of only a one-half undivided interest in land conveys the whole land with covenant of seizin, the measure of damages is one-half of the consideration with interest. *Downer v. Smith*, 38 Vt. 464.

Conveyance of Life Estate. — Where the deed conveys a life estate which the grantee has enjoyed, the entire consideration cannot be recovered, but the value of the life estate must be considered in determining the damages. *Gray v. Briscoe*, Noy 142; *Lockwood v. Sturdevant*, 6 Conn. 373; *Blanchard v. Blanchard*, 48 Me. 174; *Rickett v. Snyder*, 9 Wend. (N. Y.) 416; *Tanner v. Livingston*, 12 Wend. (N. Y.) 83; *Recohs v. Younglove*, 8 Baxt. (Tenn.) 385; *Curtis v. Brannon*, 98 Tenn. 153; *Mills v. Catlin*, 22 Vt. 98. See, however, *Wace v. Bickerton*, 3 De G. & Sm. 751, wherein the value of the land at the death of the grantor was taken as the measure of damages; *Frazer v. Peoria County*, 74 Ill. 282, wherein the grantor, who was seized of a life estate only, conveyed a fee simple with covenants of seizin, and it was held that the grantee could recover the consideration together with taxes paid on the land and interest, less the amount of rents received or which could have been received by the grantee.

Rule in Equity. — In *Thomas v. Perry*, Pet. (C. C.) 49, it was held that a court of equity, in directing an issue of *quantum damnificatus*

Conveyance of Defeasible Estate. — And it has been held that where the grantor was seized of a defeasible estate instead of an indefeasible estate, the damages should be nominal until eviction.¹

Breach by Existence of Easement. — In those states in which the existence of an easement on the land conveyed which cannot be removed is a breach of the covenant of seizin, the measure of damages is the consequent depreciation in the value of the land as of the time of the conveyance.²

Breach by Existence of Mortgage. — And where the existence of a mortgage is a breach of the covenant, the measure of damages is the amount of the debt secured by the mortgage.³

(3) *Non-eviction.* — As to the measure of damages for breach of the covenant of seizin where the covenantee has entered and held possession of the land by paramount title, and without having sustained any real injury in consequence of the alleged breach, there is an irreconcilable conflict of decisions, arising from the different views of the courts as to the effect of such a covenant.

Substantial Damages on Nominal Breach. — In some, perhaps most of the states, no distinction is taken between a nominal and a substantial breach of the covenant — that is, a breach by which the covenantee sustains no injury, and one where he is actually injured — and it is held that on such mere nominal breach the covenantee, though still possessed of the land, may sue for and recover the purchase money.⁴

Only Nominal Damages for Nominal Breach. — On the other hand, in other jurisdictions the courts hold that there is an immediate breach, if at all, as of the time of the conveyance, which entitles the covenantee to bring an action upon the covenant, but does not permit a recovery for more than nominal damages, so long as the grantee remains in possession of the land and has suffered no actual injury.⁵

for breach of a covenant of seizin by failure of title to a part of the land, will direct that the defendant be allowed to give evidence of the value of a large over-quantity of lands conveyed.

1. *Collier v. Gamble*, 10 Mo. 472.

2. **Breach by Existence of Easement.** — *Cope-land v. McAdory*, 100 Ala. 553.

3. **Breach by Existence of Mortgage.** — *Gilbert v. Bulkley*, 5 Conn. 262, 13 Am. Dec. 57.

4. **Nominal Breach — Consideration Recoverable** — *Arkansas*. — *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338.

Connecticut. — *Mitchell v. Hazen*, 4 Conn. 475, 10 Am. Dec. 169; *Lockwood v. Sturdevant*, 6 Conn. 390; *Hubbard v. Norton*, 10 Conn. 422.

Illinois. — *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269; *Richard v. Bent*, 59 Ill. 43, 14 Am. Rep. 1; *Frazer v. Peoria County*, 74 Ill. 282; *Tone v. Wilson*, 81 Ill. 529.

Maine. — See *Blanchard v. Hoxie*, 34 Me. 376.

Maryland. — *Bryan v. Smallwood*, 4 Har. & M. (Md.) 483.

Massachusetts. — See *Marston v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Cornell v. Jackson*, 3 Cush. (Mass.) 506; *Harris v. Newell*, 8 Mass. 262.

New York. — *Bingham v. Weiderwax*, 1 N. Y. 509; *Tucker v. Clark*, 2 Sandf. Ch. (N. Y.) 96; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416.

Pennsylvania. — *Bender v. Fromberger*, 4 Dall. (Pa.) 436.

South Carolina. — *Bell v. Huggins*, 1 Bay (S. Car.) 326; *Pringle v. Witten*, 1 Bay (S. Car.)

256, 1 Am. Dec. 612; *Sumter v. Welsh*, 2 Bay (S. Car.) 558; *Mackey v. Collins*, 2 Nott & M. (S. Car.) 186, 10 Am. Dec. 586; *Vaughan v. Mitchell*, 2 Brev. (S. Car.) 100.

Tennessee. — *Park v. Cheek*, 4 Coldw. (Tenn.) 20; *Kincaid v. Brittain*, 5 Sneed (Tenn.) 119.

Vermont. — *Catlin v. Hurlburt*, 3 Vt. 403; *Blake v. Burnham*, 29 Vt. 437.

5. **Nominal Damages Recoverable — Canada.** — *Snider v. Snider*, 13 U. C. C. P. 157; *Graham v. Baker*, 10 U. C. C. P. 426; *Bannon v. Frank*, 14 U. C. C. P. 295; *Brown v. O'Dwyer*, 35 U. C. B. 354. Compare *Gibson v. Boulton*, 3 U. C. C. P. 407.

Indiana. — *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Overhiser v. McCollister*, 10 Ind. 44; *Hacker v. Blake*, 17 Ind. 97; *Mason v. Cooksey*, 51 Ind. 519. See, however, *Botdorf v. Smith*, 7 Ind. 673.

Iowa. — *Nosler v. Hunt*, 18 Iowa 212; *Boon v. McHenry*, 55 Iowa 202; *Hencke v. Johnson*, 62 Iowa 555; *Norman v. Winch*, 65 Iowa 263.

Kansas. — *O'Meara v. McDaniel*, 49 Kan. 685. See also *Hammerslough v. Hackett*, 48 Kan. 700.

Minnesota. — *Ogden v. Ball*, 38 Minn. 237; *Sable v. Brockmeier*, 45 Minn. 248.

Missouri. — *Bircher v. Watkins*, 13 Mo. 521; *Mosely v. Hunter*, 15 Mo. 322; *Chambers v. Smith*, 23 Mo. 174; *Cockrell v. Proctor*, 65 Mo. 46; *Conklin v. Hannibal*, etc., R. Co., 65 Mo. 533; *Wyatt v. Dunn*, 93 Mo. 464; *Mumford v. Keet*, 65 Mo. App. 502; *Holladay v. Menifee*, 30 Mo. App. 207. See, however, *Martin v. Long*, 3 Mo. 392; *Collier v. Gamble*, 10 Mo.

No Breach while Possession Continues.—In still other jurisdictions, where the courts hold that the covenant is satisfied by a mere seizin in fact, of course not even nominal damages could be recovered, as there would be no breach of the contract.¹

Title Acquired by Grantee by Adverse Possession.—Where the covenantee has remained in possession until his possession has ripened by adverse possession into a valid title, only nominal damages can be recovered.²

(4) *Purchase of Paramount Title by Grantee.*—Where the grantee buys in the paramount title, his recovery cannot exceed the amount fairly and necessarily paid therefor.³

g. COVENANT FOR RIGHT TO CONVEY.—The covenant of good right to convey is generally considered as of practically the same import as the covenant of seizin, and the measure of damages for a breach is generally the consideration paid, with interest.⁴

Partial Failure of Title—Acquiring Paramount Title.—This amount is, however, as in actions on the covenant of seizin, subject to reduction, as where the failure

472; *Reese v. Smith*, 12 Mo. 344; *Lawless v. Collier*, 19 Mo. 485.

New Hampshire.—*Dickey v. Weston*, 61 N. H. 23. See, however, *Parker v. Brown*, 15 N. H. 176.

North Dakota.—*Bowne v. Wolcott*, 1 N. Dak. 415.

Wisconsin.—*Rich v. Johnson*, 2 Pin. (Wis.) 88, 52 Am. Dec. 144; *Noonan v. Ilsley*, 22 Wis. 27; *Bardeen v. Markstrum*, 64 Wis. 613; *Smith v. Hughes*, 50 Wis. 620; *McLennan v. Prentice*, 85 Wis. 427. See, however, *Walker v. Wilson*, 13 Wis. 522; *Hall v. Gale*, 14 Wis. 54; *Akerly v. Vilas*, 21 Wis. 110; *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68.

Comp. Laws of N. Dak., § 4584, providing that the detriment caused by a breach of the covenant of seizin "is to be deemed the price paid to the grantor, or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore, at the time of the grant, to the value of the whole property," does not abolish the common-law rule that in case of a mere technical breach only nominal damages can be recovered. *Bowne v. Wolcott*, 1 N. Dak. 415.

Conveyance of Unoccupied Lands.—Where there is a conveyance of unoccupied lands, there is an immediate constructive eviction which will entitle the grantee to recover the consideration with interest. *McInnis v. Lyman*, 62 Wis. 191.

1. **Ohio Rule.**—In Ohio the covenant is not broken until after eviction, if the grantor was in actual possession. *Backus v. McCoy*, 3 Ohio 211; 17 Am. Dec. 585; *Robinson v. Neil*, 3 Ohio 525; *Devore v. Sunderland*, 17 Ohio 52, 49 Am. Dec. 442; *Stambaugh v. Smith*, 23 Ohio St. 584.

2. **Title Acquired by Adverse Possession.**—*Wilson v. Forbes*, 2 Dev. L. (13 N. Car.) 30; *Kincaid v. Brittain*, 5 Sneed (Tenn.) 123; *Garfield v. Williams*, 2 Vt. 327; *Noonan v. Ilsley*, 21 Wis. 145. See also *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114; *Cowan v. Silliman*, 4 Dev. L. (15 N. Car.) 46; *Park v. Cheek*, 4 Coldw. (Tenn.) 20.

3. **Recovery Limited by Amount Paid for Paramount Title—United States.**—*Schnelle*, etc., *Lumber Co. v. Barlow*, 34 Fed. Rep. 853.

Arkansas.—*Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114.

Illinois.—*Weber v. Anderson*, 73 Ill. 439; *Clapp v. Herdman*, 25 Ill. App. 509.

Kansas.—*Dale v. Shively*, 8 Kan. 276; *McKee v. Bain*, 11 Kan. 569.

Maine.—*Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595.

Minnesota.—*Kimball v. Bryant*, 25 Minn. 500.

Missouri.—*Hall v. Bray*, 51 Mo. 288.

North Carolina.—*Farmers' Bank v. Glenn*, 68 N. Car. 35.

See also cases cited to similar point in actions on the other covenants, this section *passim*.

In *Long v. Sinclair*, 40 Mich. 569, it was held that where the grantee of one-quarter of a quarter-section of land goes into possession of the entire quarter-section, and subsequently suffers judgment in ejectment for the entire quarter-section and elects to pay its appraised value, he can only recover on the covenant of seizin one-quarter of the amount paid, in the absence of evidence that the land was of different value.

Burden of Proof.—In the absence of evidence as to the amount paid, it has been held that only nominal damages can be recovered. *Pate v. Mitchell*, 23 Ark. 590, 79 Am. Dec. 114. See, however, *Kimball v. Bryant*, 25 Minn. 496.

4. **Covenant for Right to Convey.**—*Mitchell v. Hazen*, 4 Conn. 516, 10 Am. Dec. 169; *Mars-ton v. Hobbs*, 2 Mass. 433, 3 Am. Dec. 61; *Bickford v. Page*, 2 Mass. 455; *Willard v. Twitchell*, 1 N. H. 177; *Willson v. Willson*, 25 N. H. 233, 57 Am. Dec. 320. See *supra*, this section, *Covenant of Seizin*.

Tax Sale.—For breach of a covenant by the tax collector in a tax deed, that the tax was assessed, etc., according to law and that the officer had a good right to convey, it was held that where the deed conveyed no seizin, either in fact or in law, the measure of damages was the consideration paid, with interest. *Stubbs v. Page*, 2 Me. 378.

Execution Sale.—And where the officer on the sale of land on execution covenanted that he had obeyed all the directions of the law relative to such sales, it was held that the measure of damages in case the sale was void was the consideration paid, with interest. *Wade v. Merwin*, 11 Pick. (Mass.) 280.

of title is only partial¹ or where the covenantee buys in the paramount title, etc.²

h. COVENANT FOR FURTHER ASSURANCE. — In an action for a breach of a covenant for further assurance, by refusal to execute the further assurance on demand, only nominal damages are recoverable unless the plaintiff proves that he has sustained actual damages.³

Eviction on Account of Breach. — But where the grantee is evicted by reason of the failure of the covenantor to make such further assurances, he may recover his actual damages.⁴

i. AFFIRMATIVE AND RESTRICTIVE COVENANTS. — In many instances, especially in cases of conveyances of city property and of rights of way to railroad companies, the deeds contain covenants on the part of the grantee or grantor for the performance or nonperformance of certain acts. The measure of damages in such cases is the same as in all cases of a breach of contract, that is, the damages proximately caused by breach of the covenant, and within the contemplation of the parties.⁵

1. Partial Breach. — In *Scantlin v. Allison*, 12 Kan. 85, it was held that where land is conveyed with covenant by the grantor that he has good and lawful authority to sue and convey the same, when in fact he has authority to convey only four undivided fifths of the same, the grantee may recover one-fifth of the consideration. See also *McKay v. McKay*, 31 U. C. C. P. 1.

2. Willson v. Willson, 25 N. H. 234, 57 Am. Dec. 320.

3. Nominal Damages. — *Burr v. Todd*, 41 Pa. St. 206, *per* Woodward, J., *citing* Rawle on Covenants for Title, 202, 319. See also *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338.

In *King v. Jones*, 5 Taunt. 418, in speaking of the effect of the covenantee's failure to sue the covenantor, the former having delayed action until he was evicted from the land, Heath, J., said: "It was wise so to do until the ultimate damage was sustained, for otherwise he could not have recovered the whole value."

Removing Cloud on Title. — The expenses of removing a cloud on the title cannot be recovered in an action on the covenant for further assurances, as such covenant covers only such defects in the title as can be remedied by the covenantor. *Luther v. Brown*, 66 Mo. App. 227.

4. King v. Jones, 5 Taunt. 418, wherein the breach of the covenantor consisted in the refusal of the covenantor and his wife to levy a fine so as to bar the wife's title to the land and resulted after their death in the recovery of the land by the devisee of the wife. The covenantee was permitted to recover the consideration paid, with interest from the time of his eviction by the devisee of the wife.

5. Actual Damages Sustained Recoverable. — *Pittsburg, etc., R. Co. v. Reno*, 22 Ill. App. 470, *affirmed* in 123 Ill. 273; *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Avery v. New York Cent., etc., R. Co.*, 121 N. Y. 31.

In *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369, wherein the grantee of a right of way covenanted to maintain a fence at the terminus of the right of way, it was held that the measure of damages for the breach of the covenant was the actual injury sustained by the grantor.

Covenant to Open Streets. — Diminution in the value of building lots by reason of the failure

of the grantor to complete streets so as to render the lots accessible, is recoverable for breach of such covenant. *Fake v. Kellogg*, (Supreme Ct.) 49 N. Y. St. Rep. 465.

Contingent Damages — Covenant to Make Partition. — For breach of a covenant between covenants to make partition so that a portion of the land shall be set off to one of the tenants who had sold the same with covenants of warranty, damages which might be recovered by his grantee for breach of his covenant of warranty cannot be recovered so long as the grantee has not been disturbed in his possession. *Shepard v. Ryers*, 15 Johns. (N. Y.) 497.

Prospective Damages. — For breach of a covenant by a railroad company to repair cattle passes under its road, for the benefit of the owner of the land, prospective damages cannot be recovered, but only the damages suffered up to the time of the commencement of the action. *Phelps v. New Haven, etc., R. Co.*, 43 Conn. 453.

Covenant to Fence Right of Way. — For breach of a covenant to fence the right of way, a railroad company is liable for the destruction of crops on the adjoining land of the grantor caused by the incursion of cattle. *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522. See generally the title *FENCES*, as to covenants to fence.

Covenant to Stop Trains on Grantor's Land. — In *Mobile, etc., R. Co. v. Gilmer*, 85 Ala. 422, it was held that the measure of damages for breach of a covenant to stop trains on the grantor's land was the difference between the value of the land had the covenant been performed and its value without the performance of the covenant. See generally the title *STATIONS (RAILROAD)*.

Covenants Against Erection of Buildings. — It has been held that where a grantor conveys portions of a tract of land, and the several grantees covenant not to erect certain buildings on the land granted to each, and the erection of such buildings will not be enjoined, a court of equity may award to the other grantees as damages the difference in the value of their land with and without the erection by a grantee of such a building. *Amerman v. Deane*, 132 N. Y. 355, 28 Am. St. Rep. 584. See also the title *BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS*, vol. 5, p. 17.

j. **CONSIDERATION NOT PECUNIARY.** — In those jurisdictions in which the measure of damages for breach of a covenant of warranty or seizin is the consideration paid, with interest, if the consideration paid was other than a money consideration, and its value was not agreed upon at the time of the conveyance, its actual value may be recovered. Thus in case of an exchange of land, the value of the land parted with by the covenantor is recoverable.¹

k. **CONSIDERATION NOT PAID TO COVENANTOR.** — Where the consideration was not paid to the covenantor, as where the conveyance is made in satisfaction of the debt of a third person, or where in pursuance of a contract of sale the deed is executed directly to the assignee of the contract, and recites the consideration paid by the assignee, which was more than the amount received by the vendor, it has been held that the liability of the covenantor was limited to the amount received by him or the value of the land.²

Consideration Held Recoverable though Not Paid to Covenantor. — There are, however, decisions in other jurisdictions which permit the recovery of the consideration, whether paid to the covenantor or not.³

l. **CONSIDERATION NOT ASCERTAINABLE.** — And where the consideration paid is not ascertainable, the measure of damages will be determined by the value of the land at the time of the conveyance.⁴

m. **ACTION BY REMOTE GRANTEE.** — Where the measure of damages is based upon the consideration paid, and the action is by a remote grantee, it is held in some jurisdictions that the consideration paid by the original grantee may be recovered, and not merely the consideration paid by the plaintiff.⁵

1. Consideration Not Pecuniary. — *Hodges v. Thayer*, 110 Mass. 286; *Evans v. Fulton*, 134 Mo. 653.

Exchange of Lands. — Where lands are exchanged without any valuation being placed upon them, the measure of damages is the value of the land parted with by the covenantor, not the value of the land conveyed by the covenantor. *Lacey v. Marnan*, 37 Ind. 171; *Looney v. Reeves*, 5 Kan. App. 279; *Grimes v. Redmon*, 14 B. Mon. (Ky.) 189; *Cook v. Curtis*, 68 Mich. 611; *Dayton v. Warren*, 10 Minn. 233; *Burke v. Beveridge*, 15 Minn. 205; *Evans v. Fulton*, 134 Mo. 653; *White v. Street*, 67 Tex. 177.

In *Cummins v. Kennedy*, 3 Litt. (Ky.) 124, 14 Am. Dec. 45, however, it was held that the value of the land conveyed to the covenantor, and not that conveyed to the covenantor, should be considered in estimating the damages.

Shares of Stock as Consideration. — In *McGuffey v. Humes*, 85 Tenn. 26, it was said that when the consideration was paid in shares of stock having no fixed value, and no value therefor was agreed upon, its actual value could be recovered.

Discharge of Debt as Consideration. — In *Barnett v. Hughey*, 54 Ark. 195, it was held that where the land was conveyed in payment of a debt due the grantee, the amount of the debt was recoverable.

2. Consideration Not Paid to Covenantor. — *Staples v. Dean*, 114 Mass. 125; *Byrnes v. Rich*, 5 Gray (Mass.) 518; *Bowne v. Wolcott*, 1 N. Dak. 497.

Conveyance by Covenantor to Purchaser from Original Vendee. — Where the covenantor sold the land to a third person, who resold to the plaintiff at an increased price, and the deed was executed by the covenantor directly to the plaintiff, in which the consideration recited

was the consideration paid by the plaintiff, it was held that the plaintiff could not recover the consideration paid by him, but was limited to a recovery of that paid to the covenantor. *Cook v. Curtis*, 68 Mich. 611. *Contra*, *McClure v. McClure*, 65 Ind. 482; *Graham v. Leslie*, 4 U. C. C. P. 176.

3. Consideration Recoverable though Not Paid to Covenantor. — *Barnett v. Hughey*, 54 Ark. 195; *McClure v. McClure*, 65 Ind. 482; *Bloom v. Wolfe*, 50 Iowa 286. See, however, *Cook v. Curtis*, 68 Mich. 611.

Conveyance by Trustee. — In *Bloom v. Wolfe*, 50 Iowa 286, it was held that the facts that the conveyance was by a trustee and that the consideration was paid to the *cestui que trust* did not prevent its recovery from the trustee. See also *Barnett v. Hughey*, 54 Ark. 195; *Graves v. Mattingly*, 6 Bush (Ky.) 361; *Taylor v. Helter*, 1 Mont. 688.

4. Consideration Not Ascertainable. — *Smith v. Strong*, 14 Pick. (Mass.) 133; *Vail v. Junction R. Co.*, 1 Cinc. Super. Ct. Rep. 571; *McGuffey v. Humes*, 85 Tenn. 26. See also *Marshall v. M'Connell*, 1 Litt. (Ky.) 424, where the consideration was the compromise of a contest between the parties.

5. Action by Remote Grantee — Consideration Paid by Original Grantee Recoverable — Kentucky. — *Dougherty v. Duvall*, 9 B. Mon. (Ky.) 57; *Cummins v. Kennedy*, 3 Litt. (Ky.) 123, 14 Am. Dec. 45.

Mississippi. — *White v. Presley*, 54 Miss. 313; *Brooks v. Black*, 68 Miss. 161, 24 Am. St. Rep. 259.

South Carolina. — *Lowrance v. Robertson*, 10 S. Car. 8.

Texas. — *Rogers v. Golson*, (Tex. Civ. App. 1895) 31 S. W. Rep. 200; *Hollingsworth v. Mexia*, (Tex. Civ. App. 1896) 37 S. W. Rep. 455.

See also *Lawless v. Collier*, 19 Mo. 480.

Remote Grantee Limited to Consideration Paid by Him. — In a number of jurisdictions, however, the subsequent grantee is limited to a recovery of the consideration paid by him, in case it is less than that paid by his grantor.¹ But in case the consideration paid by the subsequent grantee exceeds that paid by the original grantee, he can only recover the consideration paid by the latter.²

By the Grantee of Part of Land Conveyed. — Where the action is brought by a grantee of a portion of the land conveyed to his grantor by the covenantor, title to the whole tract having failed, the plaintiff's recovery cannot exceed the proportion of the consideration received by the covenantor which the value of the land conveyed to the plaintiff bears to the value of the entire tract conveyed by the covenantor.³

n. EXPENSES OF LITIGATION — (1) *Expenses of Defending Title* — (a) **In General.** — A grantee in possession of land under a deed containing the usual covenants would, in surrendering possession to what he supposed to be a paramount title, act at his peril; and it is therefore generally held that where he defends the action by the owner of the paramount title to recover possession of the land, he may recover from his covenantor the expenses necessarily incurred,⁴ including a reasonable fee paid to his

1. Consideration Paid by Remote Grantee — *Arkansas.* — Barnett *v.* Hughey, 54 Ark. 195.

Colorado. — Taylor *v.* Wallace, 20 Colo. 211.

Maryland. — Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480.

Minnesota. — Allen *v.* Walsh, 25 Minn. 543.

Missouri. — Dickson *v.* Desire, 23 Mo. 166.

North Carolina. — Williams *v.* Beeman, 2 Dev. L. (13 N. Car.) 483.

Tennessee. — Mette *v.* Dow, 9 Lea (Tenn.) 93; Whitzman *v.* Hirsh, 87 Tenn. 517.

2. Recovery Cannot Exceed Consideration Received by Covenantor. — Taylor *v.* Wallace, 20 Colo. 211; Crisfield *v.* Storr, 36 Md. 129, 11 Am. Rep. 480; White *v.* Presly, 54 Miss. 313; Dickson *v.* Desire, 23 Mo. 166; Whitzman *v.* Hirsh, 87 Tenn. 517.

3. Remote Grantee of a Portion of the Lands. — Dougherty *v.* Duvall, 9 B. Mon. (Ky.) 57; Whitzman *v.* Hirsh, 87 Tenn. 513.

In *Mischke v. Baughn*, 52 Iowa 528, it was held that a grantee of one-half of the land warranted by the covenantor could only recover one-half of the consideration received by the covenantor.

And the fact that actions by the other purchasers of the land are barred by the statute of limitations cannot enlarge his recovery. Whitzman *v.* Hirsh, 87 Tenn. 513.

4. Expenses of Defending Title — *England.* — Child *v.* Stenning, 11 Ch. Div. 82; Williams *v.* Burrell, 1 C. B. 402, 50 E. C. L. 402; Smith *v.* Compton, 3 B. & Ad. 407, 23 E. C. L. 106; Rolph *v.* Crouch, L. R. 3 Exch. 44; Williams *v.* Burrell, 1 C. B. 402, 50 E. C. L. 402. See also Howard *v.* Lovegrove, L. R. 6 Exch. 43.

Canada. — Brennan *v.* Servis, 8 U. C. Q. B. 191; Clark *v.* Robertson, 8 U. C. Q. B. 372; Stubbs *v.* Martindale, 7 U. C. C. P. 52; Stuart *v.* Mathieson, 23 U. C. Q. B. 135. See also Spence *v.* Hector, 24 U. C. Q. B. 277; Maybee *v.* Turley, 27 U. C. Q. B. 444. Compare Parker *v.* McDonald, 11 U. C. C. P. 478; Hodgins *v.* Hodgins, 13 U. C. C. P. 146.

Connecticut. — Sterling *v.* Peet, 14 Conn. 254; Butler *v.* Barnes, 61 Conn. 399.

Georgia. — Wimberley *v.* Collier, 32 Ga. 13.

Illinois. — Harding *v.* Larkin, 41 Ill. 413.

Indiana. — Worley *v.* Hineman, 6 Ind. App. 240.

Iowa. — Swartz *v.* Ballou, 47 Iowa 188, 29 Am. Rep. 470.

Kansas. — Stebbins *v.* Wolf, 33 Kan. 765.

Kentucky. — Robertson *v.* Lemon, 2 Bush (Ky.) 302; Cox *v.* Strode, 2 Bibb (Ky.) 280, 5 Am. Dec. 603; Barnett *v.* Montgomery, 6 T. B. Mon. (Ky.) 331; Mercantile Trust Co. *v.* South Park Residence Co., 94 Ky. 271; Blackwell *v.* McBride, 14 Ky. L. Rep. 760.

Maine. — Hardy *v.* Nelson, 27 Me. 525; Williamson *v.* Williamson, 71 Me. 442.

Massachusetts. — Sumner *v.* Williams, 8 Mass. 162, 5 Am. Dec. 83; Leffingwell *v.* Elliott, 8 Pick. (Mass.) 455, 19 Am. Dec. 343.

Michigan. — Webb *v.* Holt, (Mich. 1897) 71 N. W. Rep. 637.

Minnesota. — Allis *v.* Nininger, 25 Minn. 525.

Mississippi. — Brooks *v.* Black, 68 Miss. 161, 24 Am. St. Rep. 259, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 566.

Missouri. — Hutchins *v.* Roundtree, 77 Mo. 500; Matheny *v.* Stewart, 108 Mo. 73.

Nebraska. — Cheney *v.* Straube, 35 Neb. 521.

Nevada. — Dalton *v.* Bowker, 8 Nev. 190.

New Hampshire. — Winnipiseogee Paper Co. *v.* Eaton, 65 N. H. 13.

New York. — Staats *v.* Ten Eyck, 3 Cai. (N. Y.) 111, 2 Am. Dec. 254; Pitcher *v.* Livingston, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229; Waldo *v.* Long, 7 Johns. (N. Y.) 173; Bennet *v.* Jenkins, 13 Johns. (N. Y.) 50; Grantier *v.* Austin, 66 Hun (N. Y.) 157; Hymes *v.* Esty, 133 N. Y. 342.

Texas. — Hedrick *v.* Smith, 77 Tex. 608.

Vermont. — Tarbell *v.* Tarbell, 60 Vt. 486.

Hopelessness of Defense Apparent. — Where, however, the hopelessness of a defense is apparent and known to the grantee, a recovery for expenses incurred therein will be denied. Parker *v.* McDonald, 11 U. C. C. P. 478; Hodgins *v.* Hodgins, 13 U. C. C. P. 146; Hunter *v.* Johnson, 14 U. C. C. P. 123; Matheny *v.* Stewart, 108 Mo. 73; Terry *v.* Drabensdadt, 68 Pa. St. 400.

The covenantee cannot recover against the covenantor the expenses of an action brought

attorney.¹ In some jurisdictions, however, the covenantee cannot recover fees paid to his counsel, but only the other costs of the action.²

Suit by Grantee. — And the rule permitting the recovery of the costs of litigation has been extended to the recovery of the expenses of unsuccessful actions instituted by the grantee for the purpose of testing the title.³

(b) **Direction by Covenantor that No Defense Be Made.** — Where the defense is apparently hopeless, and the covenantor gives notice to the covenantee not to defend, and acknowledges liability on his covenants, it has been held that the expenses of defending the action cannot be recovered.⁴

(c) **Defense by Covenantor.** — And where the covenantor, on being called upon to defend the title, immediately employs competent counsel to do so, the cove-

against the covenantee and defendant by him after his eviction from the property. *Stark v. Olney*, 3 Oregon 89.

Mistake in Description of Land — Reformation of Deed. — Where the portion of the land from which the covenantee was evicted was by mistake omitted from the deed, the subsequent reformation of the deed so as to include such land will not entitle him to recover the expenses incurred in defending his title to the portion so omitted. *Butler v. Barnes*, 61 Conn. 399.

Covenant of Seizin — Covenantor Seized neither in Law nor in Fact. — In *Cushman v. Blanchard*, 2 Me. 266, 11 Am. Dec. 76, it was held that where part of the land conveyed with covenant of seizin was in possession of the owner of the paramount title, who sued the covenantee for a trespass upon the land, the costs of the trespass action could not be recovered from the covenantor, as such costs are only recoverable when incurred in defending the seizin, which the grantee actually gained by a conveyance from one seized in fact. See also *Stubbs v. Page*, 2 Me. 378.

Expenses Not Paid. — In *Stubbs v. Martindale*, 7 U. C. C. P. 52, a purchaser who had been ejected was held entitled to recover the expenses of defending the ejectment suit against him, though he had not actually paid them.

1. Attorney's Fees Recoverable — California. — *Levitzky v. Canning*, 33 Cal. 308.

Illinois. — *Harding v. Larkin*, 41 Ill. 413; *Walsh v. Dunn*, 34 Ill. App. 146.

Iowa. — *Meservey v. Snell*, 94 Iowa 222.

Kansas. — *McKee v. Bain*, 11 Kan. 569.

Kentucky. — *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271; *Graham v. Dyer*, 16 Ky. L. Rep. 541, 29 S. W. Rep. 346.

Maine. — *Swett v. Patrick*, 12 Me. 9; *Ryerson v. Chapman*, 66 Me. 557.

Maryland. — *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480.

Montana. — *Taylor v. Holter*, 1 Mont. 688.

Nebraska. — *Walton v. Campbell*, (Neb. 1897) 71 N. W. Rep. 737.

New Hampshire. — *Andrews v. Davison*, 17 N. H. 413, 43 Am. Dec. 606.

New York. — *Staats v. Ten Eyck*, 3 Cai. (N. Y.) 111, 2 Am. Dec. 254; *Rickert v. Snyder*, 9 Wend. (N. Y.) 416.

Ohio. — *Lane v. Fury*, 31 Ohio St. 574.

Pennsylvania. — *Robinson v. Bakewell*, 25 Pa. St. 428; *Anderson v. Washabaugh*, 43 Pa. St. 115.

Vermont. — *Pitkin v. Leavitt*, 13 Vt. 379;

Keeler v. Wood, 30 Vt. 242; *Smith v. Sprague*, 40 Vt. 43; *Turner v. Goodrich*, 26 Vt. 707.

In *Swartz v. Ballou*, 47 Iowa 188, 29 Am. Rep. 470, the recovery of counsel fees was denied because it was not shown that the covenantee had paid or was under obligation to pay any specific sum as counsel fees.

Interest on Counsel Fees. — Interest on counsel fees cannot be recovered unless it is shown that they have been paid by the grantee. *Walton v. Campbell*, (Neb. 1897) 71 N. W. Rep. 737.

2. Attorney's Fees Not Recoverable — Georgia. — *Gragg v. Richardson*, 25 Ga. 566, 71 Am. Dec. 190.

Massachusetts. — *Leffingwell v. Elliott*, 10 Pick. (Mass.) 204.

Mississippi. — *Brooks v. Black*, 68 Miss. 161, 24 Am. St. Rep. 259.

Missouri. — *Matheny v. Stewart*, 108 Mo. 73, wherein the rule adopted in *Mississippi* is announced.

New Jersey. — *Holmes v. Sinnickson*, 15 N. J. L. 313.

South Carolina. — *Jeter v. Glenn*, 9 Rich. L. (S. Car.) 380; *Ex p. Lynch*, 25 S. Car. 193.

Tennessee. — *Williams v. Burg*, 9 Lea (Tenn.) 465.

Texas. — *Turner v. Miller*, 42 Tex. 418, 19 Am. Rep. 47, *distinguishing* *Rowe v. Heath*, 23 Tex. 620.

3. Actions by Covenantee. — *Gragg v. Richardson*, 25 Ga. 566, 71 Am. Dec. 190; *Walsh v. Dunn*, 34 Ill. App. 146; *Barnett v. Montgomery*, 6 T. B. Mon. (Ky.) 331; *Kyle v. Fauntleroy*, 9 B. Mon. (Ky.) 622; *Ryerson v. Chapman*, 66 Me. 557; *Andrews v. Davison*, 17 N. H. 413, 43 Am. Dec. 606; *Pitkin v. Leavitt*, 13 Vt. 379. See also *Kingsburg v. Smith*, 13 N. H. 109; *Child v. Stenning*, 11 Ch. Div. 82. See, however, *Christy v. Ogle*, 33 Ill. 295; *Harding v. Larkin*, 41 Ill. 413.

Illustration. — In *Haynes v. Stevens*, 11 N. H. 28, wherein the breach of the covenant against incumbrances consisted in the existence of a highway across the land conveyed, it was held that the covenantee could recover the costs of an action by him against a third person for using the highway, the action having been commenced by him on the representation of the covenantor that the highway had no legal existence.

4. Direction by Covenantor that No Defense Be Made. — *Matheny v. Stewart*, 108 Mo. 73; *Terry v. Drabenstadt*, 68 Pa. St. 400. See, however, *Williamson v. Williamson*, 71 Me. 442; *Morris v. Rowan*, 17 N. J. L. 304.

nantee cannot on eviction recover the fees paid to counsel retained by him.¹

(d) **Where Defense Is Successful.** — The covenantee cannot claim against the covenantor for expenses in defense of a suit by an adverse claimant of the land which resulted in favor of the covenantee and the title which he acquired by his purchase.²

(e) **Limited to Actions in Which Paramount Title Was Asserted.** — The recovery of expenses of litigation is also limited to the recovery of expenses incurred solely in the action in which the paramount title was asserted.³

(f) **Notice of Action to Covenantor.** — And again, in some jurisdictions the recovery of the expenses of defending title is dependent upon whether the covenantor had notice of the pendency of the action, so that he might assume the defense thereof, or, if he considered a defense useless, perform his covenant by paying to the grantee the amount of damages to which he would be entitled.⁴ In other jurisdictions the right of the grantee to recover the cost of defending his title is laid down as a general rule, without any regard to the question whether notice of the action had been given to the covenantor.⁵ And in *New Jersey* it has been expressly held that such notice is unnecessary.⁶

(2) **Expense of Perfecting Title.** — The expenses incurred by the grantee in perfecting his title, as in an action to remove a cloud, cannot be recovered on any of the usual covenants in a warranty deed.⁷

o. INTEREST — (1) *In General.* — Where the damages are measured by the consideration paid, interest thereon is, as a general rule, also recoverable.⁸

(2) *Time from Which Interest Is to Be Computed* — (a) *In General.* — Where the grantee did not secure possession of the land, by reason of its being held

1. **Defense by Covenantor.** — *Kennison v. Taylor*, 18 N. H. 220; *Conrad v. Effinger*, 87 Va. 50, 24 Am. St. Rep. 646.

2. *Smith v. Parsons*, 33 W. Va. 644.

Where Suit Was Result of Actual Defect of Title. — It has, however, been held that where the action was the result of an actual legal defect in the title, the necessary expenses in successfully defending the action may be recovered. *Meservey v. Snell*, 94 Iowa 222.

3. *Harding v. Larkin*, 41 Ill. 413.

Action for Mesne Profits. — The covenantee cannot recover the costs incurred in an action by the owner of the paramount title for the recovery of mesne profits. *Staats v. Ten Eyck*, 3 Cai. (N. Y.) 111, 2 Am. Dec. 254.

4. **Notice to Covenantor Essential.** — *Chestnut v. Tyson*, 105 Ala. 149; *Yokum v. Thomas*, 15 Iowa 67; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky. 271; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Winnipiseogee Paper Co. v. Marsh*, 64 N. H. 531; *Finton v. Egelston*, 61 Hun (N. Y.) 246; *Fulweiler v. Baugher*, 15 S. & R. (Pa.) 55; *Terry v. Drabenstadt*, 68 Pa. St. 400; *Hood's Appeal*, (Pa. 1886) 7 Atl. Rep. 137. See also *Harding v. Larkin*, 41 Ill. 413; *Eldridge v. Wadleigh*, 12 Me. 371; *Williamson v. Williamson*, 71 Me. 442; *Hain v. Martin*, 5 Watts (Pa.) 179.

In *Barlow v. Delaney*, 40 Fed. Rep. 97, it was held that the covenantee could not recover against the estate of the covenantor the costs and counsel fees incurred in an action against the covenantee brought by persons holding a title paramount to that of the covenantor, where the covenantor was not notified of the suit, and where the suit was defended by the covenantee in his own interest under the belief that he had no remedy against the covenantor.

Absence of Covenantor. — In *Fulweiler v.*

Baugher, 15 S. & R. (Pa.) 55, it is suggested that notice to the covenantor is not necessary where he has left the state, and expenses must be incurred before he can be found, as in cases of fraud in the covenantor.

5. See cases cited *supra*, this section, *Expenses of Defending Title — In General*, first note.

6. *Morris v. Rowan*, 17 N. J. L. 306. See also *Ryerson v. Chapman*, 66 Me. 557, wherein it was held that if the covenantor is not notified to defend the title, the burden is upon the covenantee to show that the expenses were fairly incurred.

7. **Removing Cloud from Title.** — *Johnson v. McChesney*, 33 Ill. App. 526. See also *Winnipiseogee Paper Co. v. Marsh*, 64 N. H. 531.

8. **Interest** — *Arkansas*. — *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Carvill v. Jacks*, 43 Ark. 439.

Indiana. — *Burton v. Reeds*, 20 Ind. 87; *Wood v. Bibbins*, 58 Ind. 392; *Wilson v. Peelle*, 78 Ind. 384; *Rhea v. Swain*, 122 Ind. 272.

Iowa. — *McNear v. McComber*, 18 Iowa 12. *Kentucky.* — *Bonta v. Miller*, 1 Litt. (Ky.) 250; *Cummins v. Kennedy*, 3 Litt. (Ky.) 118, 14 Am. Dec. 45.

New Hampshire. — *Drew v. Towle*, 30 N. H. 536, 64 Am. Dec. 309.

New York. — *Staats v. Ten Eyck*, 3 Cai. (N. Y.) 111, 2 Am. Dec. 254; *Kelly v. Dutch Church*, 2 Hill (N. Y.) 105.

South Carolina. — *Wallace v. Talbot*, 1 McCord L. (S. Car.) 467.

Texas. — *Johns v. Hardin*, 81 Tex. 37.

In the computation of the interest rests are not allowed, but merely simple interest is recoverable. *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309.

at the time of sale by the owner of the paramount title, he may recover as damages interest on the consideration paid, from the time of payment.¹

(b) **Possession of Land by Grantee — Interest from Date of Payment of Consideration.** — In some jurisdictions the purchaser, though he has been in possession of the land from the date of his purchase until his eviction by the holder of the paramount title, has been allowed to recover interest from the date of the payment of the consideration.²

Interest Limited to Time for Which Covenantee Liable for Mesne Profits. — In most jurisdictions, however, the recovery of interest is limited to the time for which the covenantee would be liable to the owner of the paramount title for mesne profits.³ These decisions are based on the presumption that the profits and

1. Interest from Time of Payment — Possession Not Acquired by Grantee. — *Mitchell v. Hazen*, 4 Conn. 516, 10 Am. Dec. 169; *Bellows v. Litchfield*, 83 Iowa 36; *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595; *Caswell v. Wendell*, 4 Mass. 108; *Burke v. Beveridge*, 15 Minn. 205; *Martin v. Long*, 3 Mo. 391; *Lawless v. Collier*, 19 Mo. 480; *Staats v. Ten Eyck*, 3 Cai. (N. Y.) 111, 2 Am. Dec. 254; *Noonan v. Hsley*, 21 Wis. 138; *Conrad v. Grand Grove*, etc., 64 Wis. 258; *McLennan v. Prentice*, 77 Wis. 124; *Daggett v. Reas*, 79 Wis. 60.

In *Messer v. Oesterich*, 52 Wis. 696, however, it was held that where the grantee had been deprived of the use of the land, interest was recoverable, but not to exceed six years.

Consideration Paid Previous to Execution of Deed. — And where the consideration was paid in instalments previous to the execution of the deed, under a contract of sale in pursuance of which the deed was executed, interest is recoverable from the date of each payment, and not merely from the date of the execution of the deed. *Devine v. Lewis*, 38 Minn. 24. See, however, *McMillan v. Ritchie*, 3 T. B. Mon. (Ky.) 348, 16 Am. Dec. 107.

Payment After Conveyance. — In *Haynie v. American Trust Invest. Co.*, (Tenn. 1896) 39 S. W. Rep. 860, it was held that where the covenantee recovers for a partial breach of the covenant of seizin, he is only entitled to interest from the date of his payment, and not from the date of his contract for the sale of the land.

2. Interest from Date of Payment. — *Kingsbury v. Milner*, 69 Ala. 502; *Swafford v. Whipple*, 3 Greene (Iowa) 263, 54 Am. Dec. 498; *Brandt v. Foster*, 5 Iowa 298; *Bellows v. Litchfield*, 83 Iowa 36; *Devine v. Lewis*, 38 Minn. 24; *Taylor v. Holter*, 1 Mont. 688; *Cheney v. Straube*, 35 Neb. 521; *Singer Mfg. Co. v. Williamson*, 100 N. Car. 83; *Henning v. Withers*, 3 Brev. (S. Car.) 458, 6 Am. Dec. 589. See, however, *Locke v. Alexander*, 1 Hawks (S. N. Car.) 412.

Rents and Profits as Set-off. — In *Whiting v. Dewey*, 15 Pick. (Mass.) 428, *Wilde, J.*, after stating the New York rule, which limited the recovery of interest to the time during which the grantee was liable for mesne profits, said that such a limitation had never been sanctioned in Massachusetts, and intimated that the equitable rule would be to allow the recovery of the purchase money, with interest from date of payment, and deduct the profits received by the grantee and for which he was not liable to third persons. See also *Frazer v. Peoria County*, 74 Ill. 282.

But the weight of authority is that the rents and profits cannot be set off against a recovery of the consideration, but merely affect the recovery of interest. *Rhea v. Swain*, 122 Ind. 272; *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595; *Hulse v. White*, 1 N. J. L. 201; *Catlin v. Hurlburt*, 3 Vt. 409. See, however, *Hartford*, etc., Ore Co. v. Miller, 41 Conn. 112; *Whiting v. Dewey*, 15 Pick. (Mass.) 435; *Park v. Cheek*, 4 Coldw. (Tenn.) 20.

In *Mitchell v. Hazen*, 4 Conn. 517, 10 Am. Dec. 169, it was held that where land is conveyed by an administrator, the rents and profits received by the grantee while in possession cannot be deducted in assessing damages for breach of the covenant of seizin, as they were due to the heirs instead of the administrator.

3. From Time Covenantee Is Liable for Mesne Profits — *Arkansas*. — *Collier v. Cowger*, 52 Ark. 322.

Georgia. — *Fernander v. Dunn*, 19 Ga. 497, 65 Am. Dec. 607; *Davis v. Smith*, 5 Ga. 285, 48 Am. Dec. 279.

Illinois. — *Harding v. Larkin*, 41 Ill. 413; *Wood v. Kingston Coal Co.*, 48 Ill. 356, 95 Am. Dec. 554; *Wead v. Larkin*, 49 Ill. 99; *Ohling v. Luitjens*, 32 Ill. 23.

Indiana. — *Wright v. Nipple*, 92 Ind. 310; *Reese v. McQuilkin*, 7 Ind. 450.

Kansas. — *Stebbins v. Wolf*, 33 Kan. 765; *Danforth v. Smith*, 41 Kan. 146; *Bolinger v. Brake*, 4 Kan. App. 180.

Kentucky. — *Thompson v. Jones*, 11 B. Mon. (Ky.) 365. *Contra*, *Combs v. Tarlton*, 2 Dana (Ky.) 465; *Cox v. Strode*, 2 Bibb (Ky.) 273, 5 Am. Dec. 603; *Booker v. Bell*, 3 Bibb (Ky.) 173, 6 Am. Dec. 641.

Maine. — *Spring v. Chase*, 22 Me. 505, 39 Am. Dec. 595.

Missouri. — *Lawless v. Collier*, 19 Mo. 480; *Hutchins v. Roundtree*, 77 Mo. 500; *Lambert v. Estes*, 99 Mo. 604; *Matheny v. Stewart*, 108 Mo. 73.

New Hampshire. — *Foster v. Thompson*, 41 N. H. 380.

New Jersey. — *Stewart v. Drake*, 9 N. J. L. 139; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Morris v. Rowan*, 17 N. J. L. 304.

New York. — *Staats v. Ten Eyck*, 3 Cai. (N. Y.) 111, 2 Am. Dec. 254; *Caulkins v. Harris*, 9 Johns. (N. Y.) 324; *Bennet v. Jenkins*, 13 Johns. (N. Y.) 50; *Tanner v. Livingston*, 12 Wend. (N. Y.) 83; *Jenks v. Quinn*, 61 Hun (N. Y.) 427.

Ohio. — *Clark v. Parr*, 14 Ohio 118, 45 Am. Dec. 529.

Pennsylvania. — *Cox v. Henry*, 32 Pa. St. 18;

possession of the land purchased were equal in value to the interest on the purchase money, and therefore the grantee, having enjoyed the use of the land from the date of the deed, would not be damaged by the nonrecovery of interest except for the period for which he was liable for mesne profits.¹ And where he has not accounted nor is accountable for mesne profits, on account of an action therefor being barred by limitation or for any other reason, interest is not recoverable except from the time of eviction.²

Unproductive Lands. — It has, however, been intimated that the rule limiting the recovery of interest to the time for which the grantee is liable for mesne profits would not be applied in case of vacant and unproductive real estate.³ But in *Maine* it has been held immaterial whether the grantee in fact derived any benefits from the land, provided he had the possession.⁴

Damages Measured by Value of Land at Time of Eviction. — Where the value of the land at the time of eviction is the measure of damages, interest is, of course, only recoverable on such value from the time of eviction.⁵

Rule in Virginia. — In Virginia, though the damages are based on the consideration paid, interest is only allowed from the date of eviction,⁶ and in lieu of interest during the time the grantee is liable for mesne profits, he may recover the damages recovered against him by the evictor.⁷

(c) **Partial Breach.** — The allowance of interest in case of a partial breach of the covenant is, of course, based upon the same principles as in case of a total breach.⁸

§. EFFECT OF PURCHASE OF PARAMOUNT TITLE BY GRANTOR ON MEASURE OF DAMAGES — **Title Acquired Before Eviction of Grantee.** — Where the grantor, before the grantee has been evicted or suffered any actual injury from breach of the covenant of seizin or warranty, purchases the paramount title, and under the covenants of the deed such title inures to the benefit of the

Wacker v. Straub, 88 Pa. St. 32; *Patterson v. Stewart*, 6 W. & S. (Pa.) 527, 40 Am. Dec. 586.

Tennessee. — *Mette v. Dow*, 9 Lea (Tenn.) 96.

Texas. — *Brown v. Hearon*, 66 Tex. 63; *Mann v. Mathews*, 82 Tex. 98; *Groesbeck v. Harris*, 82 Tex. 411; *Boone v. Knox*, 80 Tex. 642, 26 Am. St. Rep. 767. *Contra*, *Simpson v. Belvin*, 37 Tex. 674.

Vermont. — *Flint v. Steadman*, 36 Vt. 210.

Wisconsin. — *Rich v. Johnson*, 2 Pin. (Wis.) 88, 52 Am. Dec. 144; *Noonan v. Ilsley*, 21 Wis. 138; *Semple v. Whorton*, 68 Wis. 626.

See also *Ela v. Card*, 2 N. H. 178, 9 Am. Dec. 46.

Rule in Equity. — In *Cogwell v. Lyon*, 3 J. J. Marsh. (Ky.) 38, the court stated that whatever the rule at law might be, in equity the grantee should only be allowed interest for the time he was liable for mesne profits. See also *Combs v. Tarlton*, 2 Dana (Ky.) 465.

Possession by Remote Grantee. — In *Graham v. Dyer*, 16 Ky. L. Rep. 541, 29 S. W. Rep. 346, it was held that the fact that the vendees of the grantee cut timber from the land does not relieve the covenantor from liability to his grantee for interest, where the vendees had paid no portion of the purchase price and the grantee derived no benefit from the cutting of the timber.

1. *Staats v. Ten Eyck*, 3 Cai. (N. Y.) 111, 2 Am. Dec. 254.

2. **Grantee Not Liable for Mesne Profits** — **Interest from Eviction.** — *White v. Tucker*, 52 Miss. 145; *King v. Kerr*, 5 Ohio 160, 22 Am. Dec. 777; *Wade v. Comstock*, 11 Ohio St. 82; *Mette v. Dow*, 9 Lea (Tenn.) 96; *McGuffey v.*

Humes, 85 Tenn. 26; *Mann v. Mathews*, 82 Tex. 98.

Statute of Limitations. — *Brown v. Hearon*, 66 Tex. 63.

Eviction under Title from State. — Where the grantee is evicted by a patentee from the state, the covenantor is only liable for interest from the date of the grant of the patent, as the patentee could only recover mesne profits from that date. *Kyle v. Fauntleroy*, 9 B. Mon. (Ky.) 620. See also *Fernander v. Dunn*, 19 Ga. 500, 65 Am. Dec. 607; *Whitlock v. Crew*, 28 Ga. 293.

3. **Vacant and Unproductive Land.** — *Wood v. Kingston Coal Co.*, 48 Ill. 356, 95 Am. Dec. 554. See also *Combs v. Tarlton*, 2 Dana (Ky.) 468.

4. *Spring v. Chase*, 22 Me. 510, 39 Am. Dec. 595.

5. **From Time of Eviction, Value of Land Measure of Damages.** — *Hardy v. Nelson*, 27 Me. 525; *Bigelow v. Jones*, 4 Mass. 512.

6. **Rule in Virginia.** — *Threlkeld v. Fitzhugh*, 2 Leigh (Va.) 451; *Jackson v. Turner*, 5 Leigh (Va.) 127; *Click v. Green*, 77 Va. 827; *Abernathy v. Phillips*, 82 Va. 769; *Conrad v. Effinger*, 87 Va. 59, 24 Am. St. Rep. 649.

7. *Threlkeld v. Fitzhugh*, 2 Leigh (Va.) 451; *Jackson v. Turner*, 5 Leigh (Va.) 127. See also *New Orleans v. Gaines*, 131 U. S. 191.

8. **Partial Breach.** — *Wright v. Nipple*, 92 Ind. 310; *Wacker v. Straub*, 88 Pa. St. 32.

South Carolina. — Act 1824, p. 24, § 4, amended in 1879, providing that the measure of damages or breach of covenant shall be the purchase price, with interest "from the time of

grantee, such fact may be considered in estimating the damages, and as a general rule will prevent the recovery of more than nominal damages.¹

Title Acquired After Eviction of Grantee. — But when the paramount title is not acquired by the covenantor until after the grantee has been evicted, the covenantor cannot compel the grantee to accept such after-acquired title in satisfaction of the covenant or in mitigation of damages for the breach thereof.²

g. EFFECT OF FRAUD ON MEASURE OF DAMAGES. — Though it has been intimated that fraud on the part of the covenantor will affect the measure of damages in an action on the covenants in the deed,³ yet the better doctrine is that where the action is brought on the covenants the damages are not affected by the question of fraud on the part of the covenantor, but if the

eviction," applies only in case of an actual eviction, and not where the grantee never had possession of the portion of the land to which the title failed, but in such case the interest runs from the date of purchase. *Hunt v. Nolen*, 46 S. Car. 551.

1. Purchase of Paramount Title by Grantor — *Alabama*. — *Sayre v. Sheffield Land, etc., Co.*, 106 Ala. 440.

Illinois. — *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 269; *Wadhams v. Swan*, 109 Ill. 46.

Maine. — *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49.

Massachusetts. — *Mussey v. Beecher*, 3 Cush. (Mass.) 511.

Missouri. — *Reese v. Smith*, 12 Mo. 344.

New Hampshire. — *Morrison v. Underwood*, 20 N. H. 369.

New York. — *M'Carty v. Leggett*, 3 Hill (N. Y.) 134.

North Carolina. — *Farmers' Bank v. Glenn*, 68 N. Car. 35.

Pennsylvania. — *Knowles v. Kennedy*, 82 Pa. St. 445.

Texas. — *Earle v. Marx*, 80 Tex. 39.

Wisconsin. — *Noonan v. Ilsley*, 21 Wis. 140.

Canada. — *Boulter v. Hamilton*, 15 U. C. C. P. 125.

See also *Cotton v. Ward*, 3 T. B. Mon. (Ky.) 312. See, however, *Lowry v. Hurd*, 7 Minn. 356.

In *Burke v. Beveridge*, 15 Minn. 205, it was held that the right of action for breach of the covenant of seizin was not affected by the covenantor's subsequently acquiring title, if such title was defeated by his failure to record the deed to him until after his grantor had conveyed to a *bona fide* purchaser, whose deed was first recorded.

Supplying Link in Chain of Title. — A person who was the actual owner of a farm and in possession thereof, traded the same, subject to a mortgage of eight hundred dollars, but the grantee, in consequence of the omission of a deed in the grantor's chain of title on the record, was unable to effect a loan on the farm, in consequence of which the mortgage was foreclosed and the grantee evicted. No fraud was charged against the grantor, and he afterwards procured a second deed to supply the missing link in his chain of title. It was held that damages for the loss of the farm were too remote and could not be recovered against the grantor. *Lamb v. Buker*, 34 Neb. 485.

2. Title Acquired After Eviction of Grantee — *Indiana*. — *Burton v. Reeds*, 20 Ind. 92; *Bethell v. Bethell*, 92 Ind. 328.

Massachusetts. — *Blanchard v. Ellis*, 1 Gray (Mass.) 195, 61 Am. Dec. 417.

Minnesota. — *Resser v. Carney*, 52 Minn. 397.

New York. — *Bingham v. Weiderwax*, 1 N. Y. 513; *Shattuck v. Lamb*, 65 N. Y. 499, 22 Am. Rep. 656; *M'Carty v. Leggett*, 3 Hill (N. Y.) 134; *Morris v. Phelps*, 5 Johns. (N. Y.) 49, 4 Am. Dec. 323.

Washington. — *Rombough v. Koons*, 6 Wash. 558.

Wisconsin. — *Nichol v. Alexander*, 28 Wis. 118; *McInnis v. Lyman*, 62 Wis. 191.

See also *Lacey v. Marnan*, 37 Ind. 168; *Fritz v. Pusey*, 31 Minn. 368. See, however, *Looney v. Reeves*, 5 Kan. App. 279; *Knowles v. Kennedy*, 82 Pa. St. 445; *Reese v. Smith*, 12 Mo. 344; *Singleton v. Allen*, 2 Strobb. Eq. S. Car. 166; *Boulter v. Hamilton*, 15 U. C. C. P. 125.

Unoccupied Lands. — In case of a conveyance of unoccupied lands there is a constructive eviction as of the time of the grant, and any subsequent acquisition of title by the covenantor cannot affect the recovery of damages by the grantee. *Nichol v. Alexander*, 28 Wis. 118; *McInnis v. Lyman*, 62 Wis. 191.

Rule in Equity. — In *Tucker v. Clark*, 2 Sandf. Ch. (N. Y.) 96, the assistant vice-chancellor, in speaking of the right of the grantor to compel the grantee to accept an after-acquired title after an action had been commenced on the covenant of seizin, said: "If the lots had become worth two or three times the price which the defendant paid for them, then they could set up the outstanding title, deprive the defendant of his speculation, and throw him upon the covenants in his deed, which would restore to him the consideration paid. If, on the other hand, the lots should depreciate very much, the complainants would procure the outstanding title for him and retain the price which he paid. There is no equity or fairness in this, and the court cannot grant the relief prayed by the bill without first making such a contract for the parties; a contract which they never did make, and I presume never would have made if any failure of title had been supposed probable when the conveyance was executed." See also *Woods v. North*, 6 Humph. (Tenn.) 309, 44 Am. Dec. 312. See, however, *Reese v. Smith*, 12 Mo. 344.

3. Fraud of Covenantor. — *Clark v. Zeigler*, 79 Ala. 346; *Phillips v. Reichert*, 17 Ind. 120, 79 Am. Dec. 463; *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229; *Bender v. Fromberger*, 4 Dall. (Pa.) 442; *King v. Pyle*, 8 S. & R. (Pa.) 166.

covenantee wishes to take advantage thereof he should bring an action on the case for fraud.¹

7. CONSIDERATION EXPRESSED IN DEED AS EVIDENCE OF CONSIDERATION PAID. — The consideration expressed in the deed, though *prima facie* evidence of the true consideration,² is not, as a general rule, conclusive between the parties where the damages are to be assessed on the basis of the consideration, but the true consideration may be shown either for the purpose of increasing or decreasing the damages to be recovered.³

Action by Remote Grantee. — Where, however, the action is by a remote grantee, it has been held that the consideration expressed in the deed is conclusive and cannot be questioned.⁴ There are, however, decisions which hold that in the absence of fraud the true consideration may be shown even in an action by a remote grantee.⁵ And of course where the remote grantee at the time of his purchase was aware of the true consideration, the consideration expressed in the deed is not binding on the covenantor.⁶

1. *Carvill v. Jacks*, 43 Ark. 439.

In *Backus v. McCoy*, 3 Ohio 211, 17 Am. Dec. 585, Sherman, J., after stating that the measure of damages in an action for breach of a covenant of seizin is the consideration paid, with interest, said: "If the grantor has practiced any fraud in the sale, the grantee may have his remedy by an action on the case in the nature of a writ of deceit."

2. **Consideration Expressed in Deed Prima Facie Evidence of True Consideration.** — *Patrick v. Leach*, 1 McCrary (U. S.) 250; *Swafford v. Whipple*, 3 Greene (Iowa) 267, 54 Am. Dec. 498; *Blanchard v. Ellis*, 1 Gray (Mass.) 203, 61 Am. Dec. 417; *Mains v. Haight*, 14 Barb. (N. Y.) 76.

Deed to Remote Grantee. — But the recital in the deed to the remote grantee is not *prima facie* evidence, in an action by him against his remote grantor, of the amount paid by such remote grantee. *Allen v. Kennedy*, 91 Mo. 324.

3. **True Consideration May Be Shown** — *United States*. — *Patrick v. Leach*, 1 McCrary (U. S.) 250; *Montgomery v. Northern Pac. R. Co.*, 67 Fed. Rep. 445.

Arkansas. — *Barnett v. Hughey*, 54 Ark. 195.

Connecticut. — *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661.

Georgia. — *Harwell v. Fitts*, 20 Ga. 723; *Martin v. Gordon*, 24 Ga. 533.

Illinois. — *Howell v. Moores*, 127 Ill. 67.

Indiana. — *Gavin v. Buckles*, 41 Ind. 528; *Hays v. Peck*, 107 Ind. 389.

Iowa. — *Swafford v. Whipple*, 3 Greene (Iowa) 261, 54 Am. Dec. 498; *Lawton v. Buckingham*, 15 Iowa 22; *Williamson v. Test*, 24 Iowa 138.

Kentucky. — *Cummins v. Kennedy*, 3 Litt (Ky.) 118, 14 Am. Dec. 45. See, however, *Yelton v. Hawkins*, 2 J. J. Marsh. (Ky.) 2.

Massachusetts. — *Blanchard v. Ellis*, 1 Gray (Mass.) 203, 61 Am. Dec. 417; *Leland v. Stone*, 10 Mass. 459.

Minnesota. — *Dayton v. Warren*, 10 Minn. 233; *Donlon v. Evans*, 40 Minn. 501.

Missouri. — *Henderson v. Henderson*, 13 Mo. 151; *Guinotte v. Chouteau*, 34 Mo. 154; *Miller v. McCoy*, 50 Mo. 214.

New Hampshire. — *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Barnes v. Learned*, 5 N. H. 264; *Nutting v. Herbert*, 35 N. H. 120.

New York. — *Bingham v. Weiderwax*, 1 N. Y. 509.

Ohio. — *Vail v. Junction R. Co.*, 1 Cinc. Super. Ct. Rep. 571.

Pennsylvania. — *Cox v. Henry*, 32 Pa. St. 19. See also the title CONSIDERATION, vol. 6, p. 767 *et seq.*

Consideration May Be Shown to Be Greater than That Expressed. — *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Devine v. Lewis*, 38 Minn. 24. See also *Bullard v. Briggs*, 7 Pick. (Mass.) 533, 19 Am. Dec. 292; *Garrett v. Stuart*, 1 McCord L. (S. Car.) 514.

4. **Action by Remote Grantee — Consideration Expressed in Deed Conclusive.** — *Illinois Land, etc., Co. v. Bonner*, 91 Ill. 114; *Hunt v. Orwig*, 17 B. Mon. (Ky.) 73, 66 Am. Dec. 144; *Greenvault v. Davis*, 4 Hill (N. Y.) 643. See also *Suydam v. Jones*, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552.

In *Greenvault v. Davis*, 4 Hill (N. Y.) 643, *Bronson, J.*, said: "Many titles have been received upon the strength of covenants running with the land, and whatever may be the rule as between the immediate parties to the deed, it would work the grossest injustice to allow the covenantor to go into the question of how much was actually paid for the land when the title has failed in the hands of an assignee."

5. **Consideration Shown in Action by Remote Grantee.** — *Martin v. Gordon*, 24 Ga. 533; *Fields v. Willingham*, 49 Ga. 352. See also *Gavin v. Buckles*, 41 Ind. 528, wherein it was held that the true consideration could be shown in an action by a remote grantee as well as in an action brought by the immediate covenantor. This decision, however, seems to have been based to some extent on the statute 2 G. & H. 38, § 6, which provided that all actions by assignees should be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment, except actions on promissory notes. The court stated that while the statute might not in terms apply to actions on covenants, still the analogy to be drawn therefrom justified the conclusion that, in an action for breach of covenants, the real consideration might be shown as well where the action was brought by an assignee as where brought by the immediate covenantor.

6. **Where Remote Grantee Aware of True Consideration.** — *Clippenger v. Hastings*, 19 Kan. 403.

s. EFFECT OF RECOVERY OF DAMAGES IN ACTIONS ON COVENANTS FOR TITLE. — It has been said in a number of cases that a recovery of the consideration paid, with interest, for a total breach of the covenant of seizin or warranty, though it may not have the effect of revesting the title in the grantor, will yet estop the grantee from claiming title, and will thereby overcome the hardship of allowing the grantee to recover such amount and at the same time hold under other covenants in his deed a title subsequently acquired by the grantor,¹ and may entitle the grantor to a reconveyance, which, if refused, a court of equity would enforce;² or where the circumstances are such as to require a reconveyance by the grantee, it might be enforced at law by imposing terms upon the grantee as to the receipt of the fruit of his judgment.³

2. **Actions on Covenants in Leases and Mortgages.** — The rules as to the measure of damages for breaches of covenants in mortgages and deeds are not within the scope of this article, and are treated elsewhere under appropriate titles.⁴

VIII. MATTERS OF EVIDENCE — 1. Burden of Proof as to Breach — a. GENERALLY — Covenant of Seizin. — Under the common-law rules of pleading the plaintiff might, in an action on a covenant of seizin, assign the breaches generally by negating the words of covenant; the defendant might plead that he was seized, and issue might be joined by a replication reiterating the denial of seizin without specifying defects of title or averring a title paramount. In this state of the pleadings it was held that the affirmative of the issue was with the defendant, who was bound to prove performance of the covenant, and if no evidence was introduced the plaintiff was entitled to judgment.⁵ This rule was in harmony with the system of conveyancing under which it grew up, and according to which land titles were not matters of public record, but each landowner had in his own hands his muniments of title not accessible to any but the owner of the estate.⁶ The rule thus established, that the burden

1. **Effect of Recovery of Damages as an Estoppel.** — *Blanchard v. Ellis*, 1 Gray (Mass.) 202, 61 Am. Dec. 417; *Porter v. Hill*, 9 Mass. 36, 6 Am. Dec. 22; *Stinson v. Sumner*, 9 Mass. 143, 6 Am. Dec. 49; *Parker v. Brown*, 15 N. H. 188; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Bowne v. Wolcott*, 1 N. Dak. 415; *Kincaid v. Brittain*, 5 Sneed (Tenn.) 124; *Noonan v. Ilsley*, 21 Wis. 148. See also *Johnson v. Simpson*, 36 N. H. 96; *Gibson v. Boulton*, 3 U. C. C. P. 407.

It appears that recovery of judgment without satisfaction thereof does not create an estoppel. *Foss v. Stickney*, 5 Me. 390.

Limited to Cases of Total Failure of Title. — In *Bowne v. Wolcott*, 1 N. Dak. 415, *Bartholomew, J.*, after stating the rule as to the effect of the recovery of the consideration, said: "This doctrine has been sometimes announced by the courts, but it is strictly limited to one class of cases, and those are cases wherein there has been a total breach of the covenant — wherein nothing, in fact, passed to the grantee; and while it would be true that the grantor could not aver against his own deed, yet the grantee could do so, and if the grantee avers that there has been a complete breach of the covenant, and that nothing in fact passed to him by the conveyance, and if such averments are verified by the decision of the court and thereby become matters of record, the grantor can thereafter take advantage of the record, and can re-enter, and the grantee will not be heard to set up the conveyance by way of estoppel."

2. **Reconveyance Enforced by Court of Equity.** — *Park v. Cheek*, 4 Coldw. (Tenn.) 28. See

also *Recohs v. Younglove*, 8 Baxt. (Tenn.) 387.

3. *Ives v. Niles*, 5 Watts (Pa.) 323.

Stay of Execution. — In *Carlin v. Hurlburt*, 3 Vt. 403, it was held that on recovery of damages by a grantee for a total breach of the covenant of seizin, the court would order a stay of execution until a discharge or quitclaim deed should have been given by the grantee. See also *Blake v. Burnham*, 29 Vt. 437.

4. See the titles **LANDLORD AND TENANT; LEASE; MORTGAGES.**

5. **Covenant of Seizin — Burden on Defendant.** — See *Marston v. Hobbs*, 2 Mass. 433; *Abbott v. Allen*, 14 Johns. (N. Y.) 248; *Woolley v. Newcombe*, 87 N. Y. 605. See also the title **COVENANT**, 5 ENCYC. OF PL. AND PR., 394.

Issue Framed to Throw Burden on Plaintiff. — Even at the common law the issues might be so framed as to throw the burden of proof upon the plaintiff. Thus if the plaintiff's replication, instead of denying seizin generally, avers who in fact is seized or sets up a particular breach, he has the affirmative and the burden of proof. *Wilford v. Rose*, 2 Root (Conn.) 14; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376. See also *Hancock v. Field*, Cro. Jac. 170; *Ingalls v. Eaton*, 25 Mich. 32.

6. **Common-law Rule Dependent on System of Conveyancing.** — "The reason for thus permitting the plaintiff to drive the defendant to the affirmative of the issue in an action upon this particular covenant is to be found in the system of conveyancing prevalent in England when these rules were established. The owner of a landed estate depended for his title upon his title deeds and muniments of title; these were not matters of public record, but

is on the defendant, has been extensively adopted in the *United States*.¹

Under Reformed Procedure — Burden Held to Be on Plaintiff. — Under the reformed system of code procedure prevailing in many of the *United States*, and under a system of conveyancing wherein land titles are matters of record, it has been held that these rules are no longer applicable, and that a plea of the general issue throws upon the plaintiff the burden of proving a breach of the covenant of seizin.²

Covenant for Right to Convey. — The same principles of pleading, and doubtless the same rules as to the burden of proof, govern under common-law pleadings the covenant for right to convey.³

Covenants of Freedom from Incumbrances and Quiet Enjoyment. — With regard to covenants of freedom from incumbrances and quiet enjoyment, the rule of pleading is that breaches must be specifically set forth by the plaintiff, and the burden of proof is always, therefore, upon him to prove such breaches.⁴

b. BURDEN OF PROVING TITLE PARAMOUNT. — Where the covenantee in a deed of warranty buys in an outstanding title as being older and better than his own, he assumes the burden of proving that it is paramount to that conveyed to him by the covenantor.⁵ So the burden of proving paramount title is on the covenantee where he voluntarily surrenders to an adverse claimant without suit,⁶ or where the covenantor was not notified by the covenantee of the pendency of the suit in ejectment against the covenantee under which the

were accessible only to the owner of the estate, who retained them in his possession. * * * Where the owner of an estate sold the fee, the right to possession of the title deeds usually passed with it, and a conveyance in fee simple usually contained a grant of all deeds, evidences, writings, etc. 2 Hilliard on Real Property 517. But where a vendor conveyed only a portion of his estate he retained his title deeds for his own security, and where in a conveyance of an estate the grantor gave a covenant of seizin or warranty, the grantee was not entitled to the title deeds. 2 Hilliard on Real Property 585 (4th ed.); Yea v. Field, 2 T. R. 708; Hooper v. Ramsbottom, 6 Taunt. 14. If the owner in fee sold without warranty the purchaser was entitled to the title deeds, etc., but if he sold with warranty he had a right to retain all deeds and evidences necessary to maintain his title. Buckhurst's Case, 1 Coke 1a." Rapallo, J., in Woolley v. Newcombe, 87 N. Y. 605. See also Abbott v. Allen, 14 Johns. (N. Y.) 248.

1. Breach of Covenant of Seizin — Burden Held to Lie on Defendant — Illinois. — Baker v. Hunt, 40 Ill. 264, 89 Am. Dec. 346.

Iowa. — Schofield v. Iowa Homestead Co., 32 Iowa 321, 7 Am. Rep. 197; Barker v. Kuhn, 38 Iowa 392; Blackshire v. Iowa Homestead Co., 39 Iowa 624; Boon v. McHenry, 55 Iowa 202; Swafford v. Whipple, 3 Greene (Iowa) 261, 54 Am. Dec. 498; Jerald v. Elly, 51 Iowa 321.

Missouri. — Bircher v. Watkins, 13 Mo. 522; Cockrell v. Proctor, 65 Mo. 46.

New York. — Abbott v. Allen, 14 Johns. (N. Y.) 253; Potter v. Kitchen, 5 Bosw. (N. Y.) 566; Talmadge v. Wallis, 25 Wend. (N. Y.) 107.

Wisconsin. — Mecklem v. Blake, 16 Wis. 102, 82 Am. Dec. 707; Beckmann v. Henn, 17 Wis. 413.

2. Burden Held to Be on Plaintiff. — Landt v. Major, 2 Colo. App. 551; Hamilton v. Shoass, 99 Ind. 63; Ingalls v. Eaton, 25 Mich. 32; Woolley v. Newcombe, 87 N. Y. 605; Stearn v. Hesdorfer, 9 Misc. Rep. (N. Y.) 134.

3. Blanchard v. Hoxie, 34 Me. 376.

4. Blanchard v. Hoxie, 34 Me. 376. See also the title COVENANT, 5 ENCYC. OF PL. AND PR., 373, 374.

Burden of Proving Incumbrance on Plaintiff. — Jerald v. Elly, 51 Iowa 321; Lathrop v. Grosvenor, 10 Gray (Mass.) 52; Hartshorn v. Cleveland, 52 N. J. L. 473. See also De Forest v. Leete, 16 Johns. (N. Y.) 122.

Burden of Proof of Breach of Covenant for Quiet Enjoyment — Plaintiff. — Abbott v. Allen, 14 Johns. (N. Y.) 253.

5. Where Covenantee Purchases Outstanding Title. — Davenport v. Bartlett, 9 Ala. 179; Barker v. Hobbs, 6 Ind. 385; Turner v. Goodrich, 26 Vt. 707; Williams v. Wetherbee, 2 Aik. (Vt.) 329. See also Crisfield v. Storr, 36 Md. 148, 11 Am. Rep. 480.

Proof of Amount Paid for Extinguishing Paramount Title. — The burden of showing the amount to be reasonable rests upon the covenantee where he has himself extinguished the paramount title by purchase; the fact of payment is no evidence of this. Brandt v. Foster, 5 Iowa 296. See *supra*, this title, Damages.

6. Where Covenantee Voluntarily Surrendered to Holder of Paramount Title — Alabama. — Dupuy v. Roebuck, 7 Ala. 484; Copeland v. McAdory, 100 Ala. 553.

Georgia. — Taylor v. Stewart, 54 Ga. 81.

Illinois. — Moore v. Vail, 17 Ill. 185.

Indiana. — Crance v. Collenbaugh, 47 Ind. 256; Morgan v. Muldoon, 82 Ind. 351; Woodford v. Leavenworth, 14 Ind. 311; Marvin v. Applegate, 18 Ind. 425; Sheetz v. Longlois, 69 Ind. 491.

Iowa. — Thomas v. Stickle, 32 Iowa 76; Brandt v. Foster, 5 Iowa 296.

Kansas. — Walker v. Kirshner, 2 Kan. App. 371.

Massachusetts. — George v. Putney, 4 Cush. (Mass.) 355, 50 Am. Dec. 788; Hamilton v. Cutts, 4 Mass. 350, 3 Am. Dec. 222.

Mississippi. — Witty v. Hightower, 12 Smed. & M. (Miss.) 482.

latter was evicted,¹ or where by reason of an adverse holding under paramount title the covenantee has not taken possession.²

But the Form of the Pleadings may shift the burden of proof to the defendant.³

2. Admissibility of Parol Evidence — *a.* AS TO SIMULTANEOUS OR PRIOR AGREEMENTS OR WARRANTIES. — In accordance with the familiar rule excluding parol evidence varying written instruments, parol evidence of simultaneous or prior agreements is inadmissible either to enlarge or to restrict a warranty in a deed.⁴

Independent Verbal Agreements. — But parol evidence of an independent verbal agreement, made contemporaneously with the deed, but disconnected with the written contract, may in some cases be admissible;⁵ or there may be an

Missouri. — *Lambert v. Estes*, 99 Mo. 604.

Nebraska. — *Snyder v. Jennings*, 15 Neb. 372.

New York. — *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Greenvault v. Davis*, 4 Hill (N. Y.) 643.

Tennessee. — *Callis v. Cogbill*, 9 Lea (Tenn.) 140.

Texas. — *Peck v. Hensley*, 20 Tex. 673; *Westrope v. Chambers*, 51 Tex. 178; *Clark v. Mumford*, 62 Tex. 531; *Johns v. Hardin*, 81 Tex. 41.

Conclusive Proof of Paramount Title. — Where the burden of proof of paramount title is cast upon the grantee, by reason of surrendering possession without suit, he is not bound to prove it conclusively. In all civil cases the measure of proof is that which produces in the minds of the jury a reasonable conviction. *Copeland v. McAdory*, 100 Ala. 553.

1. Where Covenantor Not Notified of Suit Against Covenantee — *Illinois.* — *Sisk v. Woodruff*, 15 Ill. 15; *Harding v. Larkin*, 41 Ill. 414; *Claycomb v. Munger*, 51 Ill. 373.

Indiana. — *Walton v. Cox*, 67 Ind. 164.

Maine. — *Ryerson v. Chapman*, 66 Me. 557.

Massachusetts. — *Hamilton v. Cutts*, 4 Mass. 349, 3 Am. Dec. 222.

Texas. — *Maverick v. Routh*, 7 Tex. Civ. App. 669; *Clark v. Mumford*, 62 Tex. 531.

2. Where Covenantee Has Not Taken Possession — *Illinois.* — *Beebe v. Swartwout*, 8 Ill. 162.

3. When Burden of Proof on Defendant to Establish His Title. — Where the breaches assigned were that the defendant did not have title, that the legal and paramount title at the time the deed was made was in a third person, and that by reason thereof the plaintiff was unable to obtain possession; to which the defendant pleaded that at that time the title was not in such third person, but in the defendant, and that he had effectually conveyed the same to the plaintiff; it was held that the defendant by his plea took upon himself the burden of proving that he had conveyed the fee-simple title to the plaintiff. *Owen v. Thomas*, 33 Ill. 320.

4. Parol Evidence Inadmissible to Enlarge or Restrict Warranty. — *Bigham v. Bigham*, 57 Tex. 238; *Beach v. Packard*, 10 Vt. 100, 33 Am. Dec. 185. See also *Henderson v. Henderson*, 13 Mo. 151.

Parol evidence that the covenantee had knowledge of the title by which he had been evicted, and agreed that the defendant should not be charged in the event of such an eviction, is inadmissible. *Townsend v. Weld*, 8 Mass. 146.

Nor is it competent for the grantor to prove, by oral testimony, that at the time he executed

the deed he assigned to the grantee a judgment against a third person, which the covenantee accepted as his sole security, agreeing never to hold the grantor liable on the covenant. *Collingwood v. Irwin*, 3 Watts (Pa.) 306.

Nor is parol evidence admissible to prove the making of an agreement, a few days before the deed was executed, that the covenantee was to patent the land. *McKenna v. Doughman*, 1 P. & W. (Pa.) 417. Nor to show that part of the premises included within the description was intended to be excepted from the grant. *Nutting v. Herbert*, 35 N. H. 120.

Verbal Warranty of Quantity of Land. — Where a deed described the quantity of land conveyed, but contained no warranty of the quantity, it was held that parol evidence that, during the negotiation and before the delivery of the deed, the vendor verbally warranted the quantity of the land, is inadmissible as tending to vary the terms of the deed. *Cook v. Combs*, 39 N. H. 592, 75 Am. Dec. 241. But in *Fredrick v. Campbell*, 13 S. & R. (Pa.) 142, 14 S. & R. (Pa.) 293, evidence that the vendor declared that he had a good title to the quantity conveyed was held to be admissible, although the deed contained no such warranty, on the ground that it did not restrain or narrow the conveyance, and that it was a part of the *res gesta*, necessary to show the real character and design of the transaction.

5. Parol Agreement as to Possession of Land by Third Persons. — *Page v. Lashley*, 15 Ind. 152. In this case it was held that where land is in possession of a tenant at the time the covenant is made, a parol agreement to accept the deed and the tenant's possession as the possession of the purchaser is valid, the purchaser having full knowledge of the tendency and the rights of the tenant.

So also where the land is in possession of third persons, parol evidence is admissible to prove that an agreement was made between the parties that the covenantor was to give possession at a future time when the then possessors could be removed. But as the possession of real estate within a certain statutory period may be the subject-matter of a valid parol contract, it would seem that if such a contract was made between the vendor and the vendee, a suit as to the possession would necessarily have to rest upon a breach of the parol contract, and not upon the covenants of the deed. *Lindlev v. Dakin*, 13 Ind. 388.

Quality of Land. — Parol evidence is admissible to show that a warranty as to the quality of land was a part of a prior or contemporane-

incidental covenant in an agreement which it was the intention of the parties not to merge in the deed.¹

b. AS TO PARTICULAR INCUMBRANCES NOT MENTIONED IN DEED — Inadmissible to Cut Down or Vary Covenant Against Incumbrances. — Parol evidence offered by the covenantor for the purpose of showing that an oral agreement antecedent to or contemporaneous with the deed, with reference to a particular incumbrance, was made, the effect of which would be to vary or cut down the stipulations of his written covenant against incumbrances, is inadmissible.²

ous agreement of the sale, although the deed contains only the usual covenants, for such evidence does not change the terms of the deed. *Saville v. Chalmers*, 76 Iowa 325; *Green v. Batson*, 71 Wis. 54, 5 Am. St. Rep. 194. In the last case the court said: "An agreement or covenant of warranty as to the quality of the land, and as to many other things which were a part of the prior or contemporaneous agreement of sale, may be shown by parol. Such evidence does not affect the deed or change it in any respect."

1. Incidental Covenant in Agreement Executed Prior to Deed. — An agreement to convey also contained a guaranty that the house on the land to be conveyed should remain as it then was until the grantee should himself agree to alter it. At the time the agreement was made there was a suit pending against the grantor to maintain a right of way over ground occupied by the house. The vendor afterwards executed and delivered to the vendee a deed of general warranty, for which the latter gave his note for the purchase price. The suit pending against the vendor resulted in a judgment against him. It was held in a suit brought by the vendor to recover the amount of the note that the grantee, in accepting the deed, did not intend to relinquish the covenant, and that it was not merged in the deed. The court said: "Generally we presume that the contract to convey is merged in the conveyance, but there may be incidental covenants that are not so merged." *Colvin v. Schell*, 1 Grant's Cas. (Pa.) 226.

In the case of *Pea v. Pea*, 35 Ind. 394, parol evidence was held admissible to prove an oral agreement made previously to the execution of the deed, by which the covenantor reserved a portable steam sawmill, as the circumstances, connected with the fact that the sawmill was portable, showed that there might have been such a reservation, and that it was not the intention that it should be merged in the deed subsequently executed.

And in *Harvey v. Million*, 67 Ind. 91, parol evidence that a growing crop on the land sold was reserved was held to be admissible. See also *Heavilon v. Heavilon*, 29 Ind. 509; *Hays v. Peck*, 107 Ind. 390. But the decisions in *Indiana* are not in harmony on the question. See *Chapman v. Long*, 10 Ind. 465, and *Turner v. Cool*, 23 Ind. 56, 85 Am. Dec. 449, to the contrary. The case of *Chapman v. Long* was expressly overruled in *Hays v. Peck*.

Parol Evidence that Land Was Purchased Subject to Easement. — Parol evidence that the plaintiff knew, at the time of the execution of the deed, of the existence of an easement, expected it to remain, and bought the land subject thereto, is inadmissible in mitigation of damages. *Harlow v. Thomas*, 15 Pick. (Mass.) 66.

2. Parol Evidence as to Particular Incumbrance Not Admissible. — Where the covenantor warranted premises, upon part of which he had previously executed a lease, free from all incumbrances, parol evidence that he did not warrant against the lease is inadmissible. *Grice v. Scarborough*, 2 Spears L. (S. Car.) 649, 42 Am. Dec. 391.

It cannot be shown that it was agreed that a lease was to be regarded as no incumbrance. The fact that the covenantee knew of the existence of the incumbrance makes no difference, for it is as usual, and as competent, to covenant against known as unknown incumbrances and defects of title, and with such a covenant the purchaser is not called upon to exercise any diligence. *Edwards v. Clark*, 83 Mich. 246.

Nor can it be shown that at the time of the execution of the deed the plaintiff knew of the existence of an easement, expected it to remain, and bought the land subject thereto. *Harlow v. Thomas*, 15 Pick. (Mass.) 66; *Myers v. Munson*, 65 Iowa 423. Or that it was agreed that the parties intended to except from the operation of the covenant an incumbrance consisting of a right in a third person to cut and remove standing trees within a certain time, and that it was mutually understood between them that the trees were not to pass with the land. *Spurr v. Andrew*, 6 Allen (Mass.) 420. Or that the grantee was to pay taxes for the current year, for which there was a lien on the land at the time the deed was executed. *Long v. Moler*, 5 Ohio St. 273. Or that the grantee assumed and agreed to pay off a widow's outstanding rights in the land conveyed. The estate of the wife, under the statutes of *Indiana*, is not a mere right of dower; it is not a mere incumbrance, but an interest in the land. *Bever v. North*, 107 Ind. 544.

Contra. — But in *Allen v. Lee*, 1 Ind. 58, 48 Am. Dec. 352, it was held that parol evidence is admissible to show that at the time of the execution of the deed the grantee knew of the existence of a lease upon the land, and that it was not intended to be included in a covenant of general warranty; and this upon the ground that it was a part of the *res gesta* to prove the state of facts existing at the time of the conveyance.

Statements made by the defendant at the time he employed an attorney to remove an incumbrance are not a part of the *res gesta*, and therefore not admissible to rebut such inference as grows out of such act. *Morehouse v. Heath*, 99 Ind. 510.

Stipulation Omitted by Fraud or Mistake. — In *Johnson v. Walter*, 60 Iowa 320, it was held that such evidence is admissible if the agreement was omitted from the deed through

Parol Evidence to Enlarge Covenant Inadmissible. — The same rule applies when such evidence is offered by the covenantee for the purpose of enlarging the covenant.¹

Covenant Excepted as Part of Consideration. — There are, however, many cases to the effect that if the covenantee assumed or agreed to pay, as part of the consideration, an incumbrance not expressly excepted out of the operation of the covenant, parol evidence of this agreement by the covenantor is admissible.²

Exchange of Lands. — And where parties mutually exchange lands and agree that the taxes due thereon shall be set off against each other, the taxes are part of the consideration, and parol evidence of the agreement is admissible.³

fraud, accident, or mistake. See also *Haire v. Baker*, 5 N. Y. 357.

Known Defects or Liens. — In *Georgia* parol evidence is admissible to establish the fact as to whether known defects or liens are intended to be covered by a general warranty, although the evidence relates to declarations previous to the execution of the deed. *Skinner v. Moye*, 69 Ga. 476.

It has been frequently decided that the fact that there were known defects or incumbrances is no bar to a recovery for a breach of covenant. See *supra*, this title, *Effect and Breach of Covenants*.

1. Promise to Pay Amount of Mortgage Not Created by Covenantor. — Where the covenantor executed a quitclaim deed to the covenantee with a covenant to warrant and defend the premises against the lawful claims and demands of all persons claiming by or under him, it was held that evidence of a parol agreement made by the defendant at the same time and for the same consideration was inadmissible, as it would show a covenant not merely against incumbrances created by the grantor to which the deed was restricted, but a covenant or agreement to remove incumbrances created by a third person. *Howe v. Walker* 4 Gray (Mass.) 318.

Incumbrances Expressly Excepted by Covenantor. — Where the covenantor covenants to warrant and defend the title against the claim of any person whomsoever, save and except the taxes of a certain specified year, evidence offered by the covenantee that the covenantor, by a parol contract contemporaneous with the deed, agreed to pay the taxes so expressly excepted from the operation of said covenant, is inadmissible. *MacLeod v. Skiles*, 81 Mo. 603.

Parol Agreement as to Incumbrances Where Deed Without Covenants Given. — A purchaser of land which is under incumbrance, who receives a conveyance without covenants, cannot set up a concurrent parol agreement by the grantor to pay off the incumbrances. Such agreement is parcel of an entire agreement for the sale of lands, and to be valid must be in writing. *Duncan v. Blair*, 5 Den. (N. Y.) 196.

2. Parol Evidence of Incumbrance Excepted Out of Covenant as Part of Consideration — *Indiana*. — *Allen v. Lee*, 1 Ind. 58, 48 Am. Dec. 352; *Pitman v. Conner*, 27 Ind. 337; *Fitzer v. Fitzer*, 29 Ind. 468; *Robinius v. Lister*, 30 Ind. 142, 95 Am. Dec. 674; *Carver v. Louthain*, 38 Ind. 550; *Hays v. Peck*, 107 Ind. 389; *Maris v. Iles*, 3 Ind. App. 579.

Maine. — *Dearborn v. Morse*, 59 Me. 210.

Michigan. — *Strohauer v. Voltz*, 42 Mich. 444.

Missouri. — *Laudman v. Ingram*, 49 Mo. 212.

Contra. — *Johnson v. Walter*, 60 Iowa 315. But see *Frayer v. Reeder*, 45 Iowa 274.

See also the title CONSIDERATION, vol. 6, p. 768 *et seq.*

In *Massachusetts* the rule of the text seems to be recognized in earlier cases. *Leland v. Stone*, 10 Mass. 459; *Brackett v. Evans*, 1 Cush. (Mass.) 79; *Preble v. Baldwin*, 6 Cush. (Mass.) 549. See also *Carr v. Dooley*, 119 Mass. 204; *McCormick v. Cheevers*, 124 Mass. 262. But in later cases a contrary rule is laid down by which parol evidence is excluded and the preceding cases are distinguished. *Simanovich v. Wood*, 145 Mass. 180; *Flynn v. Bourneuf*, 143 Mass. 278, 58 Am. Rep. 145; *Howe v. Walker*, 4 Gray (Mass.) 310.

Part of Consideration Money Retained by Grantee. — Where a deed acknowledged the receipt of the purchase money, and also contained full covenants of title against incumbrances, the grantee agreed that he would discharge a mortgage of one thousand dollars upon the premises and indemnify the grantor therefrom, and retained so much of the consideration money for that purpose. The grantor having been compelled to pay the debt, it was held in an action by him against the grantee upon his undertaking, that he was not estopped by his deed from proving the incumbrance and the agreement to discharge it. The agreement was considered to be collateral to the deed. *Bolles v. Beach*, 22 N. J. L. 694, 53 Am. Dec. 263.

Inadmissible Against Assignee. — As against an assignee of a covenant, parol evidence is inadmissible to prove that at the time of the conveyance it was agreed that the grantee should assume the payment of a mortgage on the land, and pay to the grantor only the difference between the amount thereof and the sum agreed on as the consideration of the conveyance. And such evidence is, it seems, inadmissible even as against the grantee. *Suydam v. Jones*, 10 Wend. (N. Y.) 181, 25 Am. Dec. 552.

Facts Inadmissible to Show that Incumbrance Was Assumed as Part Consideration. — Evidence that the vendee was upon the land before its purchase, knew for what purpose it was specially adapted, and knew it was of much greater value than the contract price is not admissible to show that the grantee assumed the incumbrance in question as part consideration of the purchase, as such evidence has no tendency to lend probability to the truth of the statement. *Morehouse v. Heath*, 99 Ind. 510.

3. Taxes Due upon Lands Mutually Exchanged. — *Robinius v. Lister*, 30 Ind. 142, 95 Am. Dec. 674.

And where in an exchange of lands the taxes

Intention of Covenantor in Making Purchase. — In an action for breach of covenant, the intention of the covenantor in making the purchase cannot ordinarily be shown for the purpose of increasing the damages, unless it entered into and formed a part of the consideration between the parties.¹

c. PROVING THE TRUE CONSIDERATION OF THE DEED. — According to the modern doctrine, the statement of the consideration in a deed is not an essential part of the instrument, but is a mere recital of a fact, and, therefore, parol evidence may in general be introduced to prove the true consideration of the conveyance, although differing from the consideration recited.²

3. How Eviction Proved. — Where the eviction has been by force of a judgment of a court, the record itself is the only proper evidence.³ But where there is no record or written evidence of the transaction, the eviction may be proved by parol evidence.⁴

4. Effect of Judgment as Evidence of Breach — *a. RECORD OF JUDGMENT AS EVIDENCE OF EVICTION* — **In Suit in Ejectment Against Covenantor.** — Where the plaintiff alleges eviction by the recovery of a judgment, the evidence must support the averment.⁵

The Record of a Judgment obtained against the covenantor in an action of ejectment by a person claiming under paramount title, under which the covenantor has been evicted, is evidence of eviction, although the covenantor was not a party to such suit, or had no notice of its pendency.⁶

for the current year were to be assessed and paid by the respective grantees, parol evidence thereof is admissible. *Laudman v. Ingram*, 49 Mo. 212.

Property Left in Defendant's Hands to Discharge Incumbrance. — In a cross-action by the defendant for a breach of warranty, parol evidence is admissible to show that in an exchange of lands there was left in the defendant's hands, for the purpose of discharging an incumbrance upon the plaintiff's lands, property equal in value to the amount of such incumbrance. *Wachendorf v. Lancaster*, 66 Iowa 458.

1. Intention of Covenantor in Making Purchase. — *Foster v. Foster*, 62 N. H. 56.

Land Bought for Purpose of Being Again Sold. — Evidence that the covenantor bought an estate which was encumbered with a lease, for the purpose of again selling the same, when no notice of the object or intention of the covenantor in making the purchase was communicated to the covenantor, is inadmissible for the purpose of enhancing the damages. *Batchelder v. Sturgis*, 3 Cush. (Mass.) 204. See also *Stearn v. Hersdorfer*, 9 Misc. Rep. (N. Y. C. Pl.) 134.

But this does not exclude evidence of the difference in the market value of the estate as affected by the existence of an incumbrance, for the fact that an estate can be sold is one of its elements of value, and is not to be excluded from consideration. *Wetherbee v. Bennett*, 2 Allen (Mass.) 428.

2. See the title CONSIDERATION, vol. 6, p. 767 *et seq.* See also *supra*, this title, *Damages* — *Consideration Expressed in Deed as Evidence of Consideration Paid*.

3. Where Eviction Was by Judgment, Record Must Be Produced. — *Booker v. Bell*, 3 Bibb (Ky.) 175, 6 Am. Dec. 641.

4. Parol Proof of Eviction. — *Booker v. Bell*, 3 Bibb (Ky.) 174, 6 Am. Dec. 641; *Hamilton v. Cutts*, 4 Mass. 349, 3 Am. Dec. 222; *Randolph v. Meek*, Mart. & Y. (Tenn.) 58.

Parol Proof as to Person by Whom Covenantor Was Evicted. — In an action for breach of a special warranty, the covenantor, in order to prove that he has been evicted by a person claiming by, from, or under the covenantor, may show by parol evidence what was the testimony given upon the trial of the ejectment which resulted in his eviction. He is not bound to call the witnesses nor to produce the original documents. *Leather v. Poultney*, 4 Binn. (Pa.) 352.

Eviction by Entry upon the Land. — Where the plaintiff averred and proved that an entry was made by an agent of a person claiming under paramount title, by which the covenantor was evicted, it was held that it was not necessary to prove that notice of the entry was given by such agent to the plaintiff, and that the latter would be presumed to have had knowledge of such entry before the action was brought. *Burrage v. Smith*, 16 Pick. (Mass.) 56.

Variance in Proof of Eviction. — Where a defendant gives notice subjoined to his plea, that he will prove that the eviction took place in consequence of the plaintiff's accepting a deed from and executing a mortgage to A, evidence that the plaintiff accepted a deed from and executed a mortgage to B is inadmissible; and proof that B was the agent of A does not remove the difficulty, unless it be shown that the plaintiff knew B to be the agent of A and dealt with him accordingly. *Cooper v. Watson*, 10 Wend. (N. Y.) 203.

5. Proof of Eviction by Judgment. — *Long v. Sinclair*, 38 Mich. 90.

Record of Eviction Not Certified. — A record of eviction which appears to be a complete transcript, although not certified to be full and complete, is admissible in evidence in an action for breach of warranty. *Radcliff v. Ship*, Hard. (Ky.) 299.

6. Indiana. — *Rhode v. Green*, 26 Ind. 83; *Wilson v. Peelle*, 78 Ind. 384; *Sheets v. Joyner*, 11 Ind. App. 205.

In Suit in Ejectment by Covenantee.—So also the record of a judgment rendered against the covenantee in an action brought by him against the person in possession is evidence of what is equivalent to an eviction.¹

b. RECORD OF JUDGMENT AS EVIDENCE OF PARAMOUNT TITLE.—Although the record of a judgment in a suit in ejectment, whether by or against the covenantee, even though the covenantor was not notified of the pendency of such suit or was not a party thereto, is evidence of the eviction of the covenantee under such judgment,² it is not evidence of paramount title.³ But where the covenantor has been notified of the pendency of such suit, or appeared, or was a party thereto, the record of such judgment is conclusive evidence of the paramount title of the adverse claimant, provided the covenantee proves or the record shows affirmatively that such judgment was not obtained through title derived from himself since the execution of the deed by the covenantor.⁴

IX. NOTICE TO DEFEND OR TO MAINTAIN TITLE — 1. In Ejectment Suit Brought Against Covenantee—*a. NECESSITY FOR NOTICE.*—It is not necessary, in order to maintain an action for breach of warranty, that notice to the covenantor to defend a suit in ejectment against the covenantee should be given.⁵

b. EFFECT OF NOTICE—(1) *In General.*—Partly in analogy to the practice under the common law of vouching to warranty, by which a writ of *summons ad warrantizandum* was served upon the warrantor, and partly upon the principle that notice of an adverse proceeding is proper where a party having an indemnity from another is sued and seeks to conclude the indemnifying party in such suit,⁶ the practice generally prevailing in the *United States* is that when a covenantee is sued by a person claiming under paramount title, a notice served by the covenantee upon his covenantor to come in and defend the title will cast upon the covenantor the duty of defending the suit,⁷ and in

Kentucky.—Booker *v.* Bell, 3 Bibb (Ky.) 174, 6 Am. Dec. 641; Cox *v.* Strode, 4 Bibb (Ky.) 4.

Maine.—Hardy *v.* Nelson, 27 Me. 525.

Maryland.—Crisfield *v.* Storr, 36 Md. 153, 11 Am. Rep. 480.

Michigan.—Hines *v.* Jenkins, 64 Mich. 469.

Missouri.—Fields *v.* Hunter, 8 Mo. 128; Holladay *v.* Menifee, 30 Mo. App. 215.

Nebraska.—Real *v.* Hollister, 17 Neb. 661.

Ohio.—Smith *v.* Dixon, 27 Ohio St. 477.

South Carolina.—Middleton *v.* Thompson, 1 Spears L. (S. Car.) 67.

Texas.—Simpson *v.* Belvin, 37 Tex. 685;

Clark *v.* Mumford, 62 Tex. 531; McGregor *v.* Tabor, (Tex. Civ. App. 1894) 26 S. W. Rep. 443.

Vermont.—Pitkin *v.* Leavitt, 13 Vt. 379.

Record of Judgment as Evidence of Eviction Against Remote Covenantor.—A widow having obtained judgment for her dower interest in land, the defendant paid the judgment and then sued and obtained judgment against his immediate grantor for the amount so paid. The latter paid this judgment and in turn sued the heirs of his grantor on their ancestor's covenant. It was held that the record of the judgment in favor of the widow, though *res inter alios acta* for other purposes, was admissible for the purpose of showing the eviction. Walker *v.* Deaver, 79 Mo. 665.

A Decree divesting a grantee of his title and right of possession is evidence of eviction. Hanson *v.* Buckner, 4 Dana (Ky.) 251, 29 Am. Dec. 401.

1. Record of Judgment Against Covenantor in Suit by Him Equivalent to Eviction—*Kentucky.*

—Cummins *v.* Kennedy, 3 Litt. (Ky.) 124, 14 Am. Dec. 45.

Nevada.—Dalton *v.* Bowker, 8 Nev. 199.

Pennsylvania.—Morris *v.* Buckley, 11 S. & R. (Pa.) 174.

Vermont.—Pitkin *v.* Leavitt, 13 Vt. 385; Brown *v.* Taylor, 13 Vt. 638, 37 Am. Dec. 618.

2. See *supra*, this section, *Record of Judgment as Evidence of Eviction.*

3. See *infra*, this title, *Notice to Defend or to Maintain Title—Effect of Judgment where No Notice Given.*

4. See *infra*, this title, *Notice to Defend or to Maintain Title—Effect of Judgment Against Covenantor where Notice Given.*

5. Notice to Defend Title Not Necessary to Recover for Breach of Warranty.—Claycomb *v.* Munger, 51 Ill. 373; Rhode *v.* Green, 26 Ind. 83; Blair *v.* Allen, 55 Ind. 412; Mason *v.* Kellogg, 38 Mich. 139; Chapman *v.* Holmes, 10 N. J. L. 33; King *v.* Kerr, 5 Ohio 155, 22 Am. Dec. 777; City Bank *v.* Dugan, 5 Tex. Civ. App. 713.

6. Duffield *v.* Scott, 3 T. R. 374; Smith *v.* Compton, 3 B. & Ad. 189, 23 E. C. L. 55; Chamberlain *v.* Preble, 11 Allen (Mass.) 373. See also Beck *v.* Barlow, 6 New Bruns. 475.

7. Defense of Suit Cast upon Covenantor After Notice.—Morgan *v.* Muldoon, 82 Ind. 352; Miner *v.* Clark, 15 Wend. (N. Y.) 426. See Linderman *v.* Berg, 12 Pa. St. 301.

Failure of Covenantor to Defend.—Where the covenantor, after notice to him to defend, fails to do so, and judgment is obtained, the covenantee is not bound to prosecute proceedings in error, nor to suspend the judgment, for he

effect the warrantor is thereby made the real party in interest.¹

Statutes. — In some states provision is made by statute for making the covenantor a party to the suit in ejectment.²

(2) *As Respects Expenses of Litigation.* — The recovery of the expenses attending the prosecution or defense of a suit in ejectment, including counsel fees, etc., is to a certain extent dependent upon whether or not notice has been given.³

c. SERVICE OF NOTICE — (1) *Must Be Given in Reasonable Time.* — The object of giving notice being to enable the covenantor to come in and defend his title, it should be given in a reasonable time, so that he can have control of the action if he so desires.⁴

(2) *When Service a Question for Jury.* — Where notice does not appear on the record of the action of ejectment it becomes a matter *in pais*, to be decided by the jury, whether notice was actually given.⁵

d. CHARACTER OF NOTICE. — The notice should be unequivocal, certain, and explicit.⁶ As to whether or not the notice should be in writing, the authori-

may rely upon the covenant. *Smith v. Dixon*, 27 Ohio St. 477.

If the covenantee, upon failure of the covenantor to appear and defend after being notified to do so, proceeds and incurs costs, he does so on his own responsibility. *Terry v. Drabenstadt*, 68 Pa. St. 400.

1. Warrantor Becomes in Effect the Real Party in Interest. — *Dalton v. Bowker*, 8 Nev. 191; *Paul v. Witman*, 3 W. & S. (Pa.) 409; *Middleton v. Thompson*, 1 Spears L. (S. Car.) 67.

Reason for Notice. — The object of giving notice is to inform the grantor of the assertion of a claim against which he has covenanted that he will warrant and defend his grantee. *Miner v. Clark*, 15 Wend. (N. Y.) 427. See also *Duffield v. Scott*, 3 T. R. 374, cited in *Smith v. Compton*, 3 B. & Ad. 407, 23 E. C. L. 106.

Form of Notice. — No particular form of notice is required. *Chamberlain v. Preble*, 11 Allen (Mass.) 374; *Cummings v. Harrison*, 57 Miss. 275; *Greenlaw v. Williams*, 2 Lea (Tenn.) 536; *Williams v. Burg*, 9 Lea (Tenn.) 460.

2. Texas. — Rev. Stat. Tex., art. 4788, allows warrantors to be brought in by defendants in trespass to try title. *Norton v. Collins*, 1 Tex. Civ. App. 272. See also *Johns v. Hardin*, 81 Tex. 41.

Tennessee. — In *Ferrell v. Alder*, 8 Humph. (Tenn.) 45, it is said that provision is made by law for making the covenantor a defendant.

Warrantor Resident in Another County. — Where the plaintiff in a suit on a covenant of warranty asks for a judgment thereon against the warrantor in case he lose the land, he is entitled to such judgment though the warrantor reside in another county. *McCreary v. Douglass*, 5 Tex. Civ. App. 492.

3. Expenses of Litigation. — For a full discussion of the principles concerning the expenses of litigation in connection with the question of notice, see *supra*, this title, *Damages — Expenses of Litigation*.

4. Notice Should Be Given in Reasonable Time. — *Finton v. Egelston*, 61 Hun (N. Y.) 246; *Middleton v. Thompson*, 1 Spears L. (S. Car.) 67; *Somers v. Schmidt*, 24 Wis. 421, 1 Am. Rep. 191.

What Is Reasonable Notice. — The notice

should be given at or before the return of process, or at least before the expiration of the time to plead or answer, and so that the covenantor may have reasonable time to prepare for the defense. *Somers v. Schmidt*, 24 Wis. 421, 1 Am. Rep. 191.

A notice served after the action is pending in the court of appeals is too late. *Finton v. Egelston*, 61 Hun (N. Y.) 346.

In *Middleton v. Thompson*, 1 Spears L. (S. Car.) 67, it is said that any notice seems reasonable that allows to the warrantor sufficient time to prepare evidence for the trial.

Fact of Service of Notice. — Where the defendant on the trial did not dispute the service of the notice, nor claim that it was not served, nor desire the question to be submitted to the jury, the court may treat the notice as proper and as actually having been served upon him. *Cook v. Curtis*, 68 Mich. 611.

In a suit against the estate of a deceased covenantor, evidence by the vendee as to the preparation of the notices that he had been sued for the land, of his taking them to the house of the deceased, of his coming away from the house without having them in his possession, and as to the identity of the notices, is inadmissible under section 829 of the *New York Code Civ. Pro.* to establish service of the notice, as it involves a transaction with the decedent. *Finton v. Egelston*, 61 Hun (N. Y.) 246.

Irregularity as to Service of Notice. — Where a declaration in a suit against the covenantor was filed May 22, but notice of the pendency of the action was served May 21, on which day the covenantor was served with notice in writing of the pendency of such action, calling upon him to defend under his covenant of warranty, it was held that the irregularity as to the time of service upon the covenantor of notice of the pendency of the ejectment suit did not affect the sufficiency of the notice of the covenantor to the covenantor. *Cook v. Curtis*, 68 Mich. 611.

5. Reception of Notice a Question for the Jury. — *Collingwood v. Irwin*, 3 Watts (Pa.) 306.

6. Character of Notice. — *Dalton v. Bowker*, 8 Nev. 191; *Paul v. Witman*, 3 W. & S. (Pa.) 409; *Greenlaw v. Williams*, 2 Lea (Tenn.) 536; *Williams v. Burg*, 9 Lea (Tenn.) 460.

ties differ; but while written notice would be more conducive to certainty in a subsequent proceeding, proof of verbal notice would appear to be sufficient.¹

e. SUFFICIENCY OF NOTICE.—(1) *In General.*—A knowledge of the action and a notice to attend the trial will not do, unless accompanied with express notice to the covenantor that he will be required to defend the title.² But a presumption may be drawn from the acts of the covenantor that he has had sufficient notice.³

(2) *Notice Given by Third Person.*—Notice given by a third person who has no concern in the matter, to the warrantor, of the action of ejectment being brought against the warrantee, is not sufficient.⁴

f. WAIVER OF NOTICE.—Notice may be waived.⁵

2. In Ejectment Suit Brought by Covenantee.—In an action of ejectment brought by the covenantee against a person in possession, he has a right to have his covenantor come in and maintain the title and make good his warranty.⁶

1. Notice Need Not Be in Writing.—*Cummings v. Harrison*, 57 Miss. 275; *Miner v. Clark*, 15 Wend. (N. Y.) 426, *Bronson, J., dissenting*; *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191.

Contra.—*Mason v. Kellogg*, 38 Mich. 141. See also *Rawle on Covenants for Title*, § 119.

Recording Written Notice.—It seems that where the notice is written it need not appear of record. *Greenlaw v. Williams*, 2 Lea (Tenn.) 536; *Williams v. Burg*, 9 Lea (Tenn.) 460.

2. Notice Must Expressly Require Covenantor to Defend.—*Paul v. Witman*, 3 W. & S. (Pa.) 409; *Collingwood v. Irwin*, 3 Watts (Pa.) 311; *Clark v. Mumford*, 62 Tex. 532. See also *Miner v. Clark*, 15 Wend. (N. Y.) 427. *Contra*, *Cummings v. Harrison*, 57 Miss. 275.

In *Boyle v. Edwards*, 114 Mass. 375, it was held that the covenantee is not bound to permit the covenantor to defend the suit, and that a refusal to do so will not discharge the covenantor from liability.

Mere Knowledge of the Pendency of the Suit is insufficient. *Collins v. Baker*, 6 Mo. App. 588.

Mere Notice Before Suit of an Intention to Sue and to insist upon the warranty is insufficient. *Dalton v. Bowker*, 8 Nev. 191.

Notice to Agent.—Notice to an agent appointed by the vendor of land to receive and collect a note executed for the purchase money, of the pendency of a suit by a third person against the vendee for the recovery of the land, is not notice to the vendor. *Graham v. Tankersley*, 15 Ala. 634.

Mistake in Description of Property in Notice.—A mistake as to the number of the lot, in describing the property in the notice given, will not avail the covenantor, if it did not mislead him and could not have done so. *Greenlaw v. Williams*, 2 Lea (Tenn.) 536.

3. Evidence of Sufficient Notice.—In a suit against the executors of a testator, who was a remote grantor, it appeared by the record of a suit for possession brought against the plaintiff, who was a subsequent grantee of the covenantee, that the warrantor, on his own application verified, stating that he was the real party in interest, and bound to maintain the title to avoid damages on his covenants, became a defendant to the suit, and undertook the control of the defense; that upon his death the suit as to him abated, the defendant

therein (the present plaintiff) was defaulted, and judgment of ouster rendered; but it was not shown that the warrantor had been formally notified of the pendency of that suit. It was held that the record was evidence of sufficient notice. *Morgan v. Muldoon*, 82 Ind. 348.

The appearance of the covenantor as an attorney to defend the ejectment suit is evidence that he has had notice. *Harding v. Larkin*, 41 Ill. 414.

4. Notice Given by Third Person Not Sufficient.—*Collingwood v. Irwin*, 3 Watts (Pa.) 311.

5. Waiver of Notice.—Formal notice is waived by appearance and action without objecting to the want of it. *Morgan v. Muldoon*, 82 Ind. 348; *Mason v. Kellogg*, 38 Mich. 133.

6. Covenantor May Be Notified to Maintain Title in Suit Brought by Covenantee.—*Gragg v. Richardson*, 25 Ga. 570, 71 Am. Dec. 190; *Dalton v. Bowker*, 8 Nev. 191; *Norton v. Collins*, 1 Tex. Civ. App. 272; *Park v. Bates*, 12 Vt. 381, 36 Am. Dec. 347; *Pitkin v. Leavitt*, 13 Vt. 379; *Brown v. Taylor*, 13 Vt. 637, 37 Am. Dec. 618. *Contra*, *Ferrell v. Alder*, 8 Humph. (Tenn.) 44.

In an action of trespass to try title against a stranger, where the covenantor is cited to maintain his warranty he cannot confess a breach of the warranty and pray a rescission of the sale; nor can he, by pleading a fraudulent combination between the plaintiff and the defendant to suffer a recovery, prevent a dismissal of the suit by the covenantee, for by dismissing the suit the plaintiff declines the assertion of his right to require the covenantor either to defend the title or to answer for a breach of warranty. *White v. Williams*, 13 Tex. 258.

Where Covenantor Bound for Manner in Which Case Conducted.—In an action by the covenantee against a party in possession, to recover the land, the covenantee gave notice to the covenantor, with demand that he appear in court with proofs of title necessary to give the covenantee possession. Afterwards, at the request of the covenantor's agent, in a personal interview, the attorney previously employed by the covenantee was discharged and another employed in his stead and paid by the covenantee for his services, but the litigation was practically controlled by the agent of the covenantor, and for the latter's benefit. It was held that the covenantee was not liable for

3. Effect of Judgment Against Covenantor where Notice Given — a. IN SUIT BROUGHT AGAINST COVENANTEE — (1) *In General.* — Where the covenantor has been notified by the covenantee to defend an action of ejectment brought against the latter, or where he has appeared and defended, a judgment rendered against the covenantee in such action is conclusive evidence of the paramount title of the plaintiff therein. And in an action on the covenant by the covenantor or his grantee, the covenantor will not be permitted to deny the validity of such judgment;¹ and the covenantee is relieved from the obligation of proving that the title of the plaintiff therein was superior to that of the covenantor,² even though the judgment was rendered upon an agreement to which the covenantor was not a party,³ or though a valid defense might have been made to the action,⁴ or though the covenantee, to save himself from eviction under the judgment, purchased the outstanding title,⁵ unless the judgment was obtained by collusion or negligence on the part of the covenantee.⁶

negligence in failing to introduce a deed, which failure resulted in a verdict for the adverse claimant, and that under the circumstances the covenantor was responsible for the manner in which the case was conducted, and was bound by the final result of the litigation, although not a party thereto. *Bellows v. Litchfield*, 83 Iowa 37.

1. Judgment Against Covenantee in Action of Ejectment Conclusive Evidence of Paramount Title — *United States.* — *Bender v. Fromberger*, 4 Dall. (Pa.) 437.

Arkansas. — *Boyd v. Whitfield*, 19 Ark. 470.

Connecticut. — *Hinds v. Allen*, 34 Conn. 195.

Georgia. — *Wimberly v. Collier*, 32 Ga. 13.

Illinois. — *Sisk v. Woodruff*, 15 Ill. 15; *Harding v. Larkin*, 41 Ill. 414; *McConnell v. Downs*, 48 Ill. 271; *Walsh v. Dunn*, 34 Ill. App. 146.

Indiana. — *Morgan v. Muldoon*, 82 Ind. 351; *Bever v. North*, 107 Ind. 544.

Kentucky. — *Cummins v. Kennedy*, 3 Litt. (Ky.) 124, 14 Am. Dec. 45; *Jones v. Jones*, 87 Ky. 82; *Elliott v. Saufley*, 89 Ky. 57; *Woodward v. Allan*, 3 Dana (Ky.) 166; *Graham v. Dyer*, (Ky. 1895) 29 S. W. Rep. 346.

Maine. — *Hardy v. Nelson*, 27 Me. 525; *Ryerson v. Chapman*, 66 Me. 563.

Massachusetts. — *Boyle v. Edwards*, 114 Mass. 375.

Michigan. — *Mason v. Kellogg*, 38 Mich. 144.

Mississippi. — *Cummings v. Harrison*, 57 Miss. 275.

Missouri. — *Collins v. Baker*, 6 Mo. App. 588.

New Jersey. — *Morris v. Rowan*, 17 N. J. L. 307.

New York. — *Adams v. Conover*, 22 Hun (N. Y.) 425, *affirmed* 87 N. Y. 422; *Cooper v. Watson*, 10 Wend. (N. Y.) 203; *Kelly v. Dutch Church*, 2 Hill (N. Y.) 114.

Ohio. — *Smith v. Dixon*, 27 Ohio St. 477.

Pennsylvania. — *Ives v. Niles*, 5 Watts (Pa.) 325; *Paul v. Witman*, 3 W. & S. (Pa.) 407; *Terry v. Drabenstadt*, 68 Pa. St. 403.

South Carolina. — *Middleton v. Thompson*, 1 Spears L. (S. Car.) 67; *Wilson v. M'Elwee*, 1 Strobb. L. (S. Car.) 65.

Tennessee. — *Greenlaw v. Williams*, 2 Lea (Tenn.) 533; *Williams v. Burg*, 9 Lea (Tenn.) 460.

Texas. — *Maverick v. Routh*, 7 Tex. Civ. App. 669; *Johns v. Hardin*, 81 Tex. 41.

Vermont. — *Turner v. Goodrich*, 26 Vt. 707.

Washington. — *Cullity v. Dorffel*, (Wash. 1897) 50 Pac. Rep. 932.

Wisconsin. — *Wendel v. North*, 24 Wis. 223. *Contra.* — In *Martin v. Cowles*, 2 Dev. & B. L. (19 N. Car.) 102, it was held that the record of a judgment obtained against the covenantee is not only not conclusive evidence of title in the plaintiff therein, but is no evidence of the fact.

In *Somerville v. Hamilton*, 4 Wheat. (U. S.) 230, the question as to whether the plaintiff, although notice to defend be given, is bound to show that the recovery of the adverse claimant was by title paramount, or whether the recovery itself is *prima facie* evidence of that fact, was left undecided, the court being equally divided in opinion. The question was also left undetermined in *Leather v. Poultney*, 4 Binn. (Pa.) 352.

2. Covenantee Relieved from Proving Title in Adverse Claimant. — *Mason v. Kellogg*, 38 Mich. 139; *Morris v. Rowan*, 17 N. J. L. 307; *Chapman v. Holmes*, 10 N. J. L. 20; *Greenlaw v. Williams*, 2 Lea (Tenn.) 533.

3. Judgment Rendered upon Agreement. — *Brown v. Hearon*, 66 Tex. 63. See also *Morris v. Buckley*, 11 S. & R. (Pa.) 168.

Judgment upon Agreed Statement of Facts in Which Fact Misstated. — One who has been duly vouched in to defend a title which he has covenanted to warrant and defend will be bound by the result of the suit establishing the adverse title, although he did not appear therein, and although it was decided upon an agreed statement of facts in which a fact was misstated which if correctly stated would have defeated the adverse title, provided such statement of facts was agreed to in good faith and without collusion. *Chamberlain v. Preble*, 11 Allen (Mass.) 370.

4. Where Valid Defense Might Have Been Made to Action in Ejectment. — *Elliott v. Saufley*, 89 Ky. 52.

5. *McConnell v. Downs*, 48 Ill. 271.

6. Judgment Against Covenantee Obtained by Collusion or Negligence. — *Sisk v. Woodruff*, 15 Ill. 15; *McConnell v. Downs*, 48 Ill. 271; *Ryerson v. Chapman*, 66 Me. 563.

In *Buckels v. Mouzon*, 1 Strobb. L. (S. Car.) 448, it was held that where the covenantee did not defend the ejectment suit, the record was inadmissible as evidence of paramount title in the evictor, even though he had notified the vendor, on the ground that the judgment might be attributable to collusion or culpable negligence.

When Record Insufficient to Prove Superior Title.—But unless the record shows affirmatively that the judgment was not obtained through title derived from the covenantee after the making of the deed to him by the covenantor, the record alone will not be sufficient proof of the paramount title of the plaintiff therein, but the covenantee must go further, and, in addition to the judgment, establish the fact that the title by which he was ejected was not one derived subsequently to the making of the covenant.¹

(2) *Judgment by Default.*—If the judgment be taken by default, it seems that it will not be evidence of the superior title of the plaintiff therein, for nothing was put in issue, and it might have been attributable to collusion or negligence.²

(3) *As to Matters in Litigation in Ejectment Suit.*—The record of the judgment is also admissible for the purpose of showing what matters were or might have been litigated in such suit; and parol evidence is admissible to prove such matters.³

b. IN SUIT BROUGHT BY COVENANTEE.—In like manner the record of a judgment obtained against the covenantee, in a suit brought by him against the person in possession, is conclusive evidence of the superior title of the latter.⁴

4. Effect of Judgment Where No Notice Given—*a. IN GENERAL.*—But if no notice be given to the covenantor to defend, or no appearance to the suit be made by him, the judgment is not evidence of the paramount title of the plaintiff in the action, and the covenantor may show, in an action on the covenant against him, that his title was superior to that by which the covenantee was evicted.⁵ The like rule applies as to a judgment against the covenantee in a suit brought by him.⁶

Judgment as Prima Facie Evidence.—Some courts have held that the record

1. When Record of Judgment Against Covenantee Insufficient to Prove Paramount Title.—*Booker v. Bell*, 3 Bibb (Ky.) 175, 6 Am. Dec. 641; *Mason v. Kellogg*, 38 Mich. 140; *Pitkin v. Leavitt*, 13 Vt. 384; *Swazey v. Brooks*, 34 Vt. 455. See also *Phelps v. Sawyer*, 1 Aik. (Vt.) 157.

In *Sisk v. Woodruff*, 15 Ill. 15, it would appear that the judgment is conclusive unless the covenantor establishes the fact that the title by which the covenantee was evicted was derived through himself.

2. Judgment Against Covenantee Taken by Default Not Evidence of Paramount Title.—*Buckels v. Mouzon*, 1 Strobb. L. (S. Car.) 448. But see *Jackson v. Marsh*, 5 Wend. (N. Y.) 46.

3. Record Admissible to Show What Matters Might Have Been Litigated.—*Merritt v. Morse*, 108 Mass. 270; *Adams v. Conover*, 22 Hun (N. Y.) 425, affirmed in 87 N. Y. 422; *Leather v. Poultney*, 4 Binn. (Pa.) 360.

4. Record of Judgment Against Covenantee in Suit by Him.—*Merritt v. Morse*, 108 Mass. 270; *Brown v. Taylor*, 13 Vt. 631, 37 Am. Dec. 618; *Pitkin v. Leavitt*, 13 Vt. 379. See also *Midleton v. Thompson*, 1 Spears L. (S. Car.) 67.

Contra.—*Ferrell v. Alder*, 8 Humph. (Tenn.) 44.

Record of Judgment as Against Covenantor's Representatives.—Where notice is given to the covenantor in an action brought by the covenantee against persons in possession, and the covenantor dies pending the suit, a judgment obtained against the covenantee in such action is also conclusive evidence, as against the covenantor's representatives, of the paramount title of the plaintiff therein, although no no-

tice was given to them. The duty to make proof of title devolved upon the representatives, upon the death of the covenantor, without further notice. *Brown v. Taylor*, 13 Vt. 638, 37 Am. Dec. 618.

5. Rule Where Notice Not Given—*Alabama.*—*Graham v. Tankersley*, 15 Ala. 634.

Connecticut.—*Hinds v. Allen*, 34 Conn. 195.

Georgia.—*Clements v. Collins*, 59 Ga. 124; *Haines v. Fort*, 93 Ga. 24.

Illinois.—*Sisk v. Woodruff*, 15 Ill. 15; *Harding v. Larkin*, 41 Ill. 414.

Indiana.—*Rhode v. Green*, 26 Ind. 83; *Walton v. Cox*, 67 Ind. 172.

Kentucky.—*Prewitt v. Kenton*, 3 Bibb (Ky.) 282; *Cox v. Strode*, 4 Bibb (Ky.) 4; *Gaither v. Brooks*, 1 A. K. Marsh. (Ky.) 409.

Maine.—*Hardy v. Nelson*, 27 Me. 525.

Michigan.—*Hovey v. Smith*, 22 Mich. 170; *Mason v. Kellogg*, 38 Mich. 144; *Hines v. Jenkins*, 64 Mich. 469.

Missouri.—*Fields v. Hunter*, 8 Mo. 128; *Holladay v. Menifee*, 30 Mo. App. 207; *Wheelock v. Overshiner*, 110 Mo. 100.

Pennsylvania.—*Morris v. Buckley*, 11 S. & R. (Pa.) 174; *Collingwood v. Irwin*, 3 Watts (Pa.) 306.

Texas.—*Peck v. Hensley*, 20 Tex. 673; *Clark v. Mumford*, 62 Tex. 531; *McGregor v. Tabor*, (Tex. Civ. App. 1894) 26 S. W. Rep. 443; *Maverick v. Routh*, 7 Tex. Civ. App. 669.

Vermont.—*Pitkin v. Leavitt*, 13 Vt. 379.

Washington.—*Cullity v. Dorffel*, (Wash. 1897) 50 Pac. Rep. 932.

Wisconsin.—*Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191.

6. Dalton v. Bowker, 8 Nev. 190.

against the covenantee, even though no notice to the covenantor was given, is *prima facie* evidence of the paramount title of the successful party in the ejectment suit; but such holding is contrary to the weight of authority.¹

b. OMISSION TO PROVE EVICTION BY PARAMOUNT TITLE. — If the covenantee, in a suit against his covenantor, omits to prove that he was evicted by paramount title, and the defendant introduces evidence showing the title of each party to the suit in which the judgment against the covenantee was rendered, and presenting the question of paramount title on the evidence, this cures the omission.²

X. REMEDIES — 1. At Law — *a.* ACTION OF COVENANT. — The remedy for breach of the usual covenants in a deed is an action of covenant to recover damages.³

b. ASSUMPSIT. — Assumpsit, is at common law only maintainable upon a parol or simple contract, and will not lie for a breach of covenant.⁴

Statutory Modification. — In some jurisdictions the common-law rule as to the action of assumpsit has been changed by statute, and assumpsit will lie where formerly the remedy was by covenant.⁵

c. BREACH OF COVENANTS AS A DEFENSE TO RECOVERY OF PURCHASE MONEY — (1) *Failure of Title as a Failure of Consideration* — **Earlier Rule.** — Where land was conveyed with covenants for title, in case of a failure of title the grantee could not, under the earlier decisions, set up such fact to show a failure of consideration, so as to prevent a recovery of the purchase price, but was compelled to resort for relief to his action on the covenants in the deed.⁶ These decisions were based on the principle that the covenants in the deed alone constituted a sufficient consideration for the payment of the purchase price.

Modern Rule. — This rule, however, has not been followed by the modern decisions, and the grantee is now permitted, in an action for the recovery of the purchase price, to set up a total failure of title as a total failure of consideration.⁷

1. Judgment as Prima Facie Evidence. — *Leather v. Poultney*, 4 Binn. (Pa.) 352. See also *Pitkin v. Leavitt*, 13 Vt. 379.

2. Omission by Covenantee to Prove Eviction by Paramount Title. — *Wheelock v. Overshiner*, 110 Mo. 100.

3. Action of Covenant. — *Abbott v. Rowan*, 33 Ark. 593; *Mitchell v. Warner*, 5 Conn. 497; *Ferguson v. Bullock*, 1 A. K. Marsh. (Ky.) 71; *Fairbrother v. Griffin*, 10 Me. 91; *Bacon v. Lincoln*, 4 Cush. (Mass.) 210, 50 Am. Dec. 765; *Bartholomew v. Candee*, 14 Pick. (Mass.) 170; *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; *Chesterman v. Gardner*, 5 Johns. Ch. (N. Y.) 29, 9 Am. Dec. 265.

4. Assumpsit Will Not Lie at Common Law. — *McCargo v. Crutcher*, 23 Ala. 575; *Lloyd v. Jewell*, 1 Me. 357, 10 Am. Dec. 73; *Hinkley v. Fowler*, 15 Me. 285; *Holmes v. Smith*, 49 Me. 242; *Dubois v. Doubleday*, 9 Wend. (N. Y.) 317; *Tullis v. Sewell*, 3 Ohio 510.

Subsequent Parol Promise. — In *Miller v. Watson*, 4 Wend. (N. Y.) 267, it was held that on failure of title, a parol promise by the grantor to repay the purchase price would entitle the grantee to recover in assumpsit, where the covenantor, when ejectment was brought against the grantee, admitted the title to be in the plaintiff in the ejectment suit, and the grantee at the request of the covenantor surrendered the possession to such plaintiff.

5. For a full discussion of this subject, see the ENCYC. OF PLEADING AND PRACTICE, titles

ASSUMPSIT, vol. 2, p. 989; COVENANT, vol. 5, p. 345.

6. Deeds With Covenants — Failure of Title Cannot Be Set Up as Failure of Consideration. — *Cullum v. Branch of State Bank*, 4 Ala. 21, 37 Am. Dec. 725; *Starke v. Hill*, 6 Ala. 785; *Long v. Allen*, 2 Fla. 403, 50 Am. Dec. 281; *Lloyd v. Jewell*, 1 Me. 352, 10 Am. Dec. 73.

7. Failure of Title Constitutes Failure of Consideration — *United States*. — *Scudder v. Andrews*, 2 McLean (U. S.) 464.

Arkansas. — *Walker v. Johnson*, 13 Ark. 522; *McDaniel v. Grace*, 15 Ark. 465; *Key v. Henson*, 17 Ark. 254.

California. — *Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297.

Connecticut. — *Cook v. Mix*, 11 Conn. 438.

Illinois. — *Slack v. McLagan*, 15 Ill. 242; *Smith v. Wise*, 58 Ill. 141; *Bentley v. Sill*, 35 Ill. 414; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Field v. Herrick*, 10 Ill. App. 591; *Barry v. Guild*, 126 Ill. 439.

Indiana. — *James v. Lawrenceburgh Ins. Co.*, 6 Blackf. (Ind.) 525; *Burk v. Clements*, 16 Ind. 132; *Scheible v. Slagle*, 89 Ind. 323.

Massachusetts. — *Knapp v. Lee*, 3 Pick. (Mass.) 452; *Rice v. Goddard*, 14 Pick. (Mass.) 293; *Holbrook v. Young*, 108 Mass. 83.

Mississippi. — *Glenn v. Thistle*, 23 Miss. 42.

New York. — *M'Allister v. Reab*, 4 Wend. (N. Y.) 483; *Edgerton v. Page*, 5 Abb. Pr. (N. Y. C. Pl.) 1; *Tone v. Brace*, 8 Paige (N. Y.) 597; *Frisbie v. Hoffnagle*, 11 Johns. (N. Y.) 50;

Limitation of the Rule.—This rule, however, must be limited to cases in which there was a total failure of title, that is, where the grantee derived no benefits by the conveyance, or where he is liable over to the owner of the paramount title for such benefits as he received, and where he would be entitled to recover for breach of the covenants the consideration and interest sought to be recovered by the grantee.¹ And it is held that where the grantee acquired the possession of the land and had not been evicted therefrom, the fact that the grantee had no title does not show a total failure of consideration.²

(2) *In the Nature of Set-off or Recoupment*—**In General.**—Aside from the right of the grantee to set up a total failure of title as a defense in an action for the purchase money, the question arises as to his right in case of a partial failure of title, which, of course, would not wholly prevent a recovery of the purchase money, to avail himself, as a partial defense to an action therefor, of the damages to which he is entitled in consequence of a breach of the covenants in his deed.

Under the Usual Set-off Statute.—Since a claim for unliquidated damages is not a subject of set-off under the usual set-off statutes,³ a grantee's claims for damages in consequence of the breach of his covenants is not ordinarily a proper subject of set-off.⁴

New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; *Tibbets v. Ayer*, Hill & D. Supp. (N. Y.) 174.

Pennsylvania.—*Steinhauer v. Witman*, 1 S. & R. (Pa.) 447.

South Carolina.—*Gray v. Handkinson*, 1 Bay (S. Car.) 278.

Vermont.—*Chandler v. Marsh*, 3 Vt. 162.

In *Rice v. Goddard*, 14 Pick. (Mass.) 293, the court said: "The promise [to pay the purchase price] is not made for a promise [the covenants in the deed], but for the land; the moving cause is the estate; and if that fails to pass the promise is a mere *nudum pactum*."

In *Scudder v. Andrews*, 2 McLean (U. S.) 464, the court said: "Why should he [the covenantor] be driven to his action on the warranty? * * * This would require the defendant to pay the money and then sue the plaintiff, on his warranty, for the same money, and recover it back again if the plaintiff should be solvent. Such a course would defeat the ends of justice, and, at best, would be dilatory and expensive."

1. Total Failure of Consideration Essential—*United States.*—*Scudder v. Andrews*, 2 McLean (U. S.) 464.

Alabama.—*Dunn v. White*, 1 Ala. 645; *Peden v. Moore*, 1 Stew. & P. (Ala.) 71, 21 Am. Dec. 649; *Christian v. Scott*, Minor (Ala.) 354.

Arkansas.—*Crowell v. Packard*, 35 Ark. 348; *Sorrells v. McHenry*, 38 Ark. 127.

Indiana.—*Post v. Shirley*, 5 Blackf. (Ind.) 430.

Maine.—*Jenness v. Parker*, 24 Me. 289.

Maryland.—*Timms v. Shannon*, 19 Md. 296. 81 Am. Dec. 632.

New York.—*Lamerson v. Marvin*, 8 Barb. (N. Y.) 9; *Lattin v. Vail*, 17 Wend. (N. Y.) 188; *Grant v. Tallman*, 20 N. Y. 191, 75 Am. Dec. 384; *Whitney v. Lewis*, 21 Wend. (N. Y.) 131; *Talmadge v. Wallis*, 25 Wend. (N. Y.) 116.

Ohio.—*Hill v. Butler*, 6 Ohio St. 207.

South Carolina.—*Westbrook v. M'Millan*, 1 Bailey L. (S. Car.) 259.

Vermont.—*Hassam v. Dompier*, 28 Vt. 32.

Assumption of Mortgage by Grantee.—The

same rule applies as to the liability of the grantee on his assumption of a mortgage upon the premises granted. *Parkinson v. Sherman*, 74 N. Y. 88, 30 Am. Rep. 268; *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617.

2. Possession of Land by Grantee—*England.*—*Archer v. Bamford*, 3 Stark. 175, 14 E. C. L. 176 b.

United States.—*Greenleaf v. Cook*, 2 Wheat. (U. S.) 13.

Alabama.—*Patton v. England*, 15 Ala. 71; *Chapman v. Lee*, 55 Ala. 616. See also *Helvenstein v. Higgason*, 35 Ala. 259.

California.—*Norton v. Jackson*, 5 Cal. 262.

Illinois.—*Vining v. Leeman*, 45 Ill. 246; *Whitlock v. Denlinger*, 59 Ill. 96; *Laforge v. Mathews*, 63 Ill. 328; *Yazel v. Palmer*, 81 Ill. 82; *People v. Sisson*, 98 Ill. 335. See also *Deal v. Dodge*, 26 Ill. 460; *Willets v. Burgess*, 34 Ill. 494; *Vincent v. Morrison*, 1 Ill. 227.

Indiana.—*Smith v. Ackerman*, 5 Blackf. (Ind.) 541; *Whisler v. Hicks*, 5 Blackf. (Ind.) 100, 33 Am. Dec. 454.

Louisiana.—*Wrinkle v. Tyler*, 3 Martin N. S. (La.) 111.

Mississippi.—*Hoy v. Taliaferro*, 8 Smed. & M. (Miss.) 727; *Duncan v. Lane*, 8 Smed. & M. (Miss.) 744.

New York.—*Lamerson v. Marvin*, 8 Barb. (N. Y.) 14.

In *Scudder v. Andrews*, 2 McLean (U. S.) 467, the court said: "If the defendant had entered into the possession of the premises and enjoyed them, it would be clear that this defense could not be set up, for then there would be only a partial failure of consideration."

For a general discussion of the subject of failure of title, see the titles CONSIDERATION, vol. 6, p. 667; VENDOR AND PURCHASER.

3. See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

4. Damages Recoverable on Covenant Not the Subject of Set-off—*United States.*—*Withers v. Greene*, 9 How. (U. S.) 226.

Alabama.—*Peden v. Moore*, 1 Stew. & P. (Ala.) 71, 21 Am. Dec. 649; *Dunn v. White*, 1 Ala. 645.

Statutes Authorizing the Defense. — The hardship of this rule has, however, been to a certain extent changed by statute.¹

Authorization of the Defense Independently of Statutes. — And the policy of the courts of law in some jurisdictions, even in the absence of statutory provision, is to allow the grantee to set up, as a partial defense to the recovery of the consideration, the amount of damages that he would be entitled to recover in an action on the covenant in the deed.²

Expenses of Removing Incumbrances. — And where this is permitted, whether under some statutory provision or independently of statutes, he will, of course, be allowed the amount necessarily expended in removing an incumbrance.³

Arkansas. — *Wheat v. Dotson*, 12 Ark. 699; *Key v. Henson*, 17 Ark. 254; *Martin v. Foreman*, 18 Ark. 249.

Indiana. — *Gibson v. Richart*, 83 Ind. 313.

Maine. — *Lloyd v. Jewell*, 1 Me. 353, 10 Am. Dec. 73; *Howard v. Witham*, 2 Me. 390; *Wentworth v. Goodwin*, 21 Me. 150; *Jenness v. Parker*, 24 Me. 289; *Hammatt v. Emerson*, 27 Me. 324, 46 Am. Dec. 598; *Morrison v. Jewell*, 34 Me. 146; *Thompson v. Mansfield*, 43 Me. 490.

Massachusetts. — *Bowley v. Holway*, 124 Mass. 395.

Mississippi. — *Wailles v. Cooper*, 24 Miss. 208.

New Hampshire. — *Drew v. Towle*, 27 N. H. 472, 59 Am. Dec. 380; *Chase v. Weston*, 12 N. H. 473.

New Jersey. — *Long v. Long*, 14 N. J. Eq. 462.

Statement of Rule. — In *Bowley v. Holway*, 124 Mass. 395, Morton, J., said: "In suits to recover the price of personal property sold it is well settled that a partial want or failure of the consideration, or a breach of the warranty of title or quality, may be shown in defense, in reduction of damages. This rule is adopted to avoid circuitry of action, because all the rights of the parties growing out of the same transaction can be justly and conveniently settled in one suit. But according to the weight of the authorities, when the consideration consists of real estate conveyed by deed with covenants of title, the grantee, in the absence of fraud, cannot show, in defense of an action for the consideration, a breach of the covenants of the deed, but he is remitted to his action upon his covenants."

Cost of Removing Incumbrance. — In *Dunn v. White*, 1 Ala. 645, it was held that the cost of removing an incumbrance could not be set off in an action for the purchase price.

1. Statutory Modification — *Illinois.* — *Wadhams v. Swan*, 109 Ill. 46.

Indiana. — *Small v. Reeves*, 14 Ind. 163 [citing Ind. Dig. 357; *Reese v. McQuilkin*, 7 Ind. 450].

Minnesota. — *Lowry v. Hurd*, 7 Minn. 356.

New York. — *Merritt v. Gouley*, 58 Hun (N. Y.) 372.

Ohio. — *Great Western Stock Co. v. Saas*, 24 Ohio St. 542; *Templeton v. Kraner*, 24 Ohio St. 554; *Cincinnati v. Brachman*, 35 Ohio St. 289. See also *Purcell v. Heeny*, 28 Ohio St. 39.

Pennsylvania. — *Ives v. Niles*, 5 Watts (Pa.) 323, 328.

Wisconsin. — *Walker v. Wilson*, 13 Wis. 522; *Hall v. Gale*, 14 Wis. 54; *Akerly v. Vilas*, 21 Wis. 88; *Eaton v. Tallmadge*, 22 Wis. 526.

Insolvency Laws. — In *Morrison v. Jewell*, 34

Me. 146, it was held that though a partial failure of title could not be set up as a defense in an action at law, yet in case of the insolvency of the grantor, the grantee in an action by the administrator of the grantor could set off the damages recoverable on the breach of covenant.

2. Breach of Covenant Entitling Covenantee to Damages Held a Defense — *Arkansas.* — *Desha v. Robinson*, 17 Ark. 228. See also *Wheat v. Dotson*, 12 Ark. 699; *Smith v. Capers*, 13 Ark. 9; *Robinson v. Mace*, 16 Ark. 97.

Florida. — *Coy v. Downie*, 14 Fla. 544.

Kentucky. — *Butt v. Riffe*, 78 Ky. 353.

Mississippi. — *Williams v. Harris*, 2 How. (Miss.) 627. See also *Brewer v. Harris*, 2 Smed. & M. (Miss.) 84, 41 Am. Dec. 587.

Missouri. — *Ash v. Holder*, 36 Mo. 163.

New York. — *M'Allister v. Reab*, 4 Wend. (N. Y.) 485, 492.

Pennsylvania. — *Christy v. Reynolds*, 16 S. & R. (Pa.) 258; *Wilson v. Cochran*, 46 Pa. St. 229.

South Carolina. — *Kibler v. Cureton*, 1 Rich. Eq. Cas. (S. Car.) 143.

Texas. — *Tarpley v. Poage*, 2 Tex. 139; *Stewart v. Insall*, 9 Tex. 397.

3. Cost of Removing Incumbrance — *Arkansas.* — *Brodie v. Watkins*, 31 Ark. 319. See also *Key v. Henson*, 17 Ark. 254; *Crowell v. Packard*, 35 Ark. 348.

Illinois. — *Schuchmann v. Knoebel*, 27 Ill. 175; *Christy v. Ogle*, 33 Ill. 295; *McDowell v. Milroy*, 69 Ill. 498. See also *Tone v. Wilson*, 81 Ill. 529.

Indiana. — *Baker v. Railsback*, 4 Ind. 533; *Smith v. Ackerman*, 5 Blackf. (Ind.) 541; *Stillwell v. Chappell*, 30 Ind. 72; *Doremus v. Bond*, 8 Blackf. (Ind.) 368. See also *Burk v. Clements*, 16 Ind. 132.

Iowa. — *Brandt v. Foster*, 5 Iowa 287; *Camp v. Douglas*, 10 Iowa 586. See also *Zent v. Picken*, 54 Iowa 535.

Maine. — *Rand v. Webber*, 64 Me. 191.

Massachusetts. — *Davis v. Bean*, 114 Mass. 358.

Mississippi. — *Myers v. Estell*, 47 Miss. 4.

Nebraska. — *Nesbitt v. Campbell*, 5 Neb. 429, 433.

Pennsylvania. — *Tod v. Gallagher*, 16 S. & R. (Pa.) 261, 16 Am. Dec. 571.

In an action on a note given for the purchase price of land conveyed by deed with warranty, the defendant may recoup what he was compelled to pay to remove an incumbrance from the land. *Davis v. Bean*, 114 Mass. 358.

Recoupment Limited to Amount Actually Paid for Removal of Incumbrance. — The grantee can only recoup the amount paid for the removal

(3) *Necessity of a Substantial Breach.* — Where, however, the covenants in the deed have not been broken, or there has been merely a technical breach of the covenant for which the grantee would be entitled to recover merely nominal damages, in an action on the covenants in the deed the general rule is that the covenants would constitute no defense, either partial or total, to the recovery of the purchase price.¹

(4) *Right to Detain Purchase Money Dependent on Covenants.* — The right of a grantee to detain the unpaid purchase money, or recover it back if already

of a mortgage, and not the full face value of the mortgage, where he has procured its assignment for a less sum. *McDowell v. Milroy*, 69 Ill. 498.

In *Brodie v. Watkins*, 31 Ark. 319, it was held that where the grantee, instead of removing the incumbrance, permits the land to be sold thereunder, but procures a third party to buy it in for him, he will be permitted to recoup from the purchase money the amount expended for the purchase of the land.

1. Covenants Not Broken — *United States.* — *Campbell v. Medbury*, 5 Biss. (U. S.) 35; *Withers v. Greene*, 9 How. (U. S.) 226.

Alabama. — *Wilson v. Jordan*, 3 Stew. & P. (Ala.) 92; *Knight v. Turner*, 11 Ala. 636.

Arkansas. — *Wheat v. Dotson*, 12 Ark. 699; *Robards v. Cooper*, 16 Ark. 288; *Lewis v. Davis*, 21 Ark. 235; *McDermott v. Cable*, 23 Ark. 200; *Farish v. Jones*, 23 Ark. 323; *Anderson v. Mills*, 28 Ark. 175; *Benjamin v. Hobbs*, 31 Ark. 151; *Sorrells v. McHenry*, 38 Ark. 133.

California. — *Norton v. Jackson*, 5 Cal. 262; *Reese v. Gordon*, 19 Cal. 147.

Colorado. — *Hurd v. Smith*, 5 Colo. 233.

Illinois. — *Deal v. Dodge*, 26 Ill. 458; *Vining v. Leeman*, 45 Ill. 246; *Cheney v. City Nat. Bank*, 77 Ill. 562.

Indiana. — *Oldfield v. Stevenson*, 1 Ind. 153; *Buell v. Tate*, 7 Blackf. (Ind.) 55; *Gaar v. Lockridge*, 9 Ind. 92; *Laughery v. McLean*, 14 Ind. 106; *Small v. Reeves*, 14 Ind. 163; *Hacker v. Blake*, 17 Ind. 97; *Jenkinson v. Ewing*, 17 Ind. 505; *Johnson v. Houghton*, 19 Ind. 359; *McClarkin v. Sutton*, 29 Ind. 407; *Starkey v. Neese*, 30 Ind. 222; *Hanna v. Shields*, 34 Ind. 84; *James v. Hays*, 34 Ind. 272; *Marsh v. Thompson*, 102 Ind. 272.

Iowa. — *Allen v. Pegram*, 16 Iowa 163; *Nosler v. Hunt*, 18 Iowa 212; *Gifford v. Ferguson*, 19 Iowa 166; *Dietz v. Mock*, 47 Iowa 451; *Burrows v. Stryker*, 47 Iowa 477; *Kramer v. Richie*, (Iowa 1886) 31 N. W. Rep. 90.

Massachusetts. — *Lothrop v. Snell*, 11 Cush. (Mass.) 453.

Mississippi. — *Hoy v. Taliaferro*, 8 Smed. & M. (Miss.) 727; *Duncan v. Lane*, 8 Smed. & M. (Miss.) 744; *Heath v. Newman*, 11 Smed. & M. (Miss.) 201; *Dennis v. Heath*, 11 Smed. & M. (Miss.) 206, 49 Am. Dec. 51; *Feemster v. May*, 13 Smed. & M. (Miss.) 275.

Missouri. — *Connor v. Eddy*, 25 Mo. 75; *Wheeler v. Standley*, 50 Mo. 511; *Mitchell v. McMullen*, 59 Mo. 252.

New York. — *Folliard v. Wallace*, 2 Johns. (N. Y.) 395; *Kirtz v. Peck*, 113 N. Y. 222.

Ohio. — *Hill v. Butler*, 6 Ohio St. 207; *Purcell v. Heeny*, 28 Ohio St. 39.

South Carolina. — *Bordeaux v. Cave*, 1 Bailey L. (S. Car.) 250.

Wisconsin. — *Hall v. Gale*, 14 Wis. 54; *Taft v. Kessel*, 16 Wis. 273; *Horton v. Arnold*, 18 Wis. 212; *Ludlow v. Gilman*, 18 Wis. 552; *Noonan v. Hsley*, 22 Wis. 27; *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Clementson v. Streeter*, 59 Wis. 429; *Bardeen v. Markstrum*, 64 Wis. 613.

Agreement for Removal of Incumbrance. — In *Martin v. Wharton*, 38 Ala. 637, it was held, in an action on a note given for the purchase money of land, that the grantee could not plead by way of set-off a promise by the grantor to obtain a relinquishment of the dower right of the grantor's wife or to indemnify the purchaser against the incumbrance by a bond with surety.

Outstanding Incumbrance. — An outstanding incumbrance, where there has been no ouster of the purchaser, is no defense to an action at law for the recovery of the purchase price of land sold with covenants of warranty. *Oldfield v. Stevenson*, 1 Ind. 153; *Clark v. Snelling*, 1 Ind. 382; *Streeter v. Henley*, 1 Ind. 401; *Pomeroy v. Burnett*, 8 Blackf. (Ind.) 142; *Mitchell v. Dibble*, 14 Ind. 526; *Evans v. McLucas*, 12 S. Car. 56.

Noneviction under Paramount Title. — Though there is an outstanding title, yet if the grantee has not been evicted, it constitutes no defense to the recovery of the purchase money. *Greenleaf v. Cook*, 2 Wheat. (U. S.) 13; *Hooker v. Folsom*, 4 Ind. 90; *Cartright v. Briggs*, 41 Ind. 184; *Mahoney v. Robbins*, 49 Ind. 146; *Winstead v. Davis*, 40 Miss. 785; *Ware v. Houghton*, 41 Miss. 382, 93 Am. Dec. 258; *Hoopes v. Meyer*, 1 Nev. 433; *Lamerson v. Marvin*, 8 Barb. (N. Y.) 9.

Outstanding Tax Title. — In *Black v. Thompson*, 136 Ind. 611, it was held that the fact that there was an outstanding tax title against land sold with covenants of warranty is no defense to an action on a note given for the purchase price, where it does not appear but that the defendant took possession of the premises conveyed under the deed, and there is no evidence of a subsequent eviction.

Easement Not Asserted. — In *Gillfillan v. Snow*, 51 Ind. 305, it was held that an answer in an action on a note given for the purchase price of land sold with covenants of warranty, alleging as a breach of the covenants that the grantor had at the time of making the covenants conveyed the perpetual right of way across the land to a railway company, and that the conveyance was still in full force, and that the land was still encumbered thereby, and that the grantee could not remove it, was held bad on demurrer for failure to aver an eviction or that the grantee had suffered injury from the existence of the easement. See also *Woodford v. Leavenworth*, 14 Ind. 311.

paid, where there is a defect in the title or incumbrance upon the land, is dependent upon the covenants in his deed; in other words, he can have no relief as to the purchase money unless he has taken the precaution to protect himself by appropriate covenants.¹ Although it was suggested in an early case that, while he may not recover the purchase money paid, he is entitled to detain such purchase money as is unpaid,² this view has been rejected in all except two³ of the United States in which the question has arisen, and it is now a generally accepted rule that a purchaser of land who has received no covenants which cover the defect or incumbrance complained of cannot, in the absence of fraud or mistake, either recover back or detain any part of the purchase money.⁴

2. In Equity — a. IN GENERAL. — A suit in equity will not lie for the recovery of damages for breach of the usual covenants in a deed, the remedy at law being adequate.⁵

b. RELIEF AGAINST COLLECTION OF PURCHASE PRICE — (1) Covenants Not Broken — (a) General Rule. — Where the purchaser has been let into possession of the land, and has continued in possession without interruption from the owner of the paramount title, and would not therefore be entitled in an action at law to recover substantial damages on the covenants in his deed, a court of equity will not, as a general rule, on account of defects in the title, restrain the collection of the purchase price, but will leave the purchaser to seek his remedy at law by action on the covenants in the deed.⁶ And this is

1. See *supra*, this title, the division *Introduction*: subd. *Origin and Purpose of Covenants for Title*.

2. In *Maynard's Case*, 2 Freem. 1, Rep. temp. Finch 288, (under the name *Maynard v. Moseley*) 3 Swanst. 651, Lord Nottingham said: "He that purchases lands without any covenants or warranties against prior titles, * * * if the land be afterwards evicted by an *eigie* title, can never exhibit a bill in equity to have his purchase money again upon that account; possibly there may be equity to stop the payment of such purchase money as is behind, but never to recover what is paid; for the chancery mends no man's bargain, though it sometimes mends his assurance."

3. **Pennsylvania and Texas Doctrine.** — In the state of Pennsylvania and, it seems, also in Texas, a grantee may, independently of the covenants in his deed, defend himself from the payment of the purchase money by reason of a clear outstanding defect or incumbrance, unless the intention was that he was to run the risk of it. *Steinhauer v. Witman*, 1 S. & R. (Pa.) 438; *Hart v. Porter*, 5 S. & R. (Pa.) 201; *Tarpley v. Pooge*, 2 Tex. 139; *Johnson v. Long*, 27 Tex. 21; *Demare v. Bennett*, 29 Tex. 262; *Groesbeck v. Harris*, 82 Tex. 411. See the title **VENDOR AND PURCHASER**.

4. **Prevailing Rule.** — *Urmston v. Pate*, 4 Cruise 90 (4th ed.); *Craig v. Hopkins*, 2 Coll. Decis. 517; *Thomas v. Powell*, 2 Cox 394; *Bree v. Holbech*, 2 Doug. 655. See the title **VENDOR AND PURCHASER**.

5. **Suit in Equity for Breach of Covenants Not Maintainable.** — *Smoot v. Coffin*, 4 Mackey (D. C.) 407; *Ferguson v. Bullock*, 1 A. K. Marsh. (Ky.) 71; *Lawless v. Helm*, 1 A. K. Marsh. (Ky.) 457; *Miller v. Long*, 3 A. K. Marsh. (Ky.) 334; *Bradford v. Long*, 4 Bibb (Ky.) 225; *Chesterman v. Gardner*, 5 Johns. Ch. (N. Y.) 29, 9 Am. Dec. 265.

In *Watkins v. Owen*, 2 J. J. Marsh. (Ky.) 142, it was held that a court of equity has no

jurisdiction of a bill by the grantee of land, with covenants of general warranty, for the investigation of a title, and the assessment of damages in case the title is defective, because of the fact that a suit is threatened by the claimant of the adverse title.

Refusal of Joint Covenantee to Join in an Action. — The mere refusal of a joint covenantee to join in an action for breach of the covenant is not ground for a bill in equity unless it further appears that the refusal proceeded from improper motives. *Forbes v. Whitlock*, 3 Edw. Ch. (N. Y.) 446.

Covenant by Married Woman. — The remedy, however, against the heirs of a married woman for breach of the covenants in her deed is in equity, and not at law, as her liability is merely an equitable one imposed upon her separate estate. *Barlow v. Delany*, 36 Fed. Rep. 577.

6. **Defects of Title Not Grounds for Equitable Relief — United States.** — *Truly v. Wanzer*, 5 How. (U. S.) 141; *Patton v. Taylor*, 7 How. (U. S.) 132.

Alabama. — *Cullum v. Branch of State Bank*, 4 Ala. 21, 37 Am. Dec. 725; *Patton v. England*, 15 Ala. 69; *Parks v. Brooks*, 16 Ala. 529; *McLemore v. Mabson*, 20 Ala. 137; *Magee v. McMillan*, 30 Ala. 420; *Hickson v. Lingold*, 47 Ala. 449.

Arkansas. — *Hoppes v. Cheek*, 21 Ark. 588; *Worthington v. Cud*, 22 Ark. 281; *Bolton v. Branch*, 22 Ark. 435; *Busby v. Treadwell*, 24 Ark. 456.

Georgia. — *Cantrell v. Cobb*, 43 Ga. 193; *Alen v. Thornton*, 51 Ga. 594; *Odel v. Reed*, 54 Ga. 142.

Illinois. — *Harding v. Commercial Loan Co.*, 84 Ill. 251.

Kentucky. — *Taylor v. Lyon*, 2 Dana (Ky.) 276; *Wiley v. Fitzpatrick*, 3 J. J. Marsh. (Ky.) 584; *Morrison v. Beckwith*, 4 T. B. Mon. (Ky.) 73, 16 Am. Dec. 136.

Maryland. — *Gayle v. Fattle*, 14 Md. 69.

especially true where the grantee had notice of the defects in the title.¹

(b) **More Liberal Rule.** — In some jurisdictions, however, the courts of equity have gone far beyond everything sanctioned by the Court of Chancery in England or the courts of equity in most of the United States, and have, irrespective of the solvency or insolvency of the grantor, and though the purchaser has not been disturbed in his possession, given relief to the purchaser against the payment of the purchase money where the title has been questioned by suit, either prosecuted or threatened, or where the purchaser shows clearly that the title is defective.²

Limitation of the Rule. — No court of equity, however, has gone to the extent

Michigan. — *Griggs v. Detroit, etc.*, R. Co., 10 Mich. 117.

Mississippi. — *Coleman v. Rowe*, 5 How. (Miss.) 460, 37 Am. Dec. 164; *Vick v. Percy*, 7 Smed. & M. (Miss.) 256, 45 Am. Dec. 303; *Walker v. Gilbert*, 7 Smed. & M. (Miss.) 456; *McDonald v. Green*, 9 Smed. & M. (Miss.) 138; *Wailles v. Cooper*, 24 Miss. 232; *Wofford v. Ashcraft*, 47 Miss. 641.

Missouri. — *Swain v. Burnley*, 1 Mo. 404; *Barton v. Rector*, 7 Mo. 528; *Cooley v. Rankin*, 11 Mo. 643; *Connor v. Eddy*, 25 Mo. 75; *Mitchell v. McMullen*, 59 Mo. 252.

New Jersey. — *Hile v. Davison*, 20 N. J. Eq. 228.

New York. — *Bumpus v. Platner*, 1 Johns. Ch. (N. Y.) 213; *Denston v. Morris*, 2 Edw. Ch. (N. Y.) 37; *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; *Leggett v. McCarty*, 3 Edw. Ch. (N. Y.) 124; *Bates v. Delavan*, 5 Paige (N. Y.) 299; *Griffith v. Kempshall*, *Clarke Ch.* (N. Y.) 571; *Woodruff v. Bunce*, 9 Paige (N. Y.) 443, 38 Am. Dec. 559; *Edwards v. Bodine*, 26 Wend. (N. Y.) 109.

North Carolina. — *Clanton v. Burges*, 2 Dev. Eq. (17 N. Car.) 13; *Hughes v. McNider*, 90 N. Car. 248.

Tennessee. — *Young v. Butler*, 1 Head (Tenn.) 640; *Elliott v. Thompson*, 4 Humph. (Tenn.) 99, 40 Am. Dec. 630; *Senter v. Hill*, 5 Sneed (Tenn.) 505; *Merriman v. Norman*, 9 Heisk. (Tenn.) 269.

Virginia. — *Beale v. Seiveley*, 8 Leigh (Va.) 658; *Long v. Israel*, 9 Leigh (Va.) 556.

See, however, *Johnson v. Gere*, 2 Johns. Ch. (N. Y.) 546, wherein proceedings on a bond and mortgage given in payment of land sold with covenants of warranty were enjoined until the determination of an action of ejectment by a person claiming under a paramount title.

In *Gayle v. Fattle*, 14 Md. 69, it was held that the mere claim by a third person of a paramount title, not alleged by the bill to enjoin the collection of the purchase price to be valid, and the bringing suit upon that claim against the purchaser, are not sufficient to authorize a court of equity to stay by injunction proceedings at law for the recovery of the unpaid purchase money.

1. Notice of Defect Additional Ground for Denying Equitable Relief. — *James v. Hays*, 34 Ind. 272; *Anderson v. Lincoln*, 5 How. (Miss.) 279; *Stone v. Buckner*, 12 Smed. & M. (Miss.) 73; *Gartman v. Jones*, 24 Miss. 234; *Wilkins v. Hogue*, 2 Jones Eq. (55 N. Car.) 479; *Merritt v. Hunt*, 4 Ired. Eq. (39 N. Car.) 406; *Demaret v. Bennett*, 29 Tex. 262. See also *Wamsley v. Stalnaker*, 24 W. Va. 226.

2. More Liberal Rule — *Florida.* — *Yonge v. McCormack*, 6 Fla. 368, 63 Am. Dec. 214.

Maryland. — *Buchanan v. Lornan*, 3 Gill (Md.) 51; *Dorsey v. Hobbs*, 10 Md. 412.

New Jersey. — *Van Riper v. Williams*, 2 N. J. Eq. 407.

Virginia. — *Ralston v. Miller*, 3 Rand. (Va.) 49, 15 Am. Dec. 704; *Koger v. Kane*, 5 Leigh (Va.) 606; *Gay v. Hancock*, 1 Rand. (Va.) 72; *Miller v. Argyle*, 5 Leigh (Va.) 460; *Bullitt v. Songster*, 3 Munf. (Va.) 55.

West Virginia. — *Renick v. Renick*, 5 W. Va. 285; *Wamsley v. Stalnaker*, 24 W. Va. 214.

In *Clarke v. Hardgrove*, 7 Gratt. (Va.) 399, it was held that where the grantee clearly shows that at the institution of the suit the title to a portion of the land conveyed to him was defective, he has a right, notwithstanding a deed with general warranty had been made, to enjoin the collection of the purchase money. In this case the court said that it was not incumbent upon the purchaser in case of a clearly defective title to risk the hazard of the vendor's insolvency.

Pendency of Action by Adverse Claimant. — In *Jaques v. Esler*, 4 N. J. Eq. 461, it was held that the purchaser of land by deed of warranty has a right to relief in equity against the vendor who seeks to enforce the payment of a bond given for the purchase money, until a suit actually brought to recover the premises by a person claiming them by a paramount title shall have been determined. In this case the question of the solvency or insolvency of the vendor was not raised, and the chancellor, in delivering the opinion, said: "He [the grantee] is not obliged to look merely to the covenants in the deed; he is not to be driven to such circuitry of action, nor to rely upon that as his only security. The fund in his hands is a security, of which it would be inequitable to deprive him."

Existence of Adverse Claim Insufficient. — In *Glenn v. Whipple*, 12 N. J. Eq. 50, it was held that the mere existence of an adverse claim (a right of dower) was insufficient to entitle the grantee to equitable relief, unless an action to enforce such claim had been instituted. See also *Van Waggoner v. McEwen*, 2 N. J. Eq. 412, cited in *Glenn v. Whipple*, 12 N. J. Eq. 50.

Incumbrance Exceeding Amount of Purchase Money Due. — Where the amount of judgment liens exceeded the amount of purchase money due, an action for the recovery of the purchase money will be stayed until the premises shall have been released from the lien of the judgments. *Buell v. Tate*, 7 Blackf. (Ind.) 55; *Dayton v. Dusenbury*, 25 N. J. Eq. 110. See also *Arnold v. Curl*, 18 Ind. 339.

of granting relief against the collection of the purchase money unless there was reasonable apprehension of danger to the grantee by reason of the defects in the title,¹ or unless the purchaser could show clearly the defect in the title.²

(c) **Insolvency and Nonresidence of Grantor as Ground for Equitable Relief** — *aa. INSOLVENCY.* — Where it is shown that the grantor is insolvent and that an adverse title is being asserted, courts of equity, under their *quia timet* jurisdiction, have enjoined the collection of the purchase price.³ The danger, however, of injury to the grantee by reason of the defects in the title must be imminent.⁴ And it has been held necessary also, in order that such relief may be granted, that the grantee did not have notice of the defects in the title at the time of his purchase.⁵

bb. NONRESIDENCE. — As in case of the insolvency of the grantor, the fact that he is a nonresident has also been held to entitle the grantee to equitable relief from the payment of the purchase money.⁶

1. Reasonable Possibility of Injury from Defects of Title Essential. — *Collins v. Clayton*, 53 Ga. 649.

In *Wamsley v. Stalnaker*, 24 W. Va. 214, it was held that equity would not enjoin the collection of a judgment at law for purchase money merely on account of judgments against the vendor, exceeding the value of the land conveyed, which were liens upon the land, where it appeared that the vendor owned other lands greatly exceeding in value the amount of the judgment, which were first bound to pay the judgments before the land conveyed could be subjected to their payment, and where the bill contained no allegation that the vendor was insolvent or that any suit was brought or threatened to subject the land conveyed to the grantee to the payment of the judgment, or that there was the least probability that any such suit would be brought.

2. Defect in Title Must Be Clearly Shown. — *Ralston v. Miller*, 3 Rand. (Va.) 44, 15 Am. Dec. 704.

In *Yancey v. Lewis*, 4 Hen. & M. (Va.) 390, it was held that where a purchaser seeks equitable relief against a judgment at law for the purchase price, on the ground of a defect in the grantor's title, it is not enough to allege such defect or want of title, but he must prove an actual eviction or a superior title in some third person.

3. Insolvency of Grantor as Ground for Equitable Relief — *Alabama.* — *Cullum v. Branch of State Bank*, 4 Ala. 21, 37 Am. Dec. 725; *McLemore v. Mabson*, 20 Ala. 137.

Georgia. — *McGehee v. Jones*, 10 Ga. 135.

Indiana. — *Fehrle v. Turner*, 77 Ind. 530.

Kentucky. — *Simpson v. Hawkins*, 1 Dana (Ky.) 303; *Morrison v. Beckwith*, 4 T. B. Mon. (Ky.) 75, 16 Am. Dec. 136; *Denny v. Wickliffe*, 1 Metc. (Ky.) 216.

Mississippi. — *Wilty v. Hightower*, 6 Smed. & M. (Miss.) 345; *Johnson v. Jones*, 13 Smed. & M. (Miss.) 580.

Missouri. — *Foote v. Clark*, 102 Mo. 394.

Tennessee. — *Young v. Butler*, 1 Head (Tenn.) 640; *Ingram v. Morgan*, 4 Humph. (Tenn.) 66, 40 Am. Dec. 626.

See, however, *Peters v. Bowman*, 98 U. S. 56; *Strong v. Downing*, 34 Ind. 300.

Basis of Equitable Relief. — "The ground upon which the chancellor interferes in such cases is the prevention of the irreparable mischief which otherwise might result from the

insolvency." *Simpson v. Hawkins*, 1 Dana (Ky.) 303, *per Underwood*, J.

Solvency of Grantor Doubtful. — In *Jones v. Stanton*, 11 Mo. 433, it was held that where the solvency of the grantor was doubtful, the collection of the purchase money would be restrained, until the purchaser should be indemnified against loss on account of a defect in the title.

Outstanding Incumbrance. — Where the covenants are broken by the existence of an outstanding incumbrance (dower right), and the grantor is insolvent, equity will restrain the collection of so much of the purchase money as will compensate for the injuries resulting from the breach, or order its appropriation to the extinguishment of the incumbrance. *McLemore v. Mabson*, 20 Ala. 137.

Incumbrance Not Asserted. — In *Worthington v. Curd*, 22 Ark. 277, however, it was held that the mere existence of the incumbrance would not entitle the purchaser to equitable relief on account of the insolvency of the grantor, unless the incumbrance was actually being prosecuted.

4. Hoag v. Rathbun, Clarke Ch. (N. Y.) 12; *Miller v. Avery*, 2 Barb. Ch. (N. Y.) 582. See, however, *Johnson v. Gere*, 2 Johns. Ch. (N. Y.) 546.

5. Known Defects. — *Worthington v. Curd*, 22 Ark. 277; *Morrison v. Beckwith*, 4 T. B. Mon. (Ky.) 73, 16 Am. Dec. 136; *Henry v. Elliott*, 6 Jones Eq. (59 N. Car.) 175. See, however, *Wailes v. Cooper*, 24 Miss. 233; *Jaques v. Esler*, 4 N. J. Eq. 461.

In *Rawlins v. Timberlake*, 6 T. B. Mon. (Ky.) 232, Bibb, C. J., said: "Upon what principle of equity could the chancellor interfere to stop the purchase money whilst the purchaser is in full enjoyment of his purchase, receiving rents and profits, using the buildings and grounds, when the title is precisely as the parties knew and contemplated at the sale and purchase? Would it accord with equity or reciprocity to help the purchaser keep the price and the tenements purchased by tying up the purchaser to wait the issue of a suit pending, and known, and within the contemplation of the parties, when the one made and the other accepted the covenant of warranty?"

6. Nonresidence of Grantor. — *McGehee v. Jones*, 10 Ga. 135; *Wiley v. Fitzpatrick*, 3 J. J. Marsh. (Ky.) 582; *Hatcher v. Andrews*, 5 Bush

c. PARTIES TO SUIT. — In order, however, that equitable relief may be granted, the grantee should bring before the court the parties from whom the danger on account of the defect in the title is apprehended, so that they may assert their right and thereby have the question of title finally litigated and settled.¹

(2) *Covenants Broken.* — Where the covenants in the deed have been broken so as to entitle the grantee to recover substantial damages, and the grantor is insolvent, the grantee may obtain an injunction to restrain the collection of the purchase money and have it finally set off against the damages which he may recover in an action on the covenants.² And it has been held that equity will grant this relief though the purchaser had notice of the defects in the title at the time of the conveyance.³

Insolvency or Nonresidence Essential. — To authorize the granting of such relief by a court of equity it is generally held necessary that the grantor be insolvent or a nonresident, as the ground upon which a court of equity acts in such cases is the irreparable injury which might result from the insolvency of the grantor.⁴ In some jurisdictions, however, as in cases where the covenant has not been broken, equitable relief has been granted irrespective of the solvency or insolvency of the grantor.⁵

c. RELIEF AGAINST JUDGMENT FOR PURCHASE PRICE. — In those jurisdictions in which the defects in the title could not have been set up in defense of an action at law for the recovery of the purchase price, equity will enjoin the collection of a judgment recovered for the purchase price under circumstances entitling the grantee to an injunction against the prosecution of an action therefor.⁶ But where the defense could have been set up in the action at law, equity will not interfere to restrain the collection of the judgment.⁷

(Ky.) 561; *Hauser v. Mann*, 1 Murph. (5 N. Car.) 411; *Green v. Campbell*, 2 Jones Eq. (55 N. Car.) 446; *Richardson v. Williams*, 3 Jones Eq. (56 N. Car.) 116. See, however, *Strong v. Downing*, 34 Ind. 300.

In *Green v. Campbell*, 2 Jones Eq. (55 N. Car.) 448, *Battle, J.*, in speaking of the nonresidence of the grantor as ground for equitable relief against the collection of the purchase money, said: "This court will not permit the defendants [grantors] to recover the purchase money for the land, the title to which is admitted to be defective, leaving to the plaintiff [grantee] the precarious remedy of suing in the courts of another state for the purpose of getting back the same by way of damages, in an action, for the breach of the covenant of warranty."

1. *Simpson v. Hawkins*, 1 Dana (Ky.) 303; *Denny v. Wickliffe*, 1 Metc. (Ky.) 226; *Taylor v. Lyon*, 2 Dana (Ky.) 279. For a general discussion of this subject, see the ENCYC. OF PLEADING AND PRACTICE, title PARTIES.

2. **Covenants Broken — Insolvency of Grantor.** — *Cullum v. Branch of State Bank*, 4 Ala. 21, 37 Am. Dec. 725; *Walton v. Bonham*, 24 Ala. 513; *Wray v. Furniss*, 27 Ala. 471; *Simpson v. Hawkins*, 1 Dana (Ky.) 303; *Trumbo v. Lockridge*, 4 Bush (Ky.) 415; *Rawlins v. Timberlake*, 6 T. B. Mon. (Ky.) 225; *Woodruff v. Bunce*, 9 Paige (N. Y.) 443, 38 Am. Dec. 559; *Young v. Butler*, 1 Head (Tenn.) 640.

3. *Wailles v. Cooper*, 24 Miss. 208.

4. **Nonresidence or Insolvency of Grantor Essential.** — *Trumbo v. Lockridge*, 4 Bush (Ky.) 415; *Hopper v. Lutkins*, 4 N. J. Eq. 149.

5. **Injunction Against Negotiating Purchase-money Notes.** — In *McDunn v. Des Moines*, 34 Iowa 467, it was held that where the title to

land has failed in part, a court of equity will enjoin the grantor from negotiating the purchase-money notes so as to enable the grantee to set up the partial failure of title in partial defense to the note.

Failure to Put Grantee in Possession. — In *Nelson v. Owen*, 3 Ired. Eq. (38 N. Car.) 175, the grantee was given equitable relief by injunction against the collection of the purchase money, where the grantor failed to put him in possession of the land, and admitted inability to do so, though the grantee at the time of the conveyance knew that the land was held adversely.

6. **Injunction Against Collection of Judgment for Price.** — *Rawlins v. Timberlake*, 6 T. B. Mon. (Ky.) 231; *Jones v. Waggoner*, 7 J. J. Marsh. (Ky.) 144; *Simpson v. Hawkins*, 1 Dana (Ky.) 303.

Eviction of Grantee and Insolvency of Grantor. — In *Lockett v. Triplett*, 2 B. Mon. (Ky.) 39, it was held that where the grantor is insolvent and the grantee has been evicted, a court of equity will restrain the collection of a judgment at law for the purchase price.

Enforcement of Offset by Courts of Law. — Courts of law have no power to order the damages, which the grantee would be entitled to recover for breach of the covenants in the deed, to be credited on a judgment recovered by the grantor for the purchase price. *Turner v. McAdory*, 58 Miss. 27.

7. *Desvergers v. Willis*, 58 Ga. 388.

In *Allen v. Thornton*, 51 Ga. 594, it was held that equity would not enjoin the collection of a judgment for the purchase money on account of the failure of the title, there being no allegation or proof of the insolvency of the grantor. This decision was based on the

And where relief would not have been granted against an action for the purchase money, relief will not, of course, be granted against a judgment therefor.¹

d. RELIEF AGAINST SALES UNDER DEEDS OF TRUST FOR PURCHASE MONEY. — In *Virginia*, in case of deeds of trust to secure the payment of the purchase money, still greater liberality in restraining proceedings has prevailed, and it is held that a sale under such deeds by the trustee will be enjoined merely on account of the existence of an adverse claim.²

e. RELIEF AGAINST FORECLOSURE OF PURCHASE-MONEY MORTGAGE — (1) *Covenants Not Broken* — (a) *In General.* — Where the collection of the purchase money is sought to be enforced by the foreclosure of a purchase-money mortgage, the general rule prevails that unless the covenants have been broken the grantee will be left to his remedy by an action at law on the covenants.³

ground that the failure of title should have been set up in the action for the purchase money. See also *Moore v. Hill*, 59 Ga. 760.

Laches in Applying for Equitable Relief. — In *Hambrick v. Dickey*, 48 Ga. 578, it was held that where the grantee permits judgments to be taken against him for part of the unpaid purchase money, equity will not, after the lapse of many years, enjoin a sale of the land in satisfaction of the judgment.

1. *Busby v. Treadwell*, 24 Ark. 456; *Clanton v. Burges*, 2 Dev. Eq. (17 N. Car.) 13.

Knowledge of Defect in Title. — Where the owner of a life estate conveyed the land in fee with covenants of warranty, the grantee, however, being aware at the time of the conveyance of the defect in the title, a court of equity will not restrain the enforcement of a judgment recovered on the purchase-money notes, but will leave the grantee to his action on the warranty. *Henry v. Elliott*, 6 Jones Eq. (59 N. Car.) 175.

2. *Deeds of Trust.* — *Gay v. Hancock*, 1 Rand. (Va.) 72; *Lane v. Tidball*, Gilmer (Va.) 130.

In *Miller v. Argyle*, 5 Leigh (Va.) 466, Tucker, P., in distinguishing the difference between the right of the grantee to an injunction against the enforcement of a judgment at law and an injunction against a sale under a deed of trust, said: "Now a distinction has always been strongly drawn between these cases; for it never can be equitable to permit a sacrifice by sale under a doubtful title, though it may be but just that the vendor should be suffered to enforce a judgment for his purchase money where the vendee is in possession, since the doubt about the title may eventually turn out to be frivolous and groundless. Accordingly it has been decided that if there is a cloud hanging over the title, or if the amount to be raised is uncertain, the sale should be enjoined."

3. *Foreclosure of Mortgage — Covenant Not Broken* — *United States.* — *Peters v. Bowman*, 98 U. S. 56.

Alabama. — *Magee v. McMillan*, 30 Ala. 420; *Wyatt v. Garlington*, 56 Ala. 576.

California. — *Alden v. Pryal*, 60 Cal. 215.

District of Columbia. — *Van Riswick v. Wal-lach*, 3 MacArthur (D. C.) 388.

Illinois. — *Beebe v. Swartwout*, 8 Ill. 162.

Indiana. — *Jordan v. Blackmore*, 20 Ind. 419; *Hume v. Dessar*, 29 Ind. 112; *Church v. Fisher*, 40 Ind. 145; *Mahoney v. Robbins*, 49 Ind. 146; *Stahl v. Hammontree*, 72 Ind. 103; *Black v. Thompson*, 136 Ind. 611.

Kentucky. — *Hall v. Priest*, 6 Bush (Ky.) 12; *English v. Thomasson*, 82 Ky. 281.

Maryland. — *Gayle v. Fattle*, 14 Md. 69.

Michigan. — *Smith v. Fiting*, 37 Mich. 148; *Haldane v. Sweet*, 55 Mich. 196.

Mississippi. — *Miller v. Owens*, Walk. (Miss.) 244.

Missouri. — *Key v. Jennings*, 66 Mo. 368.

New Jersey. — *Hulfish v. O'Brien*, 20 N. J. Eq. 230; *Hile v. Davison*, 20 N. J. Eq. 228; *Price v. Lawton*, 27 N. J. Eq. 325; *Cooper v. Bloodgood*, 32 N. J. Eq. 209; *Zabriske v. Baudendistel*, (N. J. 1890) 20 Atl. Rep. 163.

New York. — *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 520, 7 Am. Dec. 554; *Banks v. Walker*, 2 Sandf. Ch. (N. Y.) 344; *Frost v. Raymond*, 2 Cai. (N. Y.) 188, 2 Am. Dec. 228; *Denston v. Morris*, 2 Edw. Ch. (N. Y.) 37; *Parkinson v. Jacobson*, 13 Hun (N. Y.) 317; *Burke v. Nichols*, 21 How. Pr. (N. Y. Supreme Ct.) 459; *Edwards v. Bodine*, 26 Wend. (N. Y.) 109; *York v. Allen*, 30 N. Y. 104; *Parkinson v. Sherman*, 74 N. Y. 88, 30 Am. Rep. 268; *Ryerson v. Willis*, 81 N. Y. 277; *Gifford v. Father Mathew Total Abstinence Ben. Soc. No. 1*, 104 N. Y. 142; *McConihe v. Fales*, 107 N. Y. 404.

Ohio. — *Hill v. Butler*, 6 Ohio St. 207.

Rhode Island. — *Barrows v. National Rubber Co.*, 12 R. I. 173.

South Carolina. — *Lessly v. Bowie*, 27 S. Car. 193.

Tennessee. — *Young v. Butler*, 1 Head (Tenn.) 640.

Vermont. — *Darling v. Osborne*, 51 Vt. 148.

Washington. — *Kley v. Geiger*, 4 Wash. 484.

Wisconsin. — *Booth v. Ryan*, 31 Wis. 45; *Smith v. Hughes*, 50 Wis. 620; *Hyslip v. French*, 52 Wis. 516; *Clementson v. Streeter*, 59 Wis. 429.

In *Gayle v. Fattle*, 14 Md. 69, it was held that the mere claim by a third person of a paramount title, not alleged by the bill to enjoin the collection of the purchase price, to be valid, and the bringing suit upon that claim against the purchaser, are not sufficient to authorize a court of equity to stay by injunction proceedings in equity to collect the purchase money.

Equity of Rule. — In *Peters v. Bowman*, 98 U. S. 56, Mr. Justice Swayne said: "The rule is founded in reason and justice. A different result would subvert the contract of the parties and substitute for it one which they did not make. In such cases the vendor, by his covenants, if there are such, agrees upon them, and not otherwise, to be responsible for defects of title. If there are no covenants he

The fact that a decree *in personam* may be rendered for any balance which may remain after a sale under the mortgage does not alter the rule.¹

Failure of Title as a Defense. — A failure of title, however, may be set up in defense to an action to foreclose a purchase-money mortgage where a deficiency judgment is demanded against the grantee.² But where it is only sought to foreclose the mortgage lien, such defense is of no avail.³

(b) **Outstanding Incumbrance.** — Where the defect in the title consists of an outstanding incumbrance, the courts in some jurisdictions will compel a deduction of the amount of the incumbrance from the amount of the purchase money due, or compel the appropriation of the purchase money in satisfaction of the incumbrance;⁴ and this irrespective of whether or not the grantee had notice of the incumbrance.⁵ This relief, however, in other jurisdictions, has been denied unless there were other grounds therefor than the mere existence of an outstanding incumbrance.⁶

assumes no responsibility, and the other party takes the risk. The vendee agrees to pay according to his contract and secures payment by giving a lien upon the property."

Voidable Title. — Where the grantor holds a voidable title as to part of the land conveyed, the title being under a conveyance from a minor who had brought no suit to avoid his deed nor threatened any, a court of equity will not enjoin proceedings to foreclose the deed of trust given by the grantee for the unpaid purchase money. *Harding v. Commercial Loan Co.*, 84 Ill. 251.

Life Estate Only in Grantor. — Where land is conveyed in fee simple with covenants of warranty, and the grantor had only a life estate therein, the grantee cannot, if his possession has not been disturbed, resist the foreclosure of the purchase-money mortgage. *Clementson v. Streeter*, 59 Wis. 429.

Outstanding Dower Interest. — In *Glenn v. Whipple*, 12 N. J. Eq. 50, it was held that the mere existence of an outstanding dower interest was no defense to a foreclosure of the purchase-money mortgage.

Pendency of Action for Dower. — The pendency of an action for dower is no defense to the foreclosure of a mortgage for the purchase money. *Childs v. Alexander*, 22 S. Car. 185. See also *Whitworth v. Stuckey*, 1 Rich. Eq. (S. Car.) 404, wherein Hooper, C., said: "I think the dicta of some of the judges that such relief will be afforded in equity are founded on a mistaken view. Relief is to be afforded in no court because there is no grievance."

Pendency of Action on Paramount Title. — In *Platt v. Gilchrist*, 3 Sandf. (N. Y.) 118, it was held that the pendency of an action by a claimant under a paramount title was not a defense to a suit to foreclose a mortgage given for part of the purchase money.

Perfection of Title — Condition Precedent to Maturity of Debt. — Where land is conveyed with covenants of warranty, and the mortgage is conditioned that it shall not be payable until the defective title is perfected, no foreclosure can be had of that portion of the debt accruing from the purchase of the land the title to which is defective, until the title thereto is perfected, and the purchaser would be entitled to a deduction in proportion to the value of such land as compared with the value of the entire tract sold. *Weaver v. Wilson*, 48 Ill. 125.

1. *Edwards v. Bodine*, 26 Wend. (N. Y.) 109; *Leggett v. M'Carty*, 3 Edw. Ch. (N. Y.) 124.

2. **Failure of Title as a Defense.** — *Scantlin v. Allison*, 12 Kan. 85; *Cowdrey v. Coit*, 44 N. Y. 382, 4 Am. Rep. 690.

Conveyance of Homestead. — Where the deed conveying a homestead conveys no title on account of its defective execution, the grantee in an action on the purchase-money note and to foreclose a mortgage may set up the defense of failure of title. *Chambers v. Cox*, 23 Kan. 393.

3. **Failure of Title No Defense to Foreclosure of Mortgage Lien.** — *Strong v. Waddell*, 56 Ala. 471; *Byrd v. Turpin*, 62 Ga. 591; *Hanna v. Shields*, 34 Ind. 84; *Rogers v. Place*, 29 Ind. 577; *Hubbard v. Chappel*, 14 Ind. 601; *Cartwright v. Briggs*, 41 Ind. 184; *Conwell v. Clifford*, 45 Ind. 392; *Plowman v. Shidler*, 36 Ind. 484. See, however, *Conklin v. Bowman*, 7 Ind. 533.

Reasons of Doctrine — Estoppel. — In *Strong v. Waddell*, 56 Ala. 471, the doctrine prohibiting the grantee from setting up an outstanding title in bar of a suit to foreclose a purchase-money mortgage was based on the ground of estoppel.

4. **Outstanding Incumbrance.** — *Nesbitt v. Campbell*, 5 Neb. 429; *Van Riper v. Williams*, 2 N. J. Eq. 407; *Dayton v. Dusenbury*, 25 N. J. Eq. 110; *White v. Stretch*, 22 N. J. Eq. 76; *Union Nat. Bank v. Pinner*, 25 N. J. Eq. 495. See also *Smith v. Fiting*, 37 Mich. 148.

Outstanding Mortgage. — In *Shannon v. Marselis*, 1 N. J. Eq. 413, it was held that where the vendor sues on a purchase-money bond and mortgage given in payment of land conveyed with covenants against incumbrances, equity will enjoin him and compel him to appropriate the money to discharge the incumbrance.

Concealed Incumbrances. — In *Lovelace v. Harrington*, 27 Grant's Ch. (U. C.) 178, it was held that where, in a conveyance of land with covenants against incumbrances, the existence of an incumbrance is concealed by the vendor, a court of equity will restrain an action to enforce payment of the mortgage given to secure the purchase money, unless the amount of the incumbrance so concealed is deducted from the sum secured by the mortgage.

5. *Jaques v. Esler*, 4 N. J. Eq. 461.

6. **Mere Existence of Incumbrance Not Ground for Equitable Relief.** — *Goodwin v. McGehee*, 15

(c) **Insolvency of Grantor as Ground for Relief.** — The insolvency of the grantor, however, as in cases where the collection of the purchase money is sought by proceedings at law, may be ground for granting equitable relief against the foreclosure of the purchase-money mortgage.¹

(2) **Covenants Broken.** — And where the covenants have been broken, the grantee may, as a general rule, have an offset of the damages that he would be entitled to recover,² or the entire failure of title would constitute a defense as a failure of consideration.³

f. INJUNCTION AGAINST VIOLATION OF RESTRICTIVE COVENANTS. — It is a well-settled rule that a court of equity will, by injunction, enforce covenants in a deed by the grantee restricting his use of the premises conveyed, either as regards the erection of buildings or the carrying on of objectionable trades or businesses thereon,⁴ and will also enjoin the breach of similar covenants

Ala. 233; *McLemore v. Mabson*, 20 Ala. 137; *Hughes v. Hatchett*, 55 Ala. 539; *Gager v. Edwards*, 26 Ill. App. 487; *Griggs v. Detroit*, etc., R. Co., 10 Mich. 117; *York v. Allen*, 30 N. Y. 104; *Curtiss v. Bush*, 39 Barb. (N. Y.) 661; *Lessly v. Bowie*, 27 S. Car. 193.

Outstanding Mortgage. — In *Griggs v. Detroit*, etc., R. Co., 10 Mich. 117, it was held that a prior outstanding mortgage cannot be set off in a suit to foreclose the purchase-money mortgage, where it is not shown that the purchaser has been damaged or is likely to be damaged by or compelled to pay the same.

1. **Insolvency of Grantor.** — *Hughes v. Hatchett*, 55 Ala. 539; *Wyatt v. Garlington*, 56 Ala. 576; *Hall v. Priest*, 6 Bush (Ky.) 12. See, however, *Peters v. Bowman*, 98 U. S. 56.

2. **Covenant Broken.** — *Coy v. Downie*, 14 Fla. 544; *Tone v. Wilson*, 81 Ill. 529; *Lowry v. Hurd*, 7 Minn. 356; *Shannon v. Marselis*, 1 N. J. Eq. 413; *Withers v. Morrell*, 3 Edw. Ch. (N. Y.) 560; *Sandford v. Travers*, 40 N. Y. 140; *Walker v. Wilson*, 13 Wis. 523; *Hall v. Gale*, 14 Wis. 54; *Akerly v. Vilas*, 15 Wis. 401. See also *Kelly v. Kershaw*, 5 Utah 295; *Merritt v. Gonley*, 58 Hun (N. Y.) 372. This case, however, was decided on the ground that Code Civ. Pro., § 501, enabled the grantee to set up as a counterclaim the damages recoverable for breach of the covenants.

Partial Eviction. — In *Coster v. Monroe Mfg. Co.*, 2 N. J. Eq. 467, it was held that where the purchasers have been evicted from a part of the premises or a judgment in ejectment recovered against them, equity will permit the purchasers on a bill by the vendor for a foreclosure of the mortgage given for part of the purchase money to avail themselves of the failure of title as a defense against recovery upon the mortgage, and will stay the proceedings upon the mortgage until the damages arising from the failure of title are ascertained.

Removing Incumbrance — Equitable Set-off. — In a suit to foreclose a purchase-money mortgage, the amount paid by the grantee to remove an incumbrance covenanted against in the deed can be set off against the amount due on the mortgage. *Detroit*, etc., R. Co. v. *Griggs*, 12 Mich. 45; *Henderson v. Brown*, 18 Grant's Ch. (U. C.) 79.

Defense Based Solely on Covenants. — In *Church v. Fisher*, 40 Ind. 145, it was held that the defense arising out of defects of title was based solely on the covenants in the deed, and should be set out by copy or otherwise as required by statute.

3. *Cowdrey v. Coit*, 44 N. Y. 382, 4 Am. Rep. 690.

4. **Injunction Against Violation of Restrictive Covenants** — *England*. — *Clegg v. Hands*, 44 Ch. Div. 503; *Tindall v. Castle*, 62 L. J. Ch. 555.

Illinois. — *Star Brewery Co. v. Primas*, 59 Ill. App. 581.

New Hampshire. — *Winnepesaukee Camp-Meeting Assoc. v. Gordon*, 63 N. H. 505.

New Jersey. — *Richards v. Burdsall*, (N. J. 1887) 10 Atl. Rep. 274.

New York. — *Barron v. Richard*, 3 Edw. Ch. (N. Y.) 96; *Lotimer v. Livermore*, 6 Daly (N. Y.) 501; *Phenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Pr. N. S. (Brooklyn City Ct.) 266; *Rowland v. Miller*, (Super. Ct.) 15 N. Y. Supp. 701, affirmed in 61 N. Y. Super. Ct. 163.

Rhode Island. — *Middletown v. Newport Hospital*, 16 R. I. 319.

Obstruction of Platted Street. — Equity will, by injunction, compel the grantor to remove obstructions placed in streets laid out in a plat of land, one lot of which was purchased by complainant, the grantor having covenanted that the grantee should enjoy the free use of the streets. *Brooke v. Barton*, 6 Munf. (Va.) 306.

Damages to Complainant by Breach Slight. — The fact that the damages to complainant by reason of the breach of the covenant will be slight is not ground for refusing relief by injunction. *Star Brewery Co. v. Primas*, 59 Ill. App. 581. See also *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Walker v. McNulty*, 19 Misc. Rep. (N. Y. Supreme Ct.) 701. See, however, *Wright v. Heidorn*, 6 Ohio Dec. 151.

Breach of Similar Covenant by Complainant. — The fact that a similar covenant on the part of the complainant has been broken will be ground for denying him equitable relief against a breach of such covenant by the defendant. For instance, it has been held that where the deed contains a covenant against drilling oil or gas wells on the property, entered into for the purpose of rendering the adjoining lots in the platted addition habitable as dwelling-houses, free from annoyance of gas or oil, and not as a reservation of the oil to the grantor, an injunction against the drilling of the well by the grantee of one of the lots was refused, it appearing that the covenantor had himself drilled wells in the immediate neighborhood. *Acheson v. Stevenson*, 130 Pa. St. 633.

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by the grantor affecting other contiguous property retained by him at the time of the conveyance, where the covenant was entered into for the benefit of the property conveyed.¹

g. SPECIFIC PERFORMANCE — (1) *General Rule*. — The usual covenants in a deed which sound in damages, viz., the covenants of seizin, warranty for title, for quiet enjoyment, and against incumbrances, are not as a rule the subject of specific performance.² The performance of a covenant of warranty has, however, been indirectly enforced by injunction against acts of the grantor which would tend to defeat the estate granted.³

(2) *Covenant for Further Assurance*. — The covenant for further assurance partakes more of the nature of an agreement to convey land, and it is a well-settled rule that if the title is defective and the defect can be cured by the grantor, a bill in equity for the specific performance of the covenant will lie.⁴

restrictions as to the use of premises, see the title BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 2.

1. Covenants by Grantor as to the Use of Adjoining Property. — *Mackenzie v. Childers*, 43 Ch. Div. 265; *Buck v. Adams*, 45 N. J. Eq. 552; *Schenck v. Campbell*, 11 Abb. Pr. (N. Y. Super. Ct.) 292; *Phenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Pr. N. S. (Brooklyn City Ct.) 266; *Yeaton's Appeal*, 105 Pa. St. 125; *Brooke v. Barton*, 6 Munf. (Va.) 306. See also the title BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 2.

2. Jurisdiction to Compel Removal of Incumbrance. — In *Tallman v. Green*, 3 Sandf. (N. Y.) 437, it was held that a court of equity will not compel the grantor to remove an incumbrance consisting of a quit rent on the land conveyed by general warranty deed. *Mason, J.*, in delivering the opinion of the court, said: "It is said, however, that a court of equity will decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which they entertain bills *quia timet*. Whether this be so or not, the difficulty is that there is here no covenant of indemnity in the proper sense of the term. In one sense all the usual covenants in a deed may be termed covenants of indemnity; that is, they are designed to protect the purchaser to a certain extent against the failure of title, or an eviction, or against incumbrances; but they afford an indemnity in no other way than every other contract or agreement does, viz., by the right to recover damages for its breach or nonperformance, and this deed contains no other than the usual covenants."

Covenant of Warranty. — In *Tuite v. Miller*, 10 Ohio 382, wherein the grantee of land with covenants of warranty had been decreed to pay an annual sum for dower, and sought the specific performance of the covenant of warranty by a decree compelling the grantor to discharge the sum charged upon the land, it was held that a court of equity had no jurisdiction to enforce the specific performance of the covenant of warranty. In this case *Lane, C. J.*, in speaking of the jurisdiction of the court of equity over the usual covenants in a deed, said: "We find no case of interference on this side the court in relation to the covenant of warranty. This absence of precedent, although not conclusive, is a strong argument

against the plaintiff's right to relief. * * * Whatever difficulties may be in the way of the plaintiff in seeking indemnity against this rent charge, it seems to us that to extend the defendant's liability beyond that of responding in damages after an eviction, or its equivalent, would be to extend it beyond the settled terms of the covenant."

Right to Compensation by Conveyance of Other Lands. — On failure of title to a portion of the land conveyed with covenants of warranty, the grantee has not the right to demand compensation by the conveyance of other land in place of the land lost. *Wilbarger County v. Robinson*, 5 Tex. Civ. App. 10.

3. Sale by Grantor under Prior Mortgage. — In *Martin v. Martin*, 24 S. Car. 446, it was held that a court of equity would restrain a grantor of land with covenants of warranty from selling the land under a prior mortgage, and that the relief would be also granted against an assignee of the grantor who acquired the mortgage after the conveyance by the grantor.

4. Specific Performance of Covenant for Further Assurances — *England*. — *Howard v. Ducane*, 1 T. & R. 86; *Havis v. Tollemache*, 2 Jur. N. S. 1181; *Smith v. Doe*, 2 Brod. & B. 611, 6 E. C. L. 297; *Taylor v. Debar*, 1 Ch. Cas. 270; *Seabourne v. Powel*, 2 Vern. 11; *King v. Jones*, 5 Taunt. 418; *Gibson v. Goldsmid*, 5 DeG. M. & G. 757; *Banks v. Small*, 34 Ch. Div. 415.

United States. — *Fields v. Squires*, 9 Fed. Cas. No. 4776.

Ohio. — *Tuite v. Miller*, 10 Ohio 383.

Virginia. — *Nelson v. Harwood*, 3 Call (Va.) 394.

Removal of Incumbrances. — The grantee may compel the grantor to discharge incumbrances on the land. *King v. Jones*, 5 Taunt. 418; *Stock v. Aylward*, 8 Ir. Ch. Rep. 429.

Qualification. — In *Armstrong v. Darby*, 26 Mo. 517, it was held that the right of the grantee to require the grantor to discharge incumbrances was limited to incumbrances held by the grantor, and did not extend to incumbrances held by third persons. In this case, *Napton, J.*, said: "The protection furnished a purchaser by the covenants of seizin and against incumbrances are known to be imperfect, and insufficient in many cases to secure him against the actual damage resulting from their breach, by reason of the restrictions which courts have imposed upon the measure of damages. Why should these cove-

(3) *Restrictive and Affirmative Covenants*.—As regards restrictive covenants in deeds, such as covenants in regard to the use of the premises or the erection of buildings thereon, their specific performance is indirectly enforced by an injunction against a breach.¹

Affirmative Covenants.—Where the covenant is for the performance of some positive act by the grantor requiring the expenditure of money, the doctrine in the *United States* seems to be that its performance may be enforced by a mandatory injunction, irrespective of whether the proceeding is between the original parties or not.² In *England*, however, while the courts of equity might also enforce such a covenant as between the original parties,³ still they will not do so when the proceeding is not between the original parties.⁴

h. RESCISSION—(1) *By Grantee*—(a) **General Rule**.—Where the grantee has remained in the undisturbed possession of the land, it is the universal rule that the existence of defects in the title is not, in the absence of fraud on the part of the grantor, ground for the rescission of the conveyance.⁵ And this is

nants ever have been resorted to if the covenant for further assurance would furnish an equally satisfactory remedy at law for its breach and a greatly more efficient protection in equity by an action for its specific performance?"

Limitation as to Time.—When the covenant for further assurances is limited as to time, the demand therefor must be made within the time limited. *Nash v. Ashton*, Skin. 42.

1. See *supra*, this section, *In Equity—Injunction Against Violation of Restrictive Covenants*; and also the title **BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS**, vol. 5, p. 2.

2. **American Doctrine.**—*Whittenton Mfg. Co. v. Staples*, 164 Mass. 327; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Stuyvesant v. New York*, 11 Paige (N. Y.) 414.

3. **English Doctrine.**—*Storer v. Great Western R. Co.*, 2 Y. & Coll. 48, wherein it was held that a court of equity could compel a railroad company to build an archway under its tracks for the complainant's use. See also *Wilson v. Furness R. Co.*, L. R. 9 Eq. 28; *London v. Nash*, 3 Atk. 512; *Pembroke v. Thorpe*, 3 Swanst. 437, note a; *Franklyn v. Tuton*, 5 Madd. 469.

For a full discussion of the jurisdiction of courts of equity to grant injunctions requiring the performance of some positive act, see the title **INJUNCTIONS**.

4. **Suit Not Between Original Parties.**—*London, etc., R. Co. v. Gomm*, 20 Ch. Div. 562; *Haywood v. Brunswick Permanent Ben. Bldg. Soc.*, 8 Q. B. Div. 403; *Austerberry v. Oldham*, 29 Ch. Div. 750. See, however, *Cooke v. Chilcott*, 3 Ch. Div. 694.

For a full discussion as to whether affirmative covenants are binding on subsequent grantees of the land, see *supra*, sections *By and Against Whom Enforceable; Covenants Running with the Land*.

5. **Defects in Title Not Ground for Rescission of Conveyance**—*United States*.—*Noonan v. Lee*, 2 Black (U. S.) 499; *Prevost v. Gratz*, 3 Wash. (U. S.) 439; *Patton v. Taylor*, 7 How. (U. S.) 159; *Kimball v. West*, 15 Wall. (U. S.) 377.

District of Columbia.—*Smoot v. Coffin*, 4 Mackey (D. C.) 407.

Georgia.—*Roberts v. Woolbright*, 1 Ga. Dec. 98.

Illinois.—*Beebe v. Swartwout*, 8 Ill. 162; *Ohling v. Luitjens*, 32 Ill. 23.

Kentucky.—*Duvall v. Parker*, 2 Duv. (Ky.) 182; *Casey v. Lucas*, 2 Bush (Ky.) 55; *Taylor v. Lyon*, 2 Dana (Ky.) 276; *Simpson v. Hawkins*, 1 Dana (Ky.) 303; *Gale v. Conn*, 3 J. J. Marsh. (Ky.) 538; *Miller v. Long*, 3 A. K. Marsh. (Ky.) 334; *Campbell v. Whittingham*, 5 J. J. Marsh. (Ky.) 96, 20 Am. Dec. 241; *Vance v. House*, 5 B. Mon. (Ky.) 537; *Upshaw v. Debow*, 7 Bush (Ky.) 442; *English v. Thomasson*, 82 Ky. 281.

Maryland.—*Timms v. Shannon*, 19 Md. 316, 81 Am. Dec. 632.

Michigan.—*Leal v. Terbush*, 52 Mich. 100.

Minnesota.—*Brown v. Manning*, 3 Minn. 35, 74 Am. Dec. 736.

Mississippi.—*Wilty v. Hightower*, 6 Smed. & M. (Miss.) 345.

Missouri.—*Edington v. Nix*, 49 Mo. 134; *Key v. Jennings*, 66 Mo. 356.

New Jersey.—*Beach v. Waddell*, 8 N. J. Eq. 299.

New York.—*Corning v. Smith*, 6 N. Y. 84; *Platt v. Gilchrist*, 3 Sandf. (N. Y.) 118; *Woodruff v. Bunce*, 9 Paige (N. Y.) 443, 38 Am. Dec. 559; *Talmadge v. Wallis*, 25 Wend. (N. Y.) 115.

Ohio.—*Edwards v. Morris*, 1 Ohio 524; *Hill v. Butler*, 6 Ohio St. 217.

South Carolina.—*Whitworth v. Stuckey*, 1 Rich. Eq. (S. Car.) 404; *Van Lew v. Parr*, 2 Rich. Eq. (S. Car.) 321; *Maner v. Washington*, 3 Strobb. Eq. (S. Car.) 171.

Tennessee.—*Young v. Butler*, 1 Head (Tenn.) 648; *Barnett v. Clark*, 5 Sneed (Tenn.) 435; *Buchanan v. Alwell*, 8 Humph. (Tenn.) 518.

Virginia.—*Long v. Israel*, 9 Leigh (Va.) 556.

Wisconsin.—*Booth v. Ryan*, 31 Wis. 45.

See, however, *Benjamin v. Hobbs*, 31 Ark. 154, wherein the court, denying in the particular case relief against payment of the purchase money on account of defect in title, said: "If a real defect in the title were shown, and because of it and the insolvency of the plaintiff, which would render a suit on the covenants in the deed unavailing, the defendants wish to rescind the contract, they must restore the possession of the land, which they make no offer to do, for it must be rescinded entirely or not at all." See also *Walker v. Sedgwick*, 8 Cal. 398.

Life Estate Only Conveyed.—Where land is conveyed in fee with covenants of warranty, the fact that the grantor had only a life estate

especially true where the grantee had notice of the defects in the title.¹

Covenant of Seizin. — As regards the covenant of seizin, however, it has been held in jurisdictions where, for a technical breach thereof, viz., a breach without eviction, only nominal damages could be recovered, that the grantee may sue to rescind the conveyance and recover the purchase money.² There are decisions, however, which refuse even in case of a covenant of seizin to rescind an executed conveyance on account of defects in the title of which the grantee had notice.³

Rescission Must Be in Toto. — And where the grantee is entitled to rescind, the rescission must be *in toto*; he cannot rescind in part, retaining that which is valuable to him and compelling the grantor to take back that which is of no advantage.⁴

(b) **Fraud as Ground for Rescission.** — Where the grantor has been guilty of fraud in the sale of the land, in failing to disclose defects in the title, courts of equity will rescind the conveyance at the instance of the grantee though the deed contains covenants of warranty. There is nothing peculiar in the application of the doctrine of rescission on the ground of fraud to conveyances with warranty, and while the right of a purchaser to a rescission of the conveyance on the ground of defects in the title is denied, the cases recognize his right to a rescission on the ground of fraud.⁵

is not, in the absence of fraud, ground for the rescission of the conveyance. *Clementson v. Streeter*, 59 Wis. 429.

Distinction Between Right to Rescind and Right to Set Off Damages Recoverable. — In *Simpson v. Hawkins*, 1 Dana (Ky.) 303, the court below, per Underwood, J., said: "Where contracts are executed by conveyances, we are of opinion that there can be no rescission of a contract in any case, unless it has been tainted by actual fraud. If the warranty of title has been broken, so as to entitle the vendee to damages, or if the vendee be entitled to damages upon a covenant of seizin, he may apply to the chancellor, where the vendor is insolvent, to set off those damages against the unpaid purchase money."

Distinction Between Executed and Executory Contracts. — In *Miller v. Long*, 3 A. K. Marsh. (Ky.) 334, Boyle, C. J., said: "Where the contract is merely executory, the vendee is, in general, not bound to receive a conveyance from the vendor if he has no title; and in such case the vendee may, no doubt, insist upon a rescission of the contract. But where the conveyance is executed and the vendee is let into possession, he cannot, merely on the ground of the defect of title in the vendor, resort to a court of equity for the purpose of rescinding the contract."

Covenant by Cotenant by Metes and Bounds. — In *Worthington v. Staunton*, 16 W. Va. 208, it was held that where a tenant in common conveys with covenant of general warranty a part of the land by metes and bounds, and on partition of the land a material part of the land conveyed is set off to the other cotenants, so that the grantee does not obtain the substantial inducement of his contract, a court of equity will rescind the conveyance.

1. Notice of Defects in Title. — *Beck v. Simmons*, 7 Ala. 76; *Lovington v. Short*, 77 Ill. 587; *Haldane v. Sweet*, 55 Mich. 196; *Bates v. Delavan*, 5 Paige (N. Y.) 209.

Statement of Doctrine. — In *Beck v. Simmons*, 7 Ala. 71, Ormond, J., said: "It could not be

tolerated that one should purchase land to which he knew the title was defective, accept a deed and go into the possession and enjoyment of it, and then rescind the contract for the defect of the title."

2. Covenant of Seizin. — *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Taft v. Kessel*, 16 Wis. 273.

Seizin of Life Estate Only. — *Frazer v. Peoria County*, 74 Ill. 282, wherein the grantor, who was seized of a life estate only, conveyed a fee simple with covenants of seizin. The court rescinded the conveyance and permitted the grantee to recover the consideration, together with taxes paid on the land and interest, less the amount of rents received or which could have been received by the grantee. See also *Curtis v. Brannon*, 98 Tenn. 153.

3. Perkins v. Williams, 5 Coldw. (Tenn.) 512.

4. Rescission in Toto. — *Kelly v. Kershaw*, 5 Utah 295.

Conveyance of Several Tracts — Title to One Defective. — The complainant purchased two tracts of land, one of which the owner refused to sell unless both were purchased. The complainant knew that the title to the other tract was defective. It was held that he was not entitled, on account of the defect in the title to such tract, to rescind the conveyance as to such tract. *Lovington v. Short*, 77 Ill. 587.

5. Fraud as Ground for Rescission — United States. — *Boyce v. Grundy*, 3 Pet. (U. S.) 210; *Smith v. Richards*, 13 Pet. (U. S.) 26.

Kentucky. — *Campbell v. Whittingham*, 5 J. Marsh. (Ky.) 100, 20 Am. Dec. 241; *Upshaw v. Debow*, 7 Bush (Ky.) 442.

Mississippi. — *Wilty v. Hightower*, 6 Smed. & M. (Miss.) 345.

New York. — *Leggett v. M'Carty*, 3 Edw. Ch. (N. Y.) 124; *Woodruff v. Bunce*, 9 Paige (N. Y.) 443, 38 Am. Dec. 559; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 23, 7 Am. Dec. 513.

Tennessee. — *Barnett v. Clark*, 5 Sneed (Tenn.) 436; *Woods v. North*, 6 Humph.

(c) **Mistake as Ground for Rescission.** — The doctrine of rescission on the ground of mutual mistake on the part of the parties to a contract has also been applied to conveyances.¹

(2) *By Grantor.* — Defects in the title do not entitle the grantor to a rescission of the conveyance; and it has been held that where land is conveyed with covenants of warranty and there is a further stipulation that on failure of the title the grantee can only recover the consideration paid, the grantor cannot, by confessing the invalidity of the title, rescind the contract and, on payment of the consideration, compel the grantee to release the covenants and reconvey the land to the grantor.²

i. **JURISDICTION** — (1) *Action Between Original Parties.* — As between the original parties to a conveyance, an action for breach of the covenants, being founded on contract, is transitory and need not be brought in the place or county where the land lies, but may be brought in any court of competent jurisdiction.³

(2) *Action by Remote Grantee.* — But where the action is brought by a remote grantee of the land, on a covenant which runs with the land, his right of action is based on privity of estate, and not on privity of contract. The

(Tenn.) 309, 44 Am. Dec. 312; *Buchanan v. Alwell*, 8 Humph. (Tenn.) 518.

Virginia. — *Thompson v. Jackson*, 3 Rand. (Va.) 507, 15 Am. Dec. 721.

Quantum of Proof. — To authorize a rescission of an executed conveyance on the ground of fraud, the fraud must be clearly and satisfactorily proven. *Gale v. Conn*, 3 J. J. Marsh. (Ky.) 538.

Conveyance of Land Previously Conveyed. — In *Brown v. Manning*, 3 Minn. 35, 74 Am. Dec. 736, it was held that the conveyance of land with covenants of warranty which the grantor had previously conveyed was not *per se* fraud, but that there must be false representations of fact intended to deceive and relied upon by the grantee, by which he was induced to enter into the contract.

Laches. — The grantee must seek a rescission of the conveyance within a reasonable time after the discovery of the fraud, and where he delays for five years a court of equity will refuse to rescind the conveyance. *Davis v. Tarwater*, 15 Ark. 286. See also *Key v. Jennings*, 66 Mo. 356.

Eviction Not Necessary. — Eviction is not necessary to entitle the grantee under a deed with covenants to rescind because of fraud. *Edwards v. M'Leay*, 1 Cooper 308.

For general discussions of this subject, see the titles **FALSE REPRESENTATIONS**; **RESCISSION**; **VENDOR AND PURCHASER**.

1. **Mistake as Ground for Rescission.** — A purchaser bought the interest of his vendor in a remainder in fee, expectant on an estate tail. At the time of the contract, the tenant in tail had actually suffered a recovery, of which both parties were ignorant till after the conveyance had been executed and an absolute bond given for the purchase money. The court rescinded the contract, on the ground of mistake, although there was no fraud from knowledge or concealment of the fact on the part of the vendor. *Hitchcock v. Giddings*, 4 Price 135.

Mistake Must Go to Entire Consideration. — In *Leal v. Terbush*, 52 Mich. 100, it was held that a grantee under a deed with covenants of warranty cannot rescind the conveyance on

the ground of mistake as to the vendor's title, if the mistake does not go to the entire consideration, as where it was supposed that the grantor had a fee simple instead of a mere life estate. See, however, *Frazer v. Peoria County*, 74 Ill. 282.

For a full discussion of this subject, see the titles **MISTAKE**; **RESCISSION**; **VENDOR AND PURCHASER**.

2. **Rescission by Grantor.** — *Trevino v. Cantu*, 61 Tex. 88, wherein Willie, C. J., in delivering the opinion of the court, said: "Cantu had a right to retain possession and defend against the adverse claim; to defeat it if he could, or, in case of eviction, to recover upon the warranty against the vendor. He was entitled to an opportunity of compromising, or buying out the opposing claimant, and to every other privilege enjoyed by the possessor of lands to which an adverse title is set up. To compel him to reconvey would be to give his vendor all these advantages, and would permit the latter to become again possessed of land which, according to his own showing, had doubled in value, by paying only the original sum received for it. We are not referred to any rules of equity which sanction such a course on the part of a vendor, and it is certainly contrary to every principle of justice. * * * Cantu himself could not have recovered upon the warranty until eviction, or unless he had yielded possession and taken the risk of proving a valid outstanding title against his vendor. Much less could his vendor claim a rescission in opposition to the wishes of his vendee, by a mere confession of the invalidity of the title he had conveyed. To allow this would be to place the purchaser at the mercy of the seller, for in all instances when the land had appreciated in value, the seller could confess invalidity of title, return the purchase money, recover the land, and speculate upon the advance in the value of the property. It is needless to say that the law countenances no such injustice."

3. **Action Between Original Parties.** — *Birney v. Haim*, 2 Litt. (Ky.) 263. See also *McCreary v. Douglass*, 5 Tex. Civ. App. 492, wherein it

action then becomes local, and must be brought in the place or county in which the land lies.¹

j. STATUTE OF LIMITATIONS—(1) *Application of Provisions Relating to Actions on Specialties*.—Where the statutes of limitation contain provisions prescribing the time within which actions on sealed instruments shall be brought, such statutes, of course, in the absence of other special provisions, limit and determine the time within which actions on the covenants in a deed must be commenced.²

was held that where the grantee impleads his covenantor, in an action by the claimant of the paramount title, he may recover judgment against him for the consideration paid, though the covenantor resides in another county.

1. Action by Remote Grantee.—*Doulson v. Matthews*, 4 T. R. 503; *Livingston v. Jefferson*, 1 Brock. (U. S.) 203; *Eachus v. Illinois*, etc., Canal, 17 Ill. 534; *Birney v. Haim*, 2 Litt. (Ky.) 262; *Clark v. Scudder*, 6 Gray (Mass.) 122; *Lienow v. Ellis*, 6 Mass. 331; *White v. Sanborn*, 6 N. H. 220; *Worster v. Winnipiseogee Lake Co.*, 25 N. H. 525.

In *Clarkson v. Gifford*, 1 Cai. (N. Y.) 5, wherein a motion was granted to change the venue of an action on a covenant of seizin to the county in which the land lay, the report of the case does not show whether the action was or was not between the original parties. See, however, *Coleman v. Lyman*, 42 Ind. 289, wherein it was held that an action by a remote grantee on the covenant of seizin was not local and was not required to be brought in the county where the land was situated, but should be brought in the county where the defendant resided. This case was decided on the ground that the action was not within 2 G. & H. 56, 58, which required actions for the recovery of real property or any estate therein, or for the determination in any form of any right of interest therein, and for injuries to real property, to be brought in the county in which the land lay, and therefore is not authority for the proposition that in case the action arose out of the state it could have been brought within the state in the county in which the defendant resided. See also *Worley v. Hineman*, 6 Ind. App. 240.

Covenant of Warranty.—In *Birney v. Haim*, 2 Litt. (Ky.) 262, it was held that an action by a remote grantee on a covenant of warranty was local. In this case the court, in delivering the opinion, said: "If there is no privity of contract, and the action is founded on privity of estate only, such as a covenant that runs with the land in the hands of remote grantees, then the action is local, and must be brought in the county where the land lies."

Covenants Against Incumbrances.—In *Lienow v. Ellis*, 6 Mass. 331, it was held that an action by a remote grantee on a covenant against incumbrances must be brought in the county where the land lay. In this case, *Parsons, C. J.*, said: "When the action of covenant is founded on privity of contract between the parties, their executors or administrators, it is transitory and may be sued as a transitory action; but when it is founded on privity of estate, the action is then local and must be sued in the county where the land lies. In the case before us, if the plaintiff can maintain an action of covenant upon the covenant which

he declares, he must maintain it as assignee of Bartlet, by virtue of his conveyance of the land; and his privity is a privity of estate, and not of contract."

Cause of Action Arising out of the State.—The fact that the cause of action arose without the state does not prevent it from being local and from requiring the action to be brought in the county where the land lay. *White v. Sanborn*, 6 N. H. 224.

In *Barker v. Damer*, 1 Salk. 80, the land lay in Ireland, and an action on a covenant, founded on privity of estate, brought in England, was held not to lie, because the covenant was local.

Residency of Parties—Effect.—The fact that both parties to the action are residents of the state in which the action is brought, and that therefore, unless the action could be maintained in the state in which the parties resided, the plaintiff would be without remedy, is immaterial. *Clark v. Scudder*, 6 Gray (Mass.) 122. See also *Doulson v. Matthews*, 4 T. R. 503, *overruling* *Mostyn v. Fabrigas*, 1 Cowp. 180; *Shelling v. Farmer*, 1 Stra. 646.

Bill in Equity for Reimbursement for Extinguishing Paramount Title.—In *Oliver v. Loye*, 59 Miss. 320, it was held that a purchaser of land situated in another state, from a vendee holding under a warranty of title, could sue in Mississippi, where the covenantor resided, to recover the expenses of defending title and of extinguishing the paramount title.

For a general discussion of this subject, see the ENCYC. OF PLEADING AND PRACTICE, title REAL PROPERTY.

2. Provisions Relating to Actions on Specialties Applicable.—*Mitchell v. Kepler*, 75 Iowa 207; *Post v. Campau*, 42 Mich. 94; *White v. Stevens*, 13 Mo. App. 245; *Bellamy v. Chambers*, 50 Neb. 146.

Specialty.—In *Kern v. Kloke*, 21 Neb. 529, it was held that an action for breach of a covenant of warranty was on a "specialty" (Code Civ. Pro., § 10), and may be brought within five years after breach.

Bond or Obligation.—In *Thomas v. Bland*, 91 Ky. 1, it was held that the statute providing for the time after the accrual of the cause of action within which actions on a "bond or obligation for the payment of money or property or for the performance of any undertaking" shall be commenced, governs the time within which actions on the covenants in a deed shall be brought.

Assumpsit.—Comp. Laws Mich., § 6194, providing that assumpsit may be brought on contracts under seal, renders an action of assumpsit on the covenants in a deed subject to the six-years limitation of section 7148 for all actions of assumpsit founded on any contract. *Christy v. Farlin*, 49 Mich. 319.

(2) *Running of Statute* — In General. — The statute of limitations begins to run from the accrual of the cause of action, and when applied to the covenants in a deed, of course does not begin to run until the covenants have been broken.¹ And the fact that the statute has run against an action on one of the covenants is not generally a bar to an action on another distinct covenant against which the statute has not run.²

Covenant of Seizin. — The great majority of the American courts hold that the covenant of seizin is broken, if at all, when made,³ and the statute of limitations would consequently begin to run against an action thereon immediately upon the execution of the deed.⁴ In a few cases the courts have, however, taken the view that while there may be a technical breach of the covenant of seizin as soon as it is made, the statute of limitation does not begin to run until there is such a breach as entitles the covenantee to substantial damages.⁵

Covenant for Right to Convey. — The covenant for right to convey is treated as synonymous with the covenant of seizin, and is broken when made, from which time the statute of limitations begins to run.⁶

Covenant of Warranty. — To constitute a breach of the covenant of warranty it is necessary that the grantee be actually or constructively evicted,⁷ and the statute of limitations against an action thereon does not begin to run until an eviction.⁸

1. **Statute Runs from Breach of Covenant.** — *Thomas v. Bland*, 91 Ky. 1.

2. *Keefer v. Zimmerman*, 22 Md. 274.

3. **Covenant of Seizin — Time of Breach.** — *Brandt v. Foster*, 5 Iowa 295; *Kansas L. & T. Co. v. Love*, 4 Kan. App. 188. See *supra*, this title, the division *Effect and Breach of Covenants*, subdivision *Time of Breach*.

4. **Covenant of Seizin.** — *Mitchell v. Kepler*, 75 Iowa 207; *Sherwood v. Landon*, 57 Mich. 219; *Matteson v. Vaughn*, 38 Mich. 373; *Vaughn v. Matteson*, 39 Mich. 758; *Christy v. Farlin*, 49 Mich. 319; *Johnson v. Veal*, 3 McCord L. (S. Car.) 449; *Westrope v. Chambers*, 51 Tex. 178; *Pierce v. Johnson*, 4 Vt. 247.

5. **View that Statute Runs from Time Liability for Substantial Damages Attaches.** — See, however, *Wood v. Dubuque, etc.*, R. Co., 28 Fed. Rep. 910, wherein it was held that in Iowa the statute of limitations did not begin to run against an action on the covenant of seizin until there had been a substantial, as distinguished from a technical, breach of the covenant. The only authority cited for this proposition was the case of *Schofield v. Iowa Homestead Co.*, 32 Iowa 317, 7 Am. Rep. 197, wherein it was held that the covenant of seizin ran with the land until there had been a substantial breach of such covenant. The case of *Mitchell v. Kepler*, 75 Iowa 207, was subsequently decided, and, strange to say, neither the case of *Schofield v. Iowa Homestead Co.* nor of *Wood v. Dubuque, etc.*, R. Co., was even referred to.

In *Salmon v. Vallejo*, 41 Cal. 481, it was intimated that a covenant as to the quantity of the land conveyed was broken when made, yet the statute of limitations might not begin to run until the happening of the event necessary to the ascertainment of the quantity conveyed.

And in *Missouri* it is held that though there is a technical breach of the covenant of seizin for which nominal damages are recoverable, yet the statute of limitations does not begin to run against the recovery of substantial dam-

ages until such damages have been sustained. *White v. Stevens*, 13 Mo. App. 240; *Chambers v. Smith*, 23 Mo. 174. See also *Scott v. Twiss*, 4 Neb. 133.

Reasons for the View. — In *Dickson v. Desire*, 23 Mo. 163, Leonard, J., said: "The true question would then seem to be, at what time the right of substantial recovery accrues — whether at the moment of the delivery of the deed, or is it postponed, under any circumstances, until the actual damage is sustained? It would seem quite impossible to hold, as we were asked to do in a case before us at the present term, that the cause of action accrues immediately, so as to set the statute of limitations in motion against the party, if we are to hold that during the whole period of its running the party could not have recovered anything more than nominal damages."

6. **Covenant for Right to Convey.** — *Spoor v. Green*, L. R. 9 Exch. 99; *Mitchell v. Kepler*, 75 Iowa 207; *Westrope v. Chambers*, 51 Tex. 178.

7. See *supra*, the section *Effect and Breach of Covenants*.

8. **As to Actions on Covenant of Warranty Statute Runs from Time of Eviction** — *United States v. Flowers v. Foreman*, 23 How. (U. S.) 149.

Illinois. — *Moore v. Vail*, 17 Ill. 185.

Maryland. — *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480.

Mississippi. — *Burrus v. Wilkinson*, 31 Miss. 537.

Missouri. — *Blondeau v. Sheridan*, 81 Mo. 545.

Nebraska. — *Kern v. Kloke*, 21 Neb. 529; *Cheney v. Straube*, 35 Neb. 524.

North Carolina. — *Mizzell v. Ruffin*, 118 N. Car. 69.

Pennsylvania. — *Stewart v. West*, 14 Pa. St. 336.

Texas. — *Eustis v. Cowherd*, 4 Tex. Civ. App. 343; *Alvord v. Waggoner*, (Tex. Civ. App. 1895) 29 S. W. Rep. 797; *Jones v. Paul*, 59 Tex. 41.

Vermont. — *Wilder v. Davenport*, 58 Vt. 642; *Pierce v. Johnson*, 4 Vt. 247.

Covenant for Quiet Enjoyment. — The same rule that governs the running of the statute against actions on the covenant of warranty governs its running against the covenant for quiet enjoyment.¹

Covenant Against Incumbrances. — The usual covenant against incumbrances is in effect an assurance that the premises are free from incumbrances, so that, if an incumbrance exists, the covenant is broken when made.² And according to one view the statute begins to run from that time.³ But in some jurisdictions it is held that though the covenant is broken when made, still, as only nominal damages could be recovered where the grantee has suffered no injury by reason of the incumbrance, the statute of limitations does not begin to run against his recovery of substantial damages until he could have sued therefor.⁴

COVER. — See note 5.

Adverse Claimant in Possession. — Where the land conveyed was, at the time of the conveyance, in the possession of the owner of the paramount title, there is an immediate breach, and the statute of limitations begins to run from the date of the conveyance. *Eustis v. Cowherd*, 4 Tex. Civ. App. 343; *Ilseley v. Wilson*, 42 W. Va. 757.

Knowledge of the Defect in Title. — The fact that the covenantee has knowledge of the defect in the title will not start the statute running until an eviction. *Mizzell v. Ruffin*, 118 N. Car. 69.

From Time of Judgment of Eviction. — In *Rickard v. Talbird*, Rice Eq. (S. Car.) 158 it was held that the statute of limitations began to run against an action on the covenant of warranty from the date of the judgment of eviction, and not from the date of the verdict in the ejectment suit.

1. **Covenant for Quiet Enjoyment.** — *Heath v. Whidden*, 24 Me. 383; *Cheney v. Straube*, 35 Neb. 524.

2. See *supra*, the section *Effect and Breach of Covenants*.

3. **Covenant Against Incumbrances — Statute Runs from Execution of Deed.** — *Clark v. Swift*, 3 Met. (Mass.) 390; *Chapman v. Kimball*, 7 Neb. 399; *Cheney v. Straube*, 35 Neb. 521; *Bellamy v. Chambers*, 50 Neb. 146.

4. **Statute Runs from Time Substantial Damages are Suffered.** — *Spoor v. Green*, L. R. 9 Exch. 99; *Yancey v. Tatlock*, 93 Iowa 386; *Jenkins v. Hopkins*, 9 Pick. (Mass.) 543; *Post v. Campau*, 42 Mich. 90; *Priest v. Deaver*, 22 Mo. App. 276; *White v. Stevens*, 13 Mo. App. 240; *Taylor v. Priest*, 21 Mo. App. 685; *Wyatt v. Dunn*, 93 Mo. 459; *Hunt v. Marsh*, 80 Mo. 396. Compare *Matteson v. Vaughn*, 38 Mich. 373, 39 Mich. 758; *Christy v. Farlin*, 49 Mich. 319; *Smith v. Lloyd*, 29 Mich. 382; *Sherwood v. Landon*, 57 Mich. 224; *Blondeau v. Sheridan*, 81 Mo. 545.

From Date of Foreclosure. — In *Guerin v. Smith*, 62 Mich. 369, it was held that the statute of limitations would run against an action on a covenant against incumbrances, where the incumbrance consisted of a mortgage, from the date of the foreclosure of the mortgage by advertisement, without regard to the expiration of the time for redemption.

Reasons for Doctrine. — In *Post v. Campau*, 42 Mich. 98, *Cooley, J.*, said: "The doctrine that the statute shall run from the technical breach makes the covenant in many cases a

mockery. If the incumbrance consists of a mortgage having many years to run, the covenantee has no legal right to pay it off until it falls due, and the fiction of a right of present action would defeat substantial redress. I am of opinion that the better and only just rule is, that a right of action accrues when substantial damage is suffered, and that there may be successive breaches when, by successive acts or occurrences, damage is from time to time suffered as a consequence of the incumbrance."

5. **Covered by Insurance.** — A letter was issued by a firm of commission merchants inviting consignments of goods, and stating that they "shall be covered by insurance as soon as received in store." It was held that this did not import that the merchants personally were to be the insurers of such goods. *Ames, J.*, said: "The circular issued by the firm of Johnson & Co., inviting consignments of goods, does not import that they personally were to be the insurers of such goods against fire. It is merely a promise that the goods shall be insured, or, in the language of the circular, 'shall be covered by insurance as soon as received in store.' A promise to insure is fulfilled by obtaining reasonable and proper security against a contingent loss." *Johnson v. Campbell*, 120 Mass. 453. See the title FACTORS or COMMISSION MERCHANTS.

Lands Covered with Water. — An *English* statute provided that an occupier of any land covered with water should pay to the poor rate in respect of his property one fourth part only of the rate payable in respect of houses and other property. A waterworks company were possessed of a canal and filter bed supported by brick arches, sometimes covered with water and at other times not. It was held that the canal and filter bed were lands covered with water. *East London Waterworks Co. v. Leyton Sewer Authority*, L. R. 6 Q. B. 669. So the term has been held to include a water dock. See also *R. v. Newport Dock Co.*, 31 L. J. M. C. 266; *Reg. v. Birmingham Waterworks Co.*, 1 B. & S. 84, 101 E. C. L. 84. And in *Newport Dock Co. v. Local Board of Health*, 2 B. & S. 717, 110 E. C. L. 717, it is said by Lord Cockburn: "On the main question, whether the dock is to be rated on the higher or on the lower scale, I am of opinion that the case falls within the principle of the decision in *Reg. v. Birmingham Waterworks Co.*, 1 B. & S. 84, 101 E. C. L. 84. If the dock, with the surrounding buildings, were taken as a whole, it would

COVERT — COVERTURE. — See FEME COVERT; and see the titles CURTESY; DIVORCE; DOWER; HUSBAND AND WIFE; SEPARATE PROPERTY OF MARRIED WOMEN.

COVIN. (See also the titles FALSE PRETENSE; FRAUD.) — Covin is defined to be a contrivance between two or more to defraud or cheat a third.¹

COW. (See also the title ANIMALS, vol. 2, p. 341.) — See note 2.

become something more than 'land covered with water;' but that part which is the basin or reservoir is within that description." See also, upon the construction of this term, *Reg. v. Leeds*, etc., *Canal Nav. Co.*, 7 Ad. & El. 671, 34 E. C. L. 204; *Rex v. Regent's Canal Co.*, 6 B. & C. 720, 13 E. C. L. 304.

1. **Covin.** — *Mix v. Muzzy*, 28 Conn. 191.

Covin is a secret agreement determined in the hearts of two or more men to the prejudice of another. *Wimbish v. Tailbois*, Plowd. 54.

"As if tenant for life or tenant in tail secretly conspire with another that the other shall recover against the tenant for life lands which he holds, etc., to the prejudice of the one in reversion; or if an executor or administrator permit judgments to be entered against him by fraud, and plead them to a bond, or any fraudulent assignment or conveyance be made, the injured party may plead *corin*, and obtain relief." *Termes de la Ley* (ed. 1708); *Co. Litt.* 357 *b*; *Comyns' Dig.*, *Corin*, A; 1 *Viner's Abr.*, 473. "Now it can hardly be questioned that it was by collusion that the judgment was obtained against the defendants by the defendants in the name of Rolfe, for whatever purpose it was obtained; and as to its being *corinous*, the definition of *corin* was given in the argument from Coke upon Littleton, and we have it very clearly given in the *Termes de la Ley* (ed. 1708): '*Corin* is a secret assent determined in the minds of two or more to the prejudice of another.' In the present case the secret assent was the assent of Rolfe to the defendants' borrowing his name to bring the action against themselves; and the prejudice of another was the judgment being used, as in the present case, to defeat the rights of others. It matters not whether Rolfe was kept in ignorance of the purpose to which the action was to be applied, or not; it was not the less *corinous* in the defendants." *Girdlestone v. Brighton Aquarium Co.*, 3 Exch. Div. 142.

"The plea of *corin* and collusion is not proved in its legal effect, unless the jury find there was something wrong in the mind of the parties who had agreed to the judgment. I should think the jury would have to find that there was something wrong in the minds of both the parties." *Brett, L. J.*, in *Girdlestone v. Brighton Aquarium Co.*, 4 Exch. Div. 109.

2. **Heifer — Variance.** — It has been held that an indictment for stealing a *cow* cannot be supported by evidence of stealing a heifer. *Rex v. Cook*, 1 Leach C. C. 105.

But in *People v. Soto*, 49 Cal. 70, it was held that, where one was indicted for stealing a *cow* and the proof showed the theft of a heifer, there was no variance. The court said: "In the principal dictionary of our language a heifer is defined to be a 'young *cow*.' It is true that under statutes very similar to ours there are several decisions in the English

courts, and some in the American courts, which would appear to sustain the proposition of the defendant's counsel. But the rule there was that penal statutes must be strictly construed, and nothing was left to implication. But this rule has been abolished in this state by the Penal Code, the fourth section of which provides that 'the rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.' Tested by this rule of construction, it is evident, we think, that in making it a felony to steal a *cow*, the legislature intended to include under that designation a heifer also, which is but a young *cow*."

"A heifer, between two and three years old, that has never had a calf," may be described in an indictment for larceny as a *cow*. *Parker v. State*, 39 Ala. 365.

In *Pomeroy v. Trimper*, 8 Allen (Mass.) 398, it was held to be no ground for dismissing a writ of replevin, that an animal described in the writ as a heifer was described in the certificate as a *cow*. The court said: "The court know no authority for considering a 'heifer' to be misdescribed as a *cow*, except in the single instance of interpreting a penal statute, which by using both words manifested an intention to distinguish the one from the other. *Rex v. Cook*, 2 East P. C. 616, 1 Leach C. C. 105; *Freeman v. Carpenter*, 10 Vt. 434; *Carruth v. Grassie*, 11 Gray (Mass.) 211. In a case in the year books a man brought replevin of a heifer (*juvenca*), and was afterwards nonsuit, and sued out his writ of second deliverance of a *cow* (*vacca*); to which the defendant's counsel objected on the ground of variance; but Fitzherbert, J., said: 'The writ is good; for it may be that it was a heifer at the time of suing out the replevin, and that it is now a *cow*.' Year Book 26 H. VIII., p. 6, pl. 27. So here, if there were a well-defined line between a heifer and a *cow*, the court could not upon this record infer that the animals in question had not passed it after the suing out of the replevin and before the appraisement."

Same — Exemption from Execution. (See also the title EXEMPTION (FROM EXECUTION).) — In *Carruth v. Grassie*, 11 Gray (Mass.) 211, a heifer twenty months old, that had not begun to give milk, was held exempt from execution as a *cow*, under a statute exempting "one *cow*" (Mass. Pub. Stat. 1882, p. 1004), where it appeared that the owner intended to keep it as a *cow* and had no other *cow*. To the same effect, that a heifer is exempt as a *cow*, see *Johnson v. Babcock*, 8 Allen (Mass.) 583; *Freeman v. Carpenter*, 10 Vt. 433; *Dow v. Smith*, 7 Vt. 465. But in *Mitchell v. Joyce*, 69 Iowa 122, it was held that a yearling heifer was not exempt under a provision exempting two *cows* and a calf.

CRAFT. (See also **VESSEL.**, — 1. Art, skill, cunning.¹ 2. Vessels of any kind.²

A steer is an "animal of the *cow* kind" within the meaning of a statute against larceny. *Watson v. State*, 55 Ala. 150. See generally the title **LARCENY**.

Beef. — The word "beef" embraces a *cow*. *Smith v. State*, 24 Tex. App. 298.

Beast—Indictment.—If the indictment charge the malicious and unlawful killing of a *cow*, it is good without the use of the word "beast," as a *cow* is a beast within the meaning of the statute. *Taylor v. State*, 6 Humph. (Tenn.) 285. See generally the titles **INJURIES TO ANIMALS**; **MALICIOUS MISCHIEF**.

"Good Custom Cow-hide Boots." — Parol evidence has been held admissible to explain this phrase. *Wait v. Fairbanks, Brayt.* (Vt.) 77.

Cow-keeper. — For the meaning of this term within an *English* bankruptcy statute, see *Bell v. Young*, 15 C. B. 524, 80 E. C. L. 524; *In re Cramp*, 1 D. G. 398, 16 L. J. Bank 3.

1. Webster's Dict.

Documentary Evidence. (See also the title **DOCUMENTARY EVIDENCE.**) — A statute provided that the books of all persons in the practice of any regular *craft* should be allowed to go to the jury in proof of open accounts. In *Ganahl v. Shore*, 24 Ga. 23, the trial court instructed the jury that the word *craft* as used in the act meant "manual occupation; some mechanic art in which the person practicing it may acquire and exhibit dexterity and skill." It was held that this was putting too limited a construction upon the statute. *Lumpkin, J.*, said: "On the contrary, we hold that any occupation which makes it necessary for books to be kept as the record of its transactions, the monuments of its daily business — as factories, foundries, forges, gas-works, banks, factories, no matter what — if books are required, *ex necessitate rei*, to be kept, these books are to be let in under the law. And if it be inquired for what purpose and to what extent, we say for the same purpose and to the same extent that a merchant or shopkeeper's books are received in evidence; and that is, to prove those matters which appertain to the ordinary business of the concern, which require to be charged, and which in fact constitute its *res gestæ*."

2. Bay or River Craft. — A statute applied to "bay or river *craft* or other boat." These words were held to embrace steamboats of five hundred tons burden. The court said: "The word *craft* generally implies small vessels, though it is sometimes used to embrace vessels of all sizes. But it was not used in the said provision because it was intended to confine the privilege in question to small vessels. The privilege was intended to be given to the bay and river trade, and not to the vehicle in which that trade was conducted. The word *craft* may have been used because at that time the bay and river trade was exclusively conducted in small sail vessels, such as did not usually go outside of the capes; and therefore the whole trade was exempted by the exemption granted to 'the bay and river *craft*.' Steam had not then been used as a motive power to propel vessels. The introduction of that propelling power has wrought wonderful

changes in navigation, and one of these changes is, that most of the bay and river trade is now, and for a long time past has been, carried on in steamboats instead of sail vessels. But there is the same reason for the exemption of the trade now as there ever was heretofore. That it is conducted in steamboats, instead of sail vessels, can make no difference. Nor that these steamboats are often of many more tons burden than the ordinary river and bay *craft* formerly were. Steamboats are embraced by the word *craft*, as well as sail vessels; though that word might not have been as happily chosen to embrace a steamboat of five hundred tons burden, and probably would not have been chosen if steamboats, and especially steamboats of that size, had been in use when the word was first used in this connection." *The Steamboat Wenonah v. Bragdon*, 21 Gratt. (Va.) 697.

A Small Pleasure Boat, without deck, propelled by a small steam engine, and run occasionally by its owners for pleasure only, was held not within the provisions of the United States steam inspection laws, which required every ferry-boat, canal-boat, yacht, "or other small *craft* of light character, propelled by steam," to be inspected. *U. S. v. The Steamer Mollie*, 2 Woods (U. S.) 318. In this case the court said: "Now the vessel in question is neither a ferry-boat, canal-boat, nor yacht. Does it belong to the added category of 'other small *craft* of light character'? These words must be interpreted upon the principle of *noscitur a sociis*. The last clause of the section shows that, to be within the law, a vessel must at least be one which will admit of the employment of a licensed engineer and a licensed pilot. It is not to be supposed that a mere pleasure skiff, of the kind now under consideration, was intended to be embraced within the regulations of this law." See the title **SHIPS AND SHIPPING**.

Steam Tug. — A statute applied to wherries, lighters, or other *craft*, and it was held that it did not include a steam-tug towing a yacht into dry-dock. *Lord Campbell, C. J.*, said: "In this case the question turns on the construction to be put on the word *craft*, in section 37 of the act. No doubt the word *craft* may include a steam-tug, but is it so used in this section? The section ought to receive a strict construction, for it interferes with existing rights and establishes a monopoly as far as it goes, and imposes a penalty on persons infringing its provisions. It is therefore to be considered a penal enactment, and ought to receive a strict construction. That being so, can we suppose that it was intended to prevent any person from using a steam-tug for the purpose of towing another vessel, within the limits of the act, and that for that object a penalty was imposed? I am of opinion that it was not so intended. When the words 'other *craft*' are used in section 37, we must look at the words which precede, and thereby learn the intention of the legislature. The words which precede are 'wherry' and 'lighter.' Now a steam-tug is not a vessel *ejusdem generis* as wherry and lighter; it was not, therefore,

CRAMP.—"Cramp" is defined as an involuntary and painful constriction of the muscles; a variety of tonic spasms. "Cramp" is often associated with constriction and griping pains of the stomach or intestines.¹

CRANK.—Some strange action caused by a twist of judgment; a caprice; a whim; a crotchet; a vagary.²

CRAZY. (See the titles *INSANITY*; *TESTAMENTARY CAPACITY*.)—The word "crazy," in its popular sense, imports a broken, shattered, or deranged mind, rather than one enfeebled by age or disease.³

CREAMERY.—A creamery is simply a place where butter is made, and it is not the size or capacity of the factory that makes it a creamery.⁴

CREATE.—The word "create" means to bring into being; to cause to exist; to produce; to make.⁵

the intention of the legislature to include steam-tugs within the meaning of the words 'other craft.'" Reg. v. Reed, 28 Eng. L. & Eq. 133, *sub nomine* Reed v. Ingham, 3 El. & Bl. 889, 77 E. C. L. 889.

1. L. H. Harris Drug Co. v. Stucky, 46 Fed. Rep. 626, in which case it was held that the term "*cramp-cure*" was descriptive of the purpose of a medicine, and therefore could not be appropriated as a trade-mark. See generally the title *TRADE-MARK*.

2. *Libel*. (See the title *LIBEL AND SLANDER*.)—The word *crank* has no necessary defamatory meaning; and for a newspaper to publish an item that a certain pamphlet, written by a lawyer who was also the author of a textbook on the law of patents, was the "effusion of a *crank*," is not actionable without a charge in the declaration of the alleged defamatory meaning of the word by an appropriate innuendo, and an averment and proof of special damage. The court said: "It is urged, in a brief filed by plaintiff, that, since the assassination of President Garfield by Guiteau, the word *crank* has obtained a definite meaning in this country, and is understood to mean a crack-brained and murderously inclined person, and is so used by the public press. I do not think so short a term of use would give to such a word a libelous sense or meaning without an allegation or innuendo as to the sense in which it was used by the defendant. In Ogilvie's Imperial Dictionary, published in England in 1883 and republished in this country in 1885, the word is found in the supplement with the following definition: '*Crank*. Some strange action caused by a twist of judgment; a caprice; a whim; a crotchet; a vagary. "Violent of temper; subject to sudden *cranks*.'" (Carlyle.)' So that by this authority, which, I think, must be deemed the latest, and probably the best, the word would seem to have no necessarily defamatory sense. It would not necessarily imply that a man had been guilty of a crime, nor tend to subject him to ridicule or contempt, to say of him that he is capricious, or subject to vagaries or whims; and such implication or intent could only be shown by an apt averment, and proof in support of such averment." Blodgett, J., in Walker v. Tribune Co., 29 Fed. Rep. 827.

3. Shaver v. McCarthy, 110 Pa. St. 345; Leech v. Leech, 21 Pa. St. 67.

4. *Creamery Trade-mark Suit*.—Elgin Butter Co. v. Elgin Creamery Co., 155 Ill. 127. This was a trade-mark case, and it was held that "*Elgin Creamery Company*" was quite a

different name from "*Elgin Butter Company*."

5. *Create a Corporation*. (See generally the title *CORPORATIONS*, vol. 7, p. 620.)—Southern Pac. R. Co. v. Orton, 32 Fed. Rep. 473, in which case the court further said: "To my apprehension, it appears to be one thing to *create*, or bring into being, a corporation, and quite another to deal with it as an existing entity, a person, after it is *created*, by regulating its intercourse, relations, and acts as to other existing persons, natural and artificial."

To *create* a charter or a corporation is to make one which never existed before; while to renew one is to give vitality to one which has been forfeited or has expired; and to extend one is to give an existing charter more time than originally limited. Moers v. Reading, 21 Pa. St. 188.

The continuance of an old charter is not the *creation* of a new corporation, and does not infringe a constitutional provision restricting the *creation* of new corporations but recognizing and continuing existing ones. People v. Marshall, 6 Ill. 672.

An act remedying a technical defect in the organization of a corporation, *e. g.*, insufficiency in the proof or acknowledgment of a certificate of organization of a banking association formed under a general statute, is not an act to *create* a corporation. Syracuse City Bank v. Davis, 16 Barb. (N. Y.) 188.

Lease.—A sub-lessee is within the provisions of a statute which gives the right of voting to the lessee or assignee of lands or tenements for the unexpired residue of any term originally *created* for a period of not less than sixty years, etc. The words "*originally created*" refer to the *creation* of the term in respect of which the claim is made. Chorlton v. Stretford, L. R. 7 C. P. 198.

Create a Trust. (See generally the title *TRUSTS AND TRUSTEES*.)—A statute of Nevada spoke of the *creation*, grant, assignment, surrender, and declaration of trusts. In Sime v. Howard, 4 Nev. 473, it is said: "To *create* a trust, for instance, is to do one act, and for one purpose. To declare a trust, to do another, and for another purpose. To *create* is to call into existence. To declare is to make clear a pre-existence. A declaration of trust, says Bouvier, is 'the act by which an individual acknowledges that a property, the title of which he holds, does in fact belong to another, for whose use he holds the same. The instrument in which the acknowledgment is made is also called a declaration of trust.'"

It has been held that a change of phrase-

CREATURE. — See note 1.

CREDIBILITY. — See the titles EVIDENCE; WILLS; WITNESSES; and see CREDIBLE.

CREDIBLE. (See also the titles EVIDENCE; INFAMY; WILLS; WITNESSES.) — “Credible” means worthy of credit or confidence; trustworthy.²

ology in a revision of statutes from “*created* and manifested” to “*created* or declared” wrought a change of the law, so that under *Maine Rev. Stat.*, c. 73; § 11, an express trust need not be *created* by a writing; it is sufficient that it be subsequently declared by a writing signed by the party charged with the trust. *McClellan v. McClellan*, 65 Me. 500.

Created by Law. (See also **LAW**.) — The liability of a stockholder for the debt of the corporation is a liability *created* by law. *Moore v. Boyd*, 74 Cal. 167, 21 Am. & Eng. Corp. Cas. 660; *Green v. Beckman*, 59 Cal. 545.

Created by Fraud — Bankruptcy. (See also the title **INSOLVENCY AND BANKRUPTCY**.) — See *Noble v. Hammond*, 129 U. S. 68; *Chapman v. Forsyth*, 2 How. (U. S.) 202; *Neal v. Clark*, 95 U. S. 704; *Wolf v. Stix*, 99 U. S. 1; *Hennequin v. Clews*, 111 U. S. 676; *Strang v. Bradner*, 114 U. S. 555; *Palmer v. Hussey*, 119 U. S. 96; *Palmer v. Preston*, 45 Vt. 154.

1. Impounding. (See also the title **IMPOUND**.) — A clause of a by-law provided that all swine should be restrained from going at large, and if so found should be impounded, and the penalty for each *creature* aforesaid so impounded should be twenty-five cents. Prior clauses had provided that all cattle and all sheep should be restrained. It was contended that the provision providing for impounding applied only to swine. The court said: “All those clauses constitute but one by-law. They are so expressly treated in the last provision, which directs how ‘the foregoing by-law’ shall be published, and are therefore to be construed collectively. It has also been justly remarked that the use of the word *creatures*, in the third clause, favors the construction of the defendants.” *Whitlock v. West*, 26 Conn. 415.

2. Credible in the Sense of Trustworthy. — In the case of *Windham v. Chetwynd*, 1 Burr. 417, Lord Mansfield, in considering the competency of witnesses to prove a will, found it necessary to consider the meaning of the word *credible*, as used in the statute of 29 Charles II., c. 3, and he said that it had a clear, precise meaning, and was never used as synonymous to “competent,” but that when applied to testimony it presupposes the evidence given. He further says that persons undoubtedly *credible* cannot be witnesses under particular circumstances, while persons manifestly incredible may be and often are witnesses; and he held that it would be absurd to make the essential solemnity of the will depend upon the *credibility* of the witnesses. He concludes that the word *credible* slipped into the statute by mistake, or through want of attention to the impropriety of using it, and he thinks that it does not mean “competent,” because the use of the word “witnesses” implies persons competent to testify. But see cases in the next note.

Worthy of Credit. — In *Noland v. M'Cracken*,

1 Dev. & B. L. (18 N. Car.) 596, the trial court instructed “that when a witness was heard by a jury, who was neither impeached nor contradicted, whose story was *credible*, and in whose manner there was nothing to shake confidence, they were bound to believe him.” This instruction was held erroneous, the appellate court saying: “The term *credible*, as applied to a witness, has a legal and well-defined meaning; it means, deserving of confidence. But as applied to a ‘story’ it may signify worthy of belief, or probable only, or barely not incredible. It was not used by his Honor in the first sense, as it would be absurd and indelicate to suppose that the jury were instructed that they were bound to believe what they found worthy of their belief. We can scarcely understand it to have been used in the second sense, as there was no reason to doubt but that they would believe what had been testified by any witness, which had not been shown to be untrue, and which also appeared to them to be probable. A rule was laid down by the court for the guidance of the jury, on the only material question, whether the witness should be believed or not; and we apprehend that by men of plain sense it would be understood as importing, that in law they were obliged to find a verdict conformable to his testimony, as he had not been impeached or contradicted, unless his story was incredible, or his manner of testifying exceptionable.”

Worthy of Belief — Perjury. (See generally the title **PERJURY**.) — A statute provided that no person should be convicted of perjury except upon the testimony of two *credible* witnesses, or one witness corroborated strongly by other evidence, etc. It was held that the words “*credible* witness,” as used in the statute, meant “one who, being competent to give evidence, is worthy of belief.” *Wilson v. State*, 27 Tex. App. 50. In construing this same statute, *White, P. J.*, says in *Smith v. State*, 22 Tex. App. 200: “There was no evidence strongly corroborating the testimony of George Thompson and his wife as to the perjury committed by this defendant. (*Gabrielsky v. State*, 13 Tex. App. 428; *Hernandez v. State*, 18 Tex. App. 135.) Now it is expressly provided by statute that ‘in trials for perjury no person shall be convicted, except upon the testimony of two *credible* witnesses, or of one *credible* witness corroborated strongly by other evidence as to the falsity of defendant’s statements under oath, or upon his own confession in open court.’ (Code Crim. Proc., art. 746; *Gartman v. State*, 16 Tex. App. 215; *Anderson v. State*, 20 Tex. App. 312.) Mr. Bouvier, in his Law Dictionary, defines a *credible* witness to be ‘one who, being competent to give evidence, is worthy of belief.’ Was the witness George Thompson such a witness? This was a question of fact to be determined by the jury under appropriate instructions from the court. The general charge did not give them

The term, however, has been held synonymous with "competent" as used in statutes prescribing that wills shall be attested by two or more credible witnesses.¹

CREDIT. (See also CASH, vol. 5, p. 757; CREDITOR; DEBT; and see the titles ACCOUNTS, vol. 1, p. 433; ATTACHMENT, vol. 3, p. 211; EXECUTIONS; EXEMPTION FROM TAXATION; GUARANTY; INSOLVENCY AND BANKRUPTCY; LETTERS OF CREDIT; MONEY; SET-OFF; TAXATION. As to the constitutional provision prohibiting states from emitting bills of credit, and what constitutes bills of credit within the provision, see the title BILLS OF CREDIT, vol. 4, p. 61. As to the constitutional provision that full faith and credit shall be given to judgments and decrees of a sister state, see the title JUDGMENTS AND DECREES. As to the authority of agents, executors, etc., to

such an instruction. Defendant requested two special instructions which, in our opinion, under the facts in this case, it was error to refuse. They were: (1) If from the evidence the jury believe that George Thompson is not a *credible* witness, they must disregard the whole of his testimony. (2) A *credible* witness is one whose character for truth is above reproach. If the jury find from the evidence that the witness George Thompson is not a *credible* witness, they must disregard his testimony.' As stated above, there being but the two witnesses as to the perjury, and George Thompson having been impeached, the instructions were called for by the facts."

Arrest — Justice of the Peace. (See also the title JUSTICES OF THE PEACE.)—A statute provided that it should be the duty of a justice of the peace to make an arrest upon the oath of one or more *credible* witnesses that the prisoner had been guilty of an offense. This was held to confer discretion upon the justice as to ordering an arrest. *State v. Touchet*, 46 La. Ann. 827.

1. Credible in the Sense of Competent. (See also the titles WILLS; WITNESSES.)—*Bettison v. Bromley*, 12 East 250; *Hall v. Hall*, 18 Ga. 40; *Harp v. Parr*, 168 Ill. 459; *Fisher v. Spence*, 150 Ill. 253; *Matter of Noble*, 124 Ill. 266; *Fuller v. Fuller*, 83 Ky. 349; *Jones v. Larrabee*, 47 Me. 476; *Warren v. Barter*, 48 Me. 193; *Smalley v. Smalley*, 70 Me. 548; *Shaffer v. Corbett*, 3 Har. & M. (Md.) 513; *Higgins v. Carlton*, 28 Md. 140; *Estep v. Morris*, 38 Md. 423; *Amory v. Fellowes*, 5 Mass. 228; *Haven v. Hilliard*, 23 Pick. (Mass.) 16; *Hawes v. Humphrey*, 9 Pick. (Mass.) 361; *Lord v. Lord*, 58 N. H. 8; *Eustis v. Parker*, 1 N. H. 274; *Kittredge v. Hodgman*, (N. H. 1802) 32 Atl. Rep. 158; *Carlton v. Carlton*, 40 N. H. 14; *Combs's Appeal*, 105 Pa. St. 158; *Garland v. Crow*, 2 Bailey L. (S. Car.) 24; *Workman v. Dominick*, 3 Strobb. L. (S. Car.) 589; *Gamble v. Butcher*, 87 Tex. 643.

In *Sparhawk v. Sparhawk*, 10 Allen (Mass.) 156, it is said: "The much vexed question as to the true construction of the words '*credible* witnesses' in the English statute of wills was early settled by this court, in *Amory v. Fellowes*, 5 Mass. 219, 229, in which it was held that the word *credible* was used as equivalent to 'competent,' and that a witness was admissible to prove the execution of a will 'whom the law will trust to testify to a jury.' This construction was confirmed by several subsequent decisions, *Sears v. Dillingham*, 12

Mass. 358, 361; *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, 356; *Haven v. Hilliard*, 23 Pick. (Mass.) 10, 17; and was incorporated into Rev. Stat., c. 62, § 6, by changing the phrase '*credible* witnesses' into 'competent witnesses. Rep. of Com. on Rev. Stat., c. 62, § 4. The same phraseology is contained in Gen. Stat., c. 92, § 6."

In *Matter of Noble*, 22 Ill. App. 537, *affirmed* in 124 Ill. 266, it is said: "The term '*credible* witnesses,' as used in the statute in speaking of witnesses to wills, means competent witnesses, and in the instructions given the court used the words 'incompetent' and 'incredible' as synonymous terms, as we understand, and in that sense the instruction was entirely correct."

In *Hawes v. Humphrey*, 9 Pick. (Mass.) 350, it is said: "For these reasons we are of opinion that the will was duly attested. The witnesses are competent, and therefore *credible* within the meaning of the statute; for I think it clear that the word *credible* is used in the statute in the abstract sense, as denoting persons capable of obtaining credit. Now every person who is allowed to give testimony in a court of justice may be believed; otherwise it would be absurd to allow him to testify. His testimony may or may not be believed; but this cannot be ascertained at the time of the attestation. It follows, therefore, that all competent witnesses are *credible*, within the true intent of the statute."

Nuncupative Will.—A *credible* witness to prove a nuncupative will under the 15th section of the *North Carolina Act of 1784* (1 Rev. Stat., c. 122, § 2) means one who is competent according to the rules of the common law; and if he be incompetent from interest, such incompetency may be removed by a release. *Mathews v. Marchant*, 3 Dev. & B. L. (20 N. Car.) 40. See generally the title NUNCUPATIVE WILLS.

Respectable.—In *Freleigh v. State*, 8 Mo. 610, it was held that the words "respectable witness" were equivalent to the words "*credible* disinterested witness," as used in a former act *in pari materia*, and that both terms were the equivalent of "competent."

Information.—Under the law of *Texas* an information cannot be presented until oath has been made by some *credible* person charging the defendant with an offense. The words "*credible* person" must be construed to mean a competent as well as a *credible* witness. *Thomas v. State*, 14 Tex. App. 70.

make sales on credit, see such titles as AGENCY, vol. 1, p. 930; EXECUTORS AND ADMINISTRATORS, etc. As to the credit of a witness, see the title WITNESSES.)—A transfer of goods, money, or other valuable thing, in confidence of future payment. That which is due to any person, as distinguished from that which he owes. As a verb the word means to trust, to sell, or loan, in confidence of future payment; to set to the credit of; to enter upon the credit side of an account.¹

1. Other Definitions.—*Credit* is the ability to borrow on the opinion conceived by the lender that he will be repaid. Bouvier, *quoted in* People v. Wasservogle, 77 Cal. 173.

Credit is the capacity of being trusted. Dry Dock Bank v. American L. Ins., etc., Co., 3 N. Y. 356.

In Lyman v. Babcock, 40 Wis. 513, the court said: "The word *credit*, in this use, implies a right of the person *credited*, to that for which he receives *credit*."

Credit, in its large sense, means repose and confidence. Rindge v. Judson, 24 N. Y. 71.

Credit is one's ability to pay what he may promise. Abb. Law Dict., *quoted in* People v. Wasservogle, 77 Cal. 173.

Credits comprise every claim or demand for money, labor, interest, or other valuable things, due or to become due. State v. Georgia Co., 112 N. Car. 38.

In Owen v. Branch Bank, 3 Ala. 267, it is said: "The *credit* of an individual is the trust reposed in him by those who deal with him; that he is of ability to meet his engagements; and he is trusted because, through the tribunals of the country, he may be compelled to pay."

Contract upon Credit.—In Ketchum v. Buffalo, 14 N. Y. 364, the court said: "Every contract for labor, not paid for in advance, is necessarily a contract upon *credit*, because the labor, when once performed, cannot be recalled. It is otherwise in case of the purchase of property to be paid for on delivery, because, unless payment is made, it need not be delivered. Still, if it consist of several parcels, as of several loads of lumber or of stone, to be delivered at different times, and paid for when all are delivered, this is a contract upon *credit* for all except the last load."

Malicious Prosecution—Reputation.—In an action for malicious prosecution it was held that an instruction that the jury might allow the plaintiff such sum as would compensate him for injured *credit*, peace of mind, and mental suffering, was not misleading by the use of the word *credit*, though it was not claimed that the financial standing of the plaintiff had been injured. The court said: "The controversy here arises over the meaning which should be given to the word *credit*. The appellants urge that the jury would naturally understand it as relating to the financial standing of the plaintiff, that being the sense in which the word ordinarily is used. * * * But the very fact that no issue had been made thereon, and that it was not claimed the financial standing of the plaintiff had been injured, or any testimony offered in regard to it, would of itself indicate that the word was used here as relating to the reputation of the plaintiff and the esteem in which he was held by the community; and the use of the word in

this sense, while possibly not so common as in the other, is certainly not exceptional, and the connection in which it was used in this instance, with the surrounding circumstances, rendered its meaning obvious, and the jury could not have been misled thereby." Jones v. Jenkins, 3 Wash. 32. See the title MALICIOUS PROSECUTION.

Mercantile Credit—Malicious Attachment. (See also the title MALICIOUS PROSECUTION.)—It has been held that in an action for damages for malicious attachment, injury to commercial *credit* is not an element of damages. Seattle Crockery Co. v. Haley, 6 Wash. 312. The court said: "What mercantile character and *credit* are is clearly defined in Donnell v. Jones, 13 Ala. 490. 'By character in this connection,' says the court, 'we mean the generally received opinion in the community respecting the solvency of the firm—the probity and punctuality with which it discharged its obligations, and the efficiency with which its affairs are managed. *Credit*, which is usually the result of those qualities and capacities we have named, may be defined, the ability to borrow money or obtain goods in virtue of the opinion conceived by the lender, or seller, that the party will repay.' While the issuance of an attachment may do injury to this mercantile character and *credit* of a debtor, it is, in that respect, not different from other judicial proceedings."

Distinguished from Payment.—In Ainis v. Ayres, 62 Hun (N. Y.) 381, it is said: "Not only is Sawyer spoken of as the vendee's London house, but the arrangement with him and others is spoken of as a *credit*. This is a term perfectly well understood in commercial circles. It implies security for the meeting of his obligations by the holder of the *credit*, and it is not intended, ordinarily, as a substitute for these obligations. 'A *credit* with a banker,' said Chief Justice Gibson, in Bell v. Moss, 5 Whart. (Pa.) 203, 'is not payment, but a means of payment more or less secure, according to the solidity of the depository; and the greater or less certainty of the security cannot affect the question of its character; it is but a security still.'"

Same—Bill of Exchange.—*Credit* in cash means pay; and a request to *credit* in cash is a sufficient order to pay to make the instrument which contains it a bill of exchange. Eddison v. Collingridge, 9 C. B. 570, 67 E. C. L. 570, 19 L. J. C. P. 268.

Interest.—In Kidder v. School Trustees, 10 Ill. 191, it was held that a sale was not the less on *credit* because interest was charged. The court said: "The sale was not the less upon a *credit* because interest was agreed to be paid upon the purchase money. A *credit* may be given either with or without interest, as its terms may be various. The term *credit*

must receive an extended or limited construction depending upon the character of the instrument in which it is used. In a contract its meaning would be limited so as not to include interest unless it were expressed, as, if one sells a farm for so much money, on a *credit* of one, two, and three years. There the instalments would not bear interest. But if one empowers another to sell his farm upon a *credit* of one, two, and three years, without specifying whether the *credit* shall be with or without interest, he thereby gives a discretion to his attorney, to agree upon the terms of the *credit* as he shall think proper. If under such a power the agent should stipulate for interest, it would hardly be contended by any, that for that reason the principal might repudiate the contract upon the ground that the agent had exceeded his authority, or that the purchaser could resist the payment of interest because the agent was not authorized to contract for it. If the sale would be binding upon either, it would be upon both. This latter case is precisely parallel with the one before us."

Will — Notes and Bonds. — A testator directed that a legacy should be paid out of the book accounts and other *credits*. In construing this provision, the court said: "And it is urged that the word *credits*, as used here, should be restricted to such as are the proper subjects of book account. We do not think the testator attached so restricted a meaning to the word. He says 'book accounts and other *credits*,' by which we understand him to signify, if not all items on the *credit* side of the executor's account with the estate, at least all sums of money due the estate by promissory notes or bonds, as well as the charges on his account books." *Webster v. Wiggins*, (R. I. 1896) 34 Atl. Rep. 990.

Guaranty — Notes. — An indorsee of a note wrote upon its face: "*Credit* the drawer." Construing these words, the court said: "The court below was wrong in treating the words, '*Credit* the drawer,' as implying an undertaking to pay, or as affording any basis for liability on the part of Temple. It was also wrong to say that 'the jury could look at the note, the indorsement, the words "*Credit* the drawer," and all the parol testimony, and say whether the contract was original or collateral.' * * * The words, '*Credit* the drawer,' imply no promise or undertaking on the part of him who uses them, but are a direction to all persons to whom the note may be presented to treat with the drawer as the owner, notwithstanding the apparent title of the indorsee. This was the question on which the case turned in the court below, and the only one involved which was not well settled by our own cases." *Temple v. Baker*, 125 Pa. St. 634. See also the title **GUARANTY**; and see generally the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 65.

Bill of Exchange. — "*Credit* my account" indorsed on a bill of exchange is restrictive, and puts an end to its negotiability. It is an appropriation of the proceeds of the bill which renders any other illegal. *Lee v. Chillicothe Branch of State Bank*, 1 Biss. (U. S.) 325.

False Pretenses. (See also the title **FALSE PRETENSES**.) — A statement by the defendant that he had a *credit* with a firm, and that the firm would honor his draft, when he knew he

had no such *credit*, has been held within a statute against false pretenses. The court said: "It is true that to come within the statute a representation must be of some fact, past or present; but the statement of defendant that he had *credit* with the firm named for the amount of the draft, and that the firm would honor the draft, when he knew that he had no *credit* with the firm, and that the draft would not be honored or paid, was sufficient. Among the definitions of the word *credit* are the following: '*Credit* is confidence or trust reposed in one's ability to pay what he may promise,' Abb. Law Dict. 'The ability to borrow on the opinion conceived by the lender that he will be repaid,' Bouv. Law Dict. '*Credit* is the capacity of being trusted,' *Dry Dock Bank v. American L. Ins., etc., Co.*, 3 N. Y. 356. And a false pretense has been defined to be 'a representation of some fact or circumstance, calculated to mislead, which is not true.' *Com. v. Drew*, 19 Pick. (Mass.) 184. After quoting this definition, Mr. Bishop says a fuller and practically better one would be: 'A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value.' 2 Bish. Crim. Law, § 415; and see *People v. Jordan*, 66 Cal. 10. The claim that *credit* implies only futurity, and not a present fact, cannot be supported." *People v. Wasservogle*, 77 Cal. 173.

Correlative of Debt. — In *Pacific R. Co. v. Wade*, 91 Cal. 456, it is said: "*Credit* is a term attaching to the creditor, and designates property possessed by him, in contradistinction to the correlative word 'debt,' which has reference to the debtor and a personal obligation resting upon him."

Same — Garnishment. (See also the title **GARNISHMENT**.) — In *Capes v. Burgess*, 135 Ill. 61, it was held that the choses in actions and *credits* named in the *Illinois* Garnishment Act were to be limited to debts, in the strict and technical sense of that term. The term *credit* is there used as the correlative of "debt." The court said: "It certainly does no violence to the language of sections 5 and 7 to hold that the choses in action and *credits* due and owing or to become due from the garnishee to the defendant there mentioned were intended to be limited to debts in the stricter and more technical sense of that word. Such is undoubtedly the proper meaning of the term *credits*. As said by Mr. Drake: 'The term *credit*, in this connection, is used in a sense in which it is understood in commercial law, as the correlative of 'debt.' Whenever, therefore, there is a *credit* there is a debt, and without a debt there can be no *credit*.' Drake on Attachments, § 544."

Bankruptcy — Correlative of Debt. — But as used in bankrupt laws providing that mutual *credits* may be set off, it has been held that the term "mutual *credits*" imports something more than "mutual debts." *Ex p. Deeze*, 1 Atk. 228. Thus in *Rose v. Hart*, 8 Taunt. 499, 4 E. C. L. 185, it was held that mutual *credits* within the meaning of bankrupt laws were *credits* which in their nature must terminate in debts, and that this meant not *credits* which must *ex necessitate rei* terminate in debts, but *credits* which have a natural tendency to ter-

minate thus. See also upon this point *In re Voetter*, 4 Fed. Rep. 632; *French v. Fenn*, 3 Doug. 257, 26 E. C. L. 99; *Ex. p. Whiting*, 14 Nat. Bank. Reg. 307. In *Libby v. Hopkins*, 104 U. S. 309, however, it is said: "Another answer to the contention of the plaintiffs is found in the language of the twentieth section of the Bankrupt Act of March 2, 1867, c. 176, which differs materially from that of the twenty-eighth section of 5 Geo. II., c. 30. In our act the terms *credits* and 'debts' are used as correlative. What is a debt on one side is a *credit* on the other, so that the term *credits* can have no broader meaning than the term 'debts.' We find no warrant in the language of the section or its context for extending the term *credits* so as to include trusts. Generally we know that *credit* and 'trust' are not synonymous terms. They have distinct and well-settled meanings, and we see no reason why they should be confounded in interpreting the twentieth section of the Bankrupt Act."

In *Catlin v. Foster*, 5 Fed. Cas. No. 2,519, 1 Sawy. (U. S.) 37, it is said: "The term 'mutual *credits*,' in the bankrupt acts, is more comprehensive than the term 'mutual debts' in the statutes of set-off. The term *credit* is synonymous with 'trust,' and the trust or *credit* need not be of money on both sides, but if one party intrusts the other with goods or value it will be a case of mutual *credit*." 7 Bac. Abr. 170."

Bankruptcy — Obtaining Credit. — A statute forbade an undischarged bankrupt to obtain *credit* to the amount of twenty pounds or upwards from any person, without informing such person that he was an undischarged bankrupt. It has been held that it was not necessary that there should be a stipulation to grant *credit*, or anything said about *credit*, if a *credit* in fact was obtained. *Reg. v. Peters*, 16 Q. B. Div. 636; *R. v. Juby*, 3 Times Rep. 211.

Trustee Process. (See also the title GARNISHMENT.) — In *National Union Bank v. Brainerd*, 65 Vt. 291, *Rowell, J.*, said: "One who holds a deed of another's land merely as a cover to cheat the owner's *creditors* is not thereby chargeable as his trustee, for the land is not effects in his hands or possession, nor its value a *credit*, and there is no indebtedness to constitute a *credit*. In such case the land is attachable in the ordinary way."

Same. — Choses in Action, and the notes of a bank as being choses in action, are not "goods, effects, and *credits*" within an act making such subject to trustee process. *Perry v. Coates*, 9 Mass. 537.

Legacies. — Nor are legacies. *Barnes v. Treat*, 7 Mass. 271.

The contrary is held in *Maine*, legacies there having been made the subject of execution under the words "effects and *credits*." *Cummings v. Garvin*, 65 Me. 301.

Choses in Action — Property — Usury. (See generally the title USURY.) — It has been held that by the term "choses in action," as used in the *New York* statute against usury, is meant a particular species of property which, on the death of the owner, would go to his representative, and that the *credit* of the lender was not a chose in action or property at all within the statute. The court said: "If *credit* is the subject of loan, as a chose in

action, it is not an exception to the general rule above stated. Its value depends upon opinion, and is of all other things, perhaps, the most capricious and fluctuating. But *credit* is the 'capacity of being trusted.' It is no more a chose in action, or within the statute to prevent usury, than a capacity for the fine arts. The statute, by 'choses in action,' refers to a particular species of property, recognized by the law, and which, upon the death of the owner, would be inventoried as such by his legal representatives. *Credit* may be a benefit to the possessor as a means of procuring property, but is not itself recognized as property by the law. It cannot be loaned; for a loan implies that the thing borrowed is to be returned after a temporary use to the owner, *in specie or in genere*. (Ord on Usury, 37.) Where, however, A, for a consideration paid by B, executes a letter of *credit*, a promissory note, or a guaranty, and delivers them to the latter, to be used for his benefit, neither of them are choses in action in the hands of B; and yet he has received precisely what he contracted and paid for, namely, the privilege of availing himself of A's *credit* with third persons. When the *credit* is used, and a trust obtained, its whole office is fulfilled; it becomes *functus officio*, and, in the nature of things, can never be returned. The *credit* of one person may be rendered available to another by gift or sale, and in no other way. This may be done by a direct contract between the parties; as an exchange of notes, which is the sale of one promise for another; by an undertaking with third persons directly, or one to be used for the benefit, and according to the discretion, of the donee or vendee. When the responsibility is incurred gratuitously, it is, in popular language, called a loan; and when for a consideration, a sale of *credit*." *Dry Dock Bank v. American L. Ins., etc., Co.*, 3 N. Y. 356.

Stock — Taxation. (See also the titles STOCK; TAXATION (CORPORATE).) — In *Bridgman v. Keokuk*, 72 Iowa 42, it was held that corporation stocks were not *credits* of the owner within the meaning of a provision that for the purpose of taxation a taxpayer may deduct from his money and *credits* the debts which he in good faith owes at the time; the court saying that stock was not an indebtedness or a *credit*, but, on the contrary, an interest in the property of the corporation. But see *Albia First Nat. Bank v. Albia*, 86 Iowa 28, in which case it was held that shares of stock in a national bank are *credits* within the meaning of a provision entitling a taxpayer to deduct from the gross amount of his *credit* enlisted for taxation all debts owing by him in good faith.

In *Dutton v. Citizens' Nat. Bank*, 53 Kan. 440, it was held that the term *credit* as defined in section 6847 of *Kansas* Gen. Stat. did not include stock. The court said: "We think that shares of stock are rather certificates of an interest in an enterprise and in the property, of every description, subject to the liabilities of the corporation, rather than a demand for anything. It is a strained construction of the word *credit* or of the word 'demand,' to hold it to include stocks in a corporation. The decisions to which our attention is called, which seem to give countenance to such a definition

as is contended 'for by the bank, we think are to be viewed rather as applications of the substantial requirements of the United States statute than as affording a definition of the word *credit* as used in the laws of this state.' To the same effect see *New Orleans Banking Assoc. v. Wiltz*, 4 Woods (U. S.) 43; *Smith v. Crescent City Live-Stock Landing, etc., Co.*, 30 La. Ann. 1378.

In *Dutton v. Citizens' Nat. Bank*, 53 Kan. 440, it was held that the word *credit* as defined in section 6847, *Kansas Gen. Stat.*, when used in the chapter providing for the assessment and collection of taxes, did not include shares of stock in a national bank, and that the owners of such shares had no right to deduct from their assessed value the amount of their debts.

In *Niles v. Shaw*, 50 Ohio St. 370, it is said: "Irrespective of the question whether or not, in arriving at the correct amount of property subject to taxation, legal, *bona fide* debts owing by a debtor can be deducted from *credits* owing to him (considered in *Exchange Bank v. Hines*, 3 Ohio St. 1, and in *Latimer v. Morgan*, 6 Ohio St. 279), we are of opinion that shares of stock in a national bank are, within the meaning of sections 2730, 2731, *Rev. Stat.*, 'investments in stocks,' and not *credits*."

In *Bressler v. Wayne County*, 32 Neb. 834, *overruling* the former hearing in 25 Neb. 468, it was held that the owner of national bank stock, enlisting his shares for taxation, was not entitled to deduct his *bona fide* indebtedness from the value of such shares.

But in *Evansville Nat. Bank v. Britton*, 105 U. S. 325, it was held that the taxation of national bank shares by a statute of *Indiana*, without permitting the owner of them to deduct from their assessed value the amount of his *bona fide* indebtedness, as he might in the case of other investments of money capital, was a distinction forbidden by the Act of Congress. See also *Hills v. National Albany Exch. Bank*, 105 U. S. 319; *Albany County v. Stanley*, 105 U. S. 305.

Taxation — Loan Secured by Mortgage. (See generally the title *TAXATION*.) — Within a statute providing for the taxation of property, a loan of money secured by mortgage on real estate was held a *credit*. *Myers v. Seaberger*, 45 Ohio St. 232.

Taxation — Deduction of Liabilities. — In *Exchange Bank v. Hines*, 3 Ohio St. 1, *Thurman, J.*, said: "Nor is it true that in legal significance or in popular parlance the term *credits* means what is due to a man after deducting his liabilities." But in *Treasurer v. People's, etc., Bank*, 47 Ohio St. 503, it is said: "Acquiescing in the meaning of the term as thus settled by statute, the amount of the *credits* of the defendant to be placed upon the duplicate for taxation, will be the excess of all its legal claims and demands over and above its *bona fide* debts; in other words, its *credits* will be estimated by deducting such debts from its legal claims and demands." The court based this decision upon the statutory definition of *credits* contained in *Ohio Rev. Stat.*, § 2630, and the decisions in *Payne v. Watterson*, 37 Ohio St. 121; *Insurance Co. v. Cappellar*, 38 Ohio St. 560.

In *State v. Rand*, 39 Minn. 505, it is said: "*Credits*, in an act making them subject to

taxation (essentially the same as ours, including section 18, relative to deductions for debt), are defined to be 'the excess of the sum of all legal claims and demands, whether for money or other valuable thing, * * * due or to become due to the person liable to pay taxes thereon, * * * when added together (estimating every such claim or demand at its true value in money) over and above the sum of all legal *bona fide* debts owing by such person.' *Payne v. Watterson*, 37 Ohio St. 121." See also *Alabama Gold L. Ins. Co. v. Lott*, 54 Ala. 499.

Premiums of Insurance Company — Taxation. — In *Railey v. Board of Assessors*, 44 La. Ann. 765, it was held that a foreign insurance company, domiciled out of the state and collecting premiums in Louisiana, was not liable for a tax levied on said premiums, as they are *credits*, having their situs at the domicile of the company. See also *Situs*. So in *State v. Board of Assessors*, 47 La. Ann. 1498, it was held that the uncollected premiums of an insurance company are not exempt from taxation as income. The court said: "Are the uncollected premiums of an insurance company exempt from taxation as income, or liable to taxation as *credits*, in the sense of the revenue law? The provisions of article 207 of the constitution will be examined in vain for an exemption of income from taxation; and the plain meaning of the term *credits*, employed in the revenue law, includes the uncollected premiums of an insurance company. Its language is general: 'All rights, *credits*, and open accounts, and other obligations.' This contention is altogether groundless. I think that the judgment should be affirmed." See also *Republic L. Ins. Co. v. Pollak*, 75 Ill. 300.

Taxation — Property. — *Credits* were held not to be property within the provision of the *California* Constitution requiring all property to be taxed in proportion to its value. *People v. Hibernia Sav., etc., Soc.*, 51 Cal. 249. It was admitted in that case, however, that ordinarily the term "property" does include *credits*.

Tangible Property. — A statute provided that when any territory should be detached from one school district and annexed to another, the latter should be liable to the former for its just share of the liabilities and indebtedness, and should receive from the former a just share of the *credits*. It was held that the word *credits*, as used in the act, means the balance of the assets of the district from which the territory is detached, after deducting its debts and liabilities, including schoolhouses, school sites, furniture, fixtures, etc. The court said: "The most important question presented is whether the word *credits*, in the section of the act cited, is broad enough to include the \$1,000 for schoolhouses, school sites, furniture, and fixtures, which went into the sum so apportioned. As ordinarily used in trade and business, the word *credit* suggests nothing more than a chose in action. In bookkeeping it is 'the side of an account on which payment is entered; opposed to "debit;" as, this article is carried to one's *credit*, and that to one's debit.' *Century Dict.* The Imperial is substantially the same. As used in bookkeeping, Worcester gives this definition: 'That side of

CREDIT INSURANCE. (See also the titles GUARANTY; FIDELITY AND GUARANTY INSURANCE; INDEMNITY CONTRACTS; and see generally the title INSURANCE, and the insurance titles such as FIRE INSURANCE; MARINE INSURANCE, etc.)—The object of this peculiar kind of insurance is to guarantee vendors against loss by reason of the insolvency of their debtors.¹ A contract to indemnify a vendor for losses accruing from the insolvency of his debtor has been held a contract of insurance.² Companies for this purpose have been recently organized in the United States, and have existed for a longer time in England. The law relating to the subject is as yet in an undeveloped state, there being but few cases determining the rights and obligations of the parties upon such policies. This kind of insurance, however, bears a close analogy to fidelity and guaranty insurance, which is treated at large under another title in this work.³

Construction.—It has been said that such insurance contracts, like policies of fire insurance, to which they are closely analogous, must receive a reasonable construction, so as to give effect to the intention of the parties thereto, and so as to carry out, rather than defeat, the purposes for which they were executed. They should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design, nor, on the other hand, so loosely or inartificially as to relieve the obligor from a liability fairly within the scope or spirit of their terms.⁴

a personal account on which everything is entered that answers as an offset to a debt; as, 'to carry money, goods, or notes to the credit of A B,' that which is entered in an account as an offset to a debt, or for which the party in whose favor the entry is made becomes the creditor of another; as, 'the credits exceed the debts.' Webster gives a similar definition. * * * The word *credits* is obviously used in the act in the sense it is employed in book-keeping—as contradistinguished from debts and liabilities; that is to say, as a balance of the assets after deducting debts and liabilities. In view of the general purposes of the act, the use of the word 'assets' in the title, and the rules of construction mentioned, we must hold that the word *credits*, as used in the act, includes such balance of the assets of the town at the time of such division, after deducting such debts and liabilities; and hence includes schoolhouses, school sites, furniture, and fixtures." *School Directors v. School Directors*, 81 Wis. 428.

1. *American Credit Indemnity Co. v. Cas-sard*, 83 Md. 272.

2. **Contract of Insurance—Insurance Corporations.**—A contract to indemnify a person from loss arising from the insolvency of his debtors, is a contract of insurance, and a corporation authorized to make it is an insurance corporation. *Shakman v. U. S. Credit System Co.*, 92 Wis. 366, 53 Am. St. Rep. 920. See also *Robertson v. U. S. Credit System Co.*, 57 N. J. L. 12.

An agreement to purchase at a fixed price all accounts which during one year a certain business firm should have against ascertained insolvent debtors, or judgment debtors against whom execution should be returned unsatisfied, is a contract of insurance. *Clafin v. U. S. Credit System Co.*, 165 Mass. 501, 52 Am. St. Rep. 528.

And that a general statute regulating the business of insurance, other than fire, life, and marine, authorizes the business of insurance

against loss resulting from the insolvency of those to whom goods are sold on credit, see *Hayne v. Metropolitan Trust Co.*, (Minn. 1897) 69 N. W. Rep. 916.

3. See the title FIDELITY AND GUARANTY INSURANCE. And see the title GUARANTY, for the general principles governing such contracts.

4. *American Credit Indemnity Co. v. Cas-sard*, 83 Md. 272.

Interpretation of Policy.—A policy insured the plaintiffs against loss sustained by reason of the insolvency of the debtors between the first day of September, 1892, and the first day of September, 1893, in excess of one and three-quarters per cent on the total gross sales and deliveries made during said period. By an attached rider it was provided that the contract should cover all losses for one year back from August 31, 1892, to August 31, 1891. It was held that the one and three-quarters per cent of the total gross sales and deliveries was not to be deducted from the losses accruing between August 31, 1892, and August 31, 1891. The court said: "The defendant claims that the initial loss to be borne by the plaintiffs is one and three-quarters per cent of the amount of sales made during the period provided for in the rider, as well as in that covered by the policy proper. We do not concur in this view. The clause in the policy is plain, and provides for the deduction only of one and three-quarters per cent of the amount of the sales made during the year from September 1, 1892, to September 1, 1893. The rider is equally plain. It makes no provision for any deduction whatsoever. Every ambiguity must be resolved against the defendant, which drew this agreement. Here there is no real ambiguity. To sustain the defendant's contention, we should have to read into the policy something to its advantage. Nor is it a reasonable presumption that the parties meant to provide for an initial loss for the period between August 31, 1891, and August 31, 1892, similar to that for the ensuing year. The nature of the indem-

The Insolvency of the insurance company, or an assignment by it for the bene-

nity provided for in the policy proper is entirely different from that furnished by the riler.' *Goodman v. Mercantile Credit Guarantee Co.*, 17 N. Y. App. Div. 474.

Computation of Loss.—A policy insured the holder, not exceeding a certain sum, against loss sustained by reason of the insolvency of his debtors. It also contained a provision that in adjusting losses, before determining the percentage of the loss to be borne by the company there should first be deducted all sums paid or secured by the debtor and the value of collateral securities. It was held that the loss insured against meant the amount remaining due after deducting such securities and payments, and not the whole amount due from the debtor, and that such construction was not changed by a clause providing that where only part of a loss was covered by the policy, the proportionate part of everything realized or secured by the indemnified should be credited to so much of the loss as was covered; and that therefore deductions of payments and collaterals must be made before it could be determined whether the loss fell within the sum insured for. *Mercantile Credit Guarantee Co. v. Wood*, 68 Fed. Rep. 529. This case was *disapproved* in *Goodman v. Mercantile Credit Guarantee Co.*, 17 N. Y. App. Div. 474.

An Instruction in an action on a credit guaranty policy that "the amount of yearly sales which plaintiffs were authorized to make, so far as this contract bears on the losses in this case, was \$70,000," and "there is to be deducted from these losses three-fourths of one per cent.," will not be held erroneous because open to the interpretation that such percentage is on the losses, instead of on the \$70,000, where the manner of calculating the deduction and its amount were not disputed on the trial. *Sloman v. Mercantile Credit Guarantee Co.*, (Mich. 1897) 70 N. W. Rep. 886.

Power of Agents — Rating in Commercial Agencies.—An agent of a corporation permitted to insure persons against loss from the insolvency of their customers, and who is authorized on behalf of his principal to solicit insurance, transmit applications, and collect premiums, has power to make an agreement that where customers are not rated in Dun's commercial agencies, as required in the original contract of insurance, the insured may use, as to them, the rating of Bradstreet's mercantile agencies. *Shakman v. U. S. Credit System Co.*, 92 Wis. 366, 53 Am. St. Rep. 920.

Rating in Commercial Agency.—An insurance against loss in a certain ratio, resulting from sales on credit, contained a stipulation that only losses incurred by sales to persons whose capital as well as credit was rated in "Bradstreet's" should be taken into the account. It was held that a loss of the kind mentioned, accruing from the failure of a corporate customer, was not within the insurance, as the capital of corporations was not rated in "Bradstreet's." *Robertson v. U. S. Credit System Co.*, 57 N. J. L. 12.

Same — Construction.—If a policy, as written, purports to indemnify a party from all loss within one year from July 1, 1889, from the insolvency of his customers, provided they

are rated in Dun's mercantile agencies, but on objection being made that the assured should be permitted to use Bradstreet's rating as well as Dun's, at the time of the delivery of the policy, November 8, 1889, the agent of the assured writes thereon a memorandum extending the liability to persons rated in Bradstreet's agency, the liability of the insurer is not limited to the business transacted after the latter date, but extends, as to both classes of customers, to all business done with them after the commencement of the term of insurance named in the policy. *Shakman v. U. S. Credit System Co.*, 92 Wis. 366, 53 Am. St. Rep. 920.

If a policy of insurance against loss by insolvency of customers provides that, in calculating losses, no credit shall be included therein exceeding a credit of thirty per cent of the lowest capital rating of the customers in specified books, though a credit is given exceeding such rating, the assured does not lose the right of indemnity altogether, but his indemnity is restricted to thirty per cent of such rating. *Shakman v. U. S. Credit System Co.*, 92 Wis. 366, 53 Am. St. Rep. 920.

Estoppel.—After an additional agreement had been made and indorsed upon the insurance contract, a memorandum different in terms was sent to the insured, with the request that he attach it to the contract to take the place of the contract agreed to. The insured read the letter but not the memorandum, and paid no attention to it, and did not return it. It was held that his silence was not equivalent to consent to the change, and, the conduct of the company not having been in any way influenced thereby, he was not estopped to claim that the agreement, as indorsed, continued in force. *Shakman v. U. S. Credit System Co.*, 92 Wis. 366, 53 Am. St. Rep. 920.

Judgment After Period Has Expired.—A credit insurance company issued a bond to the plaintiff providing, that in case the plaintiff should suffer losses in his business during a given period by reason of the insolvency by legal process of any party to whom the plaintiff should have sold and delivered goods during the period of the bond, or by reason of any judgment or decree of a court obtained for goods so delivered within the said period of the bond upon which execution should have been returned unsatisfied over and above said loss, it would indemnify the plaintiff. The plaintiff agreed to notify the company within ten days after receiving information of any insolvency or loss, and that he would make final proof of loss at the home office of the company within thirty days after the expiration of the bond. It was held that this indemnity bond did not cover losses on sales made during the specified period where judgment for the price was not recovered until after the expiration of the period named in the bond. *Talcott v. National Credit Ins. Co.*, 9 N. Y. App. Div. 433.

But, in *Sloman v. Mercantile Credit Guarantee Co.*, (Mich. 1897) 70 N. W. Rep. 886, it was held that losses occurring after the expiration of the policy on sales made during its existence were payable though the policy was not renewed, if final proof of loss was made within the time provided for by the policy.

fit of its creditors, has the effect of canceling policies issued by it.¹

Other Cases. — In the note will be found several cases on the termination of the relation between insured and insurer, the winding up of the company, etc.²

1. See generally the title **INSURANCE**.

Assignment for Benefit of Creditors. — The defendant insurance company was engaged in the business of insuring or indemnifying mercantile concerns against "excess losses" caused by the failure or insolvency of customers to whom such concerns had made sales on credit, which excess losses were ascertained by deducting from the actual losses fifteen per cent thereof, and also one per cent of the total year's sales, to be not less than a stipulated amount. The firm of A. & M. took out such a policy to run for one year, in which it was stipulated that the year's sales on which the one per cent was to be computed should not be less than ninety thousand dollars. When the policy had run ten months and seven days the insurer, being insolvent, made an assignment for the benefit of its creditors. It was held that such assignment terminated the policy. During the ten months and seven days which the policy ran, the total amount of the sales of the insured was seventy-five thousand dollars and no more. For the purpose of determining the excess loss, it was held that one per cent should be computed on this amount, and not the ninety thousand dollars aforesaid. It was held further, the insured was also entitled to recover back the unearned premium for the balance of the year after the assignment. B. took out a similar policy, which had run but a part of the year for which it was taken out when the insurer assigned as aforesaid. During this time B. did not suffer a sufficient amount of loss to enable him to recover for the same under the policy; but, during the whole year for which the policy was issued, he did. It was held that he was not entitled, as against the funds in the hands of the insurance commissioner, deposited under section 3332, Gen. Stat. 1894, to treat the insurer as a going concern for the balance of the year, so as to recover for losses occurring subsequent to the assignment. The D. corporation took out a similar policy, which ran also but a part of the year, when the insurer assigned as aforesaid. During this time the insured suffered no loss. It was held that it was not entitled to rescind the contract and recover back the whole premium paid, and was only entitled to recover back the unearned premium for the balance of the year subsequent to the assignment. *Smith v. National Credit Ins. Co.*, 65 Minn. 283.

Waiver of Notice. — The policy of the A. company (taken out on the conditions set out in the preceding paragraph) ran the full year for which it was issued, and nine days thereafter the insured assigned as aforesaid. By the terms of the policy the insured was barred from recovering on the policy unless it made final proof of its year's losses within thirty days after the expiration of the year, which it failed to do. It was held that the assignment was a breach of the contract, and the insured was entitled to recover on a *quantum meruit* without furnishing such proof of loss. *Smith v. National Credit Ins. Co.*, 65 Minn. 283.

Partial Assignment. — A partial assignment

of a debtor's goods for the benefit of his creditors does not come within the provision of a policy indemnifying the vendor for losses sustained by reason of the insolvency of the debtors. *Goodman v. Mercantile Credit Guarantee Co.*, 17 N. Y. App. Div. 474.

2. Notice — Winding Up of Mutual Company. (See generally the title **DISSOLUTION OF CORPORATIONS**.) — Upon the winding up of a mutual guaranty society an assessment was made against a manufacturer who had been a member and had taken a guaranty insurance against bad debts. The manufacturer pleaded that his membership had terminated before the winding up of the company. It appeared that the contract of insurance was issued to him in the usual form, with the conditions that the same should be renewed at the end of three years, unless notice was given by the one party or the other that such renewal was not desired. After the manufacturer had paid a year's premium, the society, though admitting its liability for one of his bad debts, refused to pay his loss and deducted it from the premiums for the succeeding years. The manufacturer notified an agent of the society, who had received his application, and who represented the society and collected premiums, that he was dissatisfied with his arrangement, and would have nothing more to do with the company. It was held that this was a sufficient notice of the withdrawal, and determined the contract at the end of the time set, and that he was not liable to an assessment at the winding up. *In re Solvency Mut. Guarantee Soc.*, 10 W. R. 572. But if no notice is given the contract is renewed. *Solvency Mut. Guarantee Co. v. York*, 3 H. & N. 588.

Renewal of Membership in Mutual Society. — The plaintiffs, a joint stock company, by deed guaranteed the defendants, upon their gross annual returns, against loss in their business, during the term of two years, by purchasers of goods becoming bankrupt. The guarantee was subject to the following condition: "Every guarantee shall be made for a specified term, but all guarantees upon gross annual returns, floating risks, or rent, whatever may be the original term of the same, shall, from the expiration of such original term, be treated as a renewed contract of the like nature and conditions, unless either the member interested therein or the board of directors shall give two calendar months' notice of an intention not to renew the same." It was held that in the event of no notice being given, the guarantee became a renewed contract for only one period of two years from the expiration of the original term, and was not from time to time renewable. *Solvency Mut. Guarantee Co. v. Froane*, 7 H. & N. 5.

Action to Recover Subscriptions Against Member of Mutual Company. — To an action by the company to recover the annual subscriptions in respect of the guarantee, the defendant pleaded, as an equitable defense, that before making the agreement he delivered to the com-

CREDITOR. (See also DEBT — DEBTOR; and see such titles as ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 3, p. 1; DEBTS OF DECEDENTS, *post*; EXECUTORS AND ADMINISTRATORS; INSOLVENCY AND BANKRUPTCY; MARSHALING ASSETS; PLEDGE AND COLLATERAL SECURITY; SUBROGATION, etc.)—In a strict literal sense, a creditor is one who voluntarily trusts or

pany a proposal and declaration in writing which were to form the basis of the agreement of guarantee; and that the contract of guarantee was to be made, subject to the deed of settlement, and rules and by-laws of the company; that when the said proposal and declaration were so made and delivered, certain printed rules and regulations were delivered to the defendant by the company, as and for the rules and regulations under and subject to which the said proposed agreement for guarantee was to be made and entered into between the parties; that the rules and regulations so delivered to the defendant contained a certain rule, condition, and provision with respect to the payment of subscription; that the agreement for guarantee was made and entered into in consequence of the said proposal and declaration, and they formed the basis thereof, and the agreement for guarantee was made by the defendant in the belief and on the faith that it was to be subject to the said printed rules and regulations; that the agreement and guarantee did not and does not contain the said rule, condition, and provision, but contained and was made subject to a certain other and different rule substituted therefor by the company in the agreement and guarantee, and much less advantageous to the defendant; that neither before nor at the time of making and signing the agreement of guarantee had the defendant any notice or knowledge whatever of any alteration of the said printed rules and regulations, or of the substitution of the said rule, but on the contrary thereof, before and at the time of making and entering into the agreement of guarantee, he believed and had good reason for believing, and was led and induced by the company to believe, that the agreement and guarantee contained and was made subject to the said printed rules and regulations; that since the defendant became aware of the said alteration and substitution he had not in any way agreed to or acquiesced in the said agreement and contract; nor had he at any time received any value, benefit, advantage, or payment whatsoever from the company under or in respect of the said agreement and guarantee, but the same had been always wholly worthless. It was held that the plea was bad, inasmuch as, under the circumstances stated in it, a court of equity would reform the agreement and not refuse to enforce it. *Solvency Mut. Guarantee Co. v. Freeman*, 7 H. & N. 17.

Retirement of Partner. (See generally the title PARTNERSHIP.)—The plaintiffs, a joint stock company, guaranteed a firm, consisting of two partners in trade, against loss in respect of their gross annual returns. The guarantee was subject to the following condition: "If a member of this company shall die, or if any member guaranteed with respect to his gross or particular trade debts shall cease to be such trader, his guarantee or contract shall

become void upon such death, or (if such trader) on his retiring from such trade." It was held that under this condition the guarantee became void upon the retirement of one of the two partners from the trade. *Solvency Mut. Guarantee Co. v. Freeman*, 7 H. & N. 17.

Death of Partner — Discontinuance of Business.—But, in *American Credit Indemnity Co. v. Cassard*, 83 Md. 272, it was held, where a *credit insurance* policy contained a condition providing that it should be void in the event of the firm to whom the policy was issued discontinuing business, that the death of a member of the firm after a sale by it of the goods on credit, but before the vendees failed in business, did not constitute a discontinuance of business within the meaning of the policy. The court said: "It is difficult to suggest a satisfactory reason for holding that the death of one member of a creditor firm, long after goods have been sold and delivered, releases the obligor company from its liability to make good the loss arising from a subsequent insolvency of the debtor during the continuance of the bond, that would not equally apply to the case of an individual creditor who was not a member of any firm. The object of this peculiar kind of indemnity is to guarantee vendors against loss by reason of the insolvency of their debtors; and if the debt has been contracted during the continuance of the bond of indemnity, and whilst the firm or the individual protected by the bond is actually engaged in business, though the loss happens after the death of one member of the creditor firm, or after the death of the individual creditor when there is no firm, the contingency contracted against—the insolvency of the debtor—is precisely the same as though the death of the creditor had not occurred at all. * * * Undoubtedly, the death of a member of a firm does, by operation of law, dissolve the partnership, but such a dissolution of the firm can in no sense be said to be a discontinuance of business by the indemnified. The surviving partner winds up the concern. The dissolution is by operation of law, and not by the act of the parties; and the discontinuance of business on the part of the firm is not a discontinuance by the firm, but by operation of law in consequence of an act of God. Obviously, the term 'discontinuance by the indemnified' has relation to the act of the indemnified (either his voluntary act, or the consequence of his voluntary act), precisely as the other condition (the failure of the creditor) relates to a situation arising from his own acts or conduct. Had the design been to constitute the death of the creditor a ground for avoiding the bond, the addition of the words 'and the death of the indemnified,' or words of like import, would have placed the matter beyond dispute; and every individual purchasing such a bond would then have been advised in plain terms, that the contingencies which he encountered,

gives credit to another for money or other property;¹ but in a more general

and was obliged to avoid, so as to enable him to recover on the bond, were not only his own failure in, or discontinuance of, business, but his death during the period covered by the indemnity. * * * If we entertained any reasonable doubt as to the correct interpretation to be placed on the words we have been considering in the eighth condition indorsed on the bond, that doubt would be sufficient to solve the question against the defendant, because its contract to indemnify must stand in full force unless more than a doubt exists as to whether the defeasible conditions embrace the particular ground of avoidance relied on."

1. Stanly v. Ogden, 2 Root (Conn.) 261.

Other Definitions. — In its strict sense a *creditor* is one to whom money is due. Atwater v. Manchester Sav. Bank, 45 Minn. 341.

The term *creditor* signifies a person to whom a debt is owing by another person, called the debtor. Black Law Dict.; Cardenas v. Miller, 108 Cal. 250.

Attachment — Torts. — In McDonald v. Forsyth, 13 Mo. 549, it was held that under the statute of *Missouri* an attachment did not lie in an action of tort. The court said: "The first section of our attachment law provided that creditors may sue their debtors by attachment, in certain specified cases. Upon the use of these general terms of *creditor* and 'debtor' is founded all the argument which can be made to support the position of the plaintiff in error. I regard the terms as sufficiently definite to exclude all idea of embracing within the law any demands except such as grow out of contracts. The words do not, in ordinary acceptance, nor in strict legal parlance, apply to any other class of demands."

A statute provided for attachment where a debt existed in favor of a *creditor*. These two words "debt" and *creditor* were used many times throughout the statute in defining the causes for which attachment would lie. It was held that an attachment would not lie where the cause of action was founded on tort. The court said: "In every instance in which the cause of action is mentioned, it is denominated a debt, and in every instance in which the person to be injured by the acts of the defendant is mentioned, he is called a *creditor*. The question to be determined upon this statute is, What is the meaning of the words 'debt' and *creditor* as therein used? * * * In the case of Barber v. East Dallas, 83 Tex. 150, the court defines the word 'debt' as follows: 'In common parlance, the word "debt" is sometimes used to denote any kind of a just demand, and has been differently defined, owing to the subject-matter of the statutes in which it has been used; and while ordinarily it imports a sum of money arising upon a contract, express or implied, in its more general sense it means that which one person is bound to pay or to perform to another.' 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 175." Mr. Drake, in his work on Attachments (section 12), says: "Who may be regarded as a *creditor*, may be often a debatable question. A *creditor* is defined by a recent writer to be one who has a right to require of another the

fulfilment of a contract or obligation. Another writer considers a *creditor* to be one who gives or has given credit to another, one who trusts another, one to whom a debt is due; in a larger sense, one to whom any obligation is due. Webster defines the word thus: "A person to whom a sum of money or other thing is due by obligation, promise, or in law." The word is susceptible of latitudinous construction, and it is not, perhaps, as important here to arrive at its general meaning, as to ascertain the views of it, and of what constitutes an indebtedness, which have received judicial sanction in connection with the resort to an attachment." He then proceeds to discuss the cases arising in the courts of several states, from the general tenor of which decisions it may be concluded that the debt which will support an attachment is one arising out of a contract, either express or implied by law. 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 143; Elliott v. Jackson, 3 Wis. 649." El Paso Nat. Bank v. Fuchs, 89 Tex. 197. See also the title ATTACHMENT, vol. 3, pp. 189, 191.

Unliquidated Damages. — In *In re Pen-y-Van Colliery Co.*, 6 Ch. Div. 477, it was held that a claim against a company for unliquidated damages on account of alleged fraudulent representations did not constitute the claimant a *creditor* so as to entitle him to petition for the winding up of a company under the English Companies Act. And see Robertson v. Goss, L. R. 2 Exch. 396.

Must Be a Debtor — Married Women. — The plaintiff was employed to protect a wife's interest in a trust estate, with the understanding that the cost would be paid out of the income. The wife had no power by her contract to create a charge upon the trust estate. The court said: "The plaintiff cannot, in any event, reach them under the fifty-seventh section of the statute, for the reason that he does not stand in the relation of *creditor* of the *cestui que trust*. He was not a *creditor*, in the sense of that section, because Mrs. Blakeman was a *feme covert*, at the time of the retainers, and the rendition of the plaintiff's services, and incompetent to contract a debt." Noyes v. Blakeman, 6 N. Y. 578.

Same. — And that there must be a debtor, see Mohr v. Minnesota Elevator Co., 40 Minn. 348, set out *infra*.

Dissolution of Relationship — Usury. — A usury statute provided that a debtor might become a witness in the trial of any action wherein the fact of unlawful interest was an issue. It was argued that the words "debtor" and *creditor*, as thus used, showed the intention of the legislature that this provision was to apply only to those cases where the relation of debtor and *creditor* actually subsisted between the parties at the time of the trial. The court said: "The words 'debtor' and *creditor*, as used in the above-cited section of the Revised Statutes, have uniformly been incorporated in the several acts relating to usury, which have been in force in this commonwealth, and have long since received a judicial interpretation. They are intended as a *designatio personarum* merely, and not as indicating a present existing relation between the

and extensive sense of the term, a creditor is one who has a right to recover money of another on any account whatever.¹

Fraudulent Conveyances. — Thus in statutes avoiding sales and conveyances in

parties. They are meant to signify the parties to the original contract alleged to be usurious, or 'the original debtor and creditor.' Gifford v. Whitcomb, 9 Cush. (Mass.) 483. See generally the title USURY.

1. **Larger Sense.** — Stanly v. Ogden, 2 Root (Conn.) 261; Barstow v. Adams, 2 Day (Conn.) 70; New Jersey Ins. Co. v. Meeker, 37 N. J. L. 300. See also New Haven Steam Saw-Mill Co. v. Fowler, 28 Conn. 103; Gifford v. Whitcomb, 9 Cush. (Mass.) 482.

A *creditor* is one who has a right to require the fulfilment of an obligation or contract. Bouv. Law Dict., quoted in State v. Georgia Co., 112 N. Car. 38; Dunnigan v. Stevens, 122 Ill. 396.

"The term *creditor* does not mean simply a person to whom a debt is due — that is but its usual meaning; but it further denotes a person to whom any obligation is due — and this is its unusual meaning. A *creditor*, according to the definition of Bouvier, 'is he who has a right to require the fulfilment of an obligation or contract.' In this large sense it means more than the person to whom money is owing. Webster's explanation of the word is: 'A person to whom a sum of money, or other thing, is due by obligation, promise, or in law.' " Beasley, C. J., in New Jersey Ins. Co. v. Meeker, 37 N. J. L. 300.

"In a strict literal sense [a *creditor*] is he who voluntarily trusts, or gives credit to another for a sum of money, or other property, upon bond, bill, note, book, or simple contract. In a more liberal sense he is a *creditor* who has a legal demand upon another for money, or other property, which has got into the hands of another without his consent, by mistake or accident, which he is entitled to have, or to a compensation in damages for, upon the ground of an implied promise. In the more general and extensive sense of the term, he is a *creditor* who has a right by law to demand and recover of another a sum of money on any account whatever." Stanly v. Ogden, 2 Root (Conn.) 261.

Tort — Dissolution of Corporation. — A New York statute provided that upon the dissolution of a corporation its directors should, unless other persons were appointed, be the trustees of the *creditors* and stockholders. It was held that the word *creditors* included all those to whom the corporation was under any enforceable obligation at the time of its dissolution, as well as those to whom it was indebted, and therefore one having a cause of action for the loss of services of his son, who had been injured while in the employment of the company, was a *creditor*. Marsteller v. Mills, 143 N. Y. 398. This overrules Grafton v. Union Ferry Co., 22 Civ. Pro. Rep. (Brooklyn City Ct.) 402, where it was held that a person having a claim against a corporation for personal injuries was not a *creditor* of the corporation within the statute, and Grafton v. Union Ferry Co., 20 Civ. Pro. Rep. (Brooklyn City Ct.) 238, was affirmed. See also Hepworth v. Union Ferry Co., 62 Hun (N. Y.) 257, 22 Civ.

Pro. Rep. (N. Y.) 407. See generally the title DISSOLUTION OF CORPORATIONS.

Same — Conversion. — A person claiming damages for conversion of his property was held not a *creditor* within the meaning of a Vermont statute. Hutchinson v. Lamb, Brayt. (Vt.) 234.

Bankruptcy — Unliquidated Demands. — That in a bankruptcy statute the term *creditors* has been held to include persons having unliquidated demands, see *Ex p. Trafton*, 2 Lowell (U. S.) 506. See generally the title INSOLVENCY AND BANKRUPTCY. But, in Robertson v. Goss, L. R. 2 Exch. 396, it was held that one who had a claim for unliquidated damages against the debtor was not a *creditor* within an English bankruptcy act. See also *In re Pen-y-Van Colliery Co.*, 6 Ch. Div. 477.

Garnishment — Unliquidated Damages. — Under the statute with regard to foreign attachment, which provides that any *creditor* may avail himself of the process against his debtor, a person having a claim against another for unliquidated damages growing out of the breach of a contract is to be regarded as a *creditor*, and the other party as a debtor, within the intent of the statute. New Haven Steam Saw-Mill Co. v. Fowler, 28 Conn. 103.

Preferences — Breach of Contract. — A statute prohibited a corporation from preferring *creditors*, declaring that all such preferences should inure to the benefit of existing *creditors*. Construing this statute the court said: "A *creditor* is one who has the right to require the fulfilment of an obligation or contract. Beaman, at the date of the creation of the lien, had furnished the company the timber and lumber, according to the terms of the contract made by the company with him. The company had not paid for it, and he was demanding payment therefor, and had served formal notice on the corporation of his claim that the company was so indebted to him for its failure to comply with its contract with him. * * *

If Beaman was an existing *creditor* at the date of the creation of the lien, it was not in the power of the company to prefer one *creditor* over another. The law makes the deed the ratable security of all the existing *creditors*. The cause of action arose before the creation, the goods were delivered at the agreed price before the creation, of the lien. If a man takes up goods of a tradesman, says Mr. Blackstone, upon an implied contract to pay as much as they are reasonably worth (in this case the contract was express, to pay an agreed price), the right accrues to the *creditor*, and is completely vested in him at the time the agreement is made, and the law only gives him a remedy to recover the possession of that right which already in justice belongs to him. In this case the verdict of the jury did not give him a new right, but ascertained an old one, which existed by virtue of the contract between the parties, and their transactions thereunder. We cannot but conclude that Beaman was a *creditor* at the time the trust-deed lien was created." Hardy v. Norfolk Mfg. Co., 80 Va. 423.

fraud of creditors, the term "creditors" has been held to include persons entitled to damages for torts;¹ but this construction has not been invariable, some cases confining the term to its strict technical meaning, of one to whom a debt is due.²

Recording Acts. (See also the title RECORDING ACTS.)—In some states recording acts provide that unrecorded conveyances shall be void as against creditors. The term "creditors," however, has been frequently held not to include creditors at large, but is confined to judgment creditors and those who have in some other manner effected a lien on the debtor's property.³ So where

1. *Waldradt v. Brown*, 6 Ill. 397; *McKenna v. Crowley*, 16 R. 1. 364; *Farnsworth v. Bell*, 5 Sneed (Tenn.) 531; *Patrick v. Ford*, 5 Sneed (Tenn.) 532, note; *Bongard v. Block*, 81 Ill. 186, 25 Am. Rep. 276.

Claim for Damages Growing Out of a Personal Wrong—Fraudulent Conveyances. (See the title FRAUDULENT SALES AND CONVEYANCES.)—In *Bongard v. Block*, 81 Ill. 186, 25 Am. Rep. 276, it was held that a party having a claim for damages growing out of a personal wrong or tort was a *creditor* within the meaning of the statute against fraudulent conveyances. The court said: "This point is settled by this court in *Waldradt v. Brown*, 6 Ill. 397. It was contended in that case, that parties having claims or causes of action arising *ex delicto* are not protected by the statute, the word *creditors* alone being used. The court said that word was not used in its strict technical sense, but includes all parties who have demands, accounts, interests, or causes of action, for which they might recover any debt, damages, penalty, or forfeiture; that such were the interests which the statute expressly says shall be protected, and therefore all persons having such interests must be included in the word *creditors*."

In *Patrick v. Ford*, 5 Sneed (Tenn.) 532, note, it was held that the term *creditor*, used in a statute against fraudulent conveyances, embraced every person having a just demand or right. The court said: "Now the question is, in what sense is the term *creditor* to be understood, in this connection? Is it to be taken in the limited and technical sense of a person to whom 'a sum of money is due, by certain and express agreement' (3 Black. Com. 154); or is it to be understood in a more enlarged and less technical sense, so as to embrace every just demand or right recognized by law, to claim a recovery for an injury to person or property?"

2. Fraudulent Sales and Conveyances. (See the title FRAUDULENT SALES AND CONVEYANCES.)—But, in *Hill v. Bowman*, 35 Mich. 191, it was held that a disputed claim for damages, sounding in tort, was not a debt before being prosecuted to judgment, and does not constitute the claimant a *creditor*, nor invest him with the right given by law to *creditors* to question voluntary transfers of their debtor's property.

Fraudulent Conveyances—Not Confined to Judgment Creditors.—In *Gannard v. Eslava*, 20 Ala. 743, the court said: "Many authorities are cited by the counsel for the plaintiffs in error to show that the word *creditors*, as contained in our registration acts (Clay's Dig. 256, § 5, 502, § 2) and our act 'to prevent the sacrifice of real estate' (Clay's Dig. 194, § 10), is con-

strued to mean judgment *creditors*; and that the same word, as used in the bankrupt acts of England, is held not to extend to *creditors* whose debts are contingent. This is all true; but the same reasoning which would uphold such a construction of the word in these statutes would forbid it when we come to consider the great object of the statute of frauds, namely, the prevention of every sort of dishonest contrivance to defraud any and every kind of honest *creditor*. Although ordinarily none other than judgment *creditors* can proceed in equity, to set aside a conveyance void for fraud, yet the idea has never received countenance from any quarter, that a person must be a judgment *creditor* before a deed can be concocted against him that shall be fraudulent and void as to his debt."

A *creditor* by simple contract is within the protection of the provision of the statute declaring every conveyance or transfer of chattels, not followed by actual and continued change of possession, to be presumptively fraudulent (2 N. Y. Rev. Stat. 136, §§ 5, 6) as against the *creditors* of the vendor or assignor; but until he has a judgment and a lien, or a right to a lien, upon the specific property, he is not in a condition to assert his rights as a *creditor*. *Southard v. Benner*, 72 N. Y. 424.

3. Recording Acts—United States.—Simon *v. Openheimer*, 20 Fed. Rep. 553.

Alabama.—*Hardaway v. Semmes*, 38 Ala. 657; *Center v. Planters*, etc., Bank, 22 Ala. 743; *Ohio L. Ins., etc., Co. v. Ledyard*, 8 Ala. 866; *Daniel v. Sorrells*, 9 Ala. 436; *Andrews v. Burns*, 11 Ala. 691; *Fash v. Ravessies*, 32 Ala. 454; *Preston v. McMillan*, 58 Ala. 84; *Dickerson v. Carroll*, 76 Ala. 377; *Carter v. Challen*, 83 Ala. 138.

Illinois.—*McFadden v. Worthington*, 45 Ill. 362; *Martin v. Dryden*, 6 Ill. 187; *Noe v. Moutray*, 170 Ill. 169.

Kentucky.—*Underwood v. Ogden*, 6 B. Mon. (Ky.) 606.

Mississippi.—*Nugent v. Priebatsch*, 61 Miss. 402; *Pickett v. Banks*, 11 Smed. & M. (Miss.) 445; *Dixon v. Doe*, 1 Smed. & M. (Miss.) 70; *Money v. Dorsey*, 7 Smed. & M. (Miss.) 15; *Wiggie v. Thomason*, 11 Smed. & M. (Miss.) 452.

Nebraska.—*Ransom v. Schmela*, 13 Neb. 77.

New York.—*Button v. Rathbone*, 43 Hun (N. Y.) 147; *Martin v. Rothschild*, 42 Hun (N. Y.) 410; *Niagara County Nat. Bank v. Lord*, 33 Hun (N. Y.) 557; *Stewart v. Beale*, 7 Hun (N. Y.) 405, 68 N. Y. 629; *Jones v. Graham*, 77 N. Y. 628; *Thompson v. Van Vechten*, 27 N. Y. 568.

Pennsylvania.—*Mellon's Appeal*, 32 Pa. St. 121.

statutes require chattel mortgages to be registered for the protection of creditors, it has been held that a mere creditor at large is not within the protection of the statute.¹

Bona Fide Creditors. — And so the phrase "*bona fide creditors*" has been held equivalent to "judgment creditors."²

South Carolina. — King v. Fraser, 23 S. Car. 543.

Tennessee. — Chester v. Greer, 5 Humph. (Tenn.) 26.

Texas. — Overstreet v. Manning, 67 Tex. 657; McKeen v. Sultenfuss, 61 Tex. 325; Grace v. Wade, 45 Tex. 522; Ayres v. Duprey, 27 Tex. 593, 86 Am. Dec. 657.

West Virginia. — Houston v. McCluney, 8 W. Va. 153.

In Martin v. Dryden, 6 Ill. 187, it was held that a *creditor* within the meaning of the Recording Acts of that state was one who, without actual or constructive notice of a prior conveyance or incumbrance, had instituted such proceedings or taken such steps as to effect a lien on land before the recording of such conveyance or incumbrance, whether the debt were prior or subsequent to them and whether the vendor at the time of conveying or encumbering had other property sufficient to pay the debt or not. See also Dixon v. Doe, 1 Smed. & M. (Miss.) 106.

Grantor's Creditors. — It has been held that the word *creditors*, in statutes which make unrecorded deeds void as to creditors and subsequent purchasers, means *creditors* of and subsequent purchasers from the grantor and not from the grantee. Pierce v. Turner, 5 Cranch (U. S.) 154.

1. Chattel Mortgages. (See also the title RECORDING ACTS.) — In Bullard v. Kenyon, (Supreme Ct.) 21 N. Y. Supp. 32, it was held that a mere *creditor* at large, without some process for the collection or enforcement of his debt, such as attachment or execution, was not in a position to question an unfiled mortgage. See also Button v. Rathbone, 126 N. Y. 187.

One not having a judgment and execution was held not a *creditor* within the New York statute declaring that the omission to file a chattel mortgage should render it void as against *creditors*. Jones v. Graham, 77 N. Y. 628.

Under the Texas chattel mortgage act, which voids unregistered mortgages as against *creditors*, the word *creditors* has been held to mean those who acquire some lien on the property by attachment or otherwise. Overstreet v. Manning, 67 Tex. 657. And see Ransom v. Schmela, 13 Neb. 77.

Subsequent Creditors — Conditional Sales. (See also the titles CONDITIONAL SALES, vol. 6, p. 494; RECORDING ACTS.) — A statute provided that no sale of goods or chattels where possession was not delivered to the vendee should be subject to any condition whatever as against creditors of the vendee or subsequent purchasers, unless acknowledged and recorded. In construing this statute, the court, in Defiance Mach. Works v. Trisler, 21 Mo. App. 71, said: "Although the word *creditors* is used in the statute without qualification, and the word 'purchasers' is qualified by the word 'subsequent,' yet we are clear, in view of the mani-

fest purpose of the statute, that the word *creditors* should be construed to mean subsequent *creditors*. This construction comports with the general policy of all acts which require the recording of instruments conveying personal property."

In Densmore v. Tomer, 14 Neb. 392, the court, in construing a similar statute, said: "In designating the classes of persons which the statute protects against such sales, 'the *creditors* of the vendor' and 'subsequent purchasers in good faith' are named. The designation '*creditors* of the vendor' is general, and nominally includes them all, whether they became such either before or after the time of making the sale. See section 11 of our statute of frauds. But, as if to remove all doubt respecting this matter, the following section expressly defines the word *creditors*, as here used. It declares that 'it shall be construed to include all persons who shall be *creditors* of the vendor or assignor at any time whilst such goods and chattels shall remain in his possession or under his control.'"

Same — Existing Creditors. — Construing a statute making a sale fraudulent as against existing *creditors*, where possession is retained by the vendor, the court, in McAfee v. Busby, 69 Iowa 331, said: "The defendants became the *creditors* of D. T. McAfee after he gave the property to the plaintiff, and therefore it is claimed that he is not an existing *creditor* within the meaning of the statute. But in Fox v. Edwards, 38 Iowa 215, it was held that the term '*existing creditors*' cannot be limited to those only who were *creditors* when the invalid sale was made. 'It continues to be invalid until the possession is changed, the instrument recorded, or notice given; and any *creditors* becoming such while the invalidity continues are, as to that sale, existing *creditors*.'"

2. Bona Fide Creditor — Marriage Settlement — Recording Acts. (See also the titles MARRIAGE SETTLEMENTS; RECORDING ACTS.) — As used in the Georgia statute of 1847, requiring that marriage settlements be recorded, the term "*bona fide creditor*" means one who has given credit to a husband on the faith of the property contained in the marriage settlement. See Brown v. Spivey, 53 Ga. 159; Cunningham v. Schley, 41 Ga. 435.

In Cloud v. Dupree, 28 Ga. 173, it was held that the expression "*bona fide creditor*" in an act providing for the recording of marriage settlements means a *creditor* who gave credit on the faith of the property contained in the marriage settlement. The court said: "The purchaser, *creditor*, surety, are to be without notice, and also *bona fide*. They are to be something more, then, than mere real purchasers, *creditors*, sureties, without notice. They are to be also something, to adapt them to the *bona fide*. What is there, to be that additional thing, except this: that they are to

Bankruptcy and Insolvency. (See also the title **INSOLVENCY AND BANKRUPTCY**.) — The term "creditors" as used in various connections in bankruptcy acts has received frequent construction by the court, for which reference may be had to the notes.¹

purchase, give credit, become sureties, relying *bona fide* — 'in good faith' — on the property contained in the marriage settlement? We see nothing. Therefore, not to hold that this is what was meant by the words *bona fide* would seem to be equivalent to rejecting those words, or at least equivalent to rendering them inoperative and useless."

In *Cardenas v. Miller*, 108 Cal. 250, it was held that the terms *bona fides* and "good faith" had no natural application to a creditor. The court said: "The term 'good faith' as applied to a purchaser, *ex vi termini* means one who purchases without notice and for value. Black Law Dict. This term has no natural application to a creditor who is of necessity such for value; and without value, either express or implied, he is not a creditor. No sufficient reason is discerned for supposing that the lawmakers intended to modify the term creditor by the language naturally applying to subsequent purchasers and incumbrancers."

Bona Fide Creditors. — In *Thomason v. Scales*, 12 Ala. 309, it was held that the term "*bona fide creditors*" in an act to prevent the sacrifice of real estate, did not mean creditors at large of the debtor, but only such as had ascertained the *bona fides* of their debts by obtaining judgment. The court said: "The term *bona fide*, when applied to a purchaser, has a definite ascertained meaning, but when the same term is applied to a creditor the sense in which it is used is not so clear, especially in the connection in which it is found. One may assert an unfounded claim against another, but in no just sense can he be termed a creditor. The term is the correlative of 'debtor,' and can only be applied to one who has a just claim for money. It is therefore quite probable that in prefixing the emphatic term *bona fide*, such an ascertained claim as the law presumes to be *bona fide* was intended, because it is ascertained to be due, by the judgment of a court, after a contestation. It is but fair to presume it was not employed without meaning, and this was most probably what was passing in the legislative mind at the time of its enactment. Independent, however, of the argument drawn from the peculiar phraseology of the statute, we think the term creditors was not intended to mean creditors at large of the debtor, but such only as have ascertained the *bona fides* of their debt by obtaining a judgment upon it. This has been the construction placed on the word creditors in analogous cases."

Bona Fide Stock — Register in Company's Books. — An Alabama statute provided that no transfer of stock should be good as against *bona fide creditors*, without notice, except the same should have been registered in the company's books. It was held that an attaching creditor who perfected his lien by the recovery of a judgment was a *bona fide creditor*. The court said: "In *Jones v. Latham*, 70 Ala. 164, in which the creditor claimed no attachment levy, but only a judgment, we said, speaking of section 2043 of the Code: 'We have uniformly

interpreted the words "*bona fide creditors*," in statutes like this, to mean judgment creditors having a lien.' As we have said, that was not a question in that case. Possibly the proposition was stated too broadly, and was liable to mislead. But is not the Berney National Bank a judgment creditor having a lien?" *Berney Nat. Bank v. Pinckard*, 87 Ala. 577. See generally the title **STOCK AND STOCKHOLDERS**.

1. Bankruptcy — Government. — In *Smith v. Hudson*, 50 Wis. 283, it was held that in a bankrupt act the word creditor or creditors did not include the United States so that a discharge in bankruptcy would relieve the debtor of his obligation to the government. See also *U. S. v. Herron*, 20 Wall. (U. S.) 251.

Insolvency — Bastardy. — Under the Code of *North Carolina*, § 2948, providing that every creditor opposing the insolvent's discharge may suggest fraud, a mother to whom an allowance has been made in bastardy is a creditor of the father of her child, and may suggest fraud in answer to his petition for discharge. *State v. Parsons*, 115 N. Car. 730.

Bankruptcy — Receiver. — In an action in the English Chancery Division a receiver was appointed to collect and receive goods comprised in a charge given to the plaintiffs by one of the defendants, including therein any balance of the proceeds of the goods so charged in the hands of the other defendant. An order was subsequently made for the payment by the last-mentioned defendant to the receiver of a specific sum, being money received by him in respect of the proceeds of the goods, and comprised in the charge. It was held that the receiver was not a creditor entitled to present a bankruptcy petition against such defendant within the meaning of the Bankruptcy Act. Lord Esher, M. R., said: "Is, then, the sum claimed by the petitioner a debt owing to him as a creditor of the appellant? The petitioner is a receiver. He is not a trustee. There is no debt due to him from the appellant. He could not sue for this sum of money in his own name either at law or in equity. Even if he could by the authority of the court sue for it in his own name, is the money due to him personally either at law or in equity? At law it is certainly not. The debt was due to another person for whom he is not a trustee. The money will not be his when he has got it. Would it be his in equity? I apprehend that he would hold it subject to the authority of the court, who would deal with it according to the circumstances of the case, but certainly not for his benefit." *In re Sacker*, 22 Q. B. Div. 183. See also *Ex p. Muirhead*, 2 Ch. Div. 22.

See generally the title **RECEIVERS**.

Insolvency — Release — Corporation. (See generally the titles **DISSOLUTION OF CORPORATIONS**; **INSOLVENCY AND BANKRUPTCY**; **STOCKHOLDERS**.) — It was held that a release of a debt due from a corporation by its creditor, and a judgment discharging the debtor pursuant to the provisions of the *Minnesota* in-

Indorsers, Sureties, etc. (See also the title SURETYSHIP.)—A surety has been held the creditor of his principal within statutes against fraudulent conveyances.¹

solvency law, releases and discharges the stockholders of said corporation from their statutory liabilities. The court said: "A *creditor*, says Bouvier, is one 'who has a right to require the fulfilment of an obligation or contract,' and this definition is as complete as any. Unless there be a debtor, one whose duty it is to pay, and of whom the debt can be demanded, there cannot be a *creditor* to enforce and compel payment. One of these parties cannot have a being without his correspondent, and it would be a most perplexing task should we attempt to sustain an assertion that there still remained a *creditor* after the debtor, as such, had ceased to exist. In this instance there is no dispute but that the debts were as completely discharged as if paid in full, and the corporate debtor absolutely and unconditionally released from further liability. As the releases and judgment in the insolvency proceedings extinguished the legal obligations against the insolvent, there remains no *creditor* of the corporation, within the meaning of the statute, who can enforce the liability fixed by the constitution; so that, as the debt against the corporation was extinguished by the releases and judgment, the personal liability of the defendant stockholders was also extinguished." *Mohr v. Minnesota Elevator Co.*, 40 Minn. 348.

Lease—Dissolution of Corporation.—A corporation entered into a lease with the appellants, and thereby agreed to pay to them a stipulated annual rent, in monthly installments, for the term of ten years. Before the expiration of the term the corporation was dissolved. It was held that the appellants were entitled to prove their claim against the receiver, who was authorized, by the statute under which the corporation was dissolved, to distribute the assets ratably among the *creditors* who proved their debts. The court said: "When the entire provisions of the statute are read together, and the distinction between it and insolvency laws, under which the legal life of the insolvent is not extinguished by the proceedings against him, is kept in mind, it is manifest that the words 'debts' and *creditors* are not used therein in their restricted and technical sense, but in their general and popular meaning. As those words are used in this statute, a *creditor* is he who has the right to require the fulfilment of a legal obligation or contract; and a debt, any legal claim for money. *Atwater v. Manchester Sav. Bank*, 45 Minn. 346; *Spader v. Mural Decoration Mfg. Co.*, 47 N. J. Eq. 18." *Kalkhoff v. Nelson*, 60 Minn. 284.

Same—Assignee.—In *Adamson v. Cheney*, 35 Minn. 474, it was held, under the provisions of the *Minnesota* Insolvency Act, that the person in whose favor a claim against the insolvent was filed and allowed, was a *creditor* by whom a release must be made and filed, and that the term *creditor* did not include the assignee of such person.

Insolvency. (See also the title INSOLVENCY AND BANKRUPTCY.)—But in *In re Nicolin*, 55 Minn. 130, it was held, that any person to

whom an insolvent is actually indebted is a *creditor* within the meaning of that section of the *Minnesota* Insolvency Act, which provides for a petition by *creditors* for the removal of a receiver or assignee. The court said: "In the ordinary and almost universal definition of the word, a *creditor* is a person to whom a debt is owing by another person, called a debtor; and, unless it clearly appears that it was used in a different sense in the statute now under consideration, we should give the word its usual and generally accepted meaning, although it is not an uncommon thing for courts to construe words as having been used in legislative enactments in a limited sense and with a special or restricted meaning. Two instances may here be referred to where this court, when construing this same word *creditors* as used in other sections of the Insolvency Act, has held that the popular meaning just mentioned was not intended: *Adamson v. Cheney*, 35 Minn. 474; *Olson v. O'Brien*, 46 Minn. 87. But the reasons for declaring that the word had a special and limited meaning as used in the sections then being considered are obvious, and neither of the cases are in point here. Nor are the decisions under the National Bankruptcy Act of 1867, cited by counsel, of value in support of their position, as will be seen upon an examination of the provisions of the act itself, regulating the manner in which assignees were to be selected. The *creditors* referred to in the statute of 1889, and upon whom is conferred the right to petition for the removal of an assignee or receiver, are all persons to whom the insolvent may be indebted." It was contended in this case that a party was not a *creditor* until he had filed proof of his claim with the assignee or receiver.

Warehouseman—Holder of Receipt—Insolvency.—In *Daniels v. Palmer*, 41 Minn. 116, it was held that the holder of a wheat ticket or receipt issued by a warehouseman who had become insolvent was a creditor within the spirit and meaning of the insolvency law. The court said: "In *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343, this court had occasion to adopt and approve Bouvier's definition of a *creditor*, in proceedings in insolvency. It is one, he says, 'who has a right to require the fulfilment of an obligation or contract.' In this large sense it means more than a person to whom money may be owing."

1. Fraudulent Conveyances—Suretyship—Contingent Liability. (See also the title FRAUDULENT SALES AND CONVEYANCES.)—In *Keel v. Larkin*, 72 Ala. 500, it was held that a surety was a *creditor* within the meaning of the statute, and entitled to protection against fraudulent and voluntary conveyances from the time a contingent liability was assumed, although he had no technical right of action until he had paid the debt. So the covenant in a deed for land containing a general covenant of warranty is a *creditor* of the covenantor. *Gannard v. Eslava*, 20 Ala. 732. And in *Jackson v. Seward*, 5 Cow. (N. Y.) 71, it is said: "The question of *creditor* or not cannot turn on the ground of contingent liability when con-

Other Examples. — In the note will be found a number of cases in which the term "creditor" has received construction.¹ Creditors are simple contract,

sidering this act. If it should, all indorsers and sureties would be deprived of its protection."

In *Fearn v. Ward*, 65 Ala. 38, it was held that a contingent liability is as fully protected against fraudulent and voluntary conveyances as a claim certain and absolute; and that one whose claim accrued from a contract in existence at the time such conveyance was made, was a *creditor* within the meaning of the statute. To the same effect, see *Bidd v. Freeman*, 59 Ala. 612; *Jenkins v. Lockard*, 66 Ala. 377. And see *Gannard v. Eslava*, 20 Ala. 743.

A surety is the *creditor* of his principal, and may impeach voluntary conveyance by the latter, where he was bound as surety at the date of the conveyance, though he did not pay until afterwards. *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460.

Surety—General Assignment for Benefit of Creditors. — In *Rea v. Jaffray*, 82 Iowa 231, it was held that one standing in the relation of surety for an insolvent who has made a general assignment for the benefit of *creditors*, is a *creditor* within the meaning of the provision of the *Iowa* Code relating to assignments for *creditors*. The court said: "She is a *creditor*, because she 'has a right to require the fulfillment of an obligation or contract;' because she gave 'credit in business matters.' It would, in our opinion, do violence to the language and manifest purpose of the statute to say that one who was personally liable as surety, or whose separate property stood pledged for the debt of him who had made assignment for the benefit of all his *creditors*, could not be heard to demand that the proper distributive share should be applied to the debts for which he or his property were thus bound."

Recording Acts—Chattel Mortgages. — The term *creditors*, as used in the *Michigan* statute avoiding unrecorded chattel mortgages as against *creditors* of the mortgagor, has been held to include those who have entered into contracts with the parties as indorsers, guarantors, or sureties. *Cutler v. Steele*, 85 Mich. 627.

Insolvency—Accommodation Acceptor. — In *Evans v. Ross*, 30 U. C. C. P. 121, an accommodation acceptor who had not paid the note was held not to be a *creditor* within the meaning of an insolvency act. And compare *Lewis v. Tudhope*, 27 U. C. C. P. 505.

Indorser. — In *Dunnigan v. Stevens*, 122 Ill. 396, an indorser was held a *creditor*.

But in *Meriden Steam Mill Lumber Co. v. Guy*, 40 Conn. 163, it was held that upon payment of the note, and not before, the indorser becomes a *creditor*.

Wagner's Missouri Statutes, § 40, p. 89, authorizing the executor or administrator of any estate to assign any note or bond of the estate to any *creditor*, legatee, or distributee, in discharge of an amount of his claim equal to the amount of such note or bond, does not permit an administrator to assign a note belonging to the estate under his charge, to a person who is jointly liable with the estate

upon a note to a third person. The joint obligor is not a *creditor* of the estate, though he may become such by paying off the note. *Chandler v. Stevenson*, 68 Mo. 450.

Contingent Liability. — Where a statute provided that a chattel mortgage should be void as against the *creditors* of the mortgagor, unless the mortgage or a true copy thereof should be filed, it was held that an indorser whose liability had not become fixed by maturity and dishonor of the note to which he was a party was not a *creditor* of the mortgagor within the meaning of said act. *Karst v. Gane*, 61 Hun (N. Y.) 533, affirmed 136 N. Y. 316.

Bankruptcy—Contingent Liabilities. — In *Wood v. De Mattos*, L. R. 1 Exch. 100, the word *creditor* in a bankrupt act was held to have been used in the sense of a person having a claim which can be proved in bankruptcy, whether strictly a debt or not, even though the liability is contingent.

1. Garnishment. (See generally the title GARNISHMENT.) — A judgment *creditor* does not, properly speaking, become a *creditor* of the garnishee by service of an attaching order upon the latter. The garnishee continues to be debtor to his own *creditor*, the judgment debtor, until he has paid the amount owing into court, or to the attaching *creditor*, after order so to pay, or a levy of the amount has been made of his property, when he ceases to be a debtor as to the amount paid or levied. *Wardrobe v. Canadian Pac. R. Co.*, 7 Ont. Rep. 321.

A person who has obtained a garnishee order directing a company to pay him a debt due by him to a *creditor* of his, does not thereby become a *creditor* of the company. *In re Combined Weighing, etc., Mach. Co.*, 43 Ch. Div. 99.

Trustees. — A *cestui que trust* is not a *creditor* of his trustee. *Ex p. Taylor*, 18 Q. B. Div. 295; *Myers v. Board of Education*, 51 Kan. 87. See also *Ex p. Stubbins*, 17 Ch. Div. 58; *Sinclair v. Wilson*, 20 Beav. 324. See also TRUSTS AND TRUSTEES.

In *Glenn v. Reid*, 74 Md. 239, it was held that a party claiming as trustee, and not in his individual capacity, to be the largest *creditor* of an intestate's estate, was not entitled to letters of administration under the *Maryland* Code which provides that letters may be granted to the largest *creditor* where there are no relations.

Executors and Administrators. — A *New York* statute provided that *creditors* of the estate might petition for the revocation of letters testamentary. It was held that under this statute the person who had sold goods to a firm composed of a surviving partner and the executors of a deceased partner could not petition, the deceased having provided in his will that his executors should only devote that portion of his estate invested in the firm to the carrying on of the firm business. The court said: "A *creditor* is a person having a claim or demand upon which a judgment for a sum of money could be recovered in an action. Now, as there can be no doubt that the present peti-

specialty, bond, or judgment creditors, according to the nature of the obligation. Preferred creditors are entitled to some special prerogative either in the manner of recovery or the order in which their claims are paid.

tioner could not recover upon his demand as against any assets of the estate not properly employed by the executors in the business continued subsequent to the death of the testator, but would be confined as to his recovery to such assets, it is clear that he is not a *creditor* of the estate, for the estate would properly include both." Matter of Stern, 2 Connolly (N. Y.) 204.

Assignee of a Debt. — In Matter of London, etc., Flint Glass, etc., Co., 1 De G. F. & J. 257, it was held that the assignee of a debt was a *creditor* for the purposes of presenting a petition for the winding up of a company within the English Companies' Act of 1862. See also *In re Paris Skating Rink Co.*, 5 Ch. Div. 959. And see generally the title DISSOLUTION OF CORPORATIONS.

Assignee — Debts of Decedents. — In Matter of Moderno, 63 Hun (N. Y.) 261, 28 Abb. N. Cas. (N. Y.) 57, 22 Civ. Pro. Rep. (N. Y.) 72, it was held that the assignee of a claim against the estate of the decedent was a *creditor* within a statute allowing a *creditor* to petition the surrogate court to pay. See generally the titles DEBTS OF DECEDENTS, *post*; SURROGATE.

Appeal from Surrogate by Payee of a Note. — In *Lake v. Albert*, 37 Minn. 453, it was held that the payee of a note given for the benefit of another, was a *creditor* within the meaning of the statute allowing appeals from the probate court.

Claimant — Debts of Decedent. (See also the title DEBTS OF DECEDENTS, *post*.) — A *California* statute required the representative to give notice to *creditors* of the deceased, requiring all persons having claims against the deceased to exhibit them. In construing this statute, the court said: "It would seem to be clear, from the different sections of the act, taken and construed together, as well as from the nature and reason of the case, that the words 'claimant' and 'claim' are used as synonymous with *creditor* and 'legal demand for money,' to be paid out of the estate." *Gray v. Palmer*, 9 Cal. 637.

Personal Liability. — In *Buchanan v. Reid*, 43 Minn. 172, it was held that the purchaser at the foreclosure of a junior mortgage might, within a year from the foreclosure sale, redeem from the foreclosure of a prior mortgage "as a *creditor* having a lien." The court said: "That the purchaser has a lien for the purchase price, does not remove the difficulty the court found in *Tinkcom v. Lewis*, 21 Minn. 132, in holding him a *creditor* having a lien. In that opinion it is said: 'For the mortgage debt was satisfied by the sale, and the purchaser at a mortgage sale does not become a *creditor* of the mortgagor, in the usual sense of the term.' We think, however, on reflection, that the term *creditor*, as used in the statute, ought not to be construed as having the limited sense of a personal *creditor*. There may be a *creditor*, so far as concerns the land alone, without the personal relation of debtor and *creditor*, in the ordinary sense, existing. Thus a mortgage might be given

without any personal liability, any liability beyond the land, any right in the *creditor* of recourse except to the land, or a mortgage might secure the debt of a third person. In such case the mortgagee would not be a *creditor* of the mortgagor, in the usual sense of the word. Yet there could be no doubt that he would have the right of redemption as a *creditor* having a lien, within the meaning of the statute. Construing the term *creditor*, as used in the statute, as including one having a right of recourse to the land for satisfaction of his claim or demand, though he may have no personal claim against the mortgagor, we think the purchaser at a mortgage foreclosure sale comes within the class of redemptioners, *creditors* having liens."

Fire Insurance. (See the title FIRE INSURANCE.) — A policy provided that in case of loss the assured should produce a certificate of loss of a magistrate not concerned in the loss as a *creditor*. In construing this provision the court said: "The phrase 'not concerned in the loss as a *creditor*' cannot be supposed to disqualify every magistrate who may chance to be a *creditor*, even to a small amount, of the assured. The purpose of the requirement is to obtain the statement of a reputable person who has no personal interest in the policy which may tempt him to state what is not true. Such temptation would not exist when he was an unsecured *creditor* of a solvent assured; and the phrase on which the defendant relies is to be interpreted as requiring the certificate of a magistrate who is not concerned in the loss by reason of having an interest in the property insured, or in the policy as security for an obligation to him." *Dolliver v. St. Joseph F. & M. Ins. Co.*, 131 Mass. 44.

Directors of a Corporation. — In *McDowall v. Sheehan*, 129 N. Y. 200, it was held that the word *creditors*, as used in an act making the stockholders of a corporation liable to the *creditors* until the whole amount of the capital stock had been paid in, did not include the directors of the corporation. See generally the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; STOCKHOLDERS.

Taxes. — In *State v. Georgia Co.*, 112 N. Car. 38, it was held that a state and county having, through the board of commissioners sitting with the justices of the peace, assessed the property of a corporation for taxation, and placed the tax list in the hands of the sheriff, who could not find any property of the corporation upon which to levy, were *creditors*, and, as such, entitled under the statutes of the state to bring proceedings in the nature of a *creditor's* bill against such corporation. The court said: "Whatever construction may be placed upon the word 'debt,' no such restricted meaning is ever applied to the words *credit* and *creditor*. 'A *creditor* is he who has a right to require the fulfilment of an obligation or contract.' *Bouvier's Law Dict.* Credits comprise 'every claim or demand for money, labor, interest, or other valuable things,

CREDITORS' BILL. — For a full treatment see 5 ENCYC. OF PLEADING AND PRACTICE, p. 388.

CREEK. — This term has no definite legal meaning. According to Webster it sometimes signifies a small bay, inlet, or cove, and generally, in the United States, a small river.¹

CREMATION. — See the title DEAD BODY, *post*.

CREW. (See also the titles MASTERS OF VESSELS; SEAMEN.) — A ship's company, including officers as well as seamen. The term is occasionally used as exclusive of the officers; and sometimes, but rarely, as including the master as well as the officers and seamen.²

due or to become due.' Acts 1891, c. 326, § 85. The plaintiffs, being *creditors*, could formerly bring a *creditor's* bill in equity, and now, under sections 668 and 701 of the code, against the corporation, with or without proceedings enforcing its dissolution." See generally the title TAXATION.

Heirs. (See generally the title DEBTS OF DECEDENTS, *post*.) — A statute authorized the probate judge to extend the time allowed for proving claims. It was held that this did not authorize an extension of time for an heir to contest a *creditor's* claim. The court said: "The plaintiff contends that the term *creditors*, as expressed in Gen. Stat., c. 180, § 12, should receive such a construction as to include heirs; but we are unable to discover anything in any of the various statutes to which we have been referred by counsel, which indicates any intention of the legislature to give to these terms, *creditor* and 'heir,' any other than their natural and usual signification. They have no legal or technical meaning different from that which belongs to the ordinary sense of language. So far from being synonymous or associated in a class of similar condition, they are, when applied to an interest in an estate, so dissimilar as to be antagonistic; the heir at law succeeding to the obligations of the deceased to the *creditors* of the estate." Graves v. Graves, 58 N. H. 24.

Poor Debtors' Oath. — The *creditor* to whom notice of the desire of a debtor committed on execution, to take the poor debtors' oath, is required to be given, is the person in whose name the action in which the judgment was recovered was brought, although it is stated in the record to have been brought for the benefit of another. Follansbee v. Bird, 8 Cush. (Mass.) 289. See generally ENCYC. OF PL. AND PR., title POOR DEBTORS.

Validity of Claim — Insolvent Estates of Deceased Persons. — A statute provided that commissioners on the insolvent estates of deceased persons, appointed to receive and act upon claims presented against such estates, should give a written or printed notice of the times and places of their meetings to all known *creditors* residing without the probate district. It was held that the term *creditors* embraced persons claiming to be such, and was not limited to those having valid claims. The court said: "Again, this expression, 'to all known *creditors*,' does not mean that the *creditors* must be known to be so in fact before they are entitled to the notice required by law. Such knowledge oftentimes cannot be possessed by triers even after the fullest hearing has been had on the subject. The statute

must have a reasonable construction, and not one which will defeat the object of its enactment. We think the expression includes all persons who claim to be creditors of the estate, where the fact is known to the executors or administrators or to the commissioners. Such persons are entitled to their day in court, and have the right to be heard, whether they are *creditors* in fact or not. The construction claimed by the appellant would prejudice their cause without a hearing, when the statute provides a tribunal to determine the case upon its merits." Davis's Appeal, 39 Conn. 399.

1. **Creek.** — French v. Carhart, 1 N. Y. 107. See also Wilson v. Black Bird Creek Marsh Co., 2 Pet. (U. S.) 245; Surgett v. Lapice, 8 How. (U. S.) 48; Gulf Pond Oyster Co. v. Baldwin, 42 Conn. 255. It has, however, been said that "the term *creek* itself properly imports a recess, cove, bay, or inlet in the shore of a river, and not a separate or independent stream, though sometimes used in the latter meaning." Schermerhorn v. Hudson River R. Co., 38 N. Y. 103. In this case it was applied to that part of a river flowing between an island and the shore.

Obstruction. — A *creek* does not cease to be such merely because its course may be opposed by some natural or artificial obstruction. French v. Carhart, 1 N. Y. 107.

Third Creek. — Where an entry of land is designated as "beginning six hundred and forty poles north from the mouth of the third *creek* running into the Ohio above the mouth of the Little Miami," the *creek* which is third numerically must be taken to be meant, unless some other stream can be shown by reputation or notoriety to have been considered the third *creek*. Watts v. Lindsey, 7 Wheat. (U. S.) 158.

2. U. S. v. Winn, 3 Sumn. (U. S.) 209. In deciding this case, Story, J., said: "Now, the word *crew* has several well-known significations. In its general and popular sense, it is equivalent to 'company.' Thus, for example, we find the most general definition of it, laid down in Johnson's Dictionary, to be: 'a company of people associated for any purpose.' And the same learned lexicographer adds, that when spoken with reference to a ship, the *crew* of a ship, or ship's *crew* means 'the company of a ship.' * * * Falconer, in his Marine Dictionary, says: 'The *crew* of a ship (*équipage*, French) comprehends the officers, sailors, seamen, marines, ordinary men, servants, and boys.'"

Officers. — By treaty it was provided that the consuls of either nation should sit as judges and arbitrators in differences between the

CRIB. (See also CORNCRIB, vol. 7, p. 596). — "Crib" has various definitions, as the manger of a stable; a bin; a frame for a child's bed; a small habitation.¹

CRIM. CON. — See the title CRIMINAL CONVERSATION.

CRIME AGAINST NATURE. (See also the title SODOMY; and see BESTIALITY, vol. 4, p. 4; BUGGERY, vol. 4, p. 492.) — The phrase "crime against nature" includes both bestiality and sodomy.²

CRIME — CRIMINAL. (See also CIVIL, vol. 6, p. 34, and the references there given; and see the title CRIMINAL LAW, *post*, and the references there omitted.) — A crime or criminal offense has been defined as an act committed or omitted in violation of a public law either forbidding or commanding it.³

Wrong Punished by State in Criminal Proceeding. — A crime is more accurately characterized as a wrong directly or indirectly affecting the public, to the commission of which the state has annexed certain punishments and penalties, and which it prosecutes in its own name in what is called a criminal proceeding.⁴

captains and *crews* of the vessels belonging to their respective countries. It was held that the word *crews* as here used includes all the ship's company, all the seamen and officers except the captain. *The Marie*, 49 Fed. Rep. 286. See generally the title CONSULS, vol. 7, p. 6.

But where "master" and *crew* are not used in contradistinction, a master is a member of the *crew*. *Millaudon v. Martin*, 6 Rob. (La.) 540.

Articles. — A provision in articles of service, signed by a seaman, that the *crew* were, if required, to be transferred to any other ship in the same employ, was held to be several as to each of the crew, and not merely joint as to all. *Frazer v. Hatton*, 2 C. B. N. S. 525, 89 E. C. L. 525. "Any of the *crew*" means any one or more of the *crew*. *U. S. v. Harriman*, 1 Hughes (U. S.) 525.

A Passenger is not one of the *crew* or ship's company. *U. S. v. Libby*, 1 Woodb. & M. (U. S.) 231.

1. **Crib.** — *Wood v. State*, 18 Fla. 969.

In *State v. Laughlin*, 8 Jones L. (53 N. Car.) 355, it is said: "A *crib*, according to Webster, means in the United States a small building raised on posts, for storing Indian corn." And in that case it was held that an indictment for burning a barn was not sustained by proof of the burning of a *crib*.

Crib of Corn. — A *crib* of corn is an indefinite quantity, not only because the capacity of a *crib* is not fixed, but because the expression does not necessarily indicate that the *crib* is full. A contract to redeliver a *crib* of corn does not require the delivery of a full *crib*, but only of the amount of corn originally delivered; and evidence may be given to show that amount. *Masterson v. Goodlett*, 46 Tex. 402.

2. *Ausman v. Veal*, 10 Ind. 355.

3. **Blackstone** (4 Bl. Com. 15) defines a *crime* or misdemeanor to be an act committed or omitted in violation of a public law either forbidding or commanding it. This definition is quoted with approval in the following cases:

England. — *Butt v. Conant*, 1 B. & B. 548.

Colorado. — *Greeley v. Hamman*, 12 Colo. 95.

Connecticut. — *State v. Bishop*, 7 Conn. 185.

Florida. — *Theisen v. McDavid*, 34 Fla. 440.

Georgia. — *State v. Savannah Corp.*, T. U.

P. Charl. (Ga.) 235, 4 Am. Dec. 708; *Williams v. Augusta*, 4 Ga. 513.

Illinois. — *Slattery v. People*, 76 Ill. 220.

Michigan. — *Slaughter v. People*, 2 Dougl. (Mich.) 334, note.

Mississippi. — *Ex p. Hickey*, 4 Smed. & M. (Miss.) 783.

Missouri. — *Ex p. Hollwedell*, 74 Mo. 395; *Kansas City v. Clark*, 68 Mo. 588.

Montana. — *Helena v. Gray*, 7 Mont. 486.

Nebraska. — *Bohner v. Bohner*, 46 Neb. 204.

South Carolina. — *State v. Collins*, 1 McCord L. (S. Car.) 355.

Vermont. — *State v. Peterson*, 41 Vt. 511.

Wisconsin. — *Bergin's Petition*, 31 Wis. 386.

4. **Wrong Punished by State in Criminal Proceeding.** — *State v. Thibodeaux*, 48 La. Ann. 602, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 643; *Desty's Am. Crim. Law*, § 1a. See also 1 Bish. New Crim. Law, § 32; 4 Cooley's Blackstone, p. 5, editor's note, citing Austin on Jurisprudence, lecture 17.

Other Definitions. — The proper definition of the word *crime* is an offense for which the law awards punishment. *Mann v. Owen*, 9 B. & C. 595, 17 E. C. L. 456. See also Peckham, J., in *McCord v. People*, 46 N. Y. 473.

The proper meaning of *crime* is an indictable offense. *Martin, B.*, in Atty.-Gen. v. Radloff, 10 Exch. 96, 26 Eng. L. & Eq. 416.

In *Matter of Voorhees*, 32 N. J. L. 147, the court said: "But I am not aware that any jurist, in any age of the common law, has ever doubted as to the meaning of the word *crime*. It is *nomen generalissimum*, and has always been considered as embracing every species of indictable offense."

A *crime* is an act committed or omitted in violation of a public law either forbidding or commanding it. *Bouvier's Law Dict.*, quoted in *U. S. v. Jacobi*, 1 Flipp. (U. S.) 111.

In *State v. Bishop*, 7 Conn. 185, it is said: "Any offense against the public good and the first principles of justice and common honesty is a *crime*; and that the violation of a statute law made for the universal protection of the community and inflicting a penalty for the fraudulent privation of property, is of this description, there exists no doubt." Quoting 2 Hawk. P. C., c. 26, § 1.

An act committed in violation of a public law either forbidding or commanding it. By

The Term "Crime" Includes Misdemeanors. (See generally the title CRIMINAL LAW, *post.*)—Although in common usage the word "crime" commonly denotes such offenses as are of a deep and atrocious dye, and smaller faults

this are meant, of course, those wrongs of which the law takes cognizance as injurious to the public, and which it punishes in what is called a criminal proceeding, prosecuted by the state in its own name, or in the name of the people or the sovereign. Bergin's Petition, 31 Wis. 386.

A *crime* is an offense against the sovereignty, and can only be taken notice of and punished by the sovereignty offended; others have no concern in it, and must treat it as a matter of indifference. *People v. Williams*, 24 Mich. 163.

An offense which may be the subject of criminal procedure is an act committed or omitted in violation of a public law either forbidding or commanding it. Blatchford, J., in *U. S. v. Eaton*, 144 U. S. 677, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 642.

In *State v. Ostwalt*, 118 N. Car. 1208, it is said. "'A *crime*,' says Bishop, 'is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name.'" 1 Bish. Cr. Law, § 32."

A *crime* is defined as any offense for which any *criminal* punishment may be inflicted. *Temple v. People*, 4 Lans. (N. Y.) 123; *McCord v. People*, 46 N. Y. 470.

Fine.—In *U. S. v. Jacobi*, 1 Flipp. (U. S.) 111, it is said: "It is a general and sound rule of *criminal* law, that whenever the legislative power has declared an act or omission of an act to be punishable by fine or imprisonment, that act done or omitted wilfully is a *crime*, and may be punished by indictment."

Statutory Definition of Crime.—A crime is an act or omission forbidden by law and punishable upon conviction by death, or imprisonment, or fine, or removal from office, or disqualification to hold any office of trust, honor, or profit, under the state, or other penal discipline. *New York Penal Code*, § 3. See also *California Penal Code*, § 15.

In *Burgess v. State*, 44 Ala. 192, it is said: "A *crime* or public offense is an act done or an omission to act, which is forbidden by law, and which is punishable by death, by fine or imprisonment, or both by fine and imprisonment." *Citing* Rev. Code *Alabama*, § 3540.

By the statutes of *Arkansas* a crime or misdemeanor consists in a violation of public law, in the commission of which there must be a union or joint operation of act or intention, or criminal negligence. *Yoes v. State*, 9 Ark. 42. A similar definition is found in the statute of *Georgia*. *Hall v. State*, 3 Ga. 18.

Infamous Crimes. (See also the title INFAMOUS CRIMES.)—At common law, the term "infamous *crimes*" included treason, felony, and every species of *crimen falsi*, such as forgery, perjury, subornation of perjury, attaint of false verdict, and other offenses of the like description which involve the charge of falsity and affect the public administration of justice. *Com. v. Shaver*, 3 W. & S. (Pa.) 338.

As used in the Fifth Amendment of the

United States Constitution providing that "no person shall be held to answer for a capital or otherwise infamous *crime*, unless on a presentment or indictment of a grand jury," the words "infamous *crime*" mean a *crime* punishable by imprisonment in the state prison or penitentiary, with or without hard labor; and in determining whether the *crime* is infamous, the question is whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one. *Bannon v. U. S.*, 156 U. S. 464; *In re Claasen*, 140 U. S. 200; *Mackin v. U. S.*, 117 U. S. 348; *Ex p. Wilson*, 114 U. S. 417.

See generally the title INFAMOUS CRIMES.

High Crimes and Misdemeanors are such immoral or unlawful acts as are nearly allied and equal in guilt to felony, yet, owing to some technical circumstance, do not fall within the definition of felony. *State v. Knapp*, 6 Conn. 415, 16 Am. Dec. 68, *citing* 1 Russell on Crimes 61.

But, while the meaning of this phrase in the statutes of *Connecticut* is thus settled, its meaning in the constitutional provision for impeachment in cases of "high *crimes* and misdemeanors" (U. S. Const., art. 2, § 2) is not well defined. The words in this connection are adopted from British constitutional and parliamentary law. See "The Law of Impeachment," by Judge William Lawrence, 6 Am. L. Reg. N. S. 645. These words, as used in British prosecutions by impeachment, have no definite signification, but are used merely to give greater solemnity. Christian's note to 4 Bl. Com. 5. The word "misdemeanor" in this sense is said to mean no more than maladministration or misconduct which need not be indictable. 6 Am. L. Reg. N. S. 649. The meaning of the phrase was much discussed during the impeachment of President Johnson, but no definite general conclusion was arrived at. See 4 Cooley's Blackstone 5, note.

See generally the title IMPEACHMENT.

Distinguished from Civil Injuries.—In *State v. Williams*, 7 Rob. (La.) 271, it is said: "'The distinction of public wrongs from private, of *crimes* and misdemeanors from civil injuries, seems principally to consist in this, that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or *crimes* and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity.'" 4 Black. Com. 5."

Crime and Criminal Transaction Distinguished.—In *Whitford v. State*, 24 Tex. App. 492, the court said: "The doctrine of merger does not solve the question, but the doctrine of 'carving' does to some extent aid in its solution. Says Mr. Bishop: 'There is a difference between a *crime* and a *criminal* transaction. A *criminal* transaction may be defined to be

and omissions of less consequence are comprised under the name of misdemeanors, yet "crime" and "misdemeanor" in legal language are synonymous terms, and the word "crime" in a statute has frequently been held to include misdemeanors.¹

an act or series of acts proceeding from one wrongful impulse of the will of such a nature that one or more of them will be indictable.

* * * In reason there may be any number of distinct *crimes* in a single *criminal* transaction. This comes from the fact that the words of our language being limited, while the transactions of life may almost be termed infinite in variety, and the lines to be drawn around specific offenses being necessarily incomparably more limited than the words, it is impossible there should be an exact outline of crime whose circumference shall exactly coincide with every *criminal* transaction. The consequence is that the law does, what it must, declare this combination a fact and intent to be indictable, then another combination, and another, and so on, until it is supposed to have proceeded far enough, when it stops. And when this is done, it is impossible the inhibitions should be so distinct that no one shall embrace anything forbidden by another. Therefore it is established doctrine that more than one offense may be committed by a man in one transaction. Whether a prosecution for one *crime* carved out of the one transaction should be held to bar an indictment for another *crime* carved out of the same transaction, is a different question; but the authorities appear to be that in some circumstances it will be, and in others it will not.²

In *Jett v. Com.*, 18 Gratt. (Va.) 966, it is said: "A *crime* or offense is the transgression of a law; and the same act may constitute several offenses. We have seen that the same act may be an offense against the United States, and at the same time an offense against the state. So the same act may constitute several offenses against the laws of the state; of which numerous illustrations are collected in 2 Leading Criminal Cases 555. The terms *crimes* and 'offenses,' therefore, do not properly signify the acts by which the laws are violated, but they signify the violations of law which those acts produce. And I see no reason for holding that they were not used in this sense in the judiciary act. Congress could give, and intended to give, to the courts of the United States cognizance of criminal acts, only so far as they constitute violations of the laws of the United States. So far as such acts violate the laws of the states, it was not in the power of Congress to confer the cognizance of them upon the federal courts." See also the title UNITED STATES COURTS.

1. *Crime Includes Misdemeanors.*—4 Bl. Com. 5. *England.*—Mann *v.* Owen, 9 B. & C. 595, 17 E. C. L. 456.

Georgia.—State *v.* Savannah Corp., T. U. P. Charlt. (Ga.) 235, 4 Am. Dec. 708.

Illinois.—Van Meter *v.* People, 60 Ill. 168.

Indiana.—Morton *v.* Skinner, 48 Ind. 123.

Kentucky.—Harrison *v.* Chiles, 3 Litt. (Ky.) 197.

Michigan.—Slaughter *v.* People, 2 Dougl. (Mich.) 334, note.

Minnesota.—State *v.* Sauer, 42 Minn. 258.

New York.—Matter of Clark, 9 Wend. (N. Y.) 212.

Pennsylvania.—Lehigh County *v.* Schock, 113 Pa. St. 373.

South Carolina.—State *v.* Cardoza, 11 S. Car. 256; State *v.* Collins, 1 McCord L. (S. Car.) 355.

Tennessee.—Sevier *v.* Justices, Peck (Tenn.) 334; Smith *v.* Smith, 2 Sneed (Tenn.) 473.

Texas.—Illies *v.* Knight, 3 Tex. 312.

Vermont.—State *v.* Peterson, 41 Vt. 511.

Wisconsin.—Bergin's Petition, 31 Wis. 383.

Crime is often used as comprehending a misdemeanor and as synonymous with it, and also of offense; in short, as embracing every indictable offense. State *v.* Thibodeaux, 48 La. Ann. 600.

The word *crime* in its more extended sense comprehends every violation of public law. In a limited sense it embraces offenses of a serious or atrocious character. Callan *v.* Wilson, 127 U. S. 540.

Fugitive from Justice.—The term *crime* as used in the provision as to fugitives from justice includes misdemeanors. Morton *v.* Skinner, 48 Ind. 123; Com. *v.* Dennison, 24 How. (U. S.) 99. See generally the title EX-TRADITION.

Assault and Battery—Misdemeanor.—The constitution of *Arkansas* provided that no man should be put to answer any *criminal* charge but by presentment or indictment. It was held that a charge of assault and battery was a *criminal* charge within this provision. Rec- tor *v.* State, 6 Ark. 190.

The constitution of *Wisconsin* forbade involuntary servitude except as a punishment for *crime*. It has been held that the legisla- ture might authorize a person convicted of a misdemeanor, *e. g.*, an assault, to be sentenced to imprisonment at hard labor. Bergin's Petition, 31 Wis. 386.

As to this constitutional provision see the titles CONSTITUTIONAL LAW, vol. 6, p. 963; PUNISHMENT; SLAVERY.

Trial by Jury. (See also the titles CONSTITUTIONAL LAW, vol. 6, p. 962; JURY AND JURY TRIAL.)—In Callan *v.* Wilson, 127 U. S. 549, it was held that, in the provision of the constitution of the *United States* that the trial of all *crimes* shall be by jury, the term *crime* included misdemeanors the punishment of which might involve the deprivation of the liberty of the citizen. The court said: "The third article of the constitution provides for a jury in the trial of 'all *crimes*, except in cases of impeachment.' The word *crime*, in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It

Crime and Offense. (See also OFFENSE.) — So the terms "crime" and "offense" are frequently used as synonyms.¹

Criminal. — "Criminal" means relating to, having the character of crime.²

embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the constitution to hold that no prosecution for a misdemeanor is a prosecution for a *crime* within the meaning of the third article, or a *criminal* prosecution within the meaning of the sixth amendment."

Accessories — Misdemeanor. — In *Van Meter v. People*, 60 Ill. 168, it was held that the *Illinois* statute in reference to accessories before the fact, applied to misdemeanors, although it used the word *crimes*. The court said: "As the case must be retried, it is proper to dispose of another point made by counsel for plaintiff in error. It is urged that our statute in regard to accessories before the fact does not apply to misdemeanors, because the word *crime* only is used in this section of the act. But this reason is not a valid one. The word *crime* comprehends misdemeanors. Every misdemeanor is a *crime*, though not one of the gravest character. Blackstone says, properly speaking, they are synonymous terms, though in common usage the word *crimes* is made to denote offenses of a deeper dye. Book 4, p. 5."

Misdemeanor — Threatening Letters. (See also the title THREATS AND THREATENING LETTERS.) — In *State v. Linthicum*, 68 Mo. 66, it was held that the word *crime*, in a statute making it an offense to threaten to accuse one of any *crime*, included a misdemeanor as well as a felony. The court said: "While all felonies are *crimes*, all *crimes* are not felonies; hence, if, as we think clear, the legislature intended to make the offense of sending a letter threatening to accuse one of a misdemeanor only, a felony, it was absolutely necessary to employ the word *crime* or some other appropriate word to embrace that class of offenses."

Costs. (See generally the title COUNTIES, vol. 7, p. 898.) — A statute provided for the payment of costs by the county when an innocent person was accused of *crime*. In construing this provision the court said: "Properly speaking, *crimes* and 'misdemeanors' are synonymous terms; in common usage the word *crimes* is made to denote such offenses as are of a deeper and more atrocious dye, while smaller faults are comprised under the gentler name of 'misdemeanors.' 4 Blackstone Com. 5. The word *crime* is not a synonym of felony. In the Criminal Procedure Act some provisions are made respecting costs in all prosecutions except felony. Some *crimes* are felonies, others are commonly called misdemeanors; and often infamous *crimes*, as forgery and perjury, are called misdemeanors, thereby distinguishing them from felonies, in our statutes relating to costs in *criminal* cases. The provision respecting costs in all cases of conviction of any *crime* applies to felonies and misdemeanors." *Lehigh County v. Schock*, 113 Pa. St. 379.

Libel. — When a charge imputes a *crime* the words are actionable, and in this sense *crime* includes misdemeanors, which involve moral

turpitude, and for which an indictment or presentment will lie. *Smith v. Smith*, 2 Sneed (Tenn.) 477. See also the title LIBEL AND SLANDER.

1. Offense and Crime. — *State v. Thibodeaux*, 48 La. Ann. 600; *People v. Harty*, 49 Mich. 490; *State v. West*, 42 Minn. 147; *People v. French*, 102 N. Y. 583; *People v. Board of Police*, 39 Hun (N. Y.) 510; *Illies v. Knight*, 3 Tex. 314; *State v. Peterson*, 41 Vt. 511.

In *Com. v. Myers*, 1 Va. Cas. 241, the court said: "But this is an incorrect understanding of the words *crime* and 'offense,' as they are used both by the common law and the statute under consideration. In legal acceptance those words are synonymous terms, although the word *crime* is often used to denote offenses of the higher grades. 1 Haw. 1; 4 Black. Com. 5. In the same fifth page of 4 Blackstone's Commentaries, we are told that *crime* consists in doing an act in violation of a public law; and in the second page of the same book, that the law teaches the grades of every crime, and adjusts to it its adequate and necessary punishment. *Crime* or offense, then, is the doing an act in violation of a public law; and the different degrees of atrocity which may attend its commission fix the degree of the *crime*. The killing of a human being, in any case not specially allowed or excused, is a *crime* distinguished by the name of felonious homicide. But as that *crime* may be attended with greater or lesser degrees of guilt, these degrees are distinguished by different names and punishments. But still they all constitute the same *crime*, felonious homicide; and murder, being the highest grade, includes all the others; so that a man charged with murder is charged with every species of felonious homicide."

2. People v. Bradley, 60 Ill. 402.

Civil and Criminal Distinguished. — In *Landers v. Staten Island R. Co.*, 53 N. Y. 456, it is said: "The terms 'civil' and *criminal*, when used whether in reference to jurisdiction or judicial proceedings generally, have respect to the nature and form of the remedy, and the cause of action or occasion for instituting legal proceedings. 'Civil' stands for the opposite of *criminal*, and hence we have courts known as courts of civil jurisdiction and of *criminal* jurisdiction, distinguished by the character of the prosecutions in each. A civil action is brought to recover some civil right, or to obtain redress for some wrong, not being a *crime* or misdemeanor, and is thus distinguished from a *criminal* action or prosecution. A *criminal* action is a prosecution in a competent court of justice, in the name of the government, for the punishment of a *crime*; and a civil action is one prosecuted for the redress of an injury or the prosecution of a wrong. (Bouvier's Inst., pl. 2642, 2643; Bacon's Abr., Actions, A.)"

In *Ely v. Thompson*, 3 A. K. Marsh. (Ky.) 74, it is said: "The word *criminal* is used as opposed to civil suits or actions. The one includes all suits of the government, the end

A Criminal Action is one prosecuted by the people of the state, against a person charged with a public offense, for the punishment thereof.¹ Criminal jurisdiction is that which exists for the punishment of crime.²

Violation of Ordinance. (See also the title ORDINANCES.)—The term “criminal cases,” as used in statutes, has been held to refer to none but prosecutions under the state laws. Cases under city ordinances, while resembling criminal cases in being penal proceedings, are not, strictly speaking, criminal proceedings. In other words, as a crime is the violation of a public law, the term does not include the mere breach of a corporate ordinance.³ In some cases,

and design of which is the punishment of the accused; the other embraces all actions for individual redress.”

1. *Gadsden v. Woodward*, 38 Hun (N. Y.) 551. See also *Landers v. Staten Island R. Co.*, 53 N. Y. 456; *Ames v. Kansas*, 111 U. S. 460.

Criminal Action Synonymous with Indictment.—In *State v. Simons*, 68 N. Car. 378, it is said that the term “criminal action” and “indictment” are used in the constitution and in the Code of Civil Procedure of *North Carolina* as synonymous.

Criminal Accusation.—A criminal accusation or action, as defined by the Penal Code of *Texas*, is the whole or any part of the procedure which the law provides for bringing offenders to justice. *Childers v. State*, 30 Tex. App. 199; *Bautsch v. Galveston*, 27 Tex. App. 342; *Russell v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 1070.

Appeal—Criminal Action.—In *State v. Costello*, 61 Conn. 497, it was held that an appeal from the judgment of a criminal action was not itself a criminal action or proceeding within a statute providing that an attorney should not give bail in any criminal action in which he was interested.

Habeas Corpus—Pending Case.—A statute gave either the relator or defendant the right of appeal in any habeas corpus case, with the following proviso: “Provided this act shall not apply to parties held in custody in criminal cases.” In construing this proviso, the court said: “Relief upon a writ of habeas corpus is rarely sought, save by persons held in custody * * * in a criminal case; that is, in a pending case. The words ‘criminal cases’ apply to one held upon a criminal charge, against whom there is a pending case. In such cases an appeal would only operate to delay a trial and continue the imprisonment. One in custody upon a judgment of conviction is not one held in custody in a criminal case, within the meaning of the proviso. We reached this conclusion upon full argument; and the opinion of the court, by Judge Snodgrass, is reported in the case of *State v. McClellan*, 87 Tenn. 52.” *Vanvabry v. Staton*, 88 Tenn. 334. See generally 9 ENCYC. OF PL. AND PR., p. 998.

Criminal Case.—A criminal case is a prosecution for a criminal offense. *People v. Kelly*, 24 N. Y. 84.

Criminal cases are those which involve a wrong or injury done to the public, for the punishment of which the offender is prosecuted in the name of the whole people. *Gimball v. Ross*, T. U. P. Charlt. (Ga.) 181.

Criminal Charge.—In *U. S. v. Patterson*, 150

U. S. 68, the court said: “A criminal charge, strictly speaking, exists only when a formal written complaint has been made against the accused and a prosecution initiated. It is true the popular understanding of the term is ‘accusation,’ and it is freely used with reference to all accusations, whether oral, in the newspapers, or otherwise; but in legal phraseology it is properly limited to such accusations as have taken shape in a prosecution. In the eyes of the law a person is charged with crime only when he is called upon in a legal proceeding to answer to such a charge.” See also CHARGE, vol. 5, p. 890.

Quasi-Criminal Nature. (See also QUASI, and see the title PENALTIES.)—The constitution of *Illinois* conferred upon a certain court jurisdiction in cases of a quasi-criminal nature. It was held that the phrase ‘quasi-criminal nature’ was intended to embrace all offenses not crimes or misdemeanors, but which are in the nature of crimes, and which are punished, not by indictment, but by forfeitures and penalties. It includes all *qui tam* actions, prosecutions for bastardy, informations in the nature of *quo warranto*, and suits for the violation of ordinances. *Wiggins v. Chicago*, 68 Ill. 372.

2. *Landers v. Staten Island R. Co.*, 53 N. Y. 457.

3. **Ordinances.**—*Greeley, etc., R. Co. v. Harris*, 12 Colo. 226; *McInerney v. Denver*, 17 Colo. 302; *Williams v. Augusta*, 4 Ga. 513; *Naylor v. Galesburg*, 56 Ill. 285; *Wiggins v. Chicago*, 68 Ill. 372; *State v. Heuchert*, 42 La. Ann. 271; *Monroe v. Meuer*, 35 La. Ann. 1193; *Cooper v. People*, 41 Mich. 403; *People v. Jackson*, 8 Mich. 110; *People v. Manistee County*, 26 Mich. 424; *Jackson v. People*, 8 Mich. 262; *State v. Lee*, 29 Minn. 445.

In *Schneider v. McLane*, 36 Barb. (N. Y.) 499, affirmed 4 Abb. App. Dec. (N. Y.) 154, it is said: “There is a wide difference between the perpetration of a crime and the violation of a corporation ordinance. The former implies moral turpitude, and is presumed to be committed *malò animò*; while the latter involves no moral guilt, and may have been inadvertently, nay innocently, committed. The omission to remove the snow and ice from the sidewalks of a populous city may be as much a violation of a corporation ordinance, to which a penalty is attached, as to ride a horse upon the sidewalks of the same city. Neither of them are crimes and no one conversant with the nature and principles of the criminal law would regard, or think to punish, them as crimes. * * * To subject a person, without trial or examination, to search and examination of his person, and to confinement

however, the violation of an ordinance has been held a crime.¹

Intoxicating Liquors. — Violations of the regulations governing the sale of intoxicating liquors are not always crimes,² though they may be.³

during the night in the cell of a station house, who is charged with no offense but the breach of a municipal ordinance in regard to the mode of passing over the public streets, would be a needless piece of severity, if not of actual barbarity, and one which I do not think it was the intention of the legislature or the board of metropolitan police to inflict."

In *Greeley v. Hamman*, 12 Colo. 94, it was held that a prosecution for the violation of a municipal ordinance punishable by fine or imprisonment but not punishable by general statute, was not a *criminal* proceeding but a civil action.

Prosecutions in Name of State. — The constitution of *Mississippi* provided that all prosecutions should be carried on in the name of the state. It was held that this provision referred to *criminal* prosecutions for violations of state laws, and not to the recovery of penalties for violation of town ordinances. *Alexander v. Greenville*, 54 Miss. 659.

Jury and Jury Trial. — In *Mankato v. Arnold*, 36 Minn. 62, it was held that the legislature might establish municipal courts to provide for the trial of causes involving merely the violation of municipal ordinances, in a summary manner, without a jury. The court said: "Offenses against ordinances enacted by a municipal corporation, in the exercise of its legitimate police authority, for the preservation of the peace, good order, health, or morals of the community, are not generally construed to be *criminal* cases, in the proper sense of the term *criminal*, and the prosecutions therefore are not *criminal* prosecutions within the meaning of the constitution, which refers to prosecutions for offenses essentially *criminal* under the general laws of the state." *Compare*, however, the later case of *State v. West*, 42 Minn. 147, set out below. See also the titles CONSTITUTIONAL LAW, vol. 6, p. 962; JURY AND JURY TRIAL; SUMMARY PROCEEDINGS.

1. Ordinances — Violation Held Crime. — In *State v. West*, 42 Minn. 147, it was held that violations of municipal ordinances punishable by fine or imprisonment, were *criminal* offenses within the meaning of the constitution of *Minnesota*, which provides that no person shall be held to answer for a *criminal* offense unless on the presentment or indictment of the grand jury. The court *examined* and *distinguished* *State v. Lee*, 29 Minn. 445; *State v. Charles*, 16 Minn. 474; *State v. Ludwig*, 21 Minn. 202; *Mankato v. Arnold*, 36 Minn. 62; *State v. Everett*, 14 Minn. 439.

Ordinances — Involuntary Servitude. (See also the titles CONSTITUTIONAL LAW, vol. 6, p. 963; PUNISHMENT; SLAVERY.) — The *Michigan* constitution provides that neither slavery nor involuntary servitude, unless for the punishment of *crime*, shall ever be tolerated in the state. It has been held that this clause did not prohibit the confinement of an offender against a city ordinance in jail. *People v. Hanrahan*, 75 Mich. 611.

In *Bautsch v. Galveston*, 27 Tex. App. 342, it was held that a prosecution for repairing a

wooden building, in violation of a city ordinance, prosecuted in the name of the city, was a *criminal* action within the definition of the *Texas* Penal Code, which defines a *criminal* action as the whole or any part of the procedure which the law provides for bringing offenders to justice.

Quasi-Criminal Cases. — The violation of an ordinance is embraced in the phrase "of a quasi-*criminal* nature." *Wiggins v. Chicago*, 68 Ill. 372.

Charter — Ordinance. — In *People v. Manistee County*, 26 Mich. 424, the distinction is drawn between *crimes* enumerated and provided for in the charter of a municipal corporation, and which are therefore offenses against the general laws of the state, and those offenses merely prohibited by city ordinance. See also *Wayne County v. Detroit*, 17 Mich. 390; *People v. Detroit*, 18 Mich. 445.

2. Intoxicating Liquors. (For full treatment see the title INTOXICATING LIQUORS.) — A charter of a city required suits for penalties under liquor ordinances to be brought in the corporate name. It was held that such suits are not *criminal* prosecutions, but penal actions on the part of the city. *Cooper v. People*, 41 Mich. 403.

In *Cherry v. Com.*, 78 Va. 375, it was held that the defendants are competent to testify in their own behalf in proceedings to revoke liquor licenses, those proceedings not being *criminal* in their nature.

3. In *In re Lucas*, 29 U. C. Q. B. 81, it was held that a conviction under the Inland Revenue Act, 31 Vict., c. 8, § 130, for possessing distillery apparatus without having made a return thereof, was a conviction for a *crime*.

In *Reg. v. Roddy*, 41 U. C. Q. B. 291, it was held that an information for selling intoxicating liquors on Sunday was a charge of a *criminal* character, and that the defendant could not be compelled to give evidence against himself.

In *State v. Peterson*, 41 Vt. 511, it was held that an act which prohibited the manufacture of intoxicating liquors under severe penalties, constituted the manufacture of such liquors a *criminal* offense.

In *Matter of Howard*, 26 Vt. 205, it was held that in a commitment for a violation of the license law, it is of no importance whether it is denominated a *crime*, or an offense, or neither. *Redfield, C. J.*, said: "We do not think it important whether this is denominated in the commitment a *crime*, or an offense, or neither. All violations of penal statutes are in popular language *criminal*, and are *crimes*. But of *crimes* we have almost an infinite extent of enormity or degree."

Criminal Prosecution. — Prosecutions under the liquor law are *criminal* prosecutions. *People v. Manistee County*, 26 Mich. 422.

Intoxication — Qualifications as Police Officers. — In *People v. Board of Police*, 39 Hun (N. Y.) 507, it was held that a person who had been arrested, convicted, and fined for a violation of section 17, c. 628, of the *New York Acts*

Fugitives from Justice. (See the title EXTRADITION.) — As used in Art. IV., § 2, of the Constitution of the *United States*, which provides for the delivery up, by a state in which he may have taken refuge, of a fugitive from justice charged with a crime committed in another state, the term "crime" has received construction in a number of cases. The subject will receive full treatment under another title.¹ At this place a number of cases are given in which the meaning of the word "crime" has been expressly adjudicated.²

Specific Instances. — In the notes are set forth many cases determining what is a crime or criminal proceeding, case, etc.³

of 1857 as amended by chapter 856 of 1869, in that he had been found intoxicated in a public place, had been "convicted of a *crime*" within the meaning of that term as used in the provision that persons convicted of *crimes* should be disqualified from continuing as members of the police force of New York. *Affirmed* in *People v. French*, 102 N. Y. 583.

1. See the title EXTRADITION.

2. **Indictable Offense.** — The term "other *crime*," used in the provision of the constitution and laws of the *United States*, means any offense indictable by the laws of the demanding state. *Taylor v. Taintor*, 16 Wall. (U. S.) 366; *Johnston v. Riley*, 13 Ga. 97; *Morton v. Skinner*, 48 Ind. 123; *Brown's Case*, 112 Mass. 409, 17 Am. Rep. 114; *Davis's Case*, 122 Mass. 324; *Com. v. Green*, 17 Mass. 515; *Matter of Voorhees*, 32 N. J. L. 141; *Matter of Clark*, 9 Wend. (N. Y. 212); *People v. Brady*, 56 N. Y. 182; *Wilcox v. Nolze*, 34 Ohio St. 520; *Opinions of Gov. Mifflin and Atty.-Gen. Randolph*, 20 State Papers, U. S. 39, 13 Am. Law Rev. 193. But see opinions of Gov. Seward, 2 Seward's Works, 452; Gov. Dennison in *Lago's Case*, 18 Alb. L. J. 149.

The term *crime* includes every offense known to the law of the state from which the party charged had fled. *Com. v. Dennison*, 24 How. (U. S.) 102.

Statutory Offenses. — The constitutional requirement for the surrender of fugitives from justice applies to those charged with statutory as well as common-law *crimes*. *Matter of Hughes*, Phil. L. (61 N. Car.) 57; *Matter of Fetter*, 23 N. J. L. 311, 57 Am. Dec. 382; *People v. Donohue*, 84 N. Y. 438; *In re Burke*, 4 Fed. Cas. No. 2,158.

False Pretenses. (See generally the title FALSE PRETENSES.) — In *State v. Stewart*, 60 Wis. 587, 50 Am. Rep. 388, it was held that the offense of obtaining money under false pretenses was a *crime* within the meaning of that provision of the constitution of the *United States* which provides for the extradition of persons accused of treason, felony, or other *crime*.

In *In re Burke*, 4 Fed. Cas. No. 2,158, it was held that *crime* as used in this constitutional provision meant any offense indictable by the laws of the state demanding the surrender, and was not confined to common-law *crimes*. And it was held that false pretenses were a *crime* within the constitutional provision as to the extradition of fugitives.

But in *People v. Brady*, 56 N. Y. 188, it was held that affidavits charging the fugitive with confederating with others to cheat and defraud a person of his property by false pretenses and devices, and that the conspirators did obtain

the property with intent to cheat and defraud, did not necessarily charge a *crime*, the false pretenses not being set out. The court said: "The word *crime*, in the clause of the constitution which has been quoted, embraces every act forbidden and made punishable by the law of a state, and the right of a state to demand the surrender of fugitives from justice, extends to all cases of the violation of its criminal law. * * * An allegation that one obtained the goods of another by false pretenses, or by cheating, is not, in a legal sense, a charge of *crime*, for it may be true and yet no *crime* may have been committed." See also *Com. v. Dennison*, 24 How. (U. S.) 104.

3. **Smuggling.** (See the title REVENUE LAWS.) — In *Atty.-Gen. v. Siddon*, 1 Crompt. & J. 220, it was made a question whether a trader concealing smuggled goods and subject to penalties under the English Customs Acts, is to be held accused of *crime*, so as to be free from liability for the misconduct of his servant, and liable only for personal guilt. See the titles AGENCY, vol. 1, p. 1161; MASTER AND SERVANT.

In *Atty.-Gen. v. Radloff*, 10 Exch. 84, the court, consisting of four judges, was equally divided on the question whether the trial of an information filed by the attorney-general for the recovery of penalties for smuggling under sections 46 and 82 of 8 and 9 Vict., c. 87, was a civil or *criminal* proceeding.

But in *Easton's Case*, 12 Ad. & El. 645, 40 E. C. L. 147, it was held that a person sentenced by two justices to imprisonment with hard labor, under the English Smuggling Act, 4 and 5 Wm. IV., c. 13, § 2, was in execution for *criminal* matter under the English Habeas Corpus Act; Lord Denman saying: "The party is sentenced to imprisonment at hard labor, which puts the point beyond doubt."

Contempt. (See the title CONTEMPT, vol. 7, p. 25.) — A contempt for the disobedience of a decree, and the violation of an injunction, has been held to be in the nature of a *criminal* offense, and the proceeding for its punishment in the nature of a *criminal* proceeding. *Ex p. Sweeney*, 18 Nev. 74; *Phillips v. Welch*, 11 Nev. 187; *Bennett v. Wainwright*, 16 Ind. 211; *Cartwright's Case*, 114 Mass. 239; *Hill v. Crandall*, 52 Ill. 73; *Williamson's Case*, 26 Pa. St. 19; *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. (Va.) 57.

Contempt of court has been held a *criminal* cause or matter within the English Judicature Act. *O'Shea v. O'Shea*, 15 Prob. Div. 59; *Godfrey v. George*, (1896) 1 Q. B. 48.

In *Taylor's Case*, 3 East 232, it was held under the English Habeas Corpus Act that a person committed for contempt of court was

committed for "*criminal* or supposed *criminal* matter."

In *Cobbett v. Slowman*, 9 Exch. 633, it was held that a person in custody under a commission of rebellion issued out of equity is not in custody for any *criminal* or supposed *criminal* matter within the meaning of the English Habeas Corpus Act.

Contempt — Pardon. — As to whether contempt falls within the term "*criminal* cases," as used in constitutional provisions relating to the power of the executive to pardon, see the title *CONTEMPT*, vol. 7, p. 69.

Penalty. (See the title *PENALTIES*.) — In *Huntley v. Luscombe*, 2 B. & P. 530, it was made a question whether a commitment in execution for a penalty before a magistrate for an offense against the excise laws is a commitment for "*criminal* matter," within the provisions of the English Habeas Corpus Act.

Same — Lottery. (See also the title *LOTTERIES*.) — In *Rex v. Myers*, 1 T. R. 205, it was held that a person who had been convicted in a penalty under the English Lottery Act, 22 Geo. II., c. 47, and arrested on a Sunday, and sent to the house of correction for want of a sufficient distress, was not a *criminal*, so that his arrest on Sunday was unlawful.

In *Matter of Eggington*, 2 El. & Bl. 717, 75 E. C. L. 717, it was held that a town clerk dismissed from office, and convicted before two justices of the peace under statute 5 and 6 Wm. IV., c. 76, § 60, for wilfully refusing to deliver account books up after notice, was not a *criminal*, so that his arrest on Sunday was illegal. See generally the titles *ARREST*, vol. 2, p. 861; *SUNDAY*.

Same — Clergyman. — In *Rackham v. Bluck*, 5 Moo. P. C. 305, 9 Q. B. 691, 58 E. C. L. 691, it was held that a proceeding under 1 and 2 Vict., c. 106, § 32, against a beneficed clergyman, for penalties for nonresidence on his benefice, was a civil and not a *criminal* proceeding.

In *Burder v. O'Neill*, 9 Jur. N. S. 1109, where the suit was against a clergyman under the English Church Discipline Act for immorality, it was held that the clergyman was not either a competent or a compellable witness; but in *Norwich v. Pearce*, L. R. 2 Adm. & Eccl. 281, the contrary was held. See generally the title *WITNESSES*.

False Weights. — In *Atty.-Gen. v. Bowman*, 2 B. & P. 532, note *a*, an information against the defendant for keeping false weights was held by Eyre, C. B., not to disclose a *crime*, and the learned judge, being of that opinion, rejected general evidence as to character tendered on behalf of the defendant. See generally the title *WEIGHTS AND MEASURES*.

Jury and Jury Trial — Criminal Conspiracy. (See also the titles *CONSPIRACY*, vol. 6, p. 830; *CONSTITUTIONAL LAW*, vol. 6, p. 992; *JURY AND JURY TRIAL*.) — In *Callan v. Wilson*, 127 U. S. 540, it was held that *criminal* conspiracy was a *crime* within the meaning of the third article of the United States Constitution which guarantees trial by jury. The court said: "The word *crime*, in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light

of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the constitution to hold that no prosecution for a misdemeanor is a prosecution for a *crime* within the meaning of the third article, or a '*criminal* prosecution' within the meaning of the sixth amendment. And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them."

Jury Trial. — In *McInerney v. Denver*, 17 Colo. 302, it was held that the provision in the constitution of *Colorado*, guaranteeing trial by jury in *criminal* cases, is to be construed with reference to the procedure existing at the time of the adoption of the constitution, and therefore, if in a given class of cases trials without a jury were the prevailing rule, this rule was not changed by the constitution.

Extortion — Miller's Tolls. (See generally the titles *EXTORTION*; *MILLS*.) — Where a statute prescribed the taking of a certain toll and prohibited all excess, but designated no special remedy, it was held that the act was made *criminal*. *State v. Bishop*, 7 Conn. 185.

Grand Jurors. (See the title *GRAND JURY*.) — In *State v. Thibodeaux*, 48 La. Ann. 600, it was held that section 3381 of the Rev. Stat. of *Louisiana*, which required a prosecution in the name of the state against a delinquent road overseer, contained the essential description of a *crime* or an offense, and a road overseer indicted under said section was an incompetent grand juror.

Husband and Wife — Witness — Slander. (See generally the titles *HUSBAND AND WIFE*; *LIBEL AND SLANDER*; *WITNESSES*.) — The Code of *Nebraska* provides that husband and wife cannot be witnesses against each other except in cases of divorce or in *criminal* proceedings for a *crime* committed against the spouse. It has been held that a verbal slander was not a *crime* within this provision. *Bohner v. Bohner*, 46 Neb. 204.

Same — Adultery. — In *Lord v. State*, 17 Neb. 529, it was held that under a statute permitting a husband or wife to testify in a *criminal* proceeding for a *crime* committed by one against another, on the trial of a husband on an indictment for adultery, the wife was a competent witness against him. The court said: "The statute makes it an offense for a husband to desert his wife and live and cohabit with another woman. If the husband is prosecuted for the offense, the prosecution certainly would be a *criminal* proceeding, for a *crime* committed against the wife. The word *crime* is frequently used to designate gross violations of law in contradistinction to misdemeanors; but in its broad sense it means any violation of law. Webster's Dictionary, 312, 313. And in our view, it was intended by the legislature to include the offense here charged; and the ends of justice will be best subserved by permitting the wife to testify. This is the rule

adopted in Iowa under a similar statute. *State v. Bennett*, 31 Iowa 24; *State v. Sloan*, 55 Iowa 219; *State v. Hazen*, 39 Iowa 648. In Texas also: *Morrill v. State*, 5 Tex. App. 447; *Roland v. State*, 9 Tex. App. 277." See generally the titles ADULTERY, vol. I, p. 747; HUSBAND AND WIFE; WITNESSES.

Suicide — Life Insurance. (See the titles LIFE INSURANCE; SUICIDE).—The assured does not violate a provision avoiding an insurance policy in case the assured shall die in the violation of, or in the attempt to violate, any *criminal* law, by committing suicide. *Darrow v. Family Fund Soc.*, 42 Hun (N. Y.) 245, *affirmed* 116 N. Y. 537. *Landon, J.*, in that case (42 Hun (N. Y.) 247), says: "I think that suicide, or the successful attempt to commit it, is not made a *crime* by our Penal Code. 'A *crime* is an act or omission forbidden by law and punishable upon conviction by,' etc. (§ 3). 'Although suicide is deemed a grave public wrong, yet, from the impossibility of reaching the successful perpetrator, no forfeiture is imposed' (§ 173). Attempting suicide is made a *crime* (§ 178). It is thus defined: 'A person who, with intent to take his whole life, commits upon himself any act dangerous to human life, or which, if committed upon or towards another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide' (§ 174). It seems to follow that the attempt to commit suicide, if successful, is suicide and no *crime*, but only 'a grave public wrong,' but if unsuccessful is a *crime*. Section 685 — which provides that 'a person may be convicted of an attempt to commit a *crime*, although it appears on the trial that the *crime* was consummated, unless the court in its discretion discharges the jury and directs the defendant to be tried for the *crime* itself' — can, from the nature of the case, have no application to an attempt to commit suicide. The attempt is the *crime* itself. To bring it within the section there should be an attempt to attempt to commit suicide. If there is an attempt to commit suicide, the success of the attempt does not consummate the *crime*, but avoids it. How could the jury be discharged and the defendant be tried for the *crime* itself? What *crime*? The section must be limited to the cases to which it can apply."

Disorderly House. (See generally the title DISORDERLY HOUSES).—Keeping a house of ill-fame was held a *criminal* offense within the meaning of a constitutional provision requiring that no person should be held to answer for a *criminal* offense, unless on presentment of a grand jury. *Slaughter v. People*, 2 Dougl. (Mich.) 334, note.

In *Parker v. Green*, 2 B. & S. 299, 110 E. C. L. 299, a proceeding before justices preferred under 9 Geo. IV., c. 61, against a person licensed to sell excisable liquors by retail, for "that he did unlawfully and knowingly permit and suffer persons of notoriously bad character to assemble and meet together in his house and premises," was held to disclose a charge of *crime*, and the defendant was held not a competent witness. *Crompton, J.*, in delivering judgment, said (p. 311): "When a proceeding is treated by a statute as imposing a penalty for an offense against the public, the

amount of which penalty is to be meted by the justices according to the magnitude of the offense, there can be no doubt that the proceeding is a *criminal* one." And *Wightman, J.*, said (p. 309): "The justices may * * * punish such offender by fine; [the statute] thus treating fine as a punishment for offenses against good order and rule." See generally the title WITNESSES.

Dogs.—The latter decision was *followed* in *Reg. v. Sullivan*, 8 Ir. R. C. L. 404, where the charge was "for keeping a dog without a license, contrary to the Dogs Regulation (Ireland) Act 1865." *Palles, C. B.*, said (p. 407): "The penalty is imposed by way of punishment, and not as compensation to any particular individual."

Game Laws. (See the title GAME AND GAME LAWS).—In *Cattell v. Ireson*, El. Bl. & El. 91, 96 E. C. L. 91, it was held that a person convicted by justices under 1 and 2 Wm. IV., c. 32, § 23, for using an engine for the purpose of taking game without the authority of a certificate, was convicted in a *criminal* proceeding within the meaning of section 3 of Lord Denman's Act, 14 and 15 Vict., c. 99, so that the party charged was neither competent nor compellable to give evidence against himself.

Desertion.—In *Sweeney v. Spooner*, 3 B. & S. 329, 113 E. C. L. 329, where the information was under 5 Geo. IV., c. 83, § 4, charging the defendant with running away from the parish of B., whereby his wife became chargeable to the parish, it was made a question whether the charge was not so far of a *criminal* nature as to render the wife's evidence inadmissible against him. And in *Reeve v. Wood*, 5 B. & S. 364, 117 E. C. L. 364, where under section 3 of the same statute the charge was against a person for neglect to maintain his wife and children, the wife of the accused was excluded as a witness. See generally the titles HUSBAND AND WIFE; WITNESSES.

Punishment.—A law repealing the punishment of an offense is within the meaning of § 329 of the Political Code of *California*, enacting a general saving clause, where a law is repealed creating a *criminal* offense. *People v. McNulty*, 93 Cal. 427. The court said: "A description of acts necessary to constitute a *crime* does not make the commission of such acts a *crime*; punishment is as necessary to constitute a *crime* as definition. Without either, there is no *crime*; and the repeal of either leaves no *crime*. What constitutes a *crime* is definitely stated in section 15 of the Penal Code as follows: 'A *crime* or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: (1) death; (2) imprisonment; (3) fine; (4) removal from office; or (5) disqualification to hold and enjoy any office of honor, trust, or profit in this state.' And so we think that a close analysis of section 326 removes all the refined distinctions by which its apparent general purpose is sought to be thwarted." See generally the title STATUTES.

Frauds.—Where the comptroller of the city of New York appeared before the recorder, and upon his oath stated that from an examination

of documents in his possession in his official capacity, and from information which he believed to be true, frauds, *criminal* in their nature and character, had been committed upon the public treasury of the city, to a large amount; specifying the particular character of one of the frauds, as a specimen of the nature and character of the others; it was held that this was a sufficient complaint, not only to authorize but to require the recorder to investigate the matter thereof. Roosevelt, J., said: "The only point, therefore, suggested by the return, and remaining to be considered, is, do the acts complained of, if proved, constitute in law a *criminal* offense?" By the 32d section of the general provisions concerning *crimes* and their punishment (2 Rev. Stat. 702), it is declared that 'the terms *crime* or "offense," when used in this chapter or in any other statute, shall be construed to mean any offense for which any *criminal* punishment may by law be inflicted.' Frauds affecting the public may, in certain cases, be punished *criminally*, even at common law. (People v. Stone, 9 Wend. (N. Y.) 182.) And under the statute (2 Rev. Stat. 677), every person who, with intent to cheat or defraud another (extended by a subsequent section at page 703 to cities and corporations generally), shall designedly by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, upon conviction thereof shall be punished by imprisonment, etc. There is then a class of frauds, which are not only *criminal* in their nature, but *criminal* in law, and punishable by the courts as *criminal* offenses, and a class, therefore, of which the recorder, and the other magistrates referred to, had jurisdiction so far at least as to inquire into their probable commission, and their probable perpetrator, and to order his arrest and trial." People v. Hicks, 15 Barb. (N. Y.) 166.

Proceedings Against Sheriff to Procure Payment of Certain Money.—The Texas Court of Criminal Appeals has no appellate jurisdiction save in *criminal* causes. In Russell v. State, (Tex. Crim. App. 1896) 36 S. W. Rep. 1070, it was held that the Court of Appeals had no jurisdiction of an appeal from a judgment against a sheriff to require the payment to the county of money collected by the sheriff on execution, to satisfy a forfeited recognizance, and paid by him to another county.

Surety to Keep the Peace. (See also the title BAIL AND RECOGNIZANCE, vol. 3, p. 729.)—In Deloohery v. State, 27 Ind. 521, it was held that a defendant in a proceeding for a surety of the peace was not a competent witness in his own behalf. The court said: "The statute makes the parties to 'any civil cause or proceeding' competent witnesses to testify in their own behalf. 2 G. & H. 168. In Murray v. State, 26 Ind. 141, we held that a prosecution, under the statute, for surety of the peace, was a criminal proceeding to prevent the commission of *crime*. A party to a suit was not a competent witness therein for himself, at common law. And as the state has only removed the disability in civil causes and proceedings, and not in *criminal* ones, the latter are still

governed by the common-law rule." See generally the title WITNESSES.

A statute required process upon recognizances in criminal cases to conclude "against the peace and dignity of the commonwealth." It was held that a *scire facias* on a recognizance to keep the peace must conclude "against the peace and dignity of the commonwealth." The court said: "As the *scire facias* in the case before us does not conclude as required by the statute, nor anywhere contain the clause, 'against the peace and dignity of the commonwealth of Kentucky,' it would follow that it was defective and insufficient, provided the expression in the statute, 'in all *criminal* cases,' should be construed to embrace a case of this kind. The term *criminal*, when used in reference to judicial proceedings, is opposed to 'civil,' and in its most comprehensive meaning may be regarded as including all cases for the violation of the penal law. In one of the cases referred to, the recognizance was taken in a case of felony. The offense charged in the indictment in the other case does not appear. Com. v. Porter, 1 A. K. Marsh. (Ky.) 44, was a prosecution for bastardy, which this court recognized as a *criminal* and not a civil case, and as embraced by the provisions of the statute in question, requiring recognizances in all *criminal* cases to be taken in the name of the Commonwealth of Kentucky. This is very clearly not a civil case, but, in our opinion, should be considered as embraced by the expression, 'in all *criminal* cases,' as used in the statute; and consequently the court below erred in overruling the defendant's demurrer." Applegate v. Com., 7 B. Mon. (Ky.) 12.

But in State v. Brazier, 37 Ohio St. 78, it was held that jurisdiction conferred on the probate court of a certain county relating to *crimes* and misdemeanors, did not embrace the power to entertain a complaint in a peace warrant proceeding commenced before a justice of the peace. The court said: "The jurisdiction which that act conferred related wholly to *crimes* and misdemeanors. These are offenses against the statute involving the punishment therein prescribed. They are acts of commission or omission in violation of law forbidding or commanding them. The object of a peace proceeding is to obtain security against the commission of a *crime* from one whose conduct is such as to afford a reasonable ground to believe that he contemplates an offense against the person or property of another. Such conduct, however, is not a *crime* or misdemeanor within the meaning of the statute, and hence was not embraced within the jurisdiction which the act aforesaid conferred on the probate court of Clermont county."

Bail Bond—Criminal Case.—Proceedings on a forfeited bail bond have been held to constitute a *criminal* case, and a court of civil appeals having only civil jurisdiction has no jurisdiction therein. Jeter v. State, 86 Tex. 555; Gay v. State, 20 Tex. 504; Aber v. Warden, 49 Tex. 377; Cassaday v. State, 4 Tex. App. 99; State v. Ward, 9 Tex. App. 462; Hart v. State, 14 Tex. App. 323; Perry v. State, 14 Tex. App. 166. See also Reg. v. Foote, 10 Q. B. Div. 378.

Appeal for Murder. — The old appeal for murder was a civil proceeding, though the defendant was hanged if the verdict was found against him. See *In re Lucas*, 29 U. C. Q. B. 92; *Ashford v. Thornton*, 1 B. & Ald. 405.

Equity. — Cases in equity are civil and not criminal cases. *Grimball v. Ross*, T. U. P. Charl. (Ga.) 181.

Bastardy. (See CIVIL, vol. 6, p. 99; and see ENCYC. OF PL. AND PR., p. 267.) — Bastardy held a criminal action, see *State v. Burton*, 113 N. Car. 655. To the same effect see *Durr v. Howard*, 6 Ark. 461; *State v. Ostwalt*, 118 N. Car. 1208.

But in *People v. Harty*, 49 Mich. 490, bastardy was held not a crime.

Prosecutions for bastardy are embraced in the phrase, "cases of a quasi-criminal nature." *Wiggins v. Chicago*, 68 Ill. 372.

Billiard Tables. — Proceedings under a statute to enforce a penalty for keeping billiard tables were held criminal in character. *Pardee v. Smith*, 27 Mich. 33.

Interstate Commerce. — Under the constitutional provision that no person shall be compelled to be a witness against himself in any criminal case, it has been held that an investigation before a grand jury into certain alleged violations of the Interstate Commerce Act was a criminal case. *Counselman v. Hitchcock*, 142 U. S. 547. See generally the title WITNESSES.

Disbarment. — "The proceedings to disbar an attorney are not criminal proceedings, but civil." *Philbrook v. Newman*, 85 Fed. Rep. 140, citing *Randall v. Brigham*, 7 Wall. (U. S.) 523; *Ex p. Wall*, 107 U. S. 281. See also *Randall, Petitioner*, 11 Allen (Mass.) 473.

So in *Scott v. State*, 86 Tex. 321, it was held that a disbarment proceeding was not a criminal case.

An application to strike a solicitor off the rolls on the ground of misconduct was held not a criminal cause or matter. *In re Hardwick*, 12 Q. B. Div. 148.

Costs. — In *Reg. v. Steel*, 2 Q. B. Div. 37, 13 Cox C. C. 354, it was held that an order for costs made on the trial of a criminal information is criminal procedure, so that under the English Judicature Acts of 1873 and 1875 there could be no appeal from it.

A statute provided that the fees and accounts of magistrates and other officers in criminal proceedings for offenses below the grade of felonies should be a charge upon the town. *People v. Ontario County*, 4 Den. (N. Y.) 261, in which case it is said: "The words 'criminal proceedings,' as used in the 26th section of this statute, include, among other things, each and all of the following cases: (1) proceedings against beggars and vagrants (1 Rev. Stat. 632, tit. ii.); (2) proceedings to prevent the commission of crimes (2 Rev. Stat. 703, tit. ii.); (3) proceedings against disorderly persons (1 Rev. Stat. 638, tit. v.); (4) search warrants, and proceedings thereon (2 Rev. Stat. 746, § 25-28)."

Quo Warranto. — *Quo warranto*, though in form criminal, is in effect a civil proceeding. *Ames v. Kansas*, 111 U. S. 460.

Informations in the nature of *quo warranto* are embraced in the phrase, "cases of a quasi-criminal nature." *Wiggins v. Chicago*, 68 Ill.

372. See generally the title *QUO WARRANTO*, ENCYC. OF PL. AND PR.; and see CIVIL, vol. 6, p. 34.

Proceedings for Forfeiture. — A proceeding to forfeit a person's goods for an offense against the laws, though civil in form, and whether *in rem* or *in personam*, is a criminal case within the meaning of that part of the Fifth Amendment which declares that no person "shall be compelled, in any criminal case, to be a witness against himself." *Boyd v. U. S.*, 116 U. S. 616. See generally the titles WITNESSES; FORFEITURE.

Criminal Cause or Matter — English Judicature Act. — Under section 24 of the English Judicature Act of 1873, 36 and 37 Vict., c. 66, the Court of Appeal was denied all jurisdiction to hear an appeal from a judgment of the lower court on any criminal cause or matter. Upon the meaning of the words "criminal cause or matter," as thus used, there have been a number of decisions. In the first place, it may be observed that the phrase "criminal cause or matter" is much wider than crime. *Reg. v. Barnardo*, 23 Q. B. Div. 305.

A certiorari to quash a conviction for trespassing in pursuit of game is within the meaning of the phrase. *Reg. v. Fletcher*, 2 Q. B. Div. 43. See also *Reg. v. Rudge*, 16 Q. B. Div. 459; *Seaman v. Burley*, (1896) 2 Q. B. 344. So an order discharging a rule nisi for a certiorari to bring up an order for restitution of property has been held within the phrase. *Reg. v. Justices*, 18 Q. B. Div. 314.

An application for a mandamus to justices of the peace to state a case on criminal information is a criminal cause or matter. *Reg. v. Steel*, 2 Q. B. Div. 37.

An order to abate a nuisance is within the phrase. *Reg. v. Whitchurch*, 7 Q. B. Div. 534. So a refusal of bail. *Reg. v. Foote*, 10 Q. B. Div. 378.

So an information for keeping a dog without a license. *Reg. v. Sullivan*, 8 Ir. R. C. L. 404.

For other examples, see *Mellor v. Denham*, 5 Q. B. Div. 467; *Cattell v. Ireson*, El. Bl. & El. 91, 96 E. C. L. 91; *Parker v. Green*, 2 B. & S. 299, 110 E. C. L. 209; *R. v. Hawkhurst*, 26 J. P. 772; *Blake v. Beech*, 2 Exch. Div. 335; *Ex p. Schofield*, (1891) 2 Q. B. 428; *Payne v. Wright*, 61 L. J. M. C. 114.

Every cause or matter is criminal, within the meaning of this phrase, which is a proceeding for a penalty by way of punishment and not by way of compensation. *Reg. v. Kerswill*, (1895) 1 Q. B. 1. See also *Mellor v. Denham*, 5 Q. B. Div. 467; *Reg. v. Whitchurch*, 7 Q. B. Div. 534; *Reg. v. Tyler*, (1891) 2 Q. B. 588.

The phrase includes applications by fugitive criminals from foreign states or fugitive offenders from British colonies. *Ex p. Woodhall*, 20 Q. B. Div. 832.

Contempt of court is also within the phrase. *O'Shea v. O'Shea*, 15 Prob. Div. 59; *Godfrey v. George*, (1896) 1 Q. B. 48.

Same — Not Within the Act. — An application for mandamus to election commissioners to grant a witness a certificate of indemnity has been held not a criminal cause. *Reg. v. Holl*, 7 Q. B. Div. 575.

So an application for excusal from an electoral illegal practice is not within the statute.

CRIMEN FALSI. (See also the title INFAMOUS CRIMES.)—Offenses which rendered the perpetrator infamous at common law were treason, felony, and *crimen falsi*. It is not easy to define the meaning and extent of the latter term. The subject will receive full treatment under another title.¹ It may be said in general, however, that the phrase embraces not only crimes involving falsehood, but offenses which injuriously affect the administration of justice. It was the infamy of the crime, and not the nature of the punishment, which constituted the *crimen falsi*. Thus perjury, dealing with false weights and measures, altering the current coin, making false keys, and the like, are included within the term.²

CRIMINAL ACTION, CASE, PROCEEDING, SUIT, ETC.—See ACTION, vol. 1, p. 577; CASE, vol. 5, p. 748; CIVIL CRIME; SUIT.

CRIMINAL ATTEMPT.—See the title ATTEMPT TO COMMIT CRIME, vol. 3, p. 250.

CRIMINAL CONSPIRACY.—See the title CONSPIRACY, vol. 6, p. 830.

CRIMINAL CONTEMPT.—See the title CONTEMPT, vol. 7, p. 25.

In re Local Government Act, 22 Q. B. Div. 384.

A habeas corpus in an ecclesiastical suit is not within the statute. *Ex p.* Cox, 20 Q. B. Div. 1.

It would be otherwise, however, if the subject-matter of habeas corpus proceedings against the prisoner was *criminal*. *Ex p.* Woodhall, 57 L. J. M. C. 71, 20 Q. B. Div. 832. See also *In re* Keller, 22 L. R. Ir. 158.

It was held, however, that an imprisonment of an unqualified person for acting as a solicitor was a *criminal* cause or matter. *In re* Wall, 32 S. J. 693.

For other examples, see Atty.-Gen. *v.* Radloff, 10 Exch. 84; Atty.-Gen. *v.* Bradlaugh, 14 Q. B. Div. 691; Miller *v.* Salomons, 7 Exch. 475; Stroud's Judicial Dict.

Criminal Prisoner — Solicitor.—A person summarily committed to prison for acting as a solicitor without being qualified is a *criminal*

prisoner. Osborne *v.* Milman, 18 Q. B. Div. 471. See also *In re* Wall, 32 S. J. 693.

1. See the title INFAMOUS CRIMES.

2. Greenl. Evidence, § 3073; People *v.* Toynbee, 20 Barb. (N. Y.) 189, affirmed in 13 N. Y. 378; State *v.* Randolph, 24 Conn. 365.

Crimen Falsi — Forgery. (See also the title FORGERY.)—In Benson *v.* McMahon, 127 U. S. 466, it is said: "By the Roman civil law, which perhaps pervades or did pervade the jurisprudence of the larger portion of the civilized nations of the earth at the time of the making of this treaty, forgery was looked upon as one of the subdivisions of the *crimen falsi*, which included forgery, perjury, the alteration of the current coin, dealing with false weights and measures, etc. 1 Bouvier's Law Dictionary, 411. In support of this view it may be noted that the term corresponding to the word 'forgery' which is used in the Spanish draft of the treaty is *la falsificacion*."

CRIMINAL CONVERSATION.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the title CRIMINAL CONVERSATION, ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 5, p. 616.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles ADULTERY, vol. 1, p. 746; CHARACTER (IN EVIDENCE), vol. 5, p. 850; DAMAGES; DIVORCE; EVIDENCE; EXEMPLARY DAMAGES; HUSBAND AND WIFE.

I. DEFINITION.—The Term “Criminal Conversation” in its general and comprehensive sense is synonymous with “adultery.” In its more limited and technical signification, in which it is here to be considered, it may be defined as adultery in the aspect of a tort.¹ The term also signifies the action through which damages are recovered.

The Meaning of the Abbreviation “Crim. Con.” is well settled by common usage, and of its significance as a substitute for the longer term, judicial notice will be taken.²

II. NATURE OF THE TORT.—Marriage is an institution of society having its foundation in a civil contract which imposes upon the parties certain duties and invests them with corresponding rights. A fundamental right which flows from this relation, and one which the well being of society requires should be maintained inviolate, is that of exclusive marital intercourse which each acquires with the other. It follows, then, that whoever commits adultery with either of the parties commits a trespass upon the rights of the other.³ By whom, and under what circumstances, this trespass is actionable, it is the purpose of this article to discover.

III. RIGHT AND MODE OF RECOVERY—1. **Who May Recover**—*a.* **HUSBAND.**—As regards the husband, from time immemorial the law has given him a right of action for damages against the seducer of his wife.⁴

b. **WIFE**—**At Common Law.**—But as regards the wife, though in natural justice no reason exists why her right to maintain an action against the seductress of her husband should not be coextensive with his right of action against her seducer, yet the common law has never seen fit to accord to her the redress which it affords him.⁵

Reason of the Rule.—The reason of this distinction must, it seems, be discovered not in any principle of abstract right, but in the subservient relation which the wife occupied at the common law. The husband had a property in the wife’s services, and it is upon the loss of these that his right of recovery was formerly placed; but the wife had no property in the services of her husband and so could maintain no action.⁶ Moreover, at common law, in order for her to bring an action, the husband must consent to and be joined as a

1. 1 Bouv. Law Dict.; Anderson’s Law Dict.; Black’s Law Dict.; Prettyman v. Williamson, (Del. 1898,) 39 Atl. Rep. 731.

Action Abolished by Statute in England.—The action for criminal conversation was abolished in England by § 59 of the Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85). By this same statute, however, it is provided that the husband in a proceeding for dissolution of marriage or judicial separation on the ground of the wife’s adultery may claim and recover damages from the co-respondent, or he may by petition claim damages for adultery with his wife, without demanding other relief. 20 & 21 Vict., c. 85, §§ 28, 33. See Keyse v. Keyse, 11 Prob. Div. 100.

2. **Judicial Notice Taken of the Abbreviation “Crim. Con.”**—In Gibson v. Cincinnati Enquirer, 2 Flipp. (U. S.) 125, in an action for the libelous publication of an article charging the plaintiff with participation in a *crim. con.* scandal, the judge defined to the jury the meaning of the abbreviation *crim. con.* This was assigned as one of the grounds for a new trial, but the court held that when the meaning of words is well settled by common usage, there is no use in calling persons to testify as to what was meant by them at the time they were uttered, or to explain their meaning if published in a newspaper. The words *crim.*

con. are usually understood as an abbreviation for “criminal conversation,” and these words have of themselves acquired a fixed and universal significance.

3. See Buller’s *Nisi Prius*, 26a. See generally the title HUSBAND AND WIFE.

4. **Husband’s Right of Recovery.**—In Bedan v. Turney, 99 Cal. 653, an action brought by the husband for criminal conversation with his wife, the court said: “The husband has the right to the conjugal fellowship of his wife; to her society, her aid, and her fidelity in every conjugal relation. Any act of another by which he is deprived of this right constitutes a personal wrong, for which the law gives him a redress in damages.” See also Buller’s *Nisi Prius*, 26a; 3 Bl. Com. 139; 1 Selw. *Nisi Prius* (13th ed.) 7; Holt, C. J. in Rigant v. Gallissard, 7 Mod. 81, 2 Salk. 552; Birt v. Barlow, 1 Doug. 171.

5. **At Common Law—Wife Cannot Maintain Action.**—Doe v. Roe, 82 Me. 503, 17 Am. St. Rep. 499; Kroessin v. Keller, 60 Minn. 372.

6. **Reason for the Rule.**—In 3 Black. Com. 143, the reason for such denial is thus stated: “The inferior hath no kind of property in the company, care, or assistance of the superior as the superior is held to have in those of the inferior: and therefore, the inferior can suffer no loss or injury.”

party plaintiff, and furthermore, as whatever damages she might recover would immediately become his property,¹ the law could not tolerate such an indecency as that a man should so profit by his own wrong.

Under Married Women's Statutes. — But the tendency of modern thought is to abrogate the idea of superior and inferior from the relation of husband and wife, and as, under the statutes which have in recent years been passed in the various states, married women are permitted to sue independently of their husbands and to hold separate property, the reasons for the distinction would seem no longer to be tenable, and it has been held that under such statutes a married woman may maintain an action for criminal conversation.²

2. Mode of Recovery — *a.* **AT COMMON LAW AND IN THE UNITED STATES.** — At common law, the mode of recovery by the husband for the seduction of his wife was an action, usually in trespass *vi et armis*, so laid upon the principle that the wife could not give her consent, and force was in consequence implied. But the plaintiff might at his election waive the trespass and bring an action upon the case for the consequential damage.³

b. **UNDER ENGLISH STATUTE.** — The action was, however, abolished in England by the Divorce Act of 1857 (20 and 21 Vict., c. 85, § 59), and a substitute remedy given, under the provisions of which the husband may, in a suit for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from his wife's seducer, the claim to be tried on the same principles and subject to the same rules as actions for criminal conversation were previously decided in courts of law.⁴

3. Circumstances Affecting the Right of Recovery — *a.* **CONSENT OR RESISTANCE OF WIFE.** — The right of the husband to recover is not affected, except in the matter of damages, whether the intercourse be accomplished with the consent of the wife⁵ or forcibly against her will.⁶

A Wife Is Incapable of Such Consent to her own defilement as will bar the husband's right of action against the seducer.⁷

1. See generally the title **HUSBAND AND WIFE**.

2. **Under Married Women's Statutes — Wife May Maintain Action.** — *Foot v. Card*, 58 Conn. 1, 18 Am. St. Rep. 258; *Seaver v. Adams*, 66 N. H. 142.

An action is maintainable by a married woman for damages against another woman for enticing away the former's husband. *Breiman v. Paasch*, 7 Abb. N. Cas. (Brooklyn City Ct.) 249; *Warner v. Miller*, 17 Abb. N. Cas. (N. Y. Supreme Ct.) 221. And see generally the title **HUSBAND AND WIFE**.

3. **Mode of Recovery.** — See **ENCYC. OF PL. AND PR.**, vol. 5, p. 616.

Policy of the Law in Giving a Right of Action Questioned. — In *Doe v. Roe*, 82 Me. 503, 17 Am. St. Rep. 499, Walton, J., delivering the opinion of the court, said: "An action in favor of the husband for the seduction of his wife has been regarded as of doubtful expediency. It has been abolished in England. And the trials we have had in this country of such actions are not very encouraging. They seem to be better calculated to inflict pain upon the innocent members of the families of the parties than to secure redress to the persons injured."

4. See **ENCYC. OF PL. AND PR.**, vol. 5, p. 616; 1 Selw. *Nisi Prius* (13th ed.) 7; and see *supra*, this title, *Definition*, note.

5. **Consent of Wife Immaterial.** — *Moore v. Hammons*, 119 Ind. 510; *Jacobsen v. Siddal*, 12 Oregon 280, 53 Am. Rep. 360.

6. **Violence Will Not Bar Action.** — The right to an action for damages for criminal conversation with the plaintiff's wife is not barred by the fact that the act was done by violence, and that a criminal action will lie. *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260; *Jacobsen v. Siddal*, 12 Oregon 284, 53 Am. Rep. 360.

"Although seduction is ordinarily the means by which the adulterous intercourse is brought about, yet the action may be maintained without making proof of the seduction. The wrong to the husband consists in the carnal intercourse with his wife by another, and it is immaterial whether this intercourse is accomplished by persuasion or by force. His right of action is established upon proof of the intercourse, and the means by which this intercourse was effected are but incidents to increase or mitigate his damages." *Bedan v. Turney*, 99 Cal. 649.

7. **Wife Incapable of Consent.** — *Wales v. Miner*, 89 Ind. 118.

"The foundation of the husband's right of action is the wrong done him by the defendant in violating his personal rights. The husband has the right to the conjugal fellowship of his wife, to her society, her aid, and her fidelity in every conjugal relation. Any act of another by which he is deprived of this right constitutes a personal wrong, for which the law gives him a redress in damages. Her sexual intercourse with another is an invasion of his rights, and it is immaterial whether this

b. DEFENDANT'S KNOWLEDGE OR IGNORANCE OF THE MARRIAGE. — It is also immaterial whether the defendant had or had not knowledge that the woman was married. When a man engages in illicit intercourse with a woman he is bound to take notice of her domestic relations, and he assumes the hazard of being held responsible for any injuries that may result.¹

c. SEPARATION OF HUSBAND AND WIFE. — The fact that husband and wife are living apart under articles of separation or by parol agreement at the time of the alleged adultery has in *England* and in *Canada* been held to be a bar to an action therefor.² But these decisions, though followed in *Pennsylvania*,³ have never been received as law in any other of the United States, and the rule generally adopted here is that the fact of separation is no bar to the action.⁴

d. CONDUCT OF THE PARTIES — (1) *Consent or Connivance of Husband.* — It is a general rule of law that no one can maintain an action for a wrong when he has consented or contributed to the act which causes his loss. In an action for criminal conversation it is clearly settled that if the husband consents to or connives at his wife's adultery, it goes in bar of the action.⁵

invasion is accomplished by force or by the consent of the wife. As the right belongs to the husband, it is no defense to his action for redress that its violation was by the consent or procurement of the wife, for she is not competent to give such consent. And it is not necessary that the husband should show that it was by force or against her will. The original form of this action was trespass *vi et armis* (3 Black. Com. 139), even though the act was with the consent of the wife, for the reason, as was said by Holt, C. J., in *Rigaut v. Galliard*, 7 Mod. 78, that 'the law will not allow her a consent in such case to 'the prejudice of her husband, because of the interest he has in her;' but under this form of action it was not necessary to make any proof of force, as that was implied by the law." *Bedan v. Turney*, 99 Cal. 649.

1. Defendant's Ignorance that Woman Is Married No Excuse. — *Wales v. Miner*, 89 Ind. 118.

In *Calcraft v. Harborough*, 4 C. & P. 499, 19 E. C. L. 494, it was held that it was not a matter of defense, but only in mitigation of damages, that the plaintiff, having married an actress, concealed the marriage from her mother, and very seldom saw his wife, but suffered his wife to remain living with her mother as if she were a single woman, and allowed her to continue her theatrical performances in her maiden name.

2. Separation of Husband and Wife — English Rule. — A husband separated from his wife by articles cannot maintain an action for criminal conversation after the separation. *Bartelot v. Hawker*, 1 Peake N. P. (ed. 1795) 7.

In *Weedon v. Timbrell*, 5 T. R. 357, it was held that the gist of the action was the loss of the comfort and society of the plaintiff's wife, and that, therefore, an action could not be brought for the criminal conversation after a separation between the husband and wife.

To an action for criminal conversation the defendant pleaded: 1. That the plaintiff had been guilty of adultery with one L., by whom he had a child now living with him, and had continually treated his wife with intolerable cruelty, and had frequently used severe personal violence towards her, and finally put her away from him by force, and threatened to

put her to death if she ever returned to him, so that she was in danger of her life, and did live apart from him permanently. 2. That the plaintiff's wife had, while so living apart from him, obtained an order for protection under the statute, after due notice to the plaintiff of her application therefor, which order was duly registered and is in full force. It was held on demurrer that the pleas showed a good defense. *Patterson v. McGregor*, 28 U. C. Q. B. 280.

3. *Fry v. Derstler*, 2 Yeates (Pa.) 278.

4. In the United States. — *Browning v. Jones*, 52 Ill. App. 597; *Michael v. Dunkle*, 84 Ind. 544, 43 Am. Rep. 100.

"If the husband, by his conduct, compels the separation from him of his wife, he may, as to her, have lost his legal right to the solace and comfort of her society, but not as to all the world. His consent is not thereby extended to other men for sexual commerce with her. Although separated from her husband, and by his fault, she remains his wife until divorced, and for her support he is liable. Her enforced separation does not release him from his marital duties. There is always the hope of reconciliation. The proper nurture, training, and instruction of children require the united labor and affection of both parents. Their mutual comfort and support, and the good of society, require that they should live together in one family. The policy of the law encourages them, if living apart, to come together again. Reconciliation would or should be followed by purity in their marriage relation, and happiness in their home. If, while separated, she is debauched, the hope of reconciliation is thereby greatly diminished, and may be wholly extinguished." *Per Smith, J.*, in *Cross v. Grant*, 62 N. H. 675.

5. Consent or Connivance of Husband a Bar to the Action. — *Duberley v. Gunning*, 4 T. R. 656; *Winter v. Henn*, 4 C. & P. 494, 19 E. C. L. 491; *Norton v. Warner*, 9 Conn. 172; *Prettyman v. Williamson*, (Del. 1898) 39 Atl. Rep. 731; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Lowe v. Massey*, 62 Ill. 47; *Smith v. Masten*, 15 Wend. (N. Y.) 270; *Bunnell v. Greathead*, 49 Barb. (N. Y.) 106.

In an action for criminal conversation, if

Permitting Wife to Live as a Prostitute. — And it is not always necessary that the husband be proved to have connived at the particular act of adultery charged, for if he suffer his wife to live as a prostitute, and criminal intercourse with a third person ensues, he can have no action. It is *damnum absque injuria*.¹

(2) *Previous Conduct* — (a) **Of the Husband** — *aa. IN GENERAL.* — But the conduct of the husband, however licentious, cannot be construed into a consent for the wife to conduct herself in the same way. She is not released from her duty to him merely because he is unmindful of his duty to her. Recrimination is not a defense as in a suit for divorce, and a defendant cannot justify his own act by proving the unfaithfulness of the plaintiff.²

bb. NEGLIGENCE IN RESPECT TO WIFE'S CONDUCT. — Nor can the husband be charged with connivance or consent merely because he was negligent in respect to his wife's conduct, and so permitted opportunities for crime when he had no suspicion of her infidelity.³

Leaving Opportunities Open. — Even when he suspects her, he may, in order to obtain proof of her unchastity, leave open the opportunities which he finds, so long as he does not make new ones or invite the wrong.⁴

(b) **Of the Wife.** — **The Want of Chastity in the Wife,** previous to the commission of

the husband consents to his wife's adultery it is a bar to the action, whether the consent be granted by giving a general license to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery charged. *Schorn v. Berry*, 63 Hun (N. Y.) 110.

1. Constructive Consent — Permitting Wife to Live as a Prostitute. — *Hodges v. Windham*, 1 Peake N. P. (ed. 1795) 39; *Cook v. Wood*, 30 Ga. 891, 76 Am. Dec. 677.

Husband Must Consent to Wife's Profligacy to Bar His Action. — With respect to the plaintiff's conniving at the intimacies of his wife with other men, the rule of law is, if the wife is suffered to live as a prostitute with the privity of her husband, and a man is thereby drawn into criminal conversation with her, this goes in bar of the action, because the damage is without an injury. But if it be without the privity of the husband, it will go only to the damages, let her be ever so profligate. Therefore, in order to establish the fact of assent, it must be shown that the wife was permitted by the husband to live openly and publicly in a state of common prostitution, in such manner that his assent to her so living may be reasonably presumed. This, and nothing short of this, is an answer to the action. Certainly, if a husband either expressly or tacitly assents to the criminal connection, he can maintain no action. *Sanborn v. Neilson*, 4 N. H. 501.

Plaintiff's Consent Must Be Shown. — In *Sherwood v. Titman*, 55 Pa. St. 77, the following charge was held correct: "If E. T. [plaintiff's wife] was a common prostitute, and her prostitution was with the knowledge and assent of her husband, he cannot recover; but until his assent is shown, either by knowledge and acquiescence or otherwise, he cannot be regarded as having abandoned his marital rights."

The fact that the plaintiff connived at his wife's intimacies with other men will not raise a presumption that he had ever assented that she should live as a common prostitute, or that she in fact had ever so lived. *Sanborn v. Neilson*, 4 N. H. 501.

2. Unfaithfulness of Plaintiff Not a Defense. — *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Sanborn v. Neilson*, 4 N. H. 501; *Cross v. Grant*, 62 N. H. 675; *Shattuck v. Hammond*, 46 Vt. 466, 14 Am. Rep. 631.

In *Wyndham v. Wycombe*, 4 Esp. N. P. 16, Lord Kenyon, at *nisi prius*, ruled that if a married man neglects the society of his wife and lives openly with other women, in the apparent practice of adultery, he can bring no action against another for criminal conversation with his wife.

But in *Bromley v. Wallace*, 4 Esp. N. P. 237, decided at *nisi prius*, some two years afterwards, Lord Alvanley said that though he was aware of Lord Kenyon's ruling, he was of a different opinion, and ruled accordingly that the misconduct, neglect, and infidelity of the husband were no defense in an action for criminal conversation.

3. Husband's Negligence in Respect to Wife's Conduct. — In *Stumm v. Hummel*, 39 Iowa 478, the court directed the jury that "in order to charge plaintiff with collusion in the crime of his wife he must have had a knowledge of the intimacy at the time or had good and reasonable grounds for believing it existed," and modified an instruction asked by the defendant, and then gave it, to the effect that, "acts of the plaintiff, in order to be regarded as leading to the wife's infidelity, must be such as to warrant the conclusion that he assented thereto in order to constitute a defense to the action." On appeal, the instructions were held correct. The court said: "Certainly, if the plaintiff confided in his wife and defendant as husbands ordinarily do in virtuous women and in their neighbors, thus permitting opportunities of crime, he cannot be charged with collusion in the absence of knowledge, or as aiding, encouraging, or prompting intimacy, unless the circumstances would warrant presumption of his assent thereto. Knowledge of, and assent to, the crime is necessary to make him a partaker in guilt and a sharer in its consequences."

4. Puth v. Zimbleman, 99 Iowa 641.

the act of adultery with the defendant, though material as affecting the question of damages, does not bar the husband's right of recovery,¹ unless, of course, such acts of unchastity were committed with the knowledge of the husband, and under circumstances from which a general license to the wife to so conduct herself would be inferred.²

(3) *Subsequent Conduct* — (a) *Husband's Condonation of Wife's Offense.* — The circumstance that the plaintiff lived with his wife after he had knowledge of her criminal intercourse with the defendant may be evidence that he had forgiven her offense, but is no evidence that he had condoned the offense of the defendant, and proof of this fact is therefore no answer to the action,³ nor is it evidence of consent or connivance on the part of the husband to the adultery.⁴

(b) *Permitting Wife to Afterwards Live with Defendant.* — The plaintiff's original cause of action against a seducer is not extinguished by his subsequent agreement with the latter that the wife should remain with and keep house for him.⁵

(c) *Collusion of Husband and Wife in Bringing Action.* — Nor is it of any consequence, so far as the right of action is concerned, that the suit is brought by collusion between the plaintiff and his divorced wife.⁶

e. PREVIOUS SUIT — *Against Another Defendant.* — It is no bar to an action for criminal conversation with the plaintiff's wife that the plaintiff had previously brought an action of the same kind against another defendant and obtained a verdict therein, although the cause of action in both suits accrued during the same period.⁷

Against Same Defendant. — Nor is the fact that the plaintiff had previously recovered a judgment against the same defendant for enticing away the former's wife, a bar to an action subsequently brought for the criminal conversation with her.⁸

f. DEATH OF PARTIES. — A right of action for criminal conversation dies with the person of the plaintiff or the defendant,⁹ but the death of the wife

1. *Want of Chastity in Wife No Defense.* — *Harrison v. Price*, 22 Ind. 165; *Conway v. Nicol*, 34 Iowa 533; *Sanborn v. Neilson*, 4 N. H. 501.

In an action for criminal conversation, the defendant answered that, prior to the commission of the alleged offense, the plaintiff's wife had committed adultery with others, and that the plaintiff, with knowledge of such adultery, had continued to cohabit with her for more than two years immediately preceding the commission of the defendant's alleged offense. It was held on demurrer that the answer was insufficient. *Clouser v. Clapper*, 59 Ind. 548.

2. See *supra*, this section, *Consent or Connivance of Husband*.

3. *Sikes v. Tippins*, 85 Ga. 231; *Clouser v. Clapper*, 59 Ind. 548; *Verholf v. Van Houwenlengen*, 21 Iowa 429; *Smith v. Meyers*, (Neb. 1897) 71 N. W. Rep. 1006; *Sanborn v. Neilson*, 4 N. H. 501.

4. *Condonation Not Evidence of Connivance.* — In *Stumm v. Hummel*, 39 Iowa 478, a proffered instruction to the effect that, if the plaintiff, after full knowledge of his wife's infidelity, continued to live with her upon the same terms as before her crime, the fact would be evidence to show that the plaintiff connived at it, was held to have been properly refused, and that one to the effect that the plaintiff's forgiveness of his wife and continuance of the marital relation did not necessarily have the

effect to establish connivance or assent was properly given. The court said: "The law will not hold a party remediless for an injury of this kind, because through the exercise of Christian virtue, the influence of family interest, or even in the want of what may be regarded as true manly spirit, he forgives an erring wife and trusts in her reformation and promise of future good conduct and virtue."

5. *Brown v. Spaulding*, 63 N. H. 622.

6. *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539.

7. *Gregson v. M'Taggart*, 1 Campb. 415.

8. *Previous Action for Enticing Away Plaintiff's Wife.* — The defendant enticed away the plaintiff's wife, and the plaintiff brought an action for the tort and recovered judgment which was paid. The wife afterwards procured a divorce in Iowa and the defendant married her there, and the plaintiff subsequently brought an action for criminal conversation. It was held that the former action and judgment therein did not prevent the plaintiff from maintaining this action. *Schnell v. Blohm*, 40 Hun (N. Y.) 378.

9. *An Action for Criminal Conversation Abates by the Death of the Defendant.* — *Garrison v. Burden*, 40 Ala. 513; *Clarke v. McClelland*, 9 Pa. St. 128.

But in *Cox v. Whitfield*, 18 Ala. 738, it was held that where the defendant in an action of crim. con. sues out a writ of error to reverse the judgment rendered against him, and dies

does not affect the husband's right of recovery.¹

g. **DIVORCE OF HUSBAND AND WIFE.** — The fact that the plaintiff had secured a divorce from his wife before an action was brought for the criminal conversation is no bar to such action.² It has also been held that this is true even when the divorce has been secured by the wife.³ But a seemingly reasonable limitation upon this latter doctrine has been announced in at least one reported case, to the effect that if the husband was in possession of facts which would have been a complete defense to the suit for divorce, and made no defense thereto, the decree is conclusive against their existence, and a subsequent action for the criminal conversation grounded upon them will be barred.⁴

IV. DAMAGES RECOVERABLE — 1. Elements of Damage. — The commission of an act of adultery is to be considered as an invasion of conjugal rather than of property rights,⁵ and the damages which may be recovered for the injury are exemplary rather than compensatory.⁶

Recovery Not Dependent upon Actual Loss. — A plaintiff is entitled to substantial damages although he proves no resulting expense or loss of services.⁷

The Mental Anguish Suffered by the Plaintiff from the wound given to his feelings, his affections, and his pride, by the act of the defendant, is the real injury, and ought to be so considered by the jury in awarding damages.⁸

before error assigned, the action does not abate, and may be revived in the appellate court in the name of his personal representative. Chilton, J., delivering the opinion of the court, said: "We readily grant that had C. died before final judgment in the court below, the suit would have abated by reason of his death. But a final judgment was rendered against him. The action here terminated, and it is very certain that his death, after the rendition of such judgment, did not annul it, but, on the contrary, it is conceded by the counsel that it could be enforced against the estate of the decedent, and that a *scire facias* would lie to revive it against his personal representative. Now our law would be singularly defective, if a final but erroneous judgment could only be reversed by the defendant while living, thus making his death operate as a release of all errors. It would be difficult to find a reason which would give to the party himself a right to have an erroneous judgment corrected, and which would deny such right to his personal representative." But such, we are persuaded, is not the law."

1. Death of Wife Does Not Abate Right of Action. — Where a defendant has debauched the wife of the plaintiff, the right of action of the latter is complete, and a recovery by him is not defeated by her death before action brought. The right of recovery becomes complete at the time the injury was inflicted, and the right to recover damages commensurate with the injury, having then vested, is not divested by the death of the wife. Had either the plaintiff or the defendant died, then the suit could not have been sustained by or against their representatives; but neither reason nor authority sustains the proposition that the right of action abates at the death of the wife. *Yundt v. Hartrunft*, 41 Ill. 9. See also *Wilton v. Webster*, 7 C. & P. 198, 32 E. C. L. 491.

2. Wales v. Miner, 89 Ind. 118. And see generally the title **DIVORCE**.

3. Michael v. Dunkle, 84 Ind. 544, 43 Am.

Rep. 100; *Wood v. Mathews*, 47 Iowa 409; *Prettyman v. Williamson*, (Del. 1898) 39 Atl. Rep. 731.

4. Gleason v. Knapp, 56 Mich. 291, 56 Am. Rep. 388.

5. Long v. Booe, 106 Ala. 570; *Browning v. Jones*, 52 Ill. App. 597.

6. Damages Recoverable — Exemplary Rather than Compensatory. — *Johnson v. Allen*, 100 N. Car. 131; *Cornelius v. Hambay*, 150 Pa. St. 359.

Exemplary damages for injury to the plaintiff's feelings are recoverable in an action brought by a husband for criminal conversation with his wife; and they need not be susceptible of proof at a money standard, but may be fixed by the jury in view of all the facts. *Johnston v. Disbrow*, 47 Mich. 59.

Measure of Damages under English Matrimonial Causes Act. — But it has been held, under the English Matrimonial Causes Act, 1857, that in assessing damages against a co-respondent the jury is not to seek to punish him, but is only to give compensation for the loss which the husband has sustained, and is to consider whether this loss has been caused by the action of the co-respondent. *Keyse v. Keyse*, 11 Prob. Div. 100.

7. Recovery Not Dependent upon Actual Loss. — *Long v. Booe*, 106 Ala. 570, citing 9 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 835; *Prettyman v. Williamson*, (Del. 1898) 39 Atl. Rep. 731.

In *Stumm v. Hummel*, 39 Iowa 478, it was held that it was proper to have refused an instruction asked by the defendant, to the effect that if the plaintiff, by the act complained of, had not lost the affection or society of his wife, nor was his family broken up, nor his domestic relations impaired, then he could recover nothing more than nominal damages. The court remarked that the injuries enumerated in the proffered instruction are not the only ones for which compensatory damages will be awarded in this kind of action.

8. Mental Anguish the True Element of Damage. — *Long v. Booe*, 106 Ala. 570; *Prettyman*

2. Excessive Damages. — Although it is conceded that courts have the power of granting a new trial for excessiveness of damages in cases of criminal conversation,¹ there is no recorded instance in which this power has been exercised.² The amount of damages to be recovered in such a case rests so much in the discretion of the jury that a court will not disturb the verdict on the ground that the damages are excessive, unless it is manifest that they have been governed by passion, partiality, or corruption.³ To draw such a conclusion it is not enough that the damages, in the opinion of the court, are too high, or that a less amount would have been a sufficient satisfaction for the injury. It ought to be apparent at first blush, it would seem, that the damages are glaringly and grossly excessive.⁴

v. Williamson, (Del. 1898) 39 Atl. Rep. 731; *Smith v. Meyers*, (Neb. 1897) 71 N. W. Rep. 1006.

Criminal conversation is an invasion of the rights acquired by marriage. Whatever damages arise therefrom, as loss of consortium with all that term implies, aggravated as they may be by degradation, distress, and mental anguish consequent upon the injury, should be regarded as natural and proximate. *Browning v. Jones*, 52 Ill. App. 597.

"In this class of cases, the loss of services may be the alleged injury, but the injury to the character of the family is the real ground of recovery when the cause of action relates to the wife or daughter. The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery. It has not been the policy of the law to confine the recovery by the injured party to the precise amount of money which he has proved he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and anguish growing out of the injury. Nor is it true that, because appellee was absent from home, he therefore could have sustained no loss of service by reason of his wife being debauched. He had a right to her services in the nurture of his children, as well as a virtuous example to them by her. He had the right to the teachings of a virtuous and not of a depraved mother to his children. If he intrusted their care to a virtuous and undefiled mother, and appellant corrupted and debased her, he thereby became liable to appellee for the neglect to her family and her example to her children. And the circumstance that his wife died did not deprive him of his right of recovery." *Per Walker, C. J.*, in *Yundt v. Hartunff*, 41 Ill. 9.

Measure of Damage When Wife Dies After Action Brought. — If, in an action for adultery, it appear that the wife has died since the commencement of the action, the jury should give damages for the loss of the society of the wife from the time of the discovery of the adultery to the time of the wife's death, and also for the shock to the feelings of the husband; and this is so, though it appear that there was no suspicion of the wife's infidelity till she was on her death-bed, and though the husband continued to treat her kindly up to the time of her death. *Wilton v. Webster*, 7 C. & P. 198, 32 E. C. L. 491.

Injury to Family of Plaintiff Not an Element of Damage. — In *Ferguson v. Smethers*, 70 Ind.

519, 36 Am. Rep. 186, an instruction to the effect that the jury might consider, in determining the amount of damages, the injury to the happiness, reputation, and honor of the plaintiff's family, was held erroneous. The court said: "A family is that body of persons, collectively, who live in one household, under one head, including parents, children, and servants, and may include persons who are merely lodgers or boarders. The evidence in this case shows us that the family of the appellee consisted of the parents and seven children, the oldest seventeen and the youngest four years. Injury to these children does not constitute an element of damages in favor of the appellee. He can recover only for injuries to himself, for the loss of his wife."

1. *Smith v. Masten*, 15 Wend. (N. Y.) 270.

2. *Per Richardson, J.*, in *Torre v. Summers*, 2 Nott & M. (S. Car.) 267, 10 Am. Dec. 597; *Smith v. Masten*, 15 Wend. (N. Y.) 270.

3. **Excessive Damages — When Court Will Set Aside Verdict For.** — *Crose v. Rutledge*, 81 Ill. 266; *Harris v. Rupel*, 14 Ind. 209; *Torre v. Summers*, 2 Nott & M. (S. Car.) 267, 10 Am. Dec. 597.

The fact that the damages awarded by the jury in an action for the recovery of damages are in a larger amount than the appellate court would have deemed justified is not a sufficient fact to warrant the court in setting aside the verdict for excessive damages, but it must appear that the damages were awarded through passion or prejudice on the part of the jury. *Speck v. Gray*, 14 Wash. 589.

4. **Instances Where the Court Refused to Set the Verdict Aside.** — In *Duberley v. Gunning*, 4 T. R. 656, the jury awarded the plaintiff five thousand pounds damages, and though Lord Kenyon thought they should have been nominal, and Mr. Justice Buller thought there should have been a verdict for the defendant on the ground that there was consent on the part of the plaintiff to his wife's adultery, yet a majority of the court refused a new trial on the ground of excessive damages.

In *Wilford v. Berkeley*, 1 Burr. 609, the jury awarded the plaintiff five hundred pounds damages. The defendant was a clerk at a salary of only fifty pounds a year. Upon the hearing of a motion for a new trial for excessiveness of damages, it was held that the matter was properly and solely under the cognizance of the jury, and fit to be submitted to their discretion and estimate; and the motion was denied.

In *Smith v. Masten*, 15 Wend. (N. Y.) 270,

V. EVIDENCE — 1. Evidence Affecting the Right of Recovery — a. WHAT MUST BE PROVEN. — In actions for criminal conversation, proof of two facts is essential to the plaintiff's recovery, viz., the marriage and the adultery.¹

Proof of Loss of Service, Society, etc., Not Essential. — Although it is usual to allege the seduction of the wife, and the consequent alienation of her affections, the loss of her company and assistance, and sometimes of her services, these are matters of aggravation except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action. The essential injury to the husband consists in the defilement of the marriage bed. The loss of the *consortium* is presumed, although the wife may have herself been the seducer, or may not have been living with the husband.²

b. PROOF OF MARRIAGE. — As regards the fact of marriage, the rule is well settled that an actual marriage must be proved; and such evidence of cohabitation and reputation as would be sufficient in other civil actions will not suffice in such a case.³

the court refused to set aside a verdict for three thousand dollars damage, although it appeared that the plaintiff had reason to know of the improper conduct of his wife, suspected her, and yet took no measures to prevent intercourse between her and the defendant.

One thousand dollars will not be deemed excessive damages in a suit for criminal conversation, though the wife may have been somewhat easily led astray, if the result is to induce a divorce. *Wales v. Miner*, 89 Ind. 118.

A verdict for fifteen thousand dollars, in an action by a husband for the seduction of his wife and the alienation of her affections, will not be deemed so excessive on appeal as to warrant the granting of a new trial, where the evidence shows that the plaintiff and his wife were respectable people, that she was a school teacher and received good wages as such, that the plaintiff was a lawyer and had been elected prosecuting attorney, and that the relations existing between them prior to the advent of the defendant were cordial, friendly, and affectionate. *Speck v. Gray*, 14 Wash. 589.

Twenty-five hundred dollars damages, in an action by a husband against his family physician for criminal conversation, are not excessive. *Clouser v. Clapper*, 59 Ind. 548.

A verdict assessing the damages at three thousand dollars is not excessive. *Smith v. Myers*, (Neb. 1897) 71 N. W. Rep. 1006.

1. Proof of Adultery Essential. — In an action by a husband to recover damages from a defendant for seducing and debauching the plaintiff's wife, whereby her affections have been alienated from him, the gravamen of the action is the alleged criminal conversation, and the plaintiff cannot, if he fail to prove the criminal conversation, recover in this action for the loss of her society, even though caused by the defendant. Though at common law a husband may maintain an action for enticing away his wife and separating her from him whereby he loses her services and society, this constitutes a cause of action altogether distinct from and independent of an action for criminal conversation. *Wood v. Mathews*, 47 Iowa 409.

2. Per Allen, J., in Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307; *Yundt v. Hartunft*, 41 Ill. 9.

3. Actual Marriage Must Be Proven. — 2 Stark. Ev. 939; 3 Blackstone 140; *Birt v. Barlow*, 1 Doug. 171; *Morris v. Miller*, 4 Burr. 2057; *Catherwood v. Caslon*, 13 M. & W. 261; *Kepler v. Elser*, 23 Ill. App. 643; *Kibby v. Rucker*, 1 A. K. Marsh. (Ky.) 392; *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164; *Young v. Foster*, 14 N. H. 114; *Dann v. Kingdom*, 1 Thomp. & C. (N. Y.) 492. See also *Browning v. Jones*, 52 Ill. App. 597.

The plaintiff in an action of criminal conversation is bound to prove a marriage valid in all respects, and it is not sufficient *prima facie* evidence on his part to show that he and his alleged wife went through a religious ceremony with the *bona fide* intention of thereby contracting a valid marriage, and afterwards lived together as man and wife, in the belief that they had thereby contracted a valid marriage, if in law such marriage was not valid. *Catherwood v. Caslon*, 13 M. & W. 261.

Georgia Statute. — Adultery or criminal conversation with a wife gives a right of action to the husband. In such cases, proof of the marriage may be made by general reputation and the parties' living together as man and wife. Code of Georgia (1895), § 3860.

The Confession or Acknowledgment of the Relation by the Defendant Is Insufficient to prove the fact of marriage. *Kepler v. Elser*, 23 Ill. App. 643.

In trespass for criminal conversation, the plaintiff must give strict proof of his marriage; mere casual conversations of the defendant, in which he has spoken of the woman as the plaintiff's wife, or letters from him directed to her as such, are not sufficient admissions of the marriage to obviate the necessity of the strict proof of the marriage itself. *Campbell v. Carr*, 6 U. C. Q. B. O. S. 482; *Ford v. Langois*, 19 U. C. Q. B. 312.

Marriage Register. — The marriage register required to be kept by the provisions of section 2528, Revision of 1860, is sufficient to establish a marriage without other evidence showing that the person who officiated was authorized to solemnize marriages. *Verholf v. Van Houtenlengen*, 21 Iowa 420.

A Certificate from the Minister of a Church in the kingdom of Wurtemberg, that on the register of his church there is recorded the marriage of K. and B., together with the cer-

c. PROOF OF THE ADULTERY. — For obvious reasons it seldom happens in cases of this sort that direct proof of the criminal intercourse is obtainable. The evidence is usually circumstantial, and to recover thereon the plaintiff must show, first, a disposition to illicit intercourse on the part of the wife; second, a disposition to illicit intercourse with the wife on the part of the defendant; and, third, opportunity to gratify such mutual disposition. In other words, it must be shown that a criminal attachment subsisted between the wife and the defendant, and that they had an opportunity to gratify their unlawful passion.¹

tificate of a judge of the High Court that the certificate of the minister is genuine and entitled to credit, is, when the parties referred to in the minister's certificate have been identified as the plaintiff and his wife, *prima facie* evidence of marriage. *Hutchins v. Kimmell*, 37 Mich. 126, 18 Am. Rep. 164.

Justice's Certificate. — In *Dann v. Kingdom*, 1 Thomp. & C. (N. Y.) 492, the plaintiff offered in evidence as proof of marriage the certificate of a justice of the peace proved to be dead, setting forth that the justice had on a certain date united the plaintiff and S. in the bonds of matrimony. The certificate did not state that the justice knew the parties, or that they were identified to him, or that they were of sufficient age to marry, and there was no attesting witness. It was held that the certificate of the justice did not comply with the statute requirements and was not proof of the marriage.

Testimony of Witnesses Admissible. — Record evidence is not indispensable to prove a marriage; and the fact may be established by witnesses having knowledge thereof. *Kilburn v. Mullen*, 22 Iowa 498, following *State v. Williams*, 20 Iowa 98, and *State v. Wilson*, 22 Iowa 364, and followed in *Jacobsen v. Siddal*, 12 Oregon 280, 53 Am. Rep. 360.

In *Birt v. Barlow*, 1 Doug. 171, the plaintiff was nonsuited because none of the subscribing witnesses to the marriage register were called to prove the marriage. But upon a rule for a new trial, it was held that the testimony of the subscribing witnesses was not indispensable, as the fact of marriage might be proved in a thousand other ways. Lord Mansfield illustrated by saying: "Suppose the bell-ringers were called, and proved that they rung the bells and came immediately after the marriage and were paid by the parties; suppose the handwriting of the parties were proved; suppose persons called who were present at the wedding dinner, etc., etc."

The Plaintiff or His Wife Is a Competent Witness to prove the marriage. *Jacobsen v. Siddal*, 12 Oregon 280, 53 Am. Rep. 360. *Contra*, *Dann v. Kingdom*, 1 Thomp. & C. (N. Y.) 492.

1. Proof of Adultery. — *Ramsay v. Ryerson*, 40 Fed. Rep. 739, 24 Abb. N. Cas. (N. Y.) 114.

In *Burdick v. Freeman*, 120 N. Y. 420, the plaintiff sought to prove that his wife and the defendant had had adulterous intercourse on several occasions. He gave evidence of frequent intimate association and of opportunities for adultery on many occasions. The defendant requested the court to instruct the jury that the evidence was insufficient to justify a finding that he had committed adultery with the plaintiff's wife on any of the occasions specified. The court refused, and in effect

charged that if any one of the occasions stood apart by itself the instruction might be proper, but that in determining the issue the jury were to consider all the evidence and take into account all the occasions, and if they found the defendant had seduced the plaintiff's wife and alienated her affection he was liable. The instruction was held proper upon appeal.

Visits to Hotel together Evidence of Adultery. — In an action for criminal conversation, the fact that the defendant and the plaintiff's wife visited a hotel late at night and remained there several hours, is a circumstance from which the jury may infer illicit intercourse. *Cornelius v. Hambay*, 150 Pa. St. 359.

Opinion of Witness Not Admissible. — Where in an action of crim. con. a witness testifies that he saw the defendant at the plaintiff's house, in company with the wife of the latter, his opinion as to the purpose for which he was there is not admissible as evidence. *Cox v. Whitfield*, 18 Ala. 738.

Letters as Evidence. — The plaintiff in a crim. con. case may introduce in evidence letters written by his wife to the defendant, and received by him, under circumstances which refute any presumption of collusion between the wife and her husband, and which tend to show the alienation of her affections and the criminal intimacy charged. *Dalton v. Dregge*, 99 Mich. 250.

Resemblance of Child to Defendant. — In *Stumm v. Hummel*, 39 Iowa 478, the court gave the following instruction, which was held proper on appeal: "If you believe that the child of plaintiff's wife shown to you during the trial resembles defendant, and your judgment and experience teaches you that there is anything reliable in this appearance that would be safe for you to form an opinion on, you may consider it in corroborating the evidence of Mrs. Stumm."

Proof of Non-Intercourse between Husband and Wife Not Admissible. — In an action for damages for criminal conversation the testimony of the husband and wife is inadmissible to disprove intercourse between themselves for the purpose of raising a presumption against the legitimacy of the wife's child. *Egbert v. Greenwalt*, 44 Mich. 245, 38 Am. Rep. 260.

In an action of criminal conversation the plaintiff's right of action depends solely upon the defendant's carnal intercourse with the wife, and not upon the plaintiff's impotence or capacity; and the question as to whether an after-born child was begotten by the husband or the defendant, or as to whether there had been any matrimonial intercourse between the husband and his wife, is immaterial. *Bedan v. Turney*, 99 Cal. 649.

2. Evidence Affecting Amount of Damages — a. CHARACTER AND CONDUCT OF PARTIES — (1) *Of the Plaintiff.* — In actions of criminal conversation the plaintiff's general character is not in issue,¹ but his character and conduct as a husband are. It is competent for the defendant to show, in mitigation of damages, the plaintiff's criminal connection with other women at any time after marriage and before trial.²

Negligence of Plaintiff in Respect to Wife's Conduct. — So, if the plaintiff was negligent in respect to his wife's conduct, it may be shown in reduction of damages.³

Plaintiff as a Witness. — In an action by a husband for criminal conversation, the husband is not a competent witness as to the wife's adultery. *Cornelius v. Hambay*, 150 Pa. St. 359; *Hanselman v. Dovel*, 102 Mich. 505, 47 Am. St. Rep. 557.

In the case of *Tilton v. Beecher*, 59 N. Y. 176, tried before the City Court of Brooklyn in 1874, the plaintiff offered himself as a witness in his own behalf, but was objected to by the defendant on the ground that in the Act of May 10, 1867, which enables husband and wife, or either of them, to be a witness for or against the other, it is provided that nothing done in the act "shall render any husband or wife competent or compellable to give evidence for or against each other * * * in any action or proceeding for or on account of criminal conversation." For the plaintiff, it was argued that he was not called to testify against his wife because she was not a party, and the court ruled that the plaintiff was competent to be sworn and to testify in his own behalf, but that as to the principal question at issue he was not competent to testify in respect to any confidential communication. 11 Alb. L. J. 96; 2 Cent. L. J. 102.

Section 831 of the N. Y. Code of Civil Procedure, which modifies and continues the provisions of the Act of 1867, has been held to apply only where the wife is a party to the action. *Woods v. Gledhill*, 56 Hun (N. Y.) 220; *Smith v. O'Brien*, (Supreme Ct.) 6 N. Y. Supp. 174, 24 N. Y. St. Rep. 708, *affirmed* 127 N. Y. 684.

Wife Not a Competent Witness. — In an action by a husband to recover damages for alleged criminal conversation between the defendant and the plaintiff's wife, where no divorce has been obtained, the wife is incompetent to testify as a witness to any fact in the case. Hence, she is not a competent witness for the plaintiff, to prove the criminal intercourse of the defendant with her, alleged in the complaint. The Code of Procedure does not apply to such a case, for the reason that the wife is not a party to the action. *Carpenter v. White*, 46 Barb. (N. Y.) 201; *Hicks v. Bradner*, 2 Abb. App. Dec. (N. Y.) 362; *Mathews v. Yerex*, 48 Mich. 361; *Reynolds v. Schaffer*, 91 Mich. 494, 30 Am. St. Rep. 492; *Hanselman v. Dovel*, 102 Mich. 505, 47 Am. St. Rep. 557. *Contra*, *Smith v. Meyers*, (Neb. 1897) 71 N. W. Rep. 1006. See also *Speck v. Gray*, 14 Wash. 589.

Wife's Confession. — In a suit for criminal conversation, the confessions of the wife are not evidence against the defendant. *McVey v. Blair*, 7 Ind. 590; *Harris v. Rupel*, 14 Ind. 209.

On the trial of a suit for criminal conversa-

tion the plaintiff offered in evidence a certain paper written by his wife tending to show the alleged criminal intercourse, but which was not sent to or ever in the possession of the defendant. The plaintiff testified in relation to the paper that he came home on a certain occasion and found his wife writing it, and told her he would take charge of it, and did so, and had it in his possession ever since. The paper was offered in evidence attached to a deposition of the plaintiff's wife, who had since obtained a divorce from him. It was held that the paper was inadmissible in evidence. *Underwood v. Linton*, 54 Ind. 468.

Divorced Wife a Competent Witness. — In an action on the case brought by a husband for criminal conversation with his wife, the latter, after a divorce from the bonds of matrimony, is a competent witness for the plaintiff, to prove the charge in the declaration. *Dickerman v. Graves*, 6 Cush. (Mass.) 308, 53 Am. Dec. 41; *Ratcliff v. Wales*, 1 Hill (N. Y.) 63. *Contra*, *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539.

Confidential Communication. — In *Croze v. Rutledge*, 81 Ill. 266, the defendant offered the divorced wife of the plaintiff as a witness to prove a fact which must have come to her knowledge from the very nature of the fact during the existence of the marital relation. It was held that her testimony was properly excluded.

Defendant as a Witness. — In an action for crim. con., it is not error to charge that defendant "is interested in swearing, if there is any such thing as honor or moral right that would excuse falsehood, not only to that which would relieve himself, but will protect his paramour," the plaintiff's interest having also been commented upon. *Cornelius v. Hambay*, 150 Pa. St. 359.

1. Plaintiff's General Character Not in Issue. — In actions of crim. con. it is inadmissible to offer to prove that the plaintiff was a common drunkard. *Norton v. Warner*, 9 Conn. 172.

2. Plaintiff's Infidelity May Be Shown in Mitigation of Damages — *England.* — *Bromley v. Wallace*, 4 Esp. N. P. 237.

Illinois. — *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Browning v. Jones*, 52 Ill. App. 597.

New Hampshire. — *Sanborn v. Neilson*, 4 N. H. 501; *Cross v. Grant*, 62 N. H. 675.

New York. — *Schorn v. Berry*, 63 Hun (N. Y.) 110.

Vermont. — *Shattuck v. Hammond*, 46 Vt. 466, 14 Am. Rep. 631.

3. *Calcraft v. Harborough*, 4 C. & P. 499, 19 E. C. L. 494; *Bunnell v. Greathead*, 49 Barb. (N. Y.) 106.

(2) *Of the Wife.* — The character and conduct of the wife are even more material, for it is plain that if the wife was incontinent before the commission of the adultery with the defendant, the damage sustained by the plaintiff from the defendant's wrong is trifling compared with what it would otherwise have been. It is therefore competent to admit testimony of the wife's reputation for chastity,¹ as well as evidence of specific acts of adultery.²

(3) *Of the Defendant.* — The defendant's character, however, is not in issue, and it is error to permit the plaintiff to give general evidence of the defendant's reputation for unchastity.³

b. CIRCUMSTANCES LEADING TO THE COMMISSION OF THE WRONG. — Circumstances attending the adultery, as whether the wife was sought and importuned by her paramour, and overcome by persuasion, or whether she sought him, or threw herself in his way, and willingly consented, may be given in evidence as affecting the question of damages.⁴

c. PREVIOUS FAMILY RELATIONS OF HUSBAND AND WIFE. — For a like reason, the terms upon which husband and wife lived together previous to the advent of the defendant may be shown. For it is obvious that if the defendant has invaded and wrecked a home hitherto graced with the blessings of conjugal affection and domestic peace, he has inflicted an infinitely greater

1. Wife's Reputation for Unchastity Admissible. — *Sanborn v. Neilson*, 4 N. H. 501. And see the title CHARACTER (IN EVIDENCE), vol. 5, p. 865.

In an action for criminal conversation, the general bad character of the wife, if not caused by her seduction by the defendant, may be given in evidence in mitigation of damages, though not necessarily reducing them to a merely nominal sum. *Clouser v. Clapper*, 59 Ind. 548.

But in *Vaughn v. Clarkson*, (R. I. 1896) 34 Atl. Rep. 989, it was held proper to have disallowed testimony of the plaintiff's wife's reputation for chastity in England five years before the commission of the injury complained of.

Proof of Good Character for Chastity — When Admissible. — Where in an action by the husband for criminal conversation, the character of the wife for chastity is attacked by evidence of acts of adultery, it is proper to admit proof in rebuttal to show her general reputation for chastity. *Browning v. Jones*, 52 Ill. App. 597.

But the plaintiff cannot give evidence of the good character of his wife previous to the alleged adultery with the defendant, when no evidence had been produced by the other side impeaching her previous general character or her conduct with any other person than the defendant. *Pratt v. Andrews*, 4 N. Y. 493.

2. Previous Acts of Adultery May Be Proven. — It is admissible for the defendant to prove, in mitigation of damages, that the wife of the plaintiff had been guilty of adultery with other persons before her connection with the defendant. *Winter v. Henn*, 4 C. & P. 494, 19 E. C. L. 491; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Harrison v. Price*, 22 Ind. 165; *Torre v. Summers*, 2 Nott & M. (S. Car.) 267, 10 Am. Dec. 597.

In an action for crim. con., evidence of acts showing a want of chastity in plaintiff's wife before marriage can be considered by the jury in mitigation of damages. And in this con-

nection it is proper for the jury to consider evidence tending to show that her misconduct was confined to a single individual, and that individual the defendant. *Conway v. Nicol*, 34 Iowa 533.

A Witness Is Admissible to Prove that he had criminal conversation with the wife previous to her seduction by the defendant, where the witness himself does not object to give such testimony. *Torre v. Summers*, 2 Nott & M. (S. Car.) 267, 10 Am. Dec. 597.

Evidence of Subsequent Acts of Adultery Not Admissible. — Evidence of misconduct in the woman subsequent to her connection with defendant is not admissible. *Elsam v. Faucett*, 2 Esp. N. P. 562.

3. Crose v. Rutledge, 81 Ill. 266.

4. Circumstances Leading to the Commission of the Wrong May Be Shown. — *Ferguson v. Smethers*, 70 Ind. 519, 56 Am. Rep. 186.

A letter written by the wife to the defendant, showing that she had not been seduced by the defendant, but that she had solicited him and enticed him into the connection, is admissible. *Elsam v. Faucett*, 2 Esp. N. P. 562.

Where the evidence in an action for seduction fails to show that the wife was actually seduced, but it appears that her fall was rather the result of her own licentiousness, no damages can be recovered for actual seduction. *Hoggins v. Coad*, 58 Ill. App. 58.

Evidence of Predetermined Design to Wrong Plaintiff. — In *Stumm v. Hummel*, 39 Iowa 478, it was held admissible to admit testimony that the defendant had had intercourse with the plaintiff's wife before her marriage, and that he advised her to marry the plaintiff and said he "would then come and have intercourse with her." The predetermined design of the defendant to commit the wrong against the plaintiff is competent in evidence in order to show the full extent of the injury, which is much greater if the plaintiff was made the dupe of the defendant's artifice as well as the victim of his crime.

injury upon the plaintiff than if the happiness of the home had already been impaired by indifference and discord.¹

Letters Written by the Wife to the Plaintiff previous to the alleged adultery, and when there was no reason to suspect collusion, are admissible in evidence as a means of showing their deportment towards each other.² The time when such letters were written must, however, be proven.³

d. PECUNIARY CONDITION OF THE PARTIES — Of the Defendant. — In actions for criminal conversation, as in the case of other torts where it is proper for the jury to give vindictive damages, it is competent to hear evidence of the pecuniary condition of the defendant.⁴

Of the Plaintiff. — It has also been held admissible to admit evidence of the pecuniary condition of the plaintiff.⁵ This ruling probably proceeds from the assumption that the damages which the plaintiff has sustained are greater or less according to his ability to dispense with the services of his wife.

1. Evidence of Previous Family Relations of Husband and Wife. — In *Hadley v. Heywood*, 121 Mass. 236, it was held that evidence of unhappy relations existing between the plaintiff and his wife, not caused by the conduct of the defendant, was properly submitted to the jury; for, though this was in no sense a justification or palliation of the defendant's conduct, yet such evidence was admissible as affecting the question of damages, because if these unhappy relations existed the injury done to the husband was less than it otherwise might have been. See also *Prettyman v. Williamson*, (Del. 1893) 39 Atl. Rep. 731.

In actions for criminal conversation, one of the principal grounds on which the husband is allowed to recover damages is that by the wrongful act of the defendant he has been deprived of the confidence and affection of his wife. If the defendant invades domestic peace, destroys conjugal felicity, and by his solicitations alienates and seduces the wife's affections from a kind and tender husband, he inflicts a much more grievous wrong and ought to incur a far heavier penalty in damages than if love and harmony and affectionate intercourse between husband and wife had been previously impaired or lost through the misconduct and cruel treatment of the husband. It is therefore proper to admit in evidence statements of the wife made prior to the alleged seduction concerning her husband's cruel treatment of her. *Palmer v. Crook*, 7 Gray (Mass.) 418.

In an action for the seduction of the plaintiff's wife it is competent for the defendant to prove, under an answer of general denial, in mitigation of damages, that owing to the wicked and depraved disposition of the plaintiff, he and his wife, before the alleged improper intimacy, lived unhappily together, that the plaintiff frequently cursed, abused, and struck her, and about three years before their final separation drove her from his home under threats of killing her. *Coleman v. White*, 43 Ind. 429. Compare *VanVacter v. McKillip*, 7 Blackf. (Ind.) 578; *Dallas v. Sellers*, 17 Ind. 479, 79 Am. Dec. 489.

In *Dance v. McBride*, 43 Iowa 624, the defendant offered evidence tending to show that the plaintiff and his wife had never seen each other until he visited her for the purpose of marrying her, having previously made an offer of marriage by letter. The court ex-

cluded the evidence, but upon appeal this was held to be error. The court, by Adams, J., said: "While the evidence could not be regarded as having much weight, we are of the opinion that it should have been admitted. It tended to show that the marriage in its inception was not one of affection. The acts complained of occurred within eighteen months from the time the marriage took place. The inauspicious way in which it was contracted, as well as any fact tending to prove that no love ripened between the parties, were proper facts to be considered by the jury in the assessment of damages."

2. *Edwards v. Crock*, 4 Esp. N. P. 39; *Trelawney v. Coleman*, 1 B. & Ald. 90; *Willis v. Bernard*, 8 Bing. 376, 21 E. C. L. 325; *Long v. Booe*, 106 Ala. 570; *Horner v. Yancey*, 93 Wis. 352.

3. *Edwards v. Crock*, 4 Esp. N. P. 39; *Trelawney v. Coleman*, 1 B. & Ald. 90.

4. Evidence of Defendant's Pecuniary Condition Admissible. — *Johnson v. Allen*, 100 N. Car. 131; *Peters v. Lake*, 66 Ill. 206, 16 Am. Rep. 593, citing *Cochran v. Ammon*, 16 Ill. 316; *Grable v. Margrave*, 4 Ill. 372, 38 Am. Dec. 88.

In an action for criminal conversation the husband is entitled to punitive damages, and it is not improper to admit evidence that the seducer is a rich man, nor is it improper for the court to say that "there is a very great difference in a penalty as between a rich man and a poor man." *Matheis v. Mazet*, 164 Pa. St. 580.

In addition to compensatory damages, criminal conversation being wanton and criminal in its nature, and therefore the action being vindictive, the jury are always permitted to give damages for the double purpose of setting an example and of punishing the wrongdoer. For these purposes proof of the condition in life and circumstances, as well of the husband as of the party committing the injury, is highly proper and should be considered by them in estimating the damages. *Brown v. Jones*, 52 Ill. App. 597.

Contra. — *James v. Biddington*, 6 C. & P. 589, 25 E. C. L. 553.

5. Evidence of Plaintiff's Pecuniary Condition Admissible. — In an action on the case for criminal conversation with the plaintiff's wife, evidence of the pecuniary circumstances of the parties is proper. *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539.

c. RANK AND SOCIAL RELATIONS OF THE PARTIES. — Whether proof of the rank and condition in life of the parties may be given in evidence to increase or diminish the damages, is a vexed question, the reported decisions being conflicting.¹

But where such a case is tried several years after the injury complained of, it is error to admit proof of the plaintiff's bankruptcy at the time of the trial. *Peters v. Lake*, 66 Ill. 206, 16 Am. Rep. 593.

1. Rank and Social Condition of Parties May Be
8 C. of L. — 18.

Shown. — In an action of criminal conversation it is not improper to charge that the jury may take into consideration the social relation of the parties. *Matheis v. Mazet*, 164 Pa. St. 580.

Contra. — *Norton v. Warner*, 9 Conn. 172.
Volume VIII.

CRIMINAL LAW.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the cross-references under the title *CRIMINAL PROCEDURE*, *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, vol. 5, p. 622. As to *Specific Crimes*, see the titles where such offenses are treated, as *ABDUCTION*, vol. 1, p. 162; *ABORTION*, vol. 1, p. 186; *ADULTERATION*, vol. 1, p. 738; *ADULTERY (AS A CRIME)*, vol. 1, p. 746; *AFFRAY*, vol. 1, p. 915; *ARSON*, vol. 2, p. 917; *ASSAULT AND BATTERY*, vol. 2, p. 952; *BARRATRY*, vol. 3, p. 859; *BIGAMY*, vol. 4, p. 34; *BLASPHEMY AND PROFANITY*, vol. 4, p. 580; *BREACH OF THE PEACE*, vol. 4, p. 902; *BRIBERY*, vol. 4, p. 907; *BURGLARY*, vol. 5,

- p. 44; *CARRYING WEAPONS*, vol. 5, p. 729; *CHAMPERTY AND MAINTENANCE*, vol. 5, p. 815; *COMPOUNDING OFFENSES*, vol. 6, p. 399; *CONCEALMENT OF BIRTH OR DEATH*, vol. 6, p. 424; *CONSPIRACY*, vol. 6, p. 830; *COUNTERFEITING*, vol. 7, p. 875, etc.
- As to Criminal Responsibility*, see the titles *ACCIDENT*, vol. 1, p. 272; *AGENCY*, vol. 1, p. 930; *CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *DURESS*; *HUSBAND AND WIFE*; *INFANCY*; *INSANITY*; *INTOXICATION*.
- As to Criminal Acts and Connection Therewith*, see the titles *ACCESSORY*, vol. 1, p. 257; *AIDER AND ABETTOR*, vol. 2, p. 29; *ATTEMPTS TO COMMIT CRIME*, vol. 3, p. 250; *COMPOUNDING OFFENSES*, vol. 6, p. 399; *CONSPIRACY*, vol. 6, p. 830; *MISPRISION*; *SOLICITATION TO CRIME*.
- As to Evidence*, see the titles *ACCOMPLICES*, vol. 1, p. 389; *BLOOD STAINS*, vol. 4, p. 587; *BURDEN OF PROOF*, vol. 5, p. 21; *CHARACTER (IN EVIDENCE)*, vol. 5, p. 850; *CONFESSIONS*, vol. 6, p. 520; *CORPUS DELICTI*, vol. 7, p. 861; *DYING DECLARATIONS*; *EVIDENCE*, and the cross-references there given. See also the titles under which Specific Crimes are treated.
- As to Merger of different crimes and of civil remedy in prosecution*, see the title *MERGER*.
- As to Consequences of Crime and Conviction*, see *ATTAINDER*, vol. 3, p. 248; *CIVIL DEATH*, vol. 6, p. 64; *ESCHEAT*; *FORFEITURE*; *INFAMOUS CRIMES*; *SENTENCE*; *WITNESSES*.
- As to Punishment for Crime*, see *CRUEL AND UNUSUAL PUNISHMENT*; *CUMULATIVE PUNISHMENTS*; *PUNISHMENT*; and the titles under which particular crimes are treated.
- As to Jurisdiction*, see the titles *ADMIRALTY JURISDICTION*, vol. 1, p. 645; *INTERNATIONAL LAW*; *JURISDICTION*; *PRIVATE INTERNATIONAL LAW*; *UNITED STATES COURTS*.
- For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject*, see the titles *ALIBI*, vol. 2, p. 53; *ARREST*, vol. 2, p. 832; *BAIL AND RECOGNIZANCE (IN CRIMINAL CASES)*, vol. 3, p. 651; *COMMON LAW*, vol. 6, p. 268; *CONSTITUTIONAL LAW*, vol. 6, p. 882; *CONSULS*, vol. 7, p. 6; *CONTEMPT*, vol. 7, p. 25; *DETECTIVES*; *EX POST FACTO LAWS*; *FALSE IMPRISONMENT*; *INDIANS*; *JEOPARDY*; *MEDICAL JURISPRUDENCE*; *JURY AND JURY TRIALS*; *MILITARY LAW*; *MINISTERS AND AMBASSADORS*; *ORDINANCES*; *PARDON*; *PENALTY*; *SEARCHES AND SEIZURES*; *SELF-DEFENSE*; *STATUTES*; *TREATIES*; *WARRANTS*.

I. INTRODUCTORY — SCOPE OF TITLE. — Criminal Law has been defined as “that branch of jurisprudence which treats of crimes and punishments.”¹

Scope of Title. — In accordance with the encyclopædic arrangement of this work, all those topics of criminal law which admit of definite separate treatment are made the subjects of specific titles. These specific titles cover not only all particular criminal offenses, but also topics relating to crime and its punishment generally, as may be seen by consulting the table of cross-references at the beginning of this article. It is the purpose of this title to deal with certain general principles, a treatment of which may naturally be sought here, and also by means of the cross-references given above and in the notes to form a point of departure for those seeking information on particular criminal topics.

1. 1 Abb. Law Dict. 324; 1 Bouv. Law Dict. (15th ed.) 457.

Sir J. F. Stephen's definition is as follows: “The criminal law is that part of the law which relates to the definition and punishment of acts or omissions which are punished as being (1) attacks upon public order, internal

or external; or (2) abuses or obstructions of public authority; or (3) acts injurious to the public in general; or (4) attacks upon the persons of individuals; or (5) upon the property of individuals or rights connected with and similar to rights of property.” 1 Hist. Crim. Law 3.

II. SOURCES OF CRIMINAL LAW.—The criminal law is prescribed by the unwritten or common law and by the written or statutory law.

1. Common Law.—The Common Law in Relation to Crimes and Their Punishment is held to be in existence in most of the states of the Union, so that indictments will lie for common-law offenses, and these offenses may be punished by fine and imprisonment according to the general rule for punishing misdemeanors at common law for which no other specific punishment was provided.¹ In other states it is held, usually upon construction of the statutes, that common-law offenses which have not been recognized by statute are not punishable.² In all the states, however, even in those where common-law offenses are not recognized,³ the common law is resorted to for the interpretation of the terms of statutes.⁴ In some states the common-law definitions

1. See the title COMMON LAW, vol. 6, p. 268, and especially pp. 289, 290.

Indictment for Common-law Offenses.—Thus an indictment has been held to lie for recognized common-law offenses, such as conspiracy, *State v. Cawood*, 2 Stew. (Ala.) 360; *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780; *State v. Pulte*, 12 Minn. 164 (see also the title CONSPIRACY, vol. 6, p. 834); assault and battery, *State v. Danforth*, 3 Conn. 112; criminal libel, *Com. v. Chapman*, 13 Met. (Mass.) 68; escape from prison, *State v. Doud*, 7 Conn. 384.

In most of these cases the court proceeded upon some statutory recognition of the common law as existing, but this does not seem to have been the case in *State v. Danforth*, 3 Conn. 112. And in *Com. v. Chapman*, 13 Met. (Mass.) 68, Chief Justice Shaw held that the common law would exist, although there were no statutory recognition of it.

Where the Common Law Prescribes for an Offense a Punishment Which Is No Longer Applicable, the offense may be punished by fine and imprisonment. *State v. Cawood*, 2 Stew. (Ala.) 360, citing *U. S. v. Royall*, 3 Cranch (C. C.) 620, and *James v. Com.*, 12 S. & R. (Pa.) 220, in which cases the punishment by the ducking-stool for the common-law offense of being a common scold being held no longer applicable, it was held that fine and imprisonment was proper.

Legislature Prohibiting Act Without Prescribing Punishment.—"In all cases where the legislature prohibits any act without annexing any punishment, the common law considers it an indictable offense, and attaches to the breach the penalty of fine and imprisonment." *Story, J.*, in *U. S. v. Coolidge*, 1 Gall. (U. S.) 494.

Statutes Limiting the Power to Punish for Common-law Offenses.—Statutes exist in several states prescribing that, in cases of offenses not specifically provided for, the court cannot inflict punishment beyond a prescribed fine or term of imprisonment. These statutes are held to recognize the existence of common-law offenses. *State v. Doud*, 7 Conn. 384; *Johnson v. People*, 22 Ill. 314; *Smith v. People*, 25 Ill. 17, 76 Am. Dec. 780. See also the statutes of *Florida*, *New Jersey*, and other states.

Canada—Common Law in Force.—In Canada it seems that the common law as to crime remains in force where there is no particular statute creating a change in its rules. *Reg. v. Hartlen*, 34 Can. L. J. 93.

2. See the title COMMON LAW, vol. 6, p. 290. See also *Ex p. Myers*, 44 Mo. 279.

3. Common Law as Aid in Statutory Interpretation.—In *State v. Berdette*, 73 Ind. 185, 38 Am. Rep. 117, the court, by Elliott, J., said: "It is indeed true, as counsel assert, that we have no common-law offenses, and that criminal prosecutions can only be maintained for such offenses as are prescribed by statute. It does not, however, follow from this that there is no such thing as an indictable public nuisance under our statute. In *Burk v. State*, 27 Ind. 430, it was held that there is such an offense, although the statute does not specifically define a public nuisance. In that case it was held that the phrase 'public nuisance' had a very definite meaning in the law long before the statute was enacted. If the case cited should be followed to its logical consequences, it would require us to hold that what was at common law a public nuisance is such under our statute, and that permanently obstructing a highway is *per se* a public nuisance, because it was always such at common law. We hold this to be the correct ruling." See also *Benson v. State*, 5 Minn. 19.

4. In *Com. v. Chapman*, 13 Met. (Mass.) 68, Chief Justice Shaw said: "To a very great extent, the unwritten law constitutes the basis of our jurisprudence, and furnishes the rules by which public and private rights are established and secured, the social relations of all persons regulated, their rights, duties, and obligations determined, and all violations of duty redressed and punished. Without its aid, the written law, embracing the constitution and statute laws, would constitute but a lame, partial, and impracticable system. Even in many cases where statutes have been made in respect to particular subjects, they could not be carried into effect, and must remain a dead letter, without the aid of the common law. In cases of murder and manslaughter, the statute declares the punishment; but what acts shall constitute murder, what manslaughter, or what justifiable or excusable homicide, are left to be decided by the rules and principles of the common law. So, if an act is made criminal, but no mode of prosecution is directed, or no punishment provided, the common law furnishes its ready aid, prescribing the mode of prosecution by indictment, the common-law punishment of fine and imprisonment."

In *State v. Camley*, 67 Vt. 322, in determining the meaning of the term "perjury" in an

of crimes have been introduced by statute.¹

United States Courts. — The federal courts cannot resort to the common law as a source of criminal jurisdiction, but they may resort thereto in the interpretation of the criminal statutes of Congress.²

2. Statutes — *a. GENERALLY.* — The statutory or written laws in the United States whereby the criminal law is prescribed embrace the Constitution of the United States, treaties made under the authority of the United States, laws of the United States made in pursuance of the Constitution, the constitutions of the several states, state statutes, and municipal ordinances.³ All these sources of criminal law are made the subjects of separate investigation under proper titles in this work.⁴

b. CANADA — RIGHT OF CRIMINAL LEGISLATION. — Under the provisions of the B. N. A. Act 1867, the power to legislate on criminal law and procedure in criminal matters is reserved to the Dominion Parliament.⁵ But the

act regarding indictments for perjury, the court held that, in the absence of a statute defining the term, its meaning is determined by its common-law definition, that definition being "as binding as it would be if it were a legislative enactment." See also *Com. v. Shaver*, 3 W. & S. (Pa.) 338, where the meaning of the phrase "infamous crime" in a statute was determined by reference to common-law authorities.

See generally the title **STATUTES**.

1. See the title **COMMON LAW**, vol. 6, p. 290. See also *State v. Smith*, 30 La. Ann. 846; *State v. Mullen*, 14 La. Ann. 577; *State v. Depass*, 31 La. Ann. 487; *State v. Davis*, 22 La. Ann. 77.

The Adoption of the Common-law Definitions of Crimes in Louisiana extends only to the particular crimes enumerated in the Act of 1805, and has no reference to the definition of other crimes not therein enumerated. Consequently, an act referring to an offense, and not defining what constitutes it, is, where the offense is not one enumerated in the Act of 1805 or defined in some statute, unconstitutional, because it remits to the judiciary the determination of what acts constitute the offense, which is a purely legislative function. *State v. Gaster*, 45 La. Ann. 636.

2. See the title **COMMON LAW**, vol. 6, p. 289.

3. See *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248.

4. See the titles **CONSTITUTIONAL LAW**, vol. 6, p. 882; **ORDINANCES**; **STATUTES**; **TREATIES**.

5. **Criminal Legislation Vested in Dominion Parliament.** — B. N. A. Act 1867, § 91, subsec. 27. See generally *Russell v. Reg.*, L. R. 7 App. 829; *Hodge v. Reg.*, L. R. 9 App. 117; *Fielding v. Thomas*, (1896) App. 600; *Matter of Criminal Code*, etc., 27 Can. Sup. Ct. Rep. 461.

In *Reg. v. Shaw*, 7 Manitoba L. Rep. 518, it was held that keeping a gambling house is an offense against the general criminal law, which could be dealt with only by the Parliament of Canada, and could not be made an offense by a provincial act or by a municipal by-law passed under the authority of such an act. *Compare In re Brodie*, 38 U. C. Q. B. 580.

At the time when the B. N. A. Act investing the Dominion Parliament with authority over criminal law was passed, there were in the criminal laws of Nova Scotia certain provisions for enforcing the observance of the Sabbath.

These provisions were never repealed by the Dominion Parliament, and subsequently the provincial legislature of Nova Scotia enacted certain legislation purporting to be amendatory of these provisions. It was held that these amendatory acts were not a regulation of "property and civil rights," but fell within the domain of criminal law, and were, therefore, beyond the power of the provincial legislature. *Reg. v. Halifax Electric Tramway Co.*, (Nova Scotia Supreme Ct. 1898) 34 Can. L. J. 125. In delivering judgment, *Graham, J.*, after referring to *Russell v. Reg.*, L. R. 7 App. 829, and *Reg. v. Wason*, 17 Ont. App. 221, said: "Possibly the provincial legislature might approach it [the regulation of the observance of the Sabbath] by enacting a law about masters and servants, and another about winners and losers in gambling, giving the one as against the other a rest on one day in the week, and so on, and thus bring the legislation under the head of civil rights, as the statute about vendors and vendees of milk was brought. [See *Reg. v. Wason*, 17 Ont. App. 221.] But this provision is not passed about such rights at all; it is dealing with things which the legislature regarded as injurious to the public — not the rights of individuals *inter se*, but the right of the community not to have its citizens demoralized, whether they are those who engage in shooting, gambling, sporting, tippling, or working on Sunday, or those who are obliged to witness these things. One private citizen has no more interest than another in seeing it enforced. It is aiming at something analogous to public nuisances, and concerns the public."

An act which provides that a person who has obtained a certificate from a magistrate that a charge of assault and battery has been dismissed against him, or who has paid the penalty or suffered the imprisonment awarded, shall be released from all further proceedings, civil or criminal, for the same cause, is within the powers of the Dominion Parliament to legislate on the subject of criminal law, and is not objectionable as an interference with civil rights which are within the powers of the provincial legislature. *Flick v. Brisbin*, 26 Ont. Rep. 423; *Wilson v. Codyre*, 26 New Bruns. 516.

Creating Criminal Courts — Giving Power to Magistrates under Summary Convictions Act. — The Dominion Parliament has power to create

provincial legislatures have authority to pass penal enactments for the purpose of enforcing laws which they have authority to enact;¹ and they are invested with authority over the administration of justice, including the constitution, maintenance, and organization of provincial courts of criminal jurisdiction.²

courts of criminal jurisdiction in the province of New Brunswick, and to empower magistrates appointed by the local government to hear informations under the Summary Convictions Act for violations of Dominion statutes. *Ex p. Porter*, 28 New Bruns. 587.

Regulating Criminal Procedure — Dispensing with Jury. — Under the power to regulate procedure in criminal matters, the Dominion Parliament is authorized to pass a law allowing parties, on the trial of an appeal from a summary conviction under the Malicious Injuries to Property Act, to dispense with a trial by jury. Such a law is not an interference with the "constitution of the court" reserved to the provincial legislature by subsection 14 of section 91 of the B. N. A. Act. *Reg. v. Bradshaw*, 38 U. C. Q. B. 564.

1. B. N. A. Act 1867, § 92, subsec. 15.

Provincial Legislature — Enforcing Penal Provisions by Fine and Imprisonment. — The provincial legislatures have the right and power to impose punishments by fine and imprisonment as a sanction for laws which they have the power to enact (B. N. A. Act, § 92, subsec. 15). *Atty.-Gen. v. Atty.-Gen.*, 23 Can. Sup. Ct. Rep. 458, *affirming* 19 Ont. App. 31, which *affirmed* 20 Ont. Rep. 222. See also *Hodge v. Reg.*, L. R. 9 App. 117, 7 Ont. App. 246.

Imprisonment at Hard Labor. — A provincial legislature has no authority, under the power given it to punish by imprisonment, to include the imposition of hard labor as well. *Reg. v. Frawley*, 46 U. C. Q. B. 153. See also *Reg. v. Black*, 43 U. C. Q. B. 180, and *compare Reg. v. Boardman*, 30 U. C. Q. B. 553.

Enforcing Penal Provisions by Forfeiture. — Under the same subsection the provincial legislature has a right to impose "forfeiture of goods" as a punishment for the infraction of laws which it has power to enact. *King v. Gardner*, 25 Nova Scotia 48.

Penalty Enforcing Enactment as to Civil Rights and Property. — In *Reg. v. Wason*, 17 Ont. App. 221, *reversing* 17 Ont. Rep. 58, it was held that an act of the Ontario legislature to provide against frauds in the supplying of milk to cheese or butter manufacturers, although penal in its nature, was within the powers of the provincial legislature. In commenting on this case in *Reg. v. Shaw*, 7 Manitoba 531, Bain, J., said: "In that case the enactment of the provincial legislature was held to be *intra vires* and valid, because the true nature and character of the enactment was one for regulating the dealings between persons in a particular trade or business, although it imposed penalties for breach of these regulations; but the remarks of all the judges clearly imply that had the act in question been one that was punishable as a crime under the general public criminal law of the Dominion, the matter would have been *ultra vires* of the legislature." See also *Reg. v. Halifax Electric Tramway Co.*, (Nova Scotia Supreme Ct. 1898) 34 Can. L. J. 125.

Procedure under "Provincial Criminal Law." —

In *Reg. v. Bittle*, 21 Ont. Rep. 605, it was held that where the subject-matter of a provincial enactment falls within the class of subjects reserved to the provincial legislature by section 92 of the B. N. A. Act, penal provisions under section 92, subsection 15, to enforce such enactments, constitute a "provincial criminal law," the procedure in regard to which is within the power of the provincial legislature, and is not "procedure in criminal matters" within the meaning of section 91, subsection 27, reserved exclusively to the Parliament of Canada; consequently, the provincial legislature may enact that the defendant in such a criminal proceeding is neither a competent nor compellable witness.

The provincial legislature has power to regulate the procedure affecting penal laws which such legislature has authority to pass. *Pope v. Griffith*, 2 Cart. 291; *Ex p. Duncan*, 2 Cart. 297; *Page v. Griffith*, 2 Cart. 308; *Cote v. Chauveau*, 2 Cart. 311.

No Power to Change Character of Established Criminal Offense. — The provincial legislature has no power, under the guise of a penal provision to enforce legislation which it has passed with due authority, to declare that an act which, by the general law, is a crime triable and punishable as a crime with the ordinary safeguards of the constitution affecting procedure as to crime shall be something other and less than a crime, triable before and punishable by magistrates without such constitutional safeguards. *Reg. v. Lawrence*, 43 U. C. Q. B. 164. This case was one wherein an act of the provincial legislature which provided for summary punishment of those who tampered with witnesses summoned to appear upon prosecutions under the Liquor License Act was held *ultra vires*, such acts constituting a criminal offense at common law.

2. Provincial Legislature's Power as to Constitution, etc., of Provincial Courts. — B. N. A. Act 1867, § 92, subsec. 14.

Empowering Lieutenant Governor to Give Barristers Precedence by Patent. — In *Atty.-Gen. v. Atty.-Gen.*, (1898) App. 247, the Privy Council, by Lord Watson, construing this provision, said: "The enactments of section 92, subsection 14, confer upon the provincial legislature in wide and general terms power to regulate the constitution and organization of all courts of law in the province, civil or criminal." And, after referring to certain specific provisions in the same act, he continued: "But in all other respects the courts of each province, including the judges and the officials of the court, together with those persons who practice before them, are subject to the jurisdiction and control of the provincial legislature; that legislature and no other has the right to prescribe rules for the qualifications and admission of practitioners, whether they be pleaders or solicitors. Their lordships, in these circumstances, do not entertain any doubt that the Parliament of Ontario had ample authority to give the lieutenant-governor power to confer

III. DEFINITION AND CLASSIFICATION OF CRIMES — 1. General Definition of Crime. — A "crime" or "criminal" offense has been defined as an act committed or omitted in violation of a public law either forbidding or commanding it.¹

Wrong Punished by State in Criminal Proceeding. — A crime is more accurately characterized as a wrong directly or indirectly affecting the public, to the commission of which the state has annexed certain punishments and penalties, and which it prosecutes in its own name and in what is called a criminal proceeding.²

For other definitions of the term "crime" and for numerous examples of acts which have been held to be or not to be criminal offenses, reference is made to another part of this work.³

2. Distinction Between Tort and Crime — **Distinction as to Character of Rights Affected.** — The general distinction between a tort and an act which is not only a tort but amounts to crime is that while the tort is merely a wrong affecting the civil rights of an individual, a crime affects the public rights and is an injury to the whole community.⁴ Blackstone states the distinction thus: "The distinction of public wrongs from private, of crimes and misdemeanors from

precedence by patent upon such members of the bar of the province as he may think fit to select."

Regulation of Jurisdiction of Courts and Judges. — Under the power of the provincial legislature to legislate regarding the constitution, maintenance, and organization of provincial courts, it has the power to define the jurisdiction of such courts territorially as well as in other respects, and also to define the jurisdiction of the judges who constitute such courts. *In re County Cts.*, 21 Can. Sup. Ct. Rep. 446.

In a case heard before all the judges of the Queen's Bench Division of the Ontario High Court of Justice, it was held that a provincial act which authorized police magistrates to try and convict persons charged with forgery was within the powers of the provincial legislature under B. N. A. Act, § 92, subsec. 15, and that the act did not in any way trench upon the authority vested in the Parliament of Canada under B. N. A. Act, § 91, subsec. 27. *Reg. v. Levinger*, 22 Ont. Rep. 690.

But a contrary decision was reached by McMahon, J., in the Common Pleas Division of the same court, who held that such an act dealt with criminal procedure, and was therefore in conflict with the provisions of the British North American Act first quoted. *Reg. v. Toland*, 22 Ont. Rep. 505.

1. Blackstone (4 Black. Com. 5) defines a crime or misdemeanor to be an act committed or omitted in violation of a public law either forbidding or commanding it. This definition is quoted with approval in the following cases: *Butt v. Conant*, 1 B. & P. 548; *Greeley v. Hamman*, 12 Colo. 95; *State v. Bishop*, 7 Conn. 185; *Theisen v. McDavid*, 34 Fla. 440; *Williams v. Augusta*, 4 Ga. 513; *State v. Savannah*, T. U. P. Charlt. (Ga.) 235, 4 Am. Dec. 708; *Slattery v. People*, 76 Ill. 220; *Slaughter v. People*, 2 Doug. (Mich.) 334; *Ex p. Hickey*, 4 Smed. & M. (Miss.) 783; *Kansas City v. Clark*, 68 Mo. 588; *Ex p. Hollwedell*, 74 Mo. 395; *Helena v. Gray*, 7 Mont. 486; *Bohner v. Bohner*, 16 Neb. 204; *State v. Collins*, 1 McCord L. (S. Car.) 355;

State v. Peterson, 41 Vt. 511; *Bergin's Petition*, 31 Wis. 386.

2. Wrong Punished by State in Criminal Proceeding. — *State v. Thibodeaux*, 48 La. Ann. 602, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 643; *Desty's Am. Crim. Law*, § 1a. See also 1 Bish. New Crim. Law, § 32; 4 Cooley's Black. Com. 5, editor's note, citing *Austin on Jurisprudence*, Lecture 17.

3. See the title CRIME — CRIMINAL, ante.

4. Tort and Crime Distinguished — *United States*. — *Weightman v. Washington*, 1 Black (U. S.) 39; *Nottingham v. Baltimore*, etc., R. Co., 3 MacArthur (D. C.) 517.

California. — *Yolo v. Sacramento*, 36 Cal. 193; *Bigley v. Nunan*, 53 Cal. 403.

Connecticut. — *Frink v. Lawrence*, 20 Conn. 117, 50 Am. Dec. 274.

Delaware. — *Johnson v. Stayton*, 5 Harr. (Del.) 362.

Indiana. — *Sohn v. Cambern*, 106 Ind. 302; *Mount Vernon v. Dusonchett*, 2 Ind. 586, 54 Am. Dec. 467.

Iowa. — *Ingram v. Chicago*, etc., R. Co., 38 Iowa 669.

Kentucky. — *Cosby v. Owensboro*, etc., R. Co., 10 Bush (Ky.) 288.

Maine. — *Low v. Knowlton*, 26 Me. 128, 45 Am. Dec. 100; *Cole v. Sprowl*, 35 Me. 161, 56 Am. Dec. 696; *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482.

Maryland. — *Harrison v. Sterett*, 4 Har. & M. (Md.) 540.

Massachusetts. — *Stetson v. Faxon*, 19 Pick. (Mass.) 147, 31 Am. Dec. 123; *Thayer v. Boston*, 19 Pick. (Mass.) 511, 31 Am. Dec. 157.

New Hampshire. — *Lamphier v. Worcester*, etc., R. Co., 33 N. H. 495.

New York. — *Ayres v. Lawrence*, 63 Barb. (N. Y.) 454.

North Carolina. — *Gordon v. Baxter*, 74 N. Car. 470.

South Carolina. — *Carey v. Brooks*, 1 Hill L. (S. Car.) 365; *McLauchlin v. Charlotte*, etc., R. Co., 5 Rich. L. (S. Car.) 583.

Texas. — *Shephard v. Barnett*, 52 Tex. 638.

Vermont. — *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114, 52 Am. Dec. 84.

civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity. As, if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land; but treason, murder, and robbery are properly ranked among crimes, since, besides the injury done to individuals, they strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity."¹

Distinction as to Mode of Redress. — The distinction here laid down has, however, been objected to, and it has been said that the difference between crimes and civil injuries is not to be sought for in a supposed difference between their tendencies, but in the difference between the modes wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offense which is pursued at the discretion of the injured party or his representative is a civil injury. An offense which is pursued by the sovereign is a crime.²

3. Classification of Crimes — *a.* ACCORDING TO GRADE OF OFFENSE. — Having regard to the grade of the offense, the usual classification of crimes is into three classes, treason, felony, and misdemeanor.³

(1) *Treason.* — Treason may be defined in general terms as the crime committed by one against another to whom he is bound by some tie of allegiance or subjection.⁴ More specifically, it is the crime of a subject or citizen who attempts to injure the sovereign or overthrow the government.⁵

(2) *Felony.* — Felony includes, at the common law, every species of crime a conviction for which occasions the forfeiture of the offender's lands or goods.⁶ The crimes for which forfeiture was imposed were usually those for

1. 4 Black. Com. 5.

2. 2 Austin on Jurisprudence (ed. 1863), 72, quoted in 1 Whart. Cr. Law (10th ed.), § 15, note, and in 4 Cooley's Black. Com. 5, note.

3. See 1 Russell on Crimes 78; Stephen Dig. Cr. Law, art. 15; State v. Rowe, 8 Rich. L. (S. Car.) 22.

New Jersey — Distinction Between Felonies and Misdemeanors Ignored. — The Criminal Code of New Jersey wholly ignores the distinction between felonies and misdemeanors. Statutory offenses, if designated at all, are called in the Crimes Act either misdemeanors or high misdemeanors. Jackson v. State, 49 N. J. L. 252.

4. Sweet's Law Dict.

High and Petty Treason. — There were formerly two kinds of treason in England: high treason, directed against the sovereign or government, and petty treason, which was the crime committed by a servant who killed his master, a wife who killed her husband, or an ecclesiastical person who killed his superior, these crimes being violations of private allegiance. Petty treason was abolished by being converted into murder by 9 Geo. IV., c. 31, § 2, continued in 24 and 25 Vict., c. 100, § 8. See 1 Russ. on Crimes (9th ed.) 710; 4 Black. Com. 75, 203.

5. Bouv. Law Dict.

United States Constitution. — It is provided by the United States Constitution that "treason against the United States shall consist only in levying war against them or in adhering to

their enemies, giving them aid and comfort." United States Const., art. 3, § 3.

State Constitutions. — Similar provisions are found in state constitutions. See 1 Stimson's Am. Stat. Law, § 150.

For a Full Treatment of this subject, see the title TREASON.

6. Felony at Common Law. — 4 Black. Com. 94; 1 Russ. on Crimes 78; Archbold's Crim. Pr. & Pl. (Pomeroy's ed.), 1, note; Bannon v. U. S., 156 U. S. 467; *Ex p.* Wilson, 114 U. S. 423; Adams v. Barrett, 5 Ga. 404; People v. Lyon, 99 N. Y. 216; Lynch v. Com., 88 Pa. St. 189, 32 Am. Rep. 445; State v. Murphy, 17 R. I. 698.

In the last case cited, the court, after defining felony, observed: "Of course it is to be borne in mind that this definition of felony is mainly historical, and shows what it was several centuries ago, while it conveys only a faint conception of what it is now. In fact there is not, nor ever was practically, any such thing as felony in the United States. For while we speak of certain crimes, such as larceny, robbery, burglary, rape, arson, murder, etc., as felonies, yet it is mainly because we have been taught that at the common law they are so denominated. But when we come to apply the ancient English test of felony as set forth in the above definition, we find that there is not, strictly speaking, any such crime known to our law. Indeed, the rigor of the common law itself has been so far modified by

which, under the harsh rules of the old English criminal law, capital punishment was provided, so that the idea of capital punishment became associated with felony; but such punishment did not enter into the true definition.¹

By Statute it is provided in many of the United States that all offenses which are punishable by death or imprisonment in the state prison are felonies.² Under such a provision it is the liability to punishment upon conviction, rather than the actual punishment inflicted, which makes a crime felony, so that the grade of the offense is not reduced because the statute gives the court a discretion to impose a less punishment.³

(3) *Misdemeanor*. — The term "misdemeanor" comprehends all indictable offenses which do not amount to felony.⁴

b. ACCORDING TO NATURE OF OFFENSE. — In the codes offenses are usually classified according to the nature of the rights or subject-matters affected by the criminal act. Thus, such groups are formed as "offenses

statute in England that there now remain but very few of the characteristics of the ancient crime of felony. The change in the form of the indictment, however, has not kept pace with the change in the consequences of the crime, so that it is still necessary to allege in all those cases where the crime was a felony at the common law, and where the statute has not provided what shall constitute the offense, or prescribed a form of indictment, that it was done 'feloniously.'"

1. 4 Black. Com. 94; 1 Russ. on Crimes 78. See also *U. S. v. Staats*, 8 How. (U. S.) 41; *State v. Murphy*, 17 R. I. 698; *State v. Rowe*, 8 Rich. L. (S. Car.) 22; *Barker v. Com.*, 2 Va. Cas. 122.

2. *Statutory Definition of Felony* — *Arkansas*. — *State v. Waller*, 43 Ark. 381.

California. — *People v. War*, 20 Cal. 117.

Colorado. — *In re Pratt*, 19 Colo. 138.

Georgia. — *Miller v. State*, 58 Ga. 200.

Indiana. — *State v. Smith*, 8 Blackf. (Ind.)

489. *Kansas*. — *Matter of Stevens*, 52 Kan. 56.

Kentucky. — *Tharp v. Com.*, 3 Metc. (Ky.) 411; *Buford v. Com.*, 14 B. Mon. (Ky.) 20.

Maine. — *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578.

Missouri. — *Johnston v. State*, 7 Mo. 183; *Ingram v. State*, 7 Mo. 293; *Nathan v. State*, 8 Mo. 631; *State v. Lehr*, 16 Mo. App. 491.

New Hampshire. — *State v. Felch*, 58 N. H. 1.

New York. — *People v. Hughes*, 137 N. Y. 29; *People v. Lyon*, 99 N. Y. 210; *People v. Van Steenburgh*, 1 Park. Cr. Rep. (Delaware Oyer & T. Ct.) 39.

Ohio. — *State v. Rouch*, 47 Ohio St. 481.

Tennessee. — *Rafferty v. State*, 91 Tenn. 655.

Texas. — *Welsh v. State*, 3 Tex. App. 114.

Virginia. — *Barker v. Com.*, 2 Va. Cas. 122; *Benton v. Com.*, 89 Va. 570; *Canada v. Com.*, 22 Gratt. (Va.) 899.

West Virginia. — *State v. Harr*, 38 W. Va. 58.

Wisconsin. — *Wilson v. State*, 1 Wis. 184; *Nichols v. State*, 35 Wis. 308.

In the Absence of Statutory Definitions, the word "felony" must be understood to designate such serious offenses as were formerly punishable by death or by forfeiture of the lands or goods of the offender. *Bannon v. U. S.*, 156 U. S. 468. See also *State v. Murphy*, 17 R. I. 698.

3. *Where Discretion Vested in Court to Impose a Less Punishment* — *Arkansas*. — *State v. Waller*, 43 Ark. 381.

Georgia. — *Chandler v. Johnson*, 39 Ga. 85; *Miller v. State*, 58 Ga. 200.

Kansas. — *Matter of Stevens*, 52 Kan. 56.

Maine. — *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578; *State v. Goddard*, 69 Me. 181.

Massachusetts. — *Com. v. Pemberton*, 118 Mass. 36.

Missouri. — *Johnston v. State*, 7 Mo. 183; *State v. Green*, 66 Mo. 631; *State v. Joiner*, 19 Mo. 224; *State v. Melton*, 117 Mo. 618; *State v. Murdock*, 9 Mo. 739; *State v. Reeves*, 97 Mo. 668, 10 Am. St. Rep. 349; *State v. Thompson*, 30 Mo. 470.

New York. — *People v. Hughes*, 137 N. Y. 29.

Vermont. — *State v. Magoon*, 61 Vt. 45.

Virginia. — *Benton v. Com.*, 89 Va. 570.

See *In re Claasen*, 140 U. S. 200.

But where it is provided that some offenses may be punished either as felonies or misdemeanors, it is said that the punishment which is actually inflicted may determine the grade of the offense. *People v. Cornell*, 16 Cal. 187. But see *People v. War*, 20 Cal. 117.

Statutes are to be construed so as not to multiply felonies unless such construction is supported by express words or necessary implication. *Com. v. Macomber*, 3 Mass. 254; *Com. v. Barlow*, 4 Mass. 439. Nor will an offense be considered a felony, unless it comes within the description. *Bruguier v. U. S.*, 1 Dakota 5.

4. 4 Black. Com. 5; *People v. War*, 20 Cal. 117; *People v. Lyon*, 99 N. Y. 216; *People v. Cavanagh*, 2 Abb. Pr. (N. Y. Supreme Ct.) 88; *Welsh v. State*, 3 Tex. App. 114.

The Word "Misdemeanor," in its usual acceptance, is applied to all those crimes and offenses for which the law has not provided a particular name; and they may be punished according to the degree of the offense, by fine or imprisonment, or both. A misdemeanor is, in truth, any crime less than felony; and the word is generally used in contradistinction to felony. misdemeanors comprehending all indictable offenses which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances. Misdemeanors have been sometimes termed misprisions; indeed, the word "misprisions" in its larger sense is used to signify every considerable misdemeanor

against public order," for instance treason, affray, rout, riot, unlawful assembly; "offenses against the person," such as homicide, rape, assault; "offenses against public justice," such as perjury, bribery, escape, compounding offenses. The whole field of crime is thus gone over and kindred offenses brought together. As each crime or criminal offense forms a separate title in this work, it is thought that no good purpose is to be gained by a minute classification of crimes here. Such classifications must differ largely in accordance with the individual views of the classifier, and these schemes are at best but arrangements for giving order to a body of statutes or the discussions of text-writers.

IV. ELEMENTS OF CRIME — 1. Malice and Intent — a. MALICE. — Malice, in Its Legal Sense, denotes a wrongful act done intentionally without just cause or excuse.¹

Express and Implied Malice. — Malice, in the older cases, is spoken of as either express or implied,² and some courts still refer to such a distinction.³ Thus, a conviction of murder in the first degree has been set aside where the jury had not been instructed as to the distinction.⁴ The difference is not in the malice itself, but simply in the evidence by which it is established.⁵

which has not a certain name given to it in the law. 1 Russ. on Crimes 79.

A misdemeanor is an act or omission for which a punishment other than death or imprisonment in the state penitentiary is denounced by law, that is, by the will of the supreme power expressed by statute. *Pillsbury v. Brown*, 47 Cal. 480.

1. Malice Defined. — *Bronage v. Prosser*, 4 B. & C. 247, 10 E. C. L. 321, *per* Bayley, J.; *M'Pherson v. Daniels*, 10 B. & C. 263, 21 E. C. L. 69; *Reg. v. Noon*, 6 Cox C. C. 137; *Ferguson v. Kinnoull*, 9 Cl. & F. 321; *Reg. v. Ward*, L. R. 1 C. C. 356; *Willis v. Miller*, 29 Fed. Rep. 238; *Holland v. State*, 12 Fla. 117; *Powell v. State*, 28 Tex. App. 393; *Gallaher v. State*, 28 Tex. App. 247; *Gonzalez v. State*, 30 Tex. App. 203.

For other definitions, see *Ellis v. State*, 30 Tex. App. 601; *Harris v. State*, 8 Tex. App. 91; *People v. Borgetto*, 99 Mich. 336; *Beck v. State*, 76 Ga. 452; and this work, *sub voce* MALICE.

Chief Justice Shaw, in *Com. v. Snelling*, 15 Pick. (Mass.) 340, thus defines malice: "In a legal sense, any act done wilfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious. It is not necessary, to render an act malicious, that the party be actuated by a feeling of hatred or ill will towards the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if, in pursuing that design, he wilfully inflicts a wrong on others, which is not warranted by law, such act is malicious."

Malice "comprehends not only a particular ill will, but every case where there is wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured." *Com. v. Drum*, 58 Pa. St. 9.

"It is not, in the language of Blackstone, so properly spite or malevolence to the indi-

vidual in particular, as an evil design in general, the dictate of a wicked, depraved, and malignant heart." *Ann v. State*, 11 Humph. (Tenn.) 163.

Malice Implies Wilfulness. — In an action for libel, where the word "wilfully" is used in the statute, it will be sufficient if the word "maliciously" is employed in the indictment. *State v. Robbins*, 66 Me. 324.

"When used in a penal statute the word 'wilful' means more than it does in common parlance. It means with evil intent, or legal malice, or without reasonable ground for believing the act to be lawful." *Thomas v. State*, 14 Tex. App. 200. See also *Lane v. State*, 16 Tex. App. 172.

2. Express and Implied Malice. — *Parke v. Blackiston*, 3 Harr. (Del.) 373; 4 Black. Com. 199, 200. See *U. S. v. King*, 34 Fed. Rep. 311; *Wilson v. Noonan*, 35 Wis. 352.

3. California. — *People v. Moore*, 8 Cal. 90.

Iowa. — *State v. Decklotts*, 19 Iowa 447.

Massachusetts. — *Com. v. Thompson*, 6

Mass. 134.

Tennessee. — *Holly v. State*, 10 Humph.

(Tenn.) 141; *Ann v. State*, 11 Humph. (Tenn.)

164.

Texas. — *Harris v. State*, 8 Tex. App. 91;

Hubby v. State, 8 Tex. App. 597; *Lewis v.*

State, 15 Tex. App. 647; *Jacobs v. State*, 28

Tex. App. 79; *Gonzalez v. State*, 30 Tex. App.

203.

West Virginia. — *State v. Welch*, 36 W. Va.

690.

4. Jones v. State, 5 Tex. App. 397.

5. Express and Implied Malice Distinguished by

Method of Proof. — *Lewis v. Chapman*, 16 N. Y.

372; *Wilson v. Noonan*, 35 Wis. 352; *U. S. v.*

King, 34 Fed. Rep. 302, where the court said:

"Malice, in the old definitions, is spoken of as

express or implied. That again is a distinction

which is a delusion and a snare. Practically,

jurymen never deal with express malice.

There is no express evidence of malice given

to them. Malice, as I have told you, is an intent

of the mind and heart. There is never

presented to a jury direct evidence of what

was the intent of the man's heart at the time.

Malice Inferred from Act. — In the absence of evidence of excuse or justification, malice will be inferred from the act of striking another with a deadly weapon,¹ or from conduct which shows cruelty of disposition and recklessness of consequences;² but it is generally inferred from all the circumstances.³

Indiscriminate Assault — General Malice. — Where an indiscriminate assault is made on a body of persons, general malice is presumed,⁴ as where a gun is

He is the only possible direct witness to that; and if he meant so to testify, he would plead guilty. The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to any one outside of the individual, exhibited by the acts which the individual performs; and we are entitled to infer what his intent was — what were the processes of his mind and the feelings of his heart — by a careful study of the acts which he performed, and of the other external indications which he may have given of what his state of mind and heart was."

In *Darry v. People*, 10 N. Y. 136, Selden, J., said: "There is no difference in the nature or degree of the malice intended, whether it be called express or implied, when these terms are used in their most appropriate sense. If properly applied, they refer only to the evidence by which the existence of malice is established. Both alike, the one no less than the other, mean actual malice, malice shown by the proof to have really existed. It is called implied malice when it is inferred from the naked fact of the homicide, and express when established by other evidence. That this is the true original meaning of these terms, when used in connection with this crime, is apparent, I think, from the natural import of the words themselves as well as from their accustomed use in other branches of the law. They are appropriate terms to express different modes of proof, and are habitually used for that purpose, but are not adapted to the description of different degrees of malicious intent. The phrase 'implied malice' is properly applied to a case where the evidence shows that the accused did the act which caused the death, but where there is no other proof going to show the existence or the want of malice. In such cases the law does not impute a malicious intent, irrespective of its real existence, but it presumes, in accordance with the settled rules of evidence, that such an intent did actually exist."

1. Inference of Malice from Striking with Deadly Weapon — England. — *Reg. v. Noon*, 6 Cox C. C. 137.

United States. — *U. S. v. Cornell*, 2 Mason (U. S.) 91; *U. S. v. McGlue*, 1 Curt. (U. S.) 1.

Alabama. — *Commander v. State*, 60 Ala. 1; *McKee v. State*, 82 Ala. 32.

Arkansas. — *McAdams v. State*, 25 Ark. 405.

California. — *People v. Bealoba*, 17 Cal. 389.

Florida. — *Holland v. State*, 12 Fla. 117.

Illinois. — *Peri v. People*, 65 Ill. 17.

Iowa. — *State v. Hockett*, 70 Iowa 442; *State v. Decklotts*, 19 Iowa 447.

Kentucky. — *Nichols v. Com.*, 11 Bush (Ky.) 575.

Massachusetts. — *Com. v. York*, 9 Met. (Mass.) 103, 43 Am. Dec. 373.

Minnesota. — *State v. Brown*, 41 Minn. 319.

Mississippi. — *Woodsides v. State*, 2 How. (Miss.) 655.

New York. — *Leighton v. People*, 88 N. Y. 117; *People v. Sullivan*, 7 N. Y. 396; *People v. Clark*, 7 N. Y. 385.

North Carolina. — *State v. Jarrott*, 1 Ired. L. (23 N. Car.) 76; *State v. Merrill*, 2 Dev. L. (13 N. Car.) 269.

South Carolina. — *State v. Levelle*, 34 S. Car. 120, 27 Am. St. Rep. 799.

Virginia. — *Hill v. Com.*, 2 Gratt. (Va.) 504.

West Virginia. — *State v. Douglass*, 28 W. Va. 297.

Wisconsin. — *Clifford v. State*, 58 Wis. 479.

2. *McClain v. Com.*, 110 Pa. St. 263.

3. Malice Inferred from Circumstances Generally. — *Meredith v. State*, 60 Ala. 441; *Yates v. State*, 26 Fla. 484; *Hicks v. State*, 25 Fla. 535; *Crosby v. People*, 137 Ill. 325; *State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70; *Green v. State*, 13 Mo. 382; *Hubby v. State*, 8 Tex. App. 597.

In *State v. Brown*, 41 Minn. 323, the court said: "Where there are no circumstances to prevent or rebut the presumption, the law will presume that the unlawful act was intentional and malicious, and was prompted and determined on by the ordinary and natural operations of the mind. *State v. Lautenschlager*, 22 Minn. 526. The law will not, therefore, attempt to lay down a more specific rule. It cannot define the length of time within which the determination to murder or commit the unlawful act resulting in death must be formed. There is great difference in the character of men in respect to habits of thought and action, as well as to self-restraint and sense of moral obligation; and persons who have become depraved through evil habits and associations are generally reckless of restraint and ripe for crime."

In *Nichols v. Com.*, 11 Bush (Ky.) 576, it is said: "Malice is a malignant passion and may exhibit itself in wrongful acts; and when an act is cruel and is done deliberately, as such acts are generally the offspring of an evil mind, the law will imply the existence of the secret passion from proof of the outward sign of its presence."

See especially the title HOMICIDE.

4. General Malice — Utter Recklessness. — *Washington v. State*, 60 Ala. 10, 31 Am. Rep. 28; *Dunaway v. State*, 110 Ill. 333; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320; *Aiken v. State*, 10 Tex. App. 610.

In *Aiken v. State*, 10 Tex. App. 610, the defendant was convicted of murder in the second degree for shooting recklessly into a railway train through a window, and wounding a passenger from the effects of which he died. The court said: "Malice is the essential ingredient of murder, but the principle is elementary that 'this specific malevolence

fired in the direction of a crowd,¹ or where railroad cars are thrown from the track by obstructions wrongfully placed thereon, and a human being killed,² or where shooting is done recklessly, regardless of the lives of others.³

b. CRIMINAL INTENT — Evil Intent Necessary Element of Crime Generally. — An evil intent is a necessary element of every criminal offense at common law,⁴ and when not susceptible of direct proof it is to be implied from the circumstances.⁵

towards the person killed may be embraced in such utter and reckless disregard of life as shows a man to be an enemy to all mankind; as when a man resolves to kill the next man he meets, and does kill him; or shoots into a crowd wantonly, not knowing whom he may kill."

1. *England.* — Reg. v. Fretwell, L. & C. 443, 9 Cox C. C. 471.

Delaware. — State v. Sloanaker, 1 Houst. Crim. Cas. (Del.) 62.

Illinois. — Dunaway v. State, 110 Ill. 333.

Indiana. — Walker v. State, 8 Ind. 290.

Iowa. — State v. Myers, 19 Iowa 517.

Kentucky. — Golliher v. Com., 2 Duv. (Ky.) 163, 87 Am. Dec. 493.

Michigan. — People v. Raher, 92 Mich. 165, 31 Am. St. Rep. 575.

North Carolina. — State v. Nash, 86 N. Car. 650, 41 Am. Rep. 472; State v. Barbee, 92 N. Car. 820.

2. Presley v. State, 59 Ala. 98, the court saying: "It would have been a homicide proceeding from that depravity of mind and heart which is technically called 'universal malice.'"

3. Vandermark v. People, 47 Ill. 122.

4. **Evil Intent** — *England.* — *Ex p.* Rodgers, Ambl. 307; Rex v. Gascoigne, 1 Leach C. C. 284; Weaver v. Ward, Hob. 134; Lancaster's Case, 1 Leon 208; Reg. v. Allday, 8 C. & P. 136, 34 E. C. L. 327; Rex v. Harris, 7 C. & P. 428, 32 E. C. L. 570; R. v. Martin, R. & R. 196; Rex v. Holden, R. & R. C. C. 154; Rex v. Dannelly, R. & R. C. C. 310; Rex v. O'Brian, 7 Mod. 378; Reg. v. Phillips, 2 Moo. C. C. 252; Rex v. Philpotts, 1 C. & K. 112, 47 E. C. L. 112.

Alabama. — Roseberry v. State, 50 Ala. 160; Stein v. State, 37 Ala. 123; White v. State, 44 Ala. 409.

California. — People v. Harris, 29 Cal. 679.

Connecticut. — Riley v. State, 16 Conn. 47.

Nevada. — State v. Gardner, 5 Nev. 377.

New York. — Sturges v. Maitland, Anth. (N. Y.) 153.

Pennsylvania. — Com. v. Weiss, 139 Pa. St. 247, 23 Am. St. Rep. 182.

South Carolina. — State v. Coleman, 20 S. Car. 441.

Tennessee. — Duncan v. State, 7 Humph. (Tenn.) 148.

Texas. — Waddell v. State, 37 Tex. 354; Richardson v. State, 5 Tex. App. 470; Hilliard v. State, 37 Tex. 358; Horan v. State, 7 Tex. App. 183.

Guilty Mind — Mental State Different in Different Crimes. — In Reg. v. Tolson, 23 Q. B. Div. 168, Sir James Fitzjames Stephen, in discussing the question of intent with reference to the offense of bigamy (see the case stated under the title BIGAMY, vol. 4, p. 40, note 5), said: "The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental ele-

ment of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed; or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition. Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were. The mental element of most crimes is marked by one of the words 'maliciously,' 'fraudulently,' 'negligently,' or 'knowingly,' but it is the general — I might, I think, say the invariable — practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined. The meanings of the words 'malice,' 'negligence,' and 'fraud,' in relation to particular crimes, has been ascertained by numerous cases. Malice means one thing in relation to murder, another in relation to the Malicious Mischief Act, and a third in relation to libel; and so of fraud and negligence."

In another part of the same judgment the learned judge, commenting upon the maxim *non est reus, nisi mens sit rea*, said: "Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds. It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a *mens rea*, or 'guilty mind,' which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. *Mens rea* means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory indeed to describe a mere absence of mind as a *mens rea*, or guilty mind. The expression, again, is likely to and often does mislead. To an illegal mind it suggests that by the law of England no act is a crime which is done from laudable motives; in other words, that immorality is essential to crime."

5. **Evil Intent Implied from Circumstances.** — U. S. v. Fourteen Packages of Pins, 1 Gilp. (U. S.) 235; Slattery v. People, 76 Ill. 217; Ross v. Com., 2 B. Mon. (Ky.) 419; State v. Dineen, 10 Minn. 407.

Criminal Negligence. — Upon the ground that every one is presumed to contemplate the natural consequences of his acts, negligent and reckless conduct may be evidence of malicious intent, and negligent performance of a duty imposed by law or assumed by contract or by wrongful act may render the person guilty of such negligence criminally liable.¹

Act and Intent Must Coexist. — The criminal intent must unite with the overt act,² and they must concur in point of time.³ Thus the innocent possessor of

Act Not Per Se Criminal — Proof of Particular Intent. — Where an act which is in itself indifferent becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent. *Rex v. Woodfall*, 5 Burr. 2661, *per* Lord Mansfield; *Rex v. Phillips*, 6 East 464, *per* Lord Ellenborough.

1. Criminal Negligence — England. — *Rex v. Hull*, Kel. 40, 1 Bennett & H. Leading Cr. Cas. (1st ed.) 42; *Reg. v. Marriott*, 8 C. & P. 425, 34 E. C. L. 461; *Reg. v. Edwards*, 8 C. & P. 611, 34 E. C. L. 550; *Reg. v. Lowe*, 4 Cox C. C. 449, 1 Bennett & H. Leading Cr. Cas. (1st ed.) 49.

Alabama. — *Johnson v. State*, 94 Ala. 35.

Georgia. — *Pool v. State*, 87 Ga. 526.

Illinois. — *Vandermark v. People*, 47 Ill. 122; *Belk v. People*, 125 Ill. 584.

Kentucky. — *Com. v. Matthews*, 89 Ky. 291.

Massachusetts. — *Com. v. Hawkins*, 157 Mass. 553.

Michigan. — *People v. Stubenvoll*, 62 Mich. 329.

Missouri. — *State v. Emery*, 78 Mo. 77, 47 Am. Rep. 92; *State v. Morrison*, 104 Mo. 638; *State v. Grote*, 109 Mo. 345.

New York. — *Sturges v. Maitland*, Anth. (N. Y.) 153.

Pennsylvania. — *Smith v. Com.*, 100 Pa. St. 324.

See also Steph. Dig. Cr. Law, art. 211; and the titles DRUGGISTS; HOMICIDE; PHYSICIANS AND SURGEONS.

In *Com. v. Matthews*, 89 Ky. 291, the court said: "The general rule is that one who causes death by his negligence is responsible, whether he was at the time engaged in legal or illegal business. If the business be in character felonious, then he is guilty of murder. If legal, and homicide result from negligence in the discharge of it, it is manslaughter. This rule is, however, subject to exception when, for instance, the act, although careless in itself, be done under such circumstances that it could not reasonably be supposed injury would result. *Chrystal v. Com.*, 9 Bush (Ky.) 669; *York v. Com.*, 82 Ky. 360."

In *Stein v. State*, 37 Ala. 132, the court said: "Where the gist of the offense is neglect or carelessness, it would, as a general rule, be a solecism to speak of a guilty knowledge, since the neglect itself usually evidences the guilty mind; and the principle has been carried, in some cases, to the extent of making one criminally responsible for not using proper precaution to prevent the injurious acts of his servant. On this principle rest the decisions where the servant rendered bread unwholesome by the improper use of the ingredients; where the superintendent of a gas company

corrupted the water of the river Thames by conveying into it deleterious gases and fluids; where the engineer of a railroad neglected to ring the bell or blow the whistle at the crossing of a street; where the owner of a river caused detriment to neighboring lands by neglecting to scour it; where a corporation neglected to repair sea walls, in violation of its charter; and where other neglects of like character have been committed. *State v. Vermont Cent. R. Co.*, 28 Vt. 583; *Rex v. Medley*, 6 C. & P. 292, 25 E. C. L. 403; *Henly v. Lyme*, 5 Bing. 91, 15 E. C. L. 376."

2. Intent and Overt Act Must Unite — United States. — *U. S. v. Riddle*, 5 Cranch (U. S.) 311.

Alabama. — *Allen v. State*, 52 Ala. 393; *Miles v. State*, 58 Ala. 390; *Hoover v. State*, 59 Ala. 57.

Arkansas. — *Voes v. State*, 9 Ark. 42.

California. — *People v. White*, 34 Cal. 183.

Connecticut. — *State v. Wilson*, 30 Conn. 500.

Georgia. — *Long v. State*, 38 Ga. 507.

Illinois. — *Slattery v. People*, 76 Ill. 217.

Iowa. — *State v. Hollyway*, 41 Iowa 200.

Kansas. — *State v. Douglas*, 44 Kan. 618.

Missouri. — *State v. Rider*, 90 Mo. 54.

New York. — *Gates v. Lounsbery*, 20 Johns. (N. Y.) 427; *Stokes v. People*, 53 N. Y. 179, 13 Am. Rep. 492.

Pennsylvania. — *Randolph v. Com.*, 6 S. & R. (Pa.) 398.

Tennessee. — *Coffee v. State*, 3 Yerg. (Tenn.) 283, 24 Am. Dec. 570.

Texas. — *Lovett v. State*, 19 Tex. 174.

"To make a complete crime, cognizable by human laws, there must be both a will and an act. For though, *in foro conscientie*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason, in all temporal jurisdictions, an overt act, or some open evidence of an intended crime, is necessary in order to demonstrate the depravity of the will, before the man is liable to punishment. And as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will." 4 Black. Com. 21.

3. Must Concur in Point of Time. — *U. S. v. Fox*, 95 U. S. 670; *Clements v. State*, 50 Ala. 117; *State v. Hollyway*, 41 Iowa 200; *Head v. State*, 43 Neb. 30; *People v. Cogdell*, 1 Hill (N. Y.) 94, 37 Am. Dec. 297; *State v. Roper*, 3 Dev. L. (14 N. Car.) 473, 24 Am. Dec. 268; *Kelly v. Com.*, 1 Grant's Cas. (Pa.) 484.

property found is not guilty of larceny by a subsequent act in secreting or appropriating it to his own use;¹ but if the original taking was with criminal intent the conversion will be larceny.²

Artifice in Obtaining Possession of a Thing has been held not to show a felonious intent.³

Length of Existence of Intent. — The intent need not have existed for any given length of time before the act,⁴ it being sufficient that it existed at the instant of the act;⁵ and the intent and the act may be as instantaneous as successive thoughts.⁶

The Abandonment of the Evil Intention at any time before so much of the act was done as constitutes an offense takes from what has been done its indictable quality.⁷ But if an intent exists to commit a certain crime, and an act is done concurrent with the intent sufficient to constitute a lesser crime of the same nature, the party is still indictable for the lesser offense even though he repents or desists from his first intention.⁸

c. INTENT PRESUMED FROM UNLAWFUL ACT. — Criminal intent will be presumed from the commission of an act in its nature unlawful;⁹ the act of

The defendant was a guest at an inn, and in the night he left his own room and entered the barroom and stole some money therefrom. It was held that, as the original entry was without felonious intent, the larceny could not relate back and give a character to the entry into the house so as to make it illegal and subject him to punishment for entering with felonious intent. *State v. Moore*, 12 N. H. 42.

1. Guilty Appropriation of Property Rightfully in Possession — *England*. — Reg. v. Thurborn, 2 C. & K. 831, 61 E. C. L. 831; Reg. v. Yorke, 2 C. & K. 841, 61 E. C. L. 841; Reg. v. Reed, C. & M. 306, 41 E. C. L. 170.

Alabama. — *Weaver v. State*, 77 Ala. 26.

Connecticut. — *Ransom v. State*, 22 Conn. 153.

Georgia. — *Roberts v. State*, 83 Ga. 369.

Illinois. — *Tyler v. People*, 1 Ill. 293, 12 Am. Dec. 176.

Indiana. — *Bailey v. State*, 52 Ind. 462, 21 Am. Rep. 182; *Wolffington v. State*, 53 Ind. 343.

Minnesota. — *State v. Boyd*, 36 Minn. 538.

Missouri. — *State v. Conway*, 18 Mo. 321.

New York. — *People v. Anderson*, 14 Johns. (N. Y.) 204, 7 Am. Dec. 462; *People v. Cogdell*, 1 Hill (N. Y.) 94, 37 Am. Dec. 297.

Virginia. — *Hunt v. Com.*, 13 Gratt. (Va.) 761, 70 Am. Dec. 443; *Tanner v. Com.*, 14 Gratt. (Va.) 635.

2. Where Original Taking Criminal. — *Allan v. State*, 91 Ala. 19, 24 Am. St. Rep. 856; *State v. Weston*, 9 Conn. 527, 25 Am. Dec. 46; *State v. Ferguson*, 2 McMull. L. (S. Car.) 502; *Morrison v. State*, 17 Tex. App. 34, 50 Am. Rep. 120.

3. *State v. Deal*, 64 N. Car. 270. In this case, the maker of a note went to the holder, and, after promising to pay it in a certain way, which was refused, asked to see it upon some pretext, and when it was delivered to him by the holder, kept possession of it, saying, "You won't get it again;" and upon a struggle ensuing, snatched up an axe, retreated to his horse and rode off, adding, "Tom [the holder's son and a surety on the note] sent me word to get this note as I could." It was held to be no case of either robbery or larceny.

4. Intent Need Not Have Existed for Any Given Length of Time. — *Miller v. State*, 54 Ala. 155;

Hammil v. State, 90 Ala. 577; *People v. Bealoba*, 17 Cal. 389; *Cook v. State*, 77 Ga. 96; *People v. Wilson*, 145 N. Y. 628. See also the title HOMICIDE.

5. *McAdams v. State*, 25 Ark. 405.

6. *People v. Cotta*, 49 Cal. 166; *Binns v. State*, 66 Ind. 428; *State v. Dennison*, 44 La. Ann. 135; *Lanergan v. People*, 50 Barb. (N. Y.) 266; *Leighton v. People*, 88 N. Y. 117.

7. Abandonment of Intent. — *Rex v. Edmeads*, 3 C. & P. 390, 14 E. C. L. 364; *Clements v. State*, 50 Ala. 117; *State v. Allen*, 47 Conn. 121; *Young v. State*, 82 Ga. 752; *Stephens v. State*, 107 Ind. 185. See *Pinkard v. State*, 30 Ga. 757; *Harris v. State*, 15 Tex. App. 629.

For what constitutes evidence of abandonment, see *State v. Allen*, 47 Conn. 121; *State v. Gray*, 55 Kan. 135; *Phillips v. State*, 26 Tex. App. 228.

"But if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime." Reg. v. Cheeseman, L. & C. 140. See *Sipple v. State*, 46 N. J. L. 197.

8. *Young v. State*, 82 Ga. 752; *Rex v. Cox*, R. & R. C. C. 362.

9. Unlawful Act Raises Presumption of Unlawful Intent — *England*. — *Rex v. Cox*, R. & R. C. C. 362; *Rex v. Hunt*, 3 B. & Ald. 566, 5 E. C. L. 377.

United States. — *Felton v. U. S.*, 96 U. S. 699.

Alabama. — *Hoover v. State*, 59 Ala. 57.

Arkansas. — *McAdams v. State*, 25 Ark. 405.

California. — *People v. Jose Soto*, 53 Cal. 415.

Dakota. — *U. S. v. Adams*, 2 Dakota 305.

Georgia. — *Mitchum v. State*, 11 Ga. 615.

Illinois. — *Slattery v. People*, 76 Ill. 218; *Mayes v. People*, 106 Ill. 306.

Indiana. — *Hood v. State*, 56 Ind. 263.

Iowa. — *State v. Decklotts*, 19 Iowa 447.

Maine. — *State v. Goodenow*, 65 Me. 30; *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578.

Michigan. — *People v. Scott*, 6 Mich. 287.

Minnesota. — *State v. Welch*, 21 Minn. 22.

Mississippi. — *Woodsides v. State*, 2 How. (Miss.) 655.

Missouri. — *State v. Holme*, 54 Mo. 153.

itself is evidence of the intent,¹ and it is no defense that the offender entertains a belief that the law is wrong² or that it is unconstitutional.³

Specific Intent Must Be Proved. — When the statement of the act itself includes a knowledge of the illegality of the act no averment of knowledge of bad intent is necessary.⁴ But where an act becomes criminal only through the existence of a specific intent, such intent must be proven;⁵ it should be

New York. — *People v. Herrick*, 13 Wend. (N. Y.) 87; *Stokes v. People*, 53 N. Y. 179, 13 Am. Rep. 492.

North Carolina. — *State v. Barnard*, 88 N. Car. 661.

Pennsylvania. — *Com. v. Drum*, 58 Pa. St. 9. *Tennessee.* — *Coffee v. State*, 3 Verg. (Tenn.) 283, 24 Am. Dec. 570.

Texas. — *Lane v. State*, 16 Tex. App. 172; *Jacobs v. State*, 28 Tex. App. 79; *Hill v. State*, 5 Tex. App. 2.

Lord Mansfield said that "where an act, in itself indifferent, if done with a particular intent becomes criminal, there the intent must be proved and found; but where the act is in itself unlawful * * * the proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent." *Rex v. Woodfall*, 5 Burr. 2667; *State v. Goodenow*, 65 Me. 30.

A Person Is Chargeable with Notice of the Legal Consequences of His Acts, and that he did not intend to commit a crime is no defense. *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21.

The law conclusively presumes that men intend their voluntary acts, and it is the duty of the jury, upon satisfactory proof of the criminal act charged, to find the legal intent in accordance with the legal presumption. *State v. Welch*, 21 Minn. 22.

In *State v. Barnard*, 88 N. Car. 661, A recklessly shot at cattle to run them off, and killed B's mule; malice was implied.

As no sane person is presumed to act without intention, it is permissible to look to the act to interpret the intention, which is most usually secret and could not be discovered. 3 Greenleaf Evi., §§ 13, 14.

A person committing an act must be acting voluntarily, and a man voluntarily doing an unlawful act cannot be said to be free from evil intent. *McPherson v. State*, 22 Ga. 487. See also the title PRESUMPTIONS.

Natural or Probable Consequences of Act. — It seems that a person must be presumed to contemplate only the natural and probable consequences of his acts; and therefore, where a person knocked another down with his fist, and a horse then jumped upon and kicked him while prostrate, producing his death, the person who knocked him down cannot be convicted of homicide. *People v. Rockwell*, 39 Mich. 503, where Campbell, C. J., said: "It is impossible to maintain such a charge without making every one liable not only for natural and probable consequences, but for all possible consequences and circumstances which immediately follow a wrongful act."

1. Act Evidence of Intent. — *Bain v. State*, 61 Ala. 75; *Hoover v. State*, 59 Ala. 57; *State v. Goodenow*, 65 Me. 30; *State v. Presnell*, 12 Ired. L. (34 N. Car.) 103.

U. S. v. Adams, 2 Dakota 305, was an indictment for embezzling public moneys, under

statutes which make certain acts evidence of the criminal offense, and it was held that where, under these sections, the act or omission is of itself made to constitute the criminal offense, knowingly and wilfully doing the act or omitting to perform the duty imposed by the law carries with it a conclusive inference of criminal intent, and no other evidence of such intent is necessary.

On the trial of an indictment for selling liquors to minors, there can be no inquiry as to whether there was a specific intent to violate the law. *Stein v. State*, 37 Ala. 133.

2. *Reynolds v. U. S.*, 98 U. S. 145.

3. *U. S. v. Anthony*, 11 Blatchf. (U. S.) 200.

4. *Com. v. Stout*, 7 B. Mon. (Ky.) 247; *Com. v. Elwell*, 2 Met. (Mass.) 190.

5. Specific Intent Must Be Proved — *Alabama.* — *Ogletree v. State*, 28 Ala. 693.

Arkansas — *Scott v. State*, 49 Ark. 156.

Michigan. — *People v. Sweeney*, 55 Mich. 586; *Roberts v. People*, 19 Mich. 401; *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781.

North Carolina. — *State v. King*, 86 N. Car. 603; *State v. Smith*, 93 N. Car. 516.

New Jersey. — *Folwell v. State*, 49 N. J. L. 31.

New York. — *Miller v. People*, 5 Barb. (N. Y.) 203; *Coleman v. People*, 58 N. Y. 555; *Copperman v. People*, 56 N. Y. 591.

Texas. — *Reagan v. State*, 28 Tex. App. 227, 19 Am. St. Rep. 833.

In *Mullins v. State*, 37 Tex. 338, the court observed: "It is true that the intent, being an act or purpose of the mind, is undiscoverable excepting through the acts of the person; yet in most cases the acts of the person will demonstrate the intent as clearly and with as much certainty as though it were an object that could be seen or felt; and therefore no person should be punished for an act, especially where the intent forms a material part of the offense, until that intent has been demonstrated beyond a reasonable doubt."

An act which provides that any person who shall use certain instruments "with intent to evade" its provisions shall forfeit and pay, etc., constitutes an intent to evade the essence of the offense, and no judgment can be entered on a special verdict which, finding other things, does not find such intent. *U. S. v. Buzzo*, 18 Wall. (U. S.) 125.

Under a law declaring it an offense to make imitations of butter with intent to sell for butter, etc., unless the intent appears a conviction cannot be sustained. *People v. Kerin*, 39 Hun (N. Y.) 631.

Where an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offense. But where the act becomes criminal only by reason of the intent, then, unless the intent is proved, the offense is not proved. *State v. King*, 86 N. Car. 603.

averred in the indictment,¹ and its existence is a question of fact for the jury under all the circumstances.²

d. PRODUCING AN UNINTENDED RESULT. — Where One Crime Is Intended and by Mistake Another Is Committed, the wrongful intent to do one act is transposed to the other.³ Thus where chloroform is administered to the guards in a penitentiary in order that prisoners may effect an escape, and death results therefrom;⁴ or where poison is administered with the intent of mischief, and death is produced;⁵ or where the defendant threw a glass at his wife which struck a lighted lamp she was carrying, broke the same, and caused the oil therein to take fire and burn her to death;⁶ or where A chased B, a boy of fifteen years, with intent to slap him in the face, and shot his pistol in the air for the purpose of frightening him, and the ball from the pistol struck the boy and caused his death.⁷

Act Directed Against One Affecting Another. — An act directed against the person of another, done with felonious intent, is equally criminal whether it affects the person intended or not.⁸ Thus, where a shot is fired with intention to kill A, but misses its intended victim and kills B;⁹ or where a party resisting arrest attempts to kill the officer, and kills a third person,¹⁰ or strikes with

The Act of Congress providing that "if any person shall knowingly and wilfully obstruct or retard the passage of the mail * * * he shall * * * pay a fine," applies to those who know that the acts performed by them will have that effect, and perform them with the intention that such shall be their operation. *U. S. v. Kirby*, 7 Wall. (U. S.) 482.

1. *People v. Lohman*, 2 Barb. (N. Y.) 218.

2. **Existence of Specific Intent Is for Jury.** — *People v. Jose Soto*, 53 Cal. 415; *Roberts v. People*, 19 Mich. 401; *Reg. v. Jones*, 9 C. & P. 258, 38 E. C. L. 109; *Ogletree v. State*, 28 Ala. 693; *People v. Scott*, 6 Mich. 287; *Woodward v. State*, 54 Ga. 106; *Miller v. People*, 5 Barb. (N. Y.) 203.

The law will infer and take as proved the intention to defraud from the act of forging or knowingly passing forged paper. *U. S. v. Shellmire*, 1 Baldw. (U. S.) 374.

3. **One Crime Intended, Another Committed.** — *State v. Ruhl*, 8 Iowa 447, which was an indictment for enticing and taking away an unmarried female under the age of fifteen years for the purposes of prostitution. The defendant offered to prove that he had good reason to believe that she was over fifteen years of age. It was held that such testimony was irrelevant, for the only effect of it was to show that the defendant intended one wrong and by mistake committed another; that the wrongful intent to do one act is only transposed to the other.

Lord Bacon gives the maxim, *In criminalibus sufficit generalis malitia intentionis cum facto paris gradus* (Bac. Max., reg. 15): "In criminal causes general malice of intent is enough, provided it is combined with a fact of as high a degree," and observes: "All crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact, which, though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of the error, if another particular ensue of as high a nature." See *Broom's Leg. Maxims*, p. 323.

4. *State v. Wells*, 61 Iowa 629, 47 Am. Rep. 822.

5. *State v. Wagner*, 78 Mo. 644, 47 Am. Rep. 131.

6. *Mayes v. People*, 106 Ill. 306.

7. *People v. Stubenvoll*, 62 Mich. 329.

But that the intended offense must have been *malum in se*, see *Com. v. Adams*, 114 Mass. 323, 19 Am. Rep. 362; *Reg. v. Faulkner*, 13 Cox C. C. 550.

8. **Act Directed Against One Affecting Another.** — *Reg. v. Latimer*, 17 Q. B. Div. 359; *Reg. v. Smith*, 7 Cox C. C. 51; *Rex v. Jarvis*, 2 M. & Rob. 40; *Walker v. State*, 8 Ind. 290; *State v. Henson*, 81 Mo. 384; *State v. Cooper*, 13 N. J. L. 361, 25 Am. Dec. 490; *Wareham v. State*, 25 Ohio St. 601. Compare *Rex v. Holt*, 7 C. & P. 518, 32 E. C. L. 609; *Rex v. Lewis*, 6 C. & P. 161, 25 E. C. L. 333.

9. *Com. v. Breyeses*, 160 Pa. St. 451, 40 Am. St. Rep. 729.

Shooting at One, Wounding Another. — To sustain an indictment under the statute for an assault with intent to murder, evidence that the defendant, intending to kill A, shot and wounded B, has been held insufficient. *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8; *Com. v. Morgan*, 11 Bush (Ky.) 601; *Barcus v. State*, 49 Miss. 17, 19 Am. Rep. 1; *People v. Robinson*, 6 Utah 101.

See further the title ASSAULT AND BATTERY, vol. 2, p. 968.

So, evidence that one who discharged a deadly weapon with intent to kill an animal inflicted a wound upon a person, will not sustain an indictment for an assault with intent to murder such person. *People v. Keefer*, 18 Cal. 636, the court saying: "It is true that a person may be convicted of murder or of an assault though no specific intent may have existed to commit the crime of murder or assault upon the person charged. The familiar illustration is that of a man shooting at one person and killing another. In these cases the general malice and the unlawful act are enough to constitute the offense. No doubt exists that a man may be guilty of manslaughter under some circumstances by his mere carelessness. But this rule has no application to a statutory offense like that of which the defendant was convicted."

10. *Angell v. State*, 36 Tex. 542, 14 Am. Rep. 380. See *Rex v. Jarvis*, 2 M. & Rob. 40.

intent to kill one person, and the blow takes effect on another;¹ or where one threw a stone at another, and struck a third party;² or where A mistook B for some one else, and assaulted him;³ or where in attempting to commit suicide A unintentionally killed another.⁴

Crime Accomplished Has Character of That Intended. — In such cases the crime is of the character it would have been had the act intended been accomplished.⁵ If the act intended would have been excusable or justifiable, the offense committed is likewise.⁶ Where a slave killed a white person believing him to be a runaway negro, the degree of the homicide is the same as it would have been had the person slain been a runaway negro.⁷

Gross Carelessness in Performing a Lawful Act May Be Criminal if it results in injury to others;⁸ as driving at an unusual rate of speed and running over a man and killing him;⁹ or where the driver of a carriage, while racing another carriage, upsets his own and kills a passenger.¹⁰

Act Done in Sport. — That the offense charged was committed in sport furnishes no defense;¹¹ as where A, in an attempt to scare the passengers, discharged a pistol in a railway car, and wounded B;¹² or where a schoolboy throws a stone at a comrade, expecting a dodge, and it hits him, inflicting a wound.¹³

1. Wareham v. State, 25 Ohio St. 601.

2. State v. Jump, 90 Mo. 171.

3. **Assaulting Wrong Person under Mistake as to Identity.** — Reg. v. Stopford, 11 Cox C. C. 643; Reg. v. Smith, Dears. C. C. 559; People v. Torres, 38 Cal. 141; McGehee v. State, 62 Miss. 772, 52 Am. Rep. 209; Territory v. Rowand, 8 Mont. 432; Callahan v. State, 21 Ohio St. 306; Musick v. State, 21 Tex. App. 69.

4. **Killing Another while Attempting Suicide.** — State v. Levelle, 34 S. Car. 120, 27 Am. St. Rep. 799.

This is so, even in a state where suicide is not technically a felony, and where there is no provision for punishing an attempt to commit suicide. Com. v. Mink, 123 Mass. 422, 25 Am. Rep. 109, where Gray, C. J., said: "But [suicide] being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal. Every one has the same right and duty to interpose to save a life from being so unlawfully and criminally taken that he would have to defeat an attempt unlawfully to take the life of a third person. And it is not disputed that any person who in doing or attempting to do an act which is unlawful and criminal kills another, though not intending his death, is guilty of criminal homicide, and, at the least, of manslaughter."

5. **Crime Accomplished Has Character of That Intended.** — Pinder v. State, 27 Fla. 370, 26 Am. St. Rep. 75; State v. Vines, 34 La. Ann. 1079; State v. Renfrow, 111 Mo. 589; State v. Montgomery, 91 Mo. 52; State v. Henson, 81 Mo. 385; Com. v. Breyessee, 160 Pa. St. 451, 40 Am. St. Rep. 729.

Where the death of a human being occurs by the act of one who is in pursuit of an unlawful design, without any intention to kill, it will be either murder or manslaughter, according as the intended offense is a felony or only a misdemeanor. State v. Smith, 32 Me. 369, 54 Am. Dec. 578.

But the defendant can only be convicted of murder in the second degree under a code requiring express malice against the victim to constitute murder in the first degree. Musick v. State, 21 Tex. App. 69.

6. Pinder v. State, 27 Fla. 370, 26 Am. St. Rep. 75.

7. Isham v. State, 38 Ala. 213.

8. **Gross Carelessness in Lawful Action** — *England.* — Rex v. Walker, 1 C. & P. 320, 11 E. C. L. 408; Reg. v. Taylor, 9 C. & P. 672, 38 E. C. L. 284; Rex v. Green, 7 C. & P. 156, 32 E. C. L. 477; Rex v. Mastin, 6 C. & P. 396, 25 E. C. L. 455; Rex v. Grout, 6 C. & P. 629, 25 E. C. L. 569; Rex v. Carr, 8 C. & P. 163, 34 E. C. L. 336; Rex v. Williamson, 3 C. & P. 635, 14 E. C. L. 497; Rex v. Long, 4 C. & P. 398, 19 E. C. L. 440.

United States. — U. S. v. Warner, 4 McLean (U. S.) 463.

Kentucky. — Com. v. Rodes, 6 B. Mon. (Ky.) 174.

New Jersey. — State v. O'Brien, 32 N. J. L. 169.

Tennessee. — Haile v. State, 11 Humph. (Tenn.) 158.

9. Rex v. Walker, 1 C. & P. 320, 11 E. C. L. 408.

10. Rex v. Timmins, 7 C. & P. 499, 32 E. C. L. 600.

11. **Act in Sport.** — Rex v. Sullivan, 7 C. & P. 641, 32 E. C. L. 669; Washington v. State, 60 Ala. 10, 31 Am. Rep. 28; Collier v. State, 39 Ga. 31, 99 Am. Dec. 449; People v. Stubenvoll, 62 Mich. 329. Compare Rutherford v. State, 13 Tex. App. 92.

Under statutes it has been held that the pointing by one person of an unloaded pistol at another, within shooting distance, accompanied with an order to kneel down, which through fear is obeyed, will not constitute an assault. McKay v. State, 44 Tex. 43.

12. Smith v. Com., 100 Pa. St. 324.

13. Hill v. State, 63 Ga. 578, 36 Am. Rep. 120. The court in this case said: "The sole defense is that he threw in sport, without ill will or anger, and with no intention to hurt or even hit, relying upon the expertness of his schoolfellow in dodging. It is not shown, however, that he did not throw at the latter, or that he gave any notice or warning so as to put him upon guard. Grant that he desired and expected a successful 'dodge,' yet he did

e. MOTIVE IMMATERIAL. — The motive with which a criminal offense is committed is not an essential element.¹ The act committed being unlawful, the existence of a good motive is no defense,² as that the defendant agreed to take a note back if it proved to be a counterfeit,³ or that he intended ultimately to take up a forged bill.⁴

Evidence of Motive is properly admitted when it tends to establish the presence of some essential fact or element of the crime charged.⁵ Inability to discover

not get it, and the other boy was in no fault in not responding with the anticipated manœuvre; he did not see the danger."

Lawful Games. — But injuries inflicted in certain lawful sports are not a ground for criminal liability. Thus in *Com. v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328, Endicott, J., said: "The common law recognizes as not necessarily unlawful certain manly sports calculated to give bodily strength, skill, and activity, and 'to fit people for defense, public as well as personal, in time of need.' Playing at cudgels or foils, or wrestling by consent, there being no motive to do bodily harm on either side, are said to be exercises of this description. *Fost. C. L.* 259, 260; *Com. Dig.*, *Plead.* 3 *m.* 18. But prize-fighting, boxing matches, and encounters of that kind serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without anger or mutual ill will. *Fost. C. L.* 260; 2 *Greenl. on Ev.*, § 85; 1 *Stephens's N. P.* 211."

See also the observations of Stephen, J., in *Reg. v. Coney*, 8 Q. B. Div. 549, where "wrestling, single-stick, sparring with gloves, football, and the like," are instanced as lawful. Thus in *Reg. v. Bradshaw*, 14 Cox C. C. 83, it was held that a football player who inflicted injuries on another football player while engaged in playing the game, which injuries resulted in the death of the wounded person, was not guilty of manslaughter if the injuries were not inflicted with design or were not due to indifference and recklessness.

But compare *Reg. v. Moore*, 14 Times Law Rep. 229, where, under similar circumstances, a football player was found guilty of manslaughter; *Hawkins, J.*, instructing the jury that football was a lawful game, but was a rough one, and persons who played it must be careful to restrain themselves so as not to do bodily harm to any other person. No one had a right to use force which was likely to injure another, and if he did use such force, and death resulted, the crime of manslaughter had been committed.

1. Motive Immaterial — *England.* — *Reg. v. Regan*, 4 Cox C. C. 335; *R. v. Hill*, 2 Moo. C. C. 30; *Reg. v. Gillow*, 1 Moo. C. C. 85; *Reg. v. Davis*, 1 C. & P. 306, 11 E. C. L. 401; *Reg. v. Batt*, 6 C. & P. 329, 25 E. C. L. 423; *Reg. v. Bowen*, C. & M. 149, 41 E. C. L. 86.

United States. — *U. S. v. Harmon*, 45 Fed. Rep. 414; *Reynolds v. U. S.*, 98 U. S. 145; *U. S. v. Stores*, 4 Woods (U. S.) 641.

Dakota. — *U. S. v. Adams*, 2 Dakota 305.

Indiana. — *Walls v. State*, 7 Blatchf. (Ind.) 572.

Massachusetts. — *Com. v. Belding*, 13 Met. (Mass.) 10.

Missouri. — *State v. Jones*, 79 Mo. 441.

Nevada. — *State v. Slingerland*, 19 Nev. 135.

New Hampshire. — *State v. Moore*, 12 N. H. 42.

New York. — *People v. Cornetti*, 92 N. Y. 86; *People v. Sliney*, 137 N. Y. 570, 50 N. Y. St. Rep. 391.

North Carolina. — *State v. King*, 86 N. Car. 603.

Tennessee. — *Perdue v. State*, 2 Humph. (Tenn.) 494.

Vermont. — *State v. Nixon*, 18 Vt. 70, 46 Am. Dec. 135.

2. Good Motive No Defense. — *Com. v. Has*, 122 Mass. 40; *Reg. v. Johnson*, 11 Mod. 62; *Reg. v. Morby*, 8 Q. B. Div. 571; *Reg. v. Dudley*, 14 Q. B. Div. 273; *Reg. v. Geach*, 9 C. & P. 499, 38 E. C. L. 195; *Reg. v. Hicklin*, L. R. 3 Q. B. 360, 11 Cox C. C. 19; *Reynolds v. U. S.*, 98 U. S. 145; *U. S. v. Taintor*, 11 Blatchf. (U. S.) 374; *U. S. v. Anthony*, 11 Blatchf. (U. S.) 200.

It is no defense to an indictment for a nuisance in a navigable river that although the work is in some degree a hindrance to navigation, it is advantageous in a greater degree to other users of the port. *Rex v. Ward*, 4 Ad. & El. 384, 31 E. C. L. 92.

"A man," said Chief Justice Shaw, in *Com. v. Snelling*, 15 Pick. (Mass.) 337, "may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if in pursuing that design he wilfully inflicts a wrong on others which is not warranted by law, such act is malicious."

3. *Perdue v. State*, 2 Humph. (Tenn.) 494.

4. *Reg. v. Geach*, 9 C. & P. 499, 38 E. C. L. 195.

5. Evidence of Motive Admissible — *Alabama.* — *Marler v. State*, 68 Ala. 580; *Johnson v. State*, 94 Ala. 35; *Pate v. State*, 94 Ala. 14; *Commander v. State*, 60 Ala. 1.

Florida. — *Johnson v. State*, 24 Fla. 162.

Georgia. — *Turner v. State*, 70 Ga. 765.

Iowa. — *State v. Rainsbarger*, 74 Iowa 196.

Kansas. — *State v. O'Neil*, 51 Kan. 665.

Kentucky. — *O'Brien v. Com.*, 89 Ky. 354.

Minnesota. — *State v. Lentz*, 45 Minn. 177.

Mississippi. — *Miller v. State*, 68 Miss. 221.

New York. — *People v. Harris*, 136 N. Y. 423; *McCann v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 272.

Pennsylvania. — *Com. v. McManus*, 143 Pa. St. 64; *Sayres v. Com.*, 88 Pa. St. 291.

Texas. — *Johnson v. State*, 29 Tex. App. 150; *Gonzales v. State*, 31 Tex. Crim. Rep. 508; *Hall v. State*, 31 Tex. Crim. Rep. 505.

Virginia. — *Williams v. Com.*, 85 Va. 607.

In *State v. Lentz*, 45 Minn. 180, the court said: "It is always competent, as well as of the greatest importance, to show a motive on part of the defendant to commit the crime of which he is accused. If there be a motive which can be assigned, the adequacy or in-

the motive for a crime does not disprove the crime;¹ the absence of motive revealed is a circumstance to be duly considered in weighing the question of guilt.²

f. **STATUTORY CRIMES WHERE INTENT IMMATERIAL.** — The legislature may enact laws for the mere violation of which, irrespective of the criminal intent, penalties are attached;³ as for selling liquor to minors,⁴ selling adulterated food and drugs,⁵ allowing minors to frequent saloons,⁶ changing and obstructing public roads,⁷ maintaining a nuisance,⁸ disposing of mortgaged property.⁹

2. Criminal Act — *a.* GENERALLY. — In order to constitute a criminal

adequacy of it, according to our standard, is a matter of no controlling importance. What would be a motive to one mind might not be to another. Whether a motive is adequate to induce the commission of crime depends on the peculiar circumstances of each case, and the particular character of the defendant. The history of crime shows that murders are often committed from motives comparatively trivial and slight, and among the most common of these are such as to obtain, by inheritance or otherwise, a small amount of property, or to remove some person who is an obstacle to a desired marriage."

1. *McLain v. Com.*, 99 Pa. St. 86; *Green v. State*, 13 Mo. 382.

Regarding the absence of motive, in *Preston v. State*, 8 Tex. App. 38, Clark, J., said: "While in cases depending upon circumstantial evidence the existence or want of motive is sometimes of vital importance, yet the vindication of the law is not made to rest upon so narrow and frail a foundation, nor can the demands of justice be met and foiled by an averment that no motive for the prisoner's conduct has been made to appear."

2. *State v. Coleman*, 20 S. Car. 441.

3. **Intent Immaterial.** — *Hill v. State*, 62 Ala. 168; *Dickens v. State*, 30 Ga. 383; *Com. v. Raymond*, 97 Mass. 567; *Com. v. Dowling*, 114 Mass. 259; *Com. v. Connelly*, 163 Mass. 539; *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270; *People v. Welch*, 71 Mich. 548; *People v. Snowburger*, (Mich. 1897) 71 N. W. Rep. 497; *Beckham v. Nacke*, 56 Mo. 546; *State v. Hurds*, 19 Neb. 316.

See generally the titles **POLICE POWER**; **HEALTH**.

Selling Diseased Meats. — Under the statutes of *Texas* it is held that, to support a conviction for selling diseased meats, the seller must have known at the time he sold the meat that it was diseased. *Teague v. State*, 25 Tex. App. 577.

Possession of Counterfeiting Tools. — Under an act providing that if any person "shall knowingly have in his possession and secretly keep" any plate for the purpose of striking or printing any false or counterfeit banknotes, "every person so offending shall," etc., the intent to use the instrument does not constitute an ingredient of the offense. *Sutton v. State*, 9 Ohio 133; *Sasser v. State*, 13 Ohio 484.

Municipal Ordinances and Police Regulations. — In *Reg. v. Tolson*, 23 Q. B. Div. 168, Wills, J., in considering the law as to criminal intent with reference to its application in the case of a bigamous marriage (see the title **BIGAMY**,

vol. 4, p. 40, for a discussion of the case), said: "Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. By-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health, or convenience, and such by-laws are enforced by the sanction of penalties, and the breach of them constitutes an offense and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the by-law, that the person committing it had *bona fide* made an accidental miscalculation or an erroneous measurement. The Acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril."

In *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, where the owner of a saloon was convicted of violating the law relative to keeping open his place of business on Sunday, upon a sale made by his clerk without his consent, the court, by Cooley, C. J., observed: "Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible."

4. **Selling Liquor to Minors.** — *Boatright v. State*, 77 Ga. 717; *State v. Kittelle*, 110 N. Car. 560, 28 Am. St. Rep. 698; *In re Carlson's License*, 127 Pa. St. 330; *State v. Hartfiel*, 24 Wis. 60. See the title **INTOXICATING LIQUORS**.

5. *Pain v. Boughtwood*, 24 Q. B. Div. 353; *Betts v. Armstead*, 20 Q. B. Div. 771; *People v. Snowburger*, (Mich. 1897) 71 N. W. Rep. 497. See the title **ADULTERATIONS**, vol. 1, p. 744.

6. *State v. Probasco*, 62 Iowa 400.

7. *State v. Gould*, 40 Iowa 372.

8. *Toops v. State*, 92 Ind. 13; *Chute v. State*, 19 Minn. 271; *State v. White Oak River Corp.*, 111 N. Car. 661.

9. *State v. Hurds*, 19 Neb. 316.

offense, there must be, as has been seen,¹ a union of act and intent,² for as long as an act rests in the bare intention, it is not punishable.³ But where the criminal act is complete, a specific crime of some sort is presented, and the acts necessary to constitute such specific crimes are fully treated under particular titles in this work. In addition, there remains to be considered the relation between the complete criminal act and the persons against whom punishment is sought, that is, the law with regard to principals and accessories, and the like; and further, the question of responsibility for incomplete criminal acts, that is, attempts at and solicitations to crime, and criminal conspiracies.

b. CONNECTION WITH CRIMINAL ACT — (1) Principals and Accessories.—

A person may be connected with a crime as principal in the first degree, principal in the second degree or aider and abettor, accessory before the fact, or accessory after the fact.

A Principal in the First Degree is he that is the actor or absolute perpetrator of the crime.⁴

A Principal in the Second Degree is one who is present, either actually or constructively, aiding and abetting the act to be done. An equivalent term is aider and abettor.⁵

An Accessory is one who is not the chief actor in a felonious offense, nor present at its perpetration, but is in some way concerned therein, either before or after the act committed. If one be absent at the time a felony is committed, yet procures, counsels, or commands another to commit it, he is an accessory before the fact. If, knowing a felony to have been committed, he receives, relieves, comforts, or assists the felon, he is an accessory after the fact.⁶

(2) *Compounding Offenses and Misprisions.*— Still lower forms of connection with a criminal act are found in the offenses of compounding an offense and misprisions.

To Compound an Offense is to take any valuable consideration or engagement therefor, upon an agreement to conceal a crime committed, or to abstain from prosecution.⁷

Misprision of Felony is a bare concealment by one who knows that a felony has been committed.⁸ It is practically obsolete.⁹

1. See *supra*, this section, *Malice and Intent*.

2. "The intent and the act must both concur to constitute the crime." Lord Kenyon in *Fowler v. Padget*, 7 T. R. 505.

3. Lord Mansfield in *R. v. Schofield*, Cald. 397; 2 East P. C. 1028; *Rex v. Higgins*, 2 East 21. See also the titles *ATTEMPTS TO COMMIT CRIME*, vol. 3, p. 250; *THREATS AND THREATENING LETTERS*.

This rule, it is said in Broom's Legal Maxims 311, "agrees, we may observe, with that laid down by Ulpian [Dig. 48, 19, 18]: *Cogitationis panam nemo patitur*; and by Montesquieu [Esp. des Lois, bk. 12, c. 11], who says, *Les lois ne se chargent de punir que les actions extérieures*; and must evidently be recognized, unless where the worst form of tyranny prevails."

4. 4 Black. Com. 34.

5. See the title *AIDER AND ABETTOR*, vol. 2, p. 29.

6. See the title *ACCESSORIES*, vol. 1, p. 257.

7. See the title *COMPOUNDING OFFENSES*, vol. 6, p. 399.

8. **Misprision of Felony** is the concealing of a felony which a man knows of, but never consented to, for if he consented, he is either principal or accessory in the felony. 1 Hale P. C. 374.

Misprision of felony is taken for a concealment of felony, or a procuring the concealment thereof. It is generally a misdemeanor, but is specially punishable in the case of sheriffs, coroners, and bailiffs. 1 Hawk. P. C., c. 59, § 2; Steph. Dig. Crim. Law., art. 157; Stat. 3 Edw. I.

For the distinction between misprision and compounding, see *State v. Hann*, 40 N. J. L. 228, and the title *COMPOUNDING OFFENSES*, vol. 6, p. 400.

9. **Misprision of Felony Obsolete.**— 1 Whart. Crim. Law (10th ed.), § 249.

Sir James Fitzjames Stephen, in a note to articles 156 and 157 of his Digest of Criminal Law, says: "These offenses [misprision of treason and misprision of felony] have, at least in modern times, been made the subject of few, if of any, prosecutions. * * * The definition of misprision of felony is extremely vague. I have found no authority as to what amounts to a concealment. The obligation to discover treason to a judge or magistrate is mentioned by Hale. In early times, when the offense was commoner and more important, the obligation was very clearly set forth."

The United States Revised Statutes contain provisions against misprision of felony committed on the high seas or in territory within

Misprision of Treason is the concealment of the commission of the crime of treason.¹

c. ATTEMPTS, SOLICITATIONS, AND CONSPIRACIES. — Criminal responsibility for acts never completed or effected may arise from attempts, solicitations, or conspiracies to commit crime.

An Attempt to commit a crime includes an intent to commit the offense, and an act done in part execution thereof, falling short, however, of completion.²

A Bare Solicitation to Commit a Felony or other aggravated offense, unaccompanied by acts, seems, by the weight of authority, to constitute an indictable misdemeanor.³ This has been said to proceed upon the ground that a solicitation is a form of attempt.⁴ But perhaps it is best treated as a separate and distinct offense.⁵ It has been strenuously maintained, on the other hand, that a solicitation is not in general indictable, although certain special classes of solicitation form an exception to this rule.⁶

Conspiracies. — Where a conspiracy is indictable, no act need be done in execution of the design in order to render the offense complete.⁷

3. Effect of Consent and Condonation — Consent. — The general maxim, *Volenti non fit injuria*, is not universally applicable in criminal cases.⁸

In **Assaults** consent is a defense in cases where life and limb are exposed to no serious danger in the common course of things. But where the assault is of such a character as tends to arouse angry passions and result in a breach of the peace, consent does not constitute a defense.⁹

the exclusive jurisdiction of the United States. U. S. Rev. Stat., § 5390 (Act of 1790).

State Statutes. — And some of the state statutes contain provisions making the concealment of specific felonies an offense. *State v. Hann*, 40 N. J. L. 228; 1 N. J. Gen. Stat. (1895), title Crimes, §§ 6, 21.

1. Misprision of Treason is an offense consisting in the bare knowledge and concealment of treason without any degree of assent thereto. 1 Hawk. P. C., c. 20, § 2; 1 Hale P. C. 371; Steph. Dig. Crim. Law, art. 156. See also the title TREASON.

Statutes. — The U. S. Rev. Stat., § 5333, provide for punishing misprision of treason against the United States.

A like statute with regard to misprision of treason against the state is found in New Jersey. 1 N. J. Gen. Stat. (1895), title Crime, § 2.

Under the *Georgia Code* (Ga. Pen. Code, 1895, § 54), the concealment of treason against the state constitutes the crime of treason in the second degree.

2. See the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 250, where this subject is fully treated.

3. Solicitation. — *Rex v. Higgins*, 2 East 5; *Reg. v. Ransford*, 13 Cox C. C. 9; *State v. Avery*, 7 Conn. 266, 18 Am. Dec. 105; *Com. v. Flagg*, 135 Mass. 545; *State v. Bowers*, 35 S. Car. 262, 28 Am. St. Rep. 847. See generally the title SOLICITATION.

"Every one who incites any person to commit any crime commits a misdemeanor, whether the crime is or is not committed." *Stephen's Dig. Crim. Law*, art. 47.

While one may attempt to commit a crime by the use of an innocent agent, yet he cannot be convicted of inciting another to crime, unless the party incited knows that the act in which he is to engage is a crime. *Reg. v. Welham*, 1 Cox C. C. 193; *Steph. Dig. Crim. Ev.*, note iii. to art. 47.

4. See 1 Bish. New Crim. Law, § 767; *State v. Hayes*, 78 Mo. 307.

5. "Merely soliciting one to do an act is not an attempt to do that act." *Mercur, J.*, in *Stabler v. Com.*, 95 Pa. St. 318, 40 Am. Rep. 653. See also *State v. Bowers*, 35 S. Car. 262, 28 Am. St. Rep. 847.

In *State v. Butler*, 8 Wash. 194, 40 Am. St. Rep. 900, it was held, after a very thorough discussion, that solicitation to commit the crime of adultery was not indictable as an attempt.

6. This is the view adopted by Mr. Wharton, 1 Whart. Crim. Law (10th ed.), § 179, followed in *Cox v. People*, 82 Ill. 191. See also *State v. Butler*, 8 Wash. 194, 40 Am. St. Rep. 900. And see the title SOLICITATION.

7. See the title CONSPIRACY, vol. 6, p. 843.

8. "The reason is," says Mr. Wharton, "that parties cannot by consent cancel a public law necessary to the safety and morality of the state. *Jus publicum privatorum voluntate mutari nequit.*" 1 Wharton's Crim. Law, § 142.

9. See the full discussion of this question in *Reg. v. Coney*, 8 Q. B. Div. 534. See also the titles ASSAULT AND BATTERY, vol. 2, p. 986; ATTEMPTS TO COMMIT CRIME, vol. 3, p. 26; DUELLING; PRIZE FIGHTS.

As to Consent to Surgical Operations, see the title PHYSICIANS AND SURGEONS.

In *Reg. v. Coney*, 8 Q. B. Div. 549, *Stephen, J.*, said: "In all cases the question whether consent does or does not take from the application of force to another its illegal character is a question of degree depending upon circumstances."

In **Cases of Assault with Intent to Rape**, or of indecent assaults, there is a conflict as to how far the consent of children below the legal age of consent constitutes a defense. The weight of authority in the *United States* is that consent is no defense; but in *England* a contrary doc-

Burglary, Robbery, Larceny, Rape. — There are other species of crime which are deprived of some essential element by the existence of consent. Thus there can be no burglarious breaking and entry where the entry is with consent;¹ and since robbery is a taking of goods from the person of another against his will, there cannot be a robbery where there is a consent to the taking.² So, too, as a taking with a claim of right is not larceny, consent constitutes a defense to a prosecution for this crime.³ Nor can the crime of rape exist where the act was done with the consent of the woman.⁴

Murder, Abortion, Abduction, etc. — On the other hand, in a large class of crimes, consent is immaterial. Murder is no less murder because the homicide is committed at the desire of the victim.⁵ So upon a prosecution for producing or procuring an abortion, the consent of the woman, at least if she has become "quick with child," is immaterial.⁶ In abduction, likewise, the consent of the abducted person may be without effect or significance.⁷ One who maims himself that he may have the more color to beg is indictable.⁸

Condonation. — Whether an act is a crime is determined in general solely by the conduct and intent of the actor⁹ at the time of the commission of the act; consequently, the character of a criminal act is not affected by the fact that the party injured subsequently condones the offense or forgives the wrongdoer,¹⁰ or that the latter makes reparation for his criminal conduct, as by

trine is held. See the title ASSAULT AND BATTERY, vol. 2, p. 987.

In *Reg. v. Coney*, 8 Q. B. Div. 554, Hawkins, J., after laying down the general doctrine stated in the text, said: "The cases cited of alleged indecent assaults on young children by their consent * * * may all be disposed of in this one observation, viz., that the indecent impositions of hands charged in those cases as assaults neither involved, nor were calculated to involve, breaches of the peace, and therefore, being by consent, were not punishable as assaults any more than they would have been had the objects of them been for the most innocent purposes."

Consent and Submission Distinguished. — Consent means an active will to submit to the doing of the act complained of, and knowledge of what is to be done or of the nature of the act that is being done is essential to constitute consent to the act. Where a person merely submits to an act done, through ignorance, or where consent is obtained by fraud, in neither case is there such a consent as the law contemplates. *Reg. v. Lock*, L. R. 2 C. C. 10. See also the title ASSAULT AND BATTERY, vol. 2, p. 988.

1. See the title BURGLARY, vol. 5, p. 51.

2. *Rex v. Fuller*, R. & R. C. C. 408. See also the title ROBBERY.

3. *Haley v. State*, 49 Ark. 147. See also the title LARCENY.

4. See the title RAPE.

5. He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he has done it merely of his own head. 1 Hawk. Pleas of the Crown, c. 27, § 6; 1 Russ. on Crimes 670, citing *Sawyer's Case*, (1815) Old Bailey Manuscript.

6. See the title ABORTION, vol. 1, p. 187.

7. *R. v. Biswell*, 2 Cox C. C. 259. See also the title ABDUCTION, vol. 1, p. 178.

8. **Voluntary Maiming.** — Co. Litt. 127a, where Lord Coke says: "In my circuit, anno 1 Jacobi regis, in the county of Leicester, one

Wright, a young, strong, and lusty rogue, to make himself impotent, thereby to have the more color to beg, or to be relieved without putting himself to any labor, caused his companion to strike off his left hand, and both of them were indicted, fined, and ransomed therefore; and that by the opinion of the rest of the justices for the cause aforesaid." This case is put to illustrate the observation that "the life and members of every subject are under the safeguard and protection of the king." See also 1 Russ. on Crimes 971, where it is said also that a person who maims himself in order to avoid enlistment as a soldier or impressment as a sailor is indictable. See also *People v. Clough*, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303.

9. See *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741.

10. **Forgiveness or Condonation No Defense.** — *Com. v. Slattery*, 147 Mass. 423.

Such a condonation may itself, if it involves an agreement not to prosecute, amount to a crime. See the title COMPOUNDING OFFENSES, vol. 6, p. 399.

The fact that one whose name has been forged may be willing to condone the offense and even pay the obligation, does not render it less a crime in the forger. *State v. Tull*, 119 Mo. 421.

Where one was convicted of the statutory offense of entering a vessel, upon its arrival at a Massachusetts port, before it was made fast to the wharf, and without the permission of the captain, it was held that the offense was complete when he boarded the vessel without leave, and without regard to the fact that permission was afterwards given him by the captain to remain on board. *Com. v. Kennedy*, 160 Mass. 312.

Upon an indictment for the crime of assaulting a police officer, it was held that the offense of the defendant was complete as soon as he had assaulted the officer, and that his guilt could not be affected by the subsequent failure of the officer to make a complaint against him.

restoring stolen or embezzled property.¹ The status of a crime is fixed when it is once completed, and that status cannot be changed by the subsequent act of the criminal or of third parties.²

4. Contributory Negligence of Injured Person. — In criminal cases the contributory negligence of a person injured or killed by the criminal negligence of another constitutes no defense in favor of the latter.³

5. Facilities Afforded Criminal for Commission of Crime. — It is no defense to the perpetrator of a crime that facilities for its commission were purposely placed in his way,⁴ or that the criminal act was done at the "decoy sollicita-

Com. v. Tobin, 108 Mass. 426, 11 Am. Rep. 375, where Gray, J., said: "The degree of a crime, once completed, cannot be aggravated by the subsequent act of the criminal or lessened by that of a third person. In *State v. Moore*, 12 N. H. 42, it was held that a person who had lawfully entered a house could not be made a burglar by afterwards stealing therein. * * * The subsequent failure of the officer to do a distinct act which the law required him to do in the further discharge of his duty could no more affect the degree of the defendant's previous offense than it could the question of probable cause for such a prosecution."

1. Goods Restored or Satisfaction Made. — *Fleener v. State*, 58 Ark. 98; *People v. De Lay*, 80 Cal. 52, *applying* Cal. Penal Code, § 513; *McCoy v. State*, 15 Ga. 205; *Hoyt v. State*, 50 Ga. 313; *Robson v. State*, 83 Ga. 166. See also *Fagnan v. Knox*, 66 N. Y. 525.

2. Status of Crime Fixed when Complete. — *Com. v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375.

In *McCoy v. State*, 15 Ga. 211, the court said: "The law under which he [the defendant] was indicted, as we have seen, made him a complete criminal the moment he converted the proceeds to his own use; and after that no act of his, or of the person whom he had wronged, could excuse him from that complete crime — neither the payment over of the proceeds of sale, or the payment of the value of the horse, or the payment of any amount of money, or the doing of any other thing. The most that any of these acts could have accomplished would have been the compounding of a felony."

The State's Interest Paramount. — When a crime has been committed, there is no longer a controversy between the criminal and the party injured by his acts. It is now a controversy between the state and the criminal, which the state will not permit the injured party to determine; nor will the state acknowledge the validity of any settlement brought about by such party. *Fleener v. State*, 58 Ark. 98.

3. Contributory Negligence No Defense to Criminal Charge. — *Reg. v. Kew*, 12 Cox C. C. 355; 4 Moak 605. See also *Reg. v. Ledger*, 2 F. & F. 857; *Belk v. People*, 125 Ill. 584; and the title HOMICIDE.

In *Reg. v. Longbottom*, 3 Cox C. C. 439, 1 B. & H. Lead. Crim. Cas. (1st ed.) 54, which was an indictment for homicide by recklessly driving over the deceased, *Rolfe*, B., said: "Whatever may have been the negligence of the deceased, I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent

conduct, if any such existed. * * * There is a very wide distinction between a civil action for pecuniary compensation for death arising from alleged negligence and a proceeding by way of indictment for manslaughter. The latter is a charge imputing criminal negligence amounting to illegality; and there is no balance of blame in charges of felony, but wherever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter in point of law, though it may be that he ought not to be severely punished."

In *Reg. v. Swindall*, 2 C. & K. 230, 61 E. C. L. 230, which was a similar case, *Pollock*, C. B., said: "The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct, and, if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his death; for in this consists a great distinction between civil and criminal proceedings." After alluding to the rule of contributory negligence in civil cases, the learned baron continued: "But in the case of loss of life the law takes a totally different view — the converse of that proposition is true; for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person."

Improper Care of Wounds. — Closely connected with this subject is the question of criminal responsibility for the infliction of a wound where death has resulted from the wound, but was due directly to the imprudence of the deceased or to the mismanagement of his physician in caring for the wound. See upon this subject the title HOMICIDE.

4. Facilities Afforded for Crime. — *Rex v. Eglington*, 2 Leach C. C. 913, 2 B. & P. 508; *Rex v. Holden*, 2 Taunt. 334, R. & R. C. C. 154, 2 Leach C. C. 1019; *Rex v. Headge*, 2 Leach C. C. 1033, R. & R. C. C. 160; *Rex v. Bull*, 2 East P. C. 572, note *a*, cited in *Rex v. Bazeley*, 2 Leach C. C. 841; *Reg. v. Williams*, 1 C. & K. 195, 47 E. C. L. 195; *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741.

In *U. S. v. Wight*, 38 Fed. Rep. 106, Brown, J., since associate justice of the United States Supreme Court, in holding the use of decoy letters lawful, said: "We think that no obstacle should be thrown in the way of the detection of crime that does not amount to a practical inducement or solicitation to commit it. The true doctrine in respect to larceny is thus stated by Chitty, 3 Crim. Law 925: If

tion" of persons seeking to expose the criminal,¹ or that detectives feigning complicity in the act were present and apparently assisting in its commission.²

V. CAPACITY AND RESPONSIBILITY FOR CRIME — 1. Infancy, Insanity, Drunkenness. — The complete or partial incapacity to commit crime resulting from infancy, insanity, or drunkenness is treated under other titles.³

2. Ignorance or Mistake of Facts — Where Specific Intent Essential. — As a general rule, ignorance or mistake of fact will not exempt the doer of an act, which is declared to be criminal, from the responsibility for his act; but where it is necessary to show a specific intent, ignorance or mistake of fact negatives that intent and will excuse one who has done a wrong deed.⁴ For instance, if a person passes counterfeit money, believing it to be good, he is not guilty of a crime.⁵ If one person kills another, believing upon reasonable grounds that such a course is necessary in self-defense, although he may be in fact mistaken as to the extent of the danger, he is not criminally liable;⁶ nor is one who votes at an election, believing that he is a qualified voter, when in reality he is not.⁷ One who takes property of another under a claim of ownership, supposing the property to be his own, is not guilty of larceny;⁸ nor can one who in good

the owner, in order to detect a number of men in the act of stealing, directs a servant to appear to encourage the design, and leads them on until the offense is complete, so long as he did not induce the original intent, but only provided for its discovery after it was formed, the criminality of the thieves will not be destroyed."

1. Decoy Letters, etc. — *Rex v. Holden*, 2 Taunt. 334, R. & R. C. C. 154, 2 Leach C. C. 1019; *Andrews v. U. S.*, 162 U. S. 420; *Grimm v. U. S.*, 156 U. S. 604; *U. S. v. Moore*, 19 Fed. Rep. 39; *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128. See also the titles DECOY LETTERS; DETECTIVES.

Purchase of Libelous Publication Simply for Purpose of Prosecution. — When a sale of certain publications is by law made criminal, the sale to one who buys simply for purpose of prosecution is criminal, and a sufficient offense to support an indictment. *Rex v. Burdett*, 4 B. & Ald. 95, 6 E. C. L. 404; *Rex v. Wegener*, 2 Stark. 245, 3 E. C. L. 395; *State v. Avery*, 7 Conn. 266, 18 Am. Dec. 105; *Com. v. Blanding*, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; *Swindle v. State*, 2 Yerg. (Tenn.) 581, 24 Am. Dec. 515.

2. State v. Jansen, 22 Kan. 498; *State v. Stickney*, 53 Kan. 308, 42 Am. St. Rep. 284. See also the title DETECTIVES.

3. See the titles INFANCY; INSANITY; INTOXICATION.

4. Effect of Ignorance or Mistake of Fact — United States. — *U. S. v. Pearce*, 2 McLean (U. S.) 14.

Alabama. — *Gordon v. State*, 52 Ala. 308, 23 Am. Rep. 575.

Georgia. — *Stern v. State*, 53 Ga. 229, 21 Am. Rep. 266.

Illinois. — *Andrews v. People*, 60 Ill. 354.

Massachusetts. — *Curtis v. Mussey*, 6 Gray (Mass.) 261; *Com. v. Elwell*, 2 Met. (Mass.) 190; *Coles v. Clark*, 3 Cush. (Mass.) 399.

Missouri. — *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324; *State v. Graham*, 46 Mo. 490; *State v. McDonald*, 7 Mo. App. 510.

New York. — *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Pease v. Smith*, 61 N. Y. 477.

North Carolina. — *State v. Hart*, 6 Jones L. (51 N. Car.) 389.

Ohio. — *Shriedley v. State*, 23 Ohio St. 130.

Tennessee. — *McGuire v. State*, 7 Humph. (Tenn.) 54.

Texas. — *Neely v. State*, 8 Tex. App. 64; *Smedly v. State*, 30 Tex. 214; *Dignowitty v. State*, 17 Tex. 527, 67 Am. Dec. 670; *Bray v. State*, 41 Tex. 204.

Vermont. — *Courtis v. Cane*, 32 Vt. 232, 76 Am. Dec. 174.

See also *supra*, this title, *Elements of Crime — Malice and Intent — Intent Presumed from Unlawful Act*.

5. Ignorantly Passing Counterfeited Coin. — *Gordon v. State*, 52 Ala. 308, 23 Am. Rep. 575; *Com. v. Elwell*, 2 Met. (Mass.) 190; *State v. McDonald*, 7 Mo. App. 510. See also the title COUNTERFEITING, vol. 7, pp. 887, 889, *et seq.*

6. Killing under Belief that the Act Is Necessary in Self-defense. — *People v. Miles*, 55 Cal. 207; *Steinmeyer v. People*, 95 Ill. 383; *Logue v. Com.*, 38 Pa. St. 265, 80 Am. Dec. 481. See the title SELF-DEFENSE.

7. Intent in Illegal Voting. — *Carter v. State*, 55 Ala. 181; *State v. Hart*, 6 Jones L. (51 N. Car.) 389; *McGuire v. State*, 7 Humph. (Tenn.) 54.

"Illegal voting, when it is supposed to arise from the want of legal qualifications, is dependent on the voter's knowledge of the particular facts which make up the qualification. Every man is bound to know the law" in regard to his qualifications. "He is bound to exercise reasonable diligence to ascertain the facts which enter into and form these qualifications. Having exercised this diligence * * * he could not fairly be charged with illegal voting." *Gordon v. State*, 52 Ala. 308, 23 Am. Rep. 575.

See also the title ELECTIONS.

8. Taking Property under Claim of Right. — *Bray v. State*, 41 Tex. 204; *Smedly v. State*, 30 Tex. 214; *Dignowitty v. State*, 17 Tex. 527, 67 Am. Dec. 670.

In *Neely v. State*, 8 Tex. App. 64, it was held that "in theft the fraudulent intent is a necessary constituent of the offense. The act of taking, itself, without such an intent, is a mere trespass. If the taking be under an honest though mistaken claim of right, it would seem hardly necessary to cite authority that it is not theft."

See also the title LARCENY.

faith purchases and subsequently sells stolen goods be charged criminally.¹

Where No Specific Intent Essential, Mistake of Fact Immaterial. — But where an act is made criminal by its being prohibited, and there is no specific intent necessary to constitute the act a crime, ignorance or mistake of fact is no excuse, the party doing the act being chargeable with notice of the facts.² So it is rape to have carnal knowledge of a female under the age of consent as fixed by statute, even though she state that she is older than the age prescribed and the person has reason to believe that she is.³ The same rule applies in enticing a female away for the purpose of debauching her.⁴ In some states it is an offense for a person to join in marriage one who is within the age of consent. In such cases the party who performs the ceremony marries a person at his peril, for it is his duty to ascertain the party's age.⁵ When the sale of intoxicating liquors is permitted under certain restrictions, the weight of authority is that the seller must keep within the terms of his license at his peril, and must know that the person to whom he sells is not under a disability.⁶ If sale to minors is forbidden, the fact that the minor claimed that he was of age is not sufficient to relieve the seller, even if he honestly believes the minor is of age and the circumstances would so indicate.⁷

3. Ignorance or Mistake of Law. — Every person is presumed to know the law, and therefore it is presumed that his violations of it are wilful. Therefore he is liable for the consequences of his acts, and ignorance or mistake of

1. Receipt of Stolen Goods — No Criminal Intent. — *Andrews v. People*, 60 Ill. 354; *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Pease v. Smith*, 61 N. Y. 477; *Shriedley v. State*, 23 Ohio St. 130; *Courtis v. Cane*, 32 Vt. 232, 76 Am. Dec. 174. See also the title RECEIVING STOLEN PROPERTY.

2. Mistake of Fact Immaterial, where Specific Intent Not Essential — *United States*. — U. S. v. *Leathers*, 6 Sawy. (U. S.) 17.

Arkansas. — *Crampton v. State*, 37 Ark. 108; *Pounders v. State*, 37 Ark. 399; *Edgar v. State*, 37 Ark. 219; *Redmond v. State*, 36 Ark. 58, 38 Am. Rep. 24.

Connecticut. — *Barnes v. State*, 19 Conn. 398.

Illinois. — *Farmer v. People*, 77 Ill. 322; *McCutcheon v. People*, 69 Ill. 601; *Flynn v. Galesburg*, 12 Ill. App. 200; *Humpeler v. People*, 92 Ill. 400.

Indiana. — *Holmes v. State*, 88 Ind. 145.

Iowa. — *Dudley v. Sautbine*, 49 Iowa 650, 31 Am. Rep. 165; *Jamison v. Burton*, 43 Iowa 282; *State v. Newton*, 44 Iowa 45.

Kentucky. — *Ulrich v. Com.*, 6 Bush (Ky.) 400.

Massachusetts. — *Roberge v. Burnham*, 124 Mass. 277; *Com. v. Finnegan*, 124 Mass. 324; *Com. v. Lattinville*, 120 Mass. 385; *Com. v. Emmons*, 98 Mass. 6; *Com. v. Murphy*, 165 Mass. 66; *Com. v. Goodman*, 97 Mass. 117; *Com. v. Boynton*, 2 Allen (Mass.) 160; *Com. v. Waite*, 11 Allen (Mass.) 264, 87 Am. Dec. 711; *Com. v. Farren*, 9 Allen (Mass.) 489; *Com. v. Smith*, 103 Mass. 444.

Michigan. — *Bonker v. People*, 37 Mich. 4.

Minnesota. — *State v. Heck*, 23 Minn. 549.

Mississippi. — *Riley v. State*, (Miss. 1895) 18 So. Rep. 117.

Missouri. — *State v. Griffith*, 67 Mo. 287; *Beckham v. Nacke*, 56 Mo. 546.

New York. — *People v. Zeiger*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 355.

Ohio. — *Crabtree v. State*, 30 Ohio St. 382; *State v. Kelly*, 54 Ohio St. 166.

Pennsylvania. — *Donahue v. Dougherty*, 5 Rawle (Pa.) 124.

Rhode Island. — *State v. Smith*, 10 R. I. 258.

Virginia. — *Lawrence v. Com.*, 30 Gratt. (Va.) 845.

West Virginia. — *State v. Cain*, 9 W. Va. 559.

Wisconsin. — *State v. Hartfiel*, 24 Wis. 60.

See also *supra*, this title, *Elements of Crime; Malice and Intent*.

3. Statutory Rape — Female under Age of Consent. — *State v. Newton*, 44 Iowa 45; *Com. v. Murphy*, 165 Mass. 66; *Riley v. State*, (Miss. 1895) 18 So. Rep. 117; *Lawrence v. Com.*, 30 Gratt. (Va.) 845.

See the title RAPE.

4. Enticing Female to Debauch Her. — *Riley v. State*, (Miss. 1895) 18 So. Rep. 117, where it is held that "One who entices away a female for the purpose of debauching her is not relieved by the fact that he did not know her to be within the age named in the statute. It is the fact that she was, that controls and fixes the offense." See also the title ABDUCTION.

5. Marrying Persons Who Have Not Reached Age of Consent. — *Bonker v. People*, 37 Mich. 4; *State v. Griffith*, 67 Mo. 287.

The court, in *State v. Griffith*, 67 Mo. 287, said: "His honest mistake in this regard will not protect him. The law explicitly declares what is required for his protection, and unless he adopts the means pointed out he must suffer the consequences."

In *Donahue v. Dougherty*, 5 Rawle (Pa.) 124, it is said: "Nothing but compliance with the injunctions of the statute, or fraudulent representations by the parent producing a departure from it, can protect him."

6. See the title INTOXICATING LIQUORS.

7. *Pounders v. State*, 37 Ark. 399; *State v. Kittelle*, 110 N. Car. 560, 28 Am. St. Rep. 698; *State v. Hartfiel*, 24 Wis. 60. See also the title INTOXICATING LIQUORS.

the law will not excuse him.¹ The fact that a person is a foreigner and does not know the law will not excuse him.² Nor is the fact that one was advised by counsel, or by a magistrate, that the doing of a certain act was lawful, an excuse.³ A person's religious belief cannot be accepted as a justification for his committing an overt act, made criminal by the law of the land, even though he relies upon that part of the Constitution of the United States which says that one "may worship God according to his own conscience," and he

1. *Ignorantia Legis Neminem Excusat* — *England*. — *Rex v. Bailey*, R. & R. C. C. 1; *Rex v. Esop*, 7 C. & P. 456, 32 E. C. L. 584; *Matter of Barronet*, 1 El. & Bl. 1, 72 E. C. L. 1; *Reg. v. Price*, 3 Perry & D. 421; *Reg. v. Good*, 1 C. & K. 185, 47 E. C. L. 185; *Reg. v. Hoatson*, 2 C. & K. 777, 61 E. C. L. 777; *Reg. v. Reed*, C. & M. 306, 41 E. C. L. 170; *Rex v. Hall*, 3 C. & P. 409, 14 E. C. L. 373; *Reg. v. Downes*, 13 Cox C. C. 111.

United States. — *U. S. v. Anthony*, 11 Blatchf. (U. S.) 200; *U. S. v. Taintor*, 11 Blatchf. (U. S.) 374; *Reynolds v. U. S.*, 98 U. S. 145; *U. S. v. Taylor*, 3 McCrary (U. S.) 505; *Cambioso v. Maffett*, 2 Wash. (U. S.) 98; *U. S. v. Conner*, 3 McLean (U. S.) 573; *Miles v. U. S.*, 103 U. S. 304.

Alabama. — *Hoover v. State*, 59 Ala. 57; *Schuster v. State*, 48 Ala. 199; *Brent v. State*, 43 Ala. 297.

Indiana. — *Winehart v. State*, 6 Ind. 30; *Dodd v. State*, 18 Ind. 56.

Kentucky. — *Wayman v. Com.*, 14 Bush (Ky.) 467.

Maine. — *State v. Goodenow*, 65 Me. 30.

Maryland. — *Grumbine v. State*, 60 Md. 355.

Massachusetts. — *Com. v. Bradford*, 9 Met. (Mass.) 268; *Com. v. Bagley*, 7 Pick. (Mass.) 279; *Com. v. Goodman*, 97 Mass. 117; *Com. v. Has*, 122 Mass. 40; *Com. v. Doane*, 1 Cush. (Mass.) 5.

Michigan. — *People v. Cook*, 39 Mich. 236, 33 Am. Rep. 380; *People v. Husband*, 36 Mich. 306.

Minnesota. — *State v. Welch*, 21 Minn. 22.

Mississippi. — *Whitton v. State*, 37 Miss. 379.

Missouri. — *Minor v. Happersett*, 53 Mo. 58.

New Jersey. — *Cutter v. State*, 36 N. J. L. 125.

New York. — *Hamilton v. People*, 57 Barb. (N. Y.) 625; *Gardner v. People*, 62 N. Y. 299; *People v. Powell*, 63 N. Y. 88.

North Carolina. — *State v. Boyett*, 10 Ired. L. (32 N. Car.) 336; *State v. Bryson*, 81 N. Car. 595; *State v. Hart*, 6 Jones L. (51 N. Car.) 389.

Ohio. — *Cincinnati v. Rice*, 15 Ohio 225.

Pennsylvania. — *Weston v. Com.*, 111 Pa. St. 251; *Specht v. Com.*, 8 Pa. St. 312, 49 Am. Dec. 518.

Tennessee. — *McGuire v. State*, 7 Humph. (Tenn.) 54; *Walker v. State*, 2 Swan (Tenn.) 287.

In *Whitton v. State*, 37 Miss. 379, the defendant asked for an instruction to the effect that unless the accused "knowingly and wilfully violated the statute" he was not guilty; the court refused the instruction, and the appellate court in reviewing the requested instruction said: "This instruction was properly refused. It holds the idea that a party must wilfully intend to violate a statute, in order to be liable

to the penalty established by it. But as he is bound to know the law, he is held to the consequences of a wilful violation of it, whether he knew of its existence or not. Otherwise it would be difficult to punish any man for a violation of law, because it might be impossible to prove that he had knowledge of the law. Hence, the legal presumption that every man knows the law, and that his violations of it are wilful."

The court, in *Hamilton v. People*, 57 Barb. (N. Y.) 625, said: "One of the rules of criminal evidence is, that every man is presumed to intend the natural and necessary and even the probable consequences of an act which he intentionally performs. And a rule of presumption is, that no man is ignorant of the law, for the violation of which he may not be excused."

2. *Same Presumption Applies to Foreigners*. — *Rex v. Esop*, 7 C. & P. 456, 32 E. C. L. 584; *Matter of Barronet*, 1 El. & Bl. 1, 72 E. C. L. 1; *Cambioso v. Maffett*, 2 Wash. (U. S.) 98.

3. *Advice of Counsel*. — In *Weston v. Com.*, 111 Pa. St. 251, the court said: "It is only necessary to say that if counsel had advised the defendant that he might with impunity do every one of the acts necessary to make out his guilt, the fact of such advice would have been no defense whatever to him. Of course, if he was advised that he might do some of these acts without criminality it could have no higher effect. * * * The giving of the advice neither increases nor diminishes his criminality in any degree."

This was held to be the rule in *Dodd v. State*, 18 Ind. 56, where the auditor of the state relied upon the official opinion of the attorney general upon the manner in which he should handle certain moneys under a new statute; and in *State v. Hart*, 6 Jones L. (51 N. Car.) 389, where a judge of election expressed an unofficial opinion in regard to a certain man's right to vote under the law.

In *State v. Goodenow*, 65 Me. 30, the defendant, a woman, had a lawful husband alive. This husband having married again, the defendant thought that she had a right to marry again, and upon applying to a justice of the peace to perform the ceremony, asked his opinion as to her right to marry, and was advised that she might do so. The court said: "Then the respondents say that they were misled by the advice of the magistrate, of whom they took counsel concerning their marital relations. But the gross ignorance of the magistrate cannot excuse them. They were guilty of negligence and fault, to take his advice. They were bound to know or ascertain the law and the facts for themselves at their peril." See also the title *ADVICE OF COUNSEL*, vol. I, p. 897.

honestly believes that he has the right to do whatever his religion teaches.¹ However, where a specific intent is necessary to constitute a crime, ignorance or mistake of law negatives that intent, and in such cases is an excuse.²

4. Necessity. — Where the circumstances are of such a nature that the only thing that can be done is an act which constitutes a crime, the necessity of doing the act is an excuse and will relieve the doer from criminal liability.³

5. One Acting under Direction or Authority of Another. — A person who is acting under the authority of a superior is guilty if his acts are illegal, even if ordered to do so by his superior.⁴ And one who is acting as agent for another

1. Religious Belief — *England.* — Reg. v. Downes, 13 Cox C. C. 111; Reg. v. Good, 1 C. & K. 185, 47 E. C. L. 185; Reg. v. Hoatson, 2 C. & K. 777, 61 E. C. L. 777.

United States. — Reynolds v. U. S., 98 U. S. 145; Miles v. U. S., 103 U. S. 304.
Alabama. — Frolickstein v. Mobile, 40 Ala. 725.

Arkansas. — Shover v. State, 10 Ark. 259.
California. — Ex p. Andrews, 18 Cal. 678.
Georgia. — Hall v. State, 3 Ga. 18.
Illinois. — Jones v. People, 14 Ill. 196.
Maryland. — Bode v. State, 7 Gill (Md.) 326.
Massachusetts. — Com. v. Has, 122 Mass. 40.
Missouri. — State v. Amb, 20 Mo. 214.

New York. — Story v. Elliot, 8 Cow. (N. Y.) 27; Watts v. Van Ness, 1 Hill (N. Y.) 76.

Ohio. — Bloom v. Richards, 2 Ohio St. 387; Cincinnati v. Rice, 15 Ohio 225.

Pennsylvania. — Specht v. Com., 8 Pa. St. 312, 49 Am. Dec. 518.

South Carolina. — Charleston v. Benjamin, 2 Strobb. L. (S. Car.) 508, 49 Am. Dec. 608.

Bramwell, B., in Reg. v. Downes, 13 Cox C. C. 111, said: "The statute has imposed a positive and absolute duty on parents, whatever their conscientious or superstitious opinions may be, to provide medical aid for their infant children in their custody. The facts show that the prisoner thought it was irreligious to call in medical aid, but that is no excuse for not obeying the law."

In Reynolds v. U. S., 98 U. S. 145, it is said: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

2. Specific Intent Involved — *England.* — Reg. v. Reed, C. & M. 306, 41 E. C. L. 170; Rex v. Hall, 3 C. & P. 409, 14 E. C. L. 373.

United States. — U. S. v. Conner, 3 McLean (U. S.) 573.

Alabama. — Schuster v. State, 48 Ala. 199.
Massachusetts. — Com. v. Doane, 1 Cush. (Mass.) 5.

Michigan. — People v. Husband, 36 Mich. 306.

New Jersey. — Cutter v. State, 36 N. J. L. 125.

New York. — People v. Powell, 63 N. Y. 88.

In Reg. v. Reed, C. & M. 306, 41 E. C. L. 170, Coleridge, J., said: "Ignorance of the law cannot excuse any person; but at the same time, when the question is, with what intent a person takes, we cannot help looking into their state of mind; as, if a person take what he believes to be his own, it is impossible to say that he is guilty of felony."

3. Necessity as Excuse. — Brig James Wells v. U. S., 7 Cranch (U. S.) 22; The Mary, 1 Gall. (U. S.) 206; Brig Struggle v. U. S., 9 Cranch (U. S.) 71; The Diana, 7 Wall. (U. S.) 354; Com. v. Brooks, 99 Mass. 434.

In The Brig William Gray, 1 Paine (U. S.) 16, it was held that a vessel, which during the existence of our embargo laws departed from one port in the United States on a voyage to another, but was obliged from irresistible necessity to put into a foreign port, and sell her cargo, was not guilty of a violation of those laws.

Where a crew on board a vessel refused to proceed with the journey and refused to sail the vessel unless the vessel was returned to the starting port, because the vessel was leaky, they were not guilty of mutiny. U. S. v. Ashton, 2 Sumn. (U. S.) 13.

In The Gertrude, 3 Story (U. S.) 68, a foreign vessel was wrecked on the American shore. The crew landed and sold the tackle, apparel, and furniture of the vessel, separate from the hull. This was held not to be a violation of the revenue laws.

As to *Homicide in Cases of Necessity*, see the titles HOMICIDE; SELF-DEFENSE.

4. Acting under Authority of Superior. — Mottyn v. Fabrigas, 1 Cowp. 161; Mitchell v. Harmony, 13 How. (U. S.) 115; Harmony v. Mitchell, 1 Blatchf. (U. S.) 549; U. S. v. Jones, 3 Wash. (U. S.) 209; People v. Richmond, 29 Cal. 414; State v. Hull, 34 Conn. 132; Skeen v. Monkeimer, 21 Ind. 1; State v. Sutton, 10 R. I. 159; Humphrey v. Douglass, 10 Vt. 71, 33 Am. Dec. 177.

In U. S. v. Carr, 1 Woods (U. S.) 480, the court said: "A soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor by his oath to do it. So far from such an order being a jus-

cannot escape the consequences of a criminal act by showing that he did the act for and under the direction of his principal.¹

6. Corporations. — The question of the responsibility of corporations for crime — their liability to indictment — has been fully treated under the title CORPORATIONS.²

CRIMINAL LIBEL. — See the title LIBEL AND SLANDER.

CRIMINAL NEGLIGENCE. — See the title NEGLIGENCE.

CRIMINAL OFFENSE. — See CRIME — CRIMINAL, *ante*.

CRIMINAL PROCEDURE. — See 5 ENCYC. OF PLEADING AND PRACTICE, p. 622.

CRIMINAL PROCESS. — See note 3.

CRIMINAL SALES. — As to the sale of adulterated articles, see the titles ADULTERATION, vol. 1, p. 738; BOARDS OF HEALTH, vol. 4, p. 596; FOOD; MILK; OLEOMARGARINE; POLICE POWERS. As to intoxicating liquors, see the title INTOXICATING LIQUORS. As to sales and conveyances in fraud of creditors, see the title FRAUDULENT SALES AND CONVEYANCES. And see generally the title INSOLVENCY AND BANKRUPTCY.

CRIMINATION. — As to a party being compelled to criminate himself, see the titles CONTEMPT, vol. 7, pp. 47, 48, 64; WITNESSES.

CRITICISM. (See also the titles COPYRIGHT, vol. 7, p. 508; LIBEL AND SLANDER.) — Criticism is a discussion, or, as applicable in libel cases, a censure of the conduct or character or utterances of the person or thing criticised.⁴

CROPPER. — See the title CROPS, *post*.

tification, it makes the party giving the order an accomplice in the crime. For instance, an order from an officer to a soldier to shoot another for disrespectful words merely would, if obeyed, be murder both in the officer and soldier."

In *State v. Sparks*, 27 Tex. 633, it is held that no matter how high a source an order to do an illegal act comes from, it is no justification; on the other hand, a duty arises to disobey such an order.

In *Georgia* the rule is somewhat modified. Under ordinary circumstances the inferior is liable (*Hately v. State*, 15 Ga. 346), but the courts hold that in time of war the orders from a superior are those of a despot and must be obeyed, and under such circumstances the inferior is not liable. *Clark v. State*, 37 Ga. 191.

1. Agent Acting under Orders — *Alabama*. — *Winter v. State*, 30 Ala. 22; *State v. Bell*, 5 Port. (Ala.) 365.

Georgia. — *Hately v. State*, 15 Ga. 346.

Massachusetts. — *Com. v. Drew*, 3 Cush.

(Mass.) 279; *Com. v. Hadley*, 11 Met. (Mass.) 66.

Mississippi. — *Kliffield v. State*, 4 How. (Miss.) 304.

Missouri. — *Hays v. State*, 13 Mo. 246; *Schmidt v. State*, 14 Mo. 137; *State v. Bryant*, 14 Mo. 340.

New York. — *Curtis v. Knox*, 2 Den. (N. Y.) 341.

South Carolina. — *State v. Matthis*, 1 Hill L. (S. Car.) 37.

Vermont. — *State v. Bugbee*, 22 Vt. 32.

2. See the title CORPORATIONS; LIABILITIES OF CORPORATIONS; LIABILITY TO INDICTMENT, vol. 7, p. 841.

3. Distinguished from Civil Process. — In *Ward v. Lewis*, 1 Stew. (Ala.) 26, it is said: "Civil process is that which calls upon a person to answer for a civil injury. *Criminal process* issues to compel him to answer for a crime or misdemeanor, where punishment of some kind or other must be the consequence of conviction." See generally the title WARRANTS.

4. Belknap v. Ball, 83 Mich. 588.

CROPS.

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CROSS-REFERENCES.

As to how far Crops are within the provisions of the Statute of Frauds regulating sales of interests in lands, and sales of goods, wares, and merchandise, see the title FRAUDS, STATUTE OF.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: CHATTEL MORTGAGES, vol. 5, p. 945; DAMAGES, post; EXECUTIONS; LANDLORD AND TENANT; LIENS; RECORDING ACTS; SALES; TRESPASS.

I. DEFINITION. — The word "crop," in its general signification, means the product of cultivated plants while growing, or that product after it has been harvested or severed from the stalk or root to which it was attached.¹

II. FRUCTUS INDUSTRIALES AND FRUCTUS NATURALES — **1. Generally.** — There are two kinds of crops: First, those produced by annual labor and cultivation, which are called *fructus industriales*; and second, those crops which grow from perennial roots, and which do not require the annual labor of the owner to bring them into existence, which are called *fructus naturales*. A distinction between these two classes of growth is material only as relating to, first, whether the growth may be sold by parol as personal property, or whether it is a part of the real estate; and second, whether it passes to the personal representative to be administered as personal property, or to the heir as a portion of the realty. For these purposes, *fructus industriales* are personalty, and *fructus naturales* realty.²

2. What Crops Are Fructus Industriales — **Crops Planted Annually.** — All crops which require to be planted or sown annually, whether or not other labor is necessary for their production before they are ready to be gathered or reaped, are *fructus industriales*.

Fruits of Perennial Plants — **Old Doctrine.** — Formerly, in England, it was held that where the root or tree was perennial, living for a number of years, the fruit produced by it while growing was *fructus naturales*.³ This doctrine is supported now by little authority and less reason.

Correct Test: Annual Labor Necessary to Produce Annual Fruit. — The correct test to apply is to ascertain whether the annual fruit is produced by the annual labor of man, such as necessary manurance or other industry, or whether the fruit is referable to the industry of man only at the period when its seed or root

1. Definitions. — The valuable part of that which is planted in the earth, as grain, roots, etc. Kinney's Law Dict.

"A crop is, primarily, some product of the soil, gathered during a single year." Goodrich v. Stevens, 5 Lans. (N. Y.) 230.

2. Fructus Industriales and Fructus Naturales Distinguished. — "Although the cases are not uniform, there is abundant authority holding or recognizing the distinction to the effect that crops, like corn, wheat, rye, potatoes, etc., called *fructus industriales*, are considered as the representatives of the labor and expense bestowed upon them, and regarded as chattels while still growing; and as such go to the ex-

ecutor instead of the heir, and may be seized on execution as chattels, and may be sold or bargained by parol; while growing grass and trees and fruit on trees, called *fructus naturales*, are, in contemplation of law, a part of the soil of which they are the natural growth, and descend with it to the heir, and until severed cannot be seized on execution, and under the statute of frauds cannot be sold or conveyed by parol." Veazey, J., in Kimball v. Sattley, 55 Vt. 285, 45 Am. Rep. 614. See also the title FRAUDS, STATUTE OF.

3. Former Test in England. — Waddington v. Bristow, 2 B. & P. 452; Rodwell v. Phillips, 2 M. & W. 501.

was first planted, and, therefore, owes its continued existence to nature. In the former case, the fruits of the plant are *fructus industriales*, although the plants themselves are *fructus naturales*.¹ Of such character are hops, the root from which the vine grows being perennial, but their production necessitating the annual industry of man in the making of hills and the setting of poles:² and peaches, apples, or other fruits cultivated for the market.³

Entire Plant Personalty. — There are cases, also, where the entire plant may be a personal chattel rather than a part of the realty. Of such character are trees and shrubs raised in a nursery for the purpose of sale and transplantation.⁴

III. GROWING CROPS — 1. For What Purposes Part of Realty — a. IN GENERAL. — The general rule of the common law is that growing crops form a part of the real estate to which they are attached, and from which they draw nourishment, and unless there has been a constructive severance of them from the land⁵ they follow the title thereto.⁶ Thus in the case of a voluntary

1. Where the Fruits of Plants Are Fructus Industriales. — *Vulicevich v. Skinner*, 77 Cal. 239; *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591; *Smock v. Smock*, 37 Mo. App. 56; *Frank v. Harrington*, 36 Barb. (N. Y.) 417.

In *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591, *Stewart, J.*, in delivering the opinion of the court, thus comments on the contrary doctrine which formerly prevailed: "In *Taylor's* recent book on the Law of Evidence, 2d vol., § 952, the following propositions are submitted: 1st, A contract for the purchase of fruits of the earth, ripe, though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them. 2d, A sale of any growing produce of the earth, reared annually by labor and expense, and in actual existence at the time of the contract, as for instance a growing crop of corn, hops, potatoes, or turnips, is not within the fourth section, though the purchaser is to harvest or dig them. 3d, An agreement respecting the sale of a growing crop of fruit, or grass, or of standing underwood, growing poles or timber, is within the fourth section, and a written contract of sale cannot be dispensed with. However sound his first and second propositions, we think his third is to be taken with some qualification, and that a growing crop of peaches or other fruit, requiring periodical expense, industry, and attention, in its yield and production, may be well classed as *fructus industriales* and not subject to the fourth section of the statute."

2. Hops. — Hops growing on vines produced annually by industry and cultivation are personal property, and as such their sale, while growing, is not within the statute of frauds because not in writing, although the root of the hop plant is perennial, living for a series of years. *Frank v. Harrington*, 36 Barb. (N. Y.) 415, *distinguishing* *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68, in which it had been decided that hop poles, habitually attached to the land, were realty and not personalty. See also *Webster v. Zielly*, 52 Barb. (N. Y.) 482, where it was held that the roots of hops were part of the realty.

Contra. — *Waddington v. Bristow*, 2 B. & P. 452. But see the remarks of *Parke, B.*, as reported in brief in *Rodwell v. Phillips*, 9 M. & W. 501, where he is quoted as having said: "Hops are *fructus industriales*. That case

[referring to *Waddington v. Bristow*] would now probably be decided differently."

3. Fruits Cultivated for Market. — *Vulicevich v. Skinner*, 77 Cal. 239; *Smock v. Smock*, 37 Mo. App. 56; *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591. But see *Rodwell v. Phillips*, 9 M. & W. 501, in which it was held that an agreement for the sale of growing fruit was an agreement for the sale of an interest in land, and, if of the value of £20, required a stamp under the statute then in force imposing a tax on agreements for the sale of land.

4. Plants Raised in Nursery for Sale. — See *Miller v. Baker*, 1 Met. (Mass.) 27, and *Whitmarsh v. Walker*, 1 Met. (Mass.) 315, in both of which it was held that plants of this character were personal chattels. This is one of the states, however, in which no title to *fructus industriales* passes until actual severance and delivery. See the title **FRAUDS, STATUTE OF**.

5. Constructive Severance. — On their actual severance from the land, crops, of course, become personal property. They may also, while still growing, become in law severed from the soil, by some act of the owner thereof, as where they are sold, mortgaged, or devised by the owner apart from the land; or by an act not through the owner's agency, as where they are levied on under attachment or execution; or where the owner of land dies without devising them, when they become severed from the land and pass as personal property to the executor or administrator instead of to the heir. See *infra*, this title, *passim*.

6. Follow the Title to Land — Alabama. — *Thweat v. Stamps*, 67 Ala. 96; *Carlisle v. Killebrew*, 89 Ala. 329; *Wilkinson v. Ketter*, 69 Ala. 435.

Arkansas. — *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374.

California. — *Fiske v. Soule*, 87 Cal. 313; *Treat v. Dorman*, 100 Cal. 623; *Huerstal v. Muir*, 64 Cal. 450.

Connecticut. — *Maples v. Millon*, 31 Conn. 598.

Georgia. — *Pitts v. Hendrix*, 6 Ga. 452; *Craig v. Watson*, 68 Ga. 115.

Illinois. — *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284; *Talbot v. Hill*, 68 Ill. 106; *Rankin v. Kinsey*, 7 Ill. App. 215; *Altes v. Hinckley*, 36 Ill. 275, 85 Am. Dec. 407; *Powell v. Rich*, 41 Ill. 466; *Creel v. Kirkham*, 47 Ill. 344; *Har*

conveyance of land they pass to the grantee, unless specially reserved by the grantor; ¹ or in the case of a lease of the land the crops pass to the lessee,

mon v. Fisher, 9 Ill. App. 22; *Damery v. Ferguson*, 48 Ill. App. 224; *McGinnis v. Fernandes*, 135 Ill. 69, 25 Am. St. Rep. 347; *Anderson v. Strauss*, 98 Ill. 485.

Indiana. — *Jones v. Thomas*, 8 Blackf. (Ind.) 428; *Chapman v. Long*, 10 Ind. 465; *Turner v. Cool*, 23 Ind. 56; *Heavilon v. Heavilon*, 29 Ind. 509; *McCaslin v. State*, 99 Ind. 428.

Iowa. — *Downard v. Groff*, 40 Iowa 597; *Wheeler v. Kirkendall*, 67 Iowa 612; *Martin v. Knapp*, 57 Iowa 336; *Schmidt v. Williams*, 72 Iowa 317.

Kansas. — *Garganflo v. Cooley*, 33 Kan. 137; *Chapman v. Veach*, 32 Kan. 167; *Smith v. Hague*, 25 Kan. 246; *Shockey v. Johtz*, 2 Kan. App. 483; *Beckman v. Sikes*, 35 Kan. 120; *Missouri Valley Land Co. v. Barwick*, 50 Kan. 57; *Missouri Valley L. Ins. Co. v. Kiehl*, 25 Kan. 390.

Kentucky. — *Foster v. Fletcher*, 7 T. B. Mon. (Ky.) 534, 18 Am. Dec. 208; *Bourne v. Bourne*, 12 Ky. L. Rep. 467, 92 Ky. 211; *Huston v. Skaggs*, 7 Ky. L. Rep. 592.

Louisiana. — *Bludworth v. Hunter*, 9 Rob. (La.) 256.

Maine. — *Perley v. Chase*, 79 Me. 519.

Maryland. — *Johnson v. Hines*, 61 Md. 122; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236.

Michigan. — *Coman v. Thompson*, 47 Mich. 22, 41 Am. Rep. 706; *Tripp v. Hasceig*, 20 Mich. 254, 4 Am. Rep. 388; *Scriven v. Moote*, 36 Mich. 64; *Preston v. Ryan*, 45 Mich. 174; *Ruggles v. Centreville First Nat. Bank*, 43 Mich. 192; *Dayton v. Dakin*, 103 Mich. 65.

Minnesota. — *Erickson v. Paterson*, 47 Minn. 525.

Missouri. — *Watson v. Menteer*, 59 Mo. App. 387; *McIlvaine v. Harris*, 20 Mo. 457, 64 Am. Dec. 196; *Fowler v. Carr*, 63 Mo. App. 486; *Culverhouse v. Worts*, 32 Mo. App. 419; *Reed v. Swan*, 133 Mo. 100; *Steele v. Farber*, 37 Mo. 71; *Hayden v. Burkemper*, 40 Mo. App. 346; *Wallace v. Cherry*, 32 Mo. App. 436.

New Jersey. — *Terhune v. Elbertson*, 3 N. J. L. 297; *Howell v. Schenck*, 24 N. J. L. 89; *Bloom v. Welsh*, 27 N. J. L. 177.

New York. — *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; *Gardner v. Finley*, 19 Barb. (N. Y.) 321; *Shepard v. Philbrick*, 2 Den. (N. Y.) 174; *Sherman v. Willett*, 42 N. Y. 146; *Gillett v. Balcom*, 6 Barb. (N. Y.) 370; *Austin v. Sawyer*, 9 Cow. (N. Y.) 40; *Aldrich v. Reynolds*, 1 Barb. Ch. (N. Y.) 613; *Jewett v. Keenholts*, 16 Barb. (N. Y.) 193; *Wintermute v. Light*, 46 Barb. (N. Y.) 278; *Batterman v. Albright*, 122 N. Y. 484, 19 Am. St. Rep. 510.

Ohio. — *Herron v. Herron*, 47 Ohio St. 544, 21 Am. St. Rep. 854.

Pennsylvania. — *Sallade v. James*, 6 Pa. St. 144; *Wilkins v. Vashbinder*, 7 Watts (Pa.) 378; *Backenstoss v. Stahler*, 33 Pa. St. 251, 75 Am. Dec. 592; *Long v. Seavers*, 103 Pa. St. 517; *Bear v. Bitzer*, 16 Pa. St. 175, 55 Am. Dec. 490; *Hershey v. Metzgar*, 90 Pa. St. 217; *State Bank v. Wise*, 3 Watts (Pa.) 394; *Burnside v. Weightman*, 9 Watts (Pa.) 46.

South Carolina. — *Hancock v. Caskey*, 8 S. Car. 282.

Tennessee. — *Pickens v. Reed*, 1 Swan (Tenn.) 80.

Vermont. — *Hamblet v. Bliss*, 55 Vt. 535.

Virginia. — *Crews v. Pendleton*, 1 Leigh (Va.) 297, 19 Am. Dec. 750.

West Virginia. — *Kerr v. Hill*, 27 W. Va. 577.

Wisconsin. — *McLean v. Bovee*, 24 Wis. 295, 1 Am. Rep. 185.

Pass to Wife by Decree for Alimony. — A growing crop sown by a husband on his land pending a suit for divorce brought by the wife follows the title to the land given to her as alimony, whether or not such crop is referred to in the decree. *Herron v. Herron*, 47 Ohio St. 544, 21 Am. St. Rep. 854.

1. When Not Reserved Pass to Grantee of Land

— *Alabama*. — *Wilkinson v. Ketler*, 69 Ala. 435.

Arkansas. — *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233.

California. — *Fiske v. Soule*, 87 Cal. 313.

Illinois. — *Damery v. Ferguson*, 48 Ill. App. 224; *Powell v. Rich*, 41 Ill. 466; *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284; *Talbot v. Hill*, 68 Ill. 106.

Indiana. — *Chapman v. Long*, 10 Ind. 465; *Heavilon v. Heavilon*, 29 Ind. 509; *Turner v. Cool*, 23 Ind. 56.

Kansas. — *Garganflo v. Cooley*, 33 Kan. 137; *Chapman v. Veach*, 32 Kan. 167.

Kentucky. — *Bourne v. Bourne*, 12 Ky. L. Rep. 467, 92 Ky. 211.

Louisiana. — *Bludworth v. Hunter*, 9 Rob. (La.) 256.

Maine. — *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438.

Michigan. — *Coman v. Thompson*, 47 Mich. 22, 41 Am. Rep. 706; *Tripp v. Hasceig*, 20 Mich. 254, 4 Am. Rep. 388.

Minnesota. — *Erickson v. Paterson*, 47 Minn. 525.

Missouri. — *Culverhouse v. Worts*, 32 Mo. App. 419; *McIlvaine v. Harris*, 20 Mo. 458, 64 Am. Dec. 196; *Wallace v. Cherry*, 32 Mo. App. 436.

New Jersey. — *Terhune v. Elbertson*, 3 N. J. L. 297.

New York. — *Austin v. Sawyer*, 9 Cow. (N. Y.) 40; *Wintermute v. Light*, 46 Barb. (N. Y.) 278.

Pennsylvania. — *Backenstoss v. Stahler*, 33 Pa. St. 251, 75 Am. Dec. 592; *Sallade v. James*, 6 Pa. St. 144; *Wilkins v. Vashbinder*, 7 Watts (Pa.) 378; *Burnside v. Weightman*, 9 Watts (Pa.) 46, *overruling* *Smith v. Johnston*, 1 P. & W. (Pa.) 471, 21 Am. Dec. 404, in which it had been held that a crop of growing grain did not pass with the land.

South Carolina. — *Hancock v. Caskey*, 8 S. Car. 282, where the land was sold under the order of court for partition, there being no reservation of crops, and in which the court held that the crops passed to the purchaser.

Tennessee. — *Pickens v. Reed*, 1 Swan (Tenn.) 80.

Canada. — *Wood v. Lang*, 5 U. C. C. P. 204; *Stewart v. Hunter*, 2 Ch. Chamb. 335.

Growing Crop Passes to Mortgagee. — A growing crop passes to the mortgagee by virtue of

unless expressly reserved;¹ or when the land is sold under foreclosure,² or under execution,³ the purchaser of the land acquires title to the crops; or

the mortgage on the land on which it is growing; and if such crop is afterwards harvested by the mortgagee in possession, it should be applied to the payment of the debt secured. *Steele v. Farber*, 37 Mo. 71.

Purchaser of Lands from Government.—The general rule that crops growing on land follow the title thereto applies where crops have been planted on government lands by a person without title. The possession of such person not being adverse to the government, no rights can be acquired by the planting of such crop, and where the government sells the land the crops of necessity follow the title. *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Rasor v. Qualls*, 4 Blackf. (Ind.) 286, 30 Am. Dec. 658; *Boyer v. Williams*, 5 Mo. 335, 32 Am. Dec. 324. See also *Carson v. Clark*, 2 Ill. 113, 25 Am. Dec. 79; *Hutson v. Overturf*, 2 Ill. 170; *Roberts v. Garen*, 2 Ill. 396; *Townsend v. Briggs*, 2 Ill. 472; *Blankenship v. Cutrell*, 16 Ill. 62; *Boston v. Dodge*, 1 Blackf. (Ind.) 19, 12 Am. Dec. 205; *Merrel v. Legrand*, 1 How. (Miss.) 150, where the improvement of government lands consisted in things other than crops.

1. Pass to Lessee, Unless Expressly Reserved.—*Hisey v. Troutman*, 84 Ind. 115; *Hosli v. Yokel*, 57 Mo. App. 622; *Edwards v. Perkins*, 7 Oregon 149; *Emery v. Fugina*, 68 Wis. 505.

2. Purchaser at Foreclosure Sale—*California*.—*Treat v. Dorman*, 100 Cal. 623. *Connecticut*.—*Maples v. Millon*, 31 Conn. 598. *Georgia*.—*Pitts v. Hendrix*, 6 Ga. 452. *Illinois*.—*Harmon v. Fisher*, 9 Ill. App. 22; *Rankin v. Kinsey*, 7 Ill. App. 215; *Anderson v. Strauss*, 98 Ill. 485. *Indiana*.—*Jones v. Thomas*, 8 Blackf. (Ind.) 428.

Iowa.—*Downard v. Groff*, 40 Iowa 597; *Martin v. Knapp*, 57 Iowa 336; *Wheeler v. Kirkendall*, 67 Iowa 612.

Kansas.—*Beckman v. Sikes*, 35 Kan. 120; *Missouri Valley Land Co. v. Barwick*, 50 Kan. 57; *Shockey v. Johntz*, 2 Kan. App. 483; *Smith v. Hague*, 25 Kan. 246.

Michigan.—*Dayton v. Dakin*, 103 Mich. 65; *Ruggles v. Centreville First Nat. Bank*, 43 Mich. 192; *Scriven v. Moote*, 36 Mich. 64.

Missouri.—*Fowler v. Carr*, 63 Mo. App. 486; *Hayden v. Burkemper*, 40 Mo. App. 346; *Reed v. Swan*, 133 Mo. 100; *Watson v. Mentee*, 59 Mo. App. 387.

New Jersey.—*Howell v. Schenck*, 24 N. J. L. 89.

New York.—*Aldrich v. Reynolds*, 1 Barb. Ch. (N. Y.) 613; *Gardner v. Finley*, 19 Barb. (N. Y.) 321; *Gillett v. Balcorn*, 6 Barb. (N. Y.) 370; *Jewett v. Keenholts*, 16 Barb. (N. Y.) 193; *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; *Batterman v. Albright*, 122 N. Y. 484, 19 Am. St. Rep. 510; *Shepard v. Philbrick*, 2 Den. (N. Y.) 174; *Sherman v. Willett*, 42 N. Y. 146.

Virginia.—*Crews v. Pendleton*, 1 Leigh (Va.) 297, 19 Am. Dec. 750.

West Virginia.—*Kerr v. Hill*, 27 W. Va. 577.

3. Purchaser of Land at Sheriff's Sale—*Alabama*.—*Thweat v. Stamps*, 67 Ala. 96.

Kansas.—*Missouri Valley L. Ins. Co. v. Kiehl*, 25 Kan. 390.

Kentucky.—*Foster v. Fletcher*, 7 T. B. Mon. (Ky.) 534, 18 Am. Dec. 208.

Maryland.—*Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236.

New Jersey.—*Bloom v. Welsh*, 27 N. J. L. 177.

Pennsylvania.—*Bear v. Bitzer*, 16 Pa. St. 175, 55 Am. Dec. 490; *Hershey v. Metzgar*, 90 Pa. St. 217; *Sallade v. James*, 6 Pa. St. 144; *Hoover v. Hoover*, (Pa. C. Pl.) 10 Pa. Co. Ct. Rep. 563; *Long v. Seavers*, 103 Pa. St. 517.

Case Where Rule Held Not to Apply.—An execution was levied upon land, and successive writs of *venditioni exponas* were issued thereon for a period of six years, and the land was sold under the last writ. Subsequent to the levy of the execution and prior to the issue of the last *venditioni exponas* the land had been conveyed by a deed in trust, and at the time of the sale under execution crops were growing thereon. It was held that the lien created by the levy of the execution did not embrace crops subsequently planted, and that the bargainee under the deed in trust was entitled to the crops as against the purchaser of the land at the execution sale. *Walton v. Jordan*, 65 N. Car. 170. The court declared that there was a presumption that growing crops pass with the title to the land, but that this presumption might be rebutted even by parol evidence.

Where Rent Is Conveyed.—And when property is leased before sale under execution against the owner, the sheriff's deed, when the tenant is entitled to the crops, conveys the rent due by the tenant. *Butt v. Ellett*, 19 Wall. (U. S.) 544; *Townsend v. Isenberger*, 45 Iowa 671; *Moffett v. Armstrong*, 40 Iowa 484; *Culverhouse v. Worts*, 32 Mo. App. 419; *Lamberton v. Stouffer*, 55 Pa. St. 284.

Sowing of Crop by Tenant After Judgment Against Landlord.—Where a judgment was recovered against the landlord prior to the execution of a lease at a rent payable in advance, and where, after payment of the rent and the sowing of the crop by the tenant, the land was sold under an execution on the prior judgment, it was held that the purchaser, and not the tenant, was entitled to the growing crop. *Sallade v. James*, 6 Pa. St. 144.

Redemption from Execution—Debtor Entitled to Crops.—Under the laws of *Oregon*, when a judgment debtor redeems land sold under execution, he is entitled to the crops which were growing thereon at the time of sale; or, if they have been harvested by the purchaser while in possession, he may recover their value. *Cartwright v. Savage*, 5 Oregon 397.

Title Does Not Pass Before Confirmation.—Under the *Nebraska* law governing the sale of real property under execution, the title of the purchaser thereat depends upon the final confirmation of the sale made. Hence, where a judgment debtor harvested a crop from land after it had been sold on execution, but before confirmation, it was held that the title to the crop did not pass to the purchaser at the sale. *Yeazel v. White*, 40 Neb. 432.

where there is a recovery of possession of land held adversely, the successful plaintiff is entitled to the growing crops as against the evicted defendant who planted them.¹ It has recently been held that growing crops must be considered as a part of the realty in an action to recover damages for an injury to them.²

b. PASS WITH REALTY THOUGH RESERVED BY PAROL.— Since, under a conveyance of land, growing crops pass to the vendee, unless specially reserved, the familiar rule of evidence, which excludes proof of a parol agreement contemporaneous with and impairing the legal effect of a written instrument, forbids the establishment of such reservation by parol.³

Appraisal of Real Estate Sold under Execution.

— A *Nebraska* statute requires an appraisal of real estate sold under execution before confirmation. Where it appeared from such appraisal that the value of a crop of corn standing ungathered upon the land was not included, the court held that the corn did not pass to the purchaser at the judicial sale, but remained the property of the owner who had planted and cultivated it. *Foss v. Marr*, 40 Neb. 559.

Harvested Crop — Right of Mortgagee in Possession as Against Execution Creditor.— The title and right of possession to a crop harvested on mortgaged land will enable the mortgagee in possession to hold such crop as against an execution creditor of the mortgagor. *Steele v. Farber*, 37 Mo. 71.

1. Recovery of Land from Adverse Holder — England.— *Hodgson v. Gascoigne*, 5 B. & Ald. 88, 7 E. C. L. 35.

Alabama.— *Carlisle v. Killebrew*, 89 Ala. 329.

California.— *Huerstal v. Muir*, 64 Cal. 450.

Georgia.— *Craig v. Watson*, 68 Ga. 115.

Illinois.— *McGinnis v. Fernandes*, 135 Ill. 69, 25 Am. St. Rep. 347; *Altes v. Hinckler*, 36 Ill. 275, 85 Am. Dec. 407.

Indiana.— *McCaslin v. State*, 99 Ind. 428; *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235.

Kentucky.— *Huston v. Skaggs*, 7 Ky. L. Rep. 592.

Wisconsin.— *McLean v. Bovee*, 24 Wis. 295, 1 Am. Rep. 185.

Recovery of Damages for Removal of Crops by Defendant in Ejectment.— As between the plaintiff and defendant in an ejectment suit, growing crops are a part of the realty, and if, after recovery by the plaintiff, the defendant enters, cuts and removes a growing crop which had been planted by him, the plaintiff may maintain an action of trover for the value thereof. *Altes v. Hinckler*, 36 Ill. 275, 85 Am. Dec. 407; *Carlisle v. Killebrew*, 89 Ala. 329.

A general recovery in ejectment includes the land as well as crops remaining unsevered. Therefore, after such a recovery, it was held that assumpsit could not be maintained by one of the defendants against the plaintiff in ejectment for the value of the crop, based on a contract alleged to have been made prior to the recovery in ejectment, by which the defendant was to cultivate the land and pay the rent to the true owner. *Craig v. Watson*, 68 Ga. 114.

Where Mortgagor Purchased Property Before Execution Became Lien.— A executed a deed of trust on land to B, to secure a debt to C. In March, 1879, the trustee, B, sold the land to the *cestui que trust* for a default in the payment

of interest. In April, 1878, B recovered a judgment against A, upon which an execution was levied upon the wheat sown by A. In the fall of 1878, the sheriff, under an execution, sold the same to D, who in 1879 took possession of and shocked the same. In an action of replevin brought by C against D, the court held that the wheat belonged to the former. *Anderson v. Strauss*, 98 Ill. 485.

Crops Harvested by Evicted Defendant.— Where crops are harvested by the tenant of an evicted defendant, pending an appeal to the supreme court, the successful plaintiff may maintain an action of replevin for such crops. The fact that he might have maintained an action for mesne profits in no wise impairs his right of ownership in the crops grown on the land. *McGinnis v. Fernandes*, 135 Ill. 69, 25 Am. St. Rep. 347.

Crop Planted by Tenant with Notice of Pending Suit.— And it follows, that if a tenant, with notice of the pendency of a suit for the possession of land, rents the same and plants a crop thereon, the title to the crop passes to the successful plaintiff. The tenant planting with notice could have acquired no better title than his landlord could have done. *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235; *Samson v. Rose*, 65 N. Y. 411.

2. Part of Realty as Relating to Action for Damages to Them.— In a voluminous opinion, and after a painstaking review of the numerous authorities bearing both on the several purposes for which growing crops must be considered a part of the realty, and on the several purposes for which they are personality (see *infra*, this section, *For What Purposes Regarded as Personality*), the Supreme Court of *Georgia* concluded that as relating to their character, when that character is involved in determining whether a justice of the peace has jurisdiction of a suit for damages for injury to them, they are a part of the realty. *Bagley v. Columbus Southern R. Co.*, 98 Ga. 626.

3. Growing Crops Cannot Be Reserved by Parol — Arkansas.— *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233.

California.— *Fiske v. Soule*, 87 Cal. 313.

Illinois.— *Powell v. Rich*, 41 Ill. 466; *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284; *Damery v. Ferguson*, 48 Ill. App. 225.

Kansas.— *Chapman v. Veach*, 32 Kan. 167.

Maine.— *Brown v. Thurston*, 26 Me. 125, 96 Am. Dec. 438.

Missouri.— *McIlvaine v. Harris*, 20 Mo. 457, 64 Am. Dec. 196.

New York.— *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Wintermute v. Light*, 46 Barb. (N. Y.) 279.

The Contrary Doctrine, however, has been affirmed in the states of *Indiana*, *Pennsylvania*, *Ohio*, *North Carolina*, and *New Jersey*.¹ In *Pennsylvania*, *North Carolina*, and probably in *Indiana*, the validity of a verbal reservation is based solely on the fact that the crops, being *fructus industriales*, would pass by a verbal sale.² No consideration seems to have been given to the general rule that parol evidence is inadmissible to vary the import of a written agreement. In *New Jersey* a verbal reservation may be shown, whether the growths be *fructus naturales* or *fructus industriales*.³

c. PURCHASER ENTITLED TO CROPS AS AGAINST TENANT OF MORTGAGOR. — A tenant of the owner of mortgaged premises can have no greater right to the crop than has his landlord. Hence, a purchaser under foreclosure proceedings is entitled to all crops growing on the land at the time of the foreclosure, as against a tenant who became such after the execution of the mortgage.⁴ A crop harvested by the tenant, however, before the foreclosure,

A parol reservation of growing crops, whether made before or contemporaneously with the execution and delivery of a deed to real estate, is ineffectual to affect the force of the conveyance by which the crops passed. *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438, *overruling Safford v. Annis*, 7 Me. 169, in which a parol reservation of growing trees by the grantor of land had been held good.

Parol evidence being inadmissible for the purpose of contradicting or substantially varying the effect of the written instrument, the grantor cannot show that a crop of wheat growing on the land was reserved from the operation of the deed, either at the time of its execution or at a previous time, when it was agreed between the parties that the crop would be reserved. *Austin v. Sawyer*, 9 Cow. (N. Y.) 39.

1. Parol Reservation of Crop Allowed. — *Heavilon v. Heavilon*, 29 Ind. 509; *Kluse v. Sparks*, 10 Ind. App. 445; *Benner v. Bragg*, 68 Ind. 338; *Harvey v. Million*, 67 Ind. 90; *Hendrickson v. Ivins*, 1 N. J. Eq. 562; *Flynt v. Conrad*, Phil. L. (61 N. Car.) 190, 93 Am. Dec. 588; *Baker v. Jordan*, 3 Ohio St. 438; *Backenstoss v. Stahler*, 33 Pa. St. 251, 75 Am. Dec. 592.

And it follows that, under a written lease, there may be a parol reservation of growing crops, which otherwise would pass to the lessor. *Hisey v. Troutman*, 84 Ind. 115.

2. Where Nature of Crop Reserved Governs. — *Kluse v. Sparks*, 10 Ind. App. 445; *Flynt v. Conrad*, Phil. L. (61 N. Car.) 190, 93 Am. Dec. 588; *Backenstoss v. Stahler*, 33 Pa. St. 251, 75 Am. Dec. 592.

In *Backenstoss v. Stahler*, 33 Pa. St. 251, 75 Am. Dec. 592, it was held that the reservation of growing crops need not be in writing, because they were not an interest in land. It was said to be otherwise with respect to a reservation of *fructus naturales*.

In *Kluse v. Sparks*, 10 Ind. App. 445, it was said: "Such crops [referring to *fructus industriales*], raised annually by labor, may be sold before they are matured and severed from the soil, by parol, the same as personal property, and no written memorandum is required to make such sale a valid one." On this consideration the case seems to have been decided.

The subject of the sale of growing produce of land, as affected by the statute of frauds, is fully treated elsewhere. See the title FRAUDS, STATUTE OF.

3. *Hendrickson v. Ivins*, 1 N. J. Eq. 562.

4. Purchaser at Foreclosure — Right Superior to Tenant. — *Jones v. Thomas*, 8 Blackf. (Ind.) 428; *Downard v. Groff*, 40 Iowa 597; *Wheeler v. Kirkendall*, 67 Iowa 612; *Shockey v. Johtzt*, 2 Kan. App. 483; *Hayden v. Burkemper*, 40 Mo. App. 346; *Fowler v. Carr*, 63 Mo. App. 486; *Howell v. Schenck*, 24 N. J. L. 89; *Batterman v. Albright*, 122 N. Y. 484, 19 Am. St. Rep. 510; *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105.

Where a Tenant Raises Nursery Trees on Mortgaged Land, the nursery trees raised for sale cannot be taken away by the tenant after the perfection of a title by foreclosure sale, although he might have taken them away before foreclosure without liability to the mortgagor. *Batterman v. Albright*, 122 N. Y. 484, 19 Am. St. Rep. 510.

As to when and what fruit-trees are *fructus industriales*, see *supra*, this title, *What Crops Are Fructus Industriales*.

Ohio — Tenant's Right Preferred to Purchaser's. — It is held in Ohio that, where mortgaged lands were afterwards leased by the mortgagor and crops planted by his tenant thereon, the tenant acquires a right superior to that which the landlord would have had if he had made no lease; that a growing crop planted by his tenant at the time of the foreclosure of the land does not pass to the purchaser at the foreclosure sale, but is the property of the tenant. *Casilly v. Rhodes*, 12 Ohio 88.

Texas — Mortgagee Without Title — Tenant Entitled to Crop. — In Texas a mortgage is but a security for debt and does not convey the title to the mortgagee. It was held, therefore, that the purchaser of mortgaged lands at a foreclosure sale was not entitled to the growing crops as against a purchaser thereof from the mortgagor before the foreclosure. *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284.

Fully Matured Crops Held Not Part of Realty. — It was held in *Hecht v. Dettman*, 56 Iowa 679, 41 Am. Rep. 131, that the question as to whether crops pass with the land on the foreclosure of a mortgage depends upon their state of maturity, rather than upon whether at the time of such sale there had been a severance of them from the land. Thus, as between the purchaser at a foreclosure sale and a tenant of the mortgagor, the latter is entitled to all standing crops matured at the time of sale.

The vendee of a matured and unsevered

is no part of the realty, and hence does not pass to the purchaser;¹ or when severed after foreclosure, but before confirmation, the purchaser obtains no title thereto.²

2. For What Purposes Regarded as Personality — *a.* **MAY BE LEVIED ON UNDER EXECUTION** — (1) *In General*. — Though growing crops are regarded as part of the realty for the purposes indicated,³ they are treated as personality for the purposes of levy and sale under attachment or execution.

At Common Law, Maturity of Crop Immaterial. — In the absence of statutory limitation as to the time when such a levy may be made, the state of maturity of the crop is immaterial; the levy may be made at any period of its growth.⁴

crop on mortgaged lands, who purchased the same from the mortgagor, although after knowledge of his default, obtained a good title as against the mortgagee. *Caldwell v. Alsop*, 48 Kan. 571.

The question of maturity of the crop at the time of the mortgage foreclosure is necessarily one of fact, and the finding of a jury as to that question is conclusive and will not be disturbed by the court on appeal. *Richards v. Knight*, 78 Iowa 69.

All Standing Crops Held Realty. — In *Tripp v. Hasceig*, 20 Mich. 254, 4 Am. Rep. 388, the opposite doctrine was laid down. It was held that all ripe crops, although no longer drawing nourishment from the ground, are, if unsevered, a part of the realty. In commenting upon the distinction in this regard between standing and severed crops, and between ripe and unripe ones, the court observed: "It is true that the authorities in alluding to this subject very generally use the words 'growing crops' as those embraced by a conveyance of the land, but this expression appears to have been commonly employed to distinguish crops still attached to the ground, rather than to mark any distinction between ripe and unripe crops. * * * If, however, the crops are to be considered as land or personal chattels as they continue or do not continue to draw nourishment from the soil, the instances will be numerous in which very difficult inquiries will be requisite to settle the point."

It should be observed, however, that this general rule as to what crops constitute a part of the realty was laid down in a case where a vendor attempted as against a vendee to enforce a parol agreement by which the crops were reserved from the operation of the deed. The question as to whether this rule would operate in a case where the crop had been planted and grown by the mortgagor or by his tenant subsequent to the execution, but prior to the foreclosure of the mortgage, was not involved, though no reason can be perceived why an exception should be engrafted on the general rule if such were the fact. The landlord or his tenant in such a case would sow with the knowledge that the estate or the tenancy might be terminated by the mortgagee before the fruits could be reaped.

1. Tenant's Right to Crop Harvested Before Foreclosure. — Where, pending a suit for foreclosure, the mortgagor leased the land to a tenant, who raised and harvested a crop thereon, which was subsequently converted by the purchaser at the foreclosure sale, the court held that this crop so grown and harvested did not pass to the purchaser, and the tenant could

maintain an action of trespass against him for its conversion. *Johnson v. Camp*, 51 Ill. 220.

2. Crop Severed After Foreclosure Before Confirmation. — *Woehler v. Endter*, 46 Wis. 301.

3. See *supra*, this section, *For What Purposes Part of Realty*.

4. Personality for Levy of Execution — *California*. — *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147; *Raventas v. Green*, 57 Cal. 254.

Georgia. — *Crine v. Tifts*, 65 Ga. 644.

Illinois. — *Gittings v. Nelson*, 86 Ill. 591.

Indiana. — *Northern v. State*, 1 Ind. 113.

Kansas. — *Throop v. Maiden*, 52 Kan. 258.

Kentucky. — *Craddock v. Riddlesbarger*, 2 Dana (Ky.) 205; *Parham v. Tompson*, 2 J. J. Marsh. (Ky.) 159; *Thompson v. Craigmyle*, 4 B. Mon. (Ky.) 391, 41 Am. Dec. 240; *Moreland v. Myall*, 14 Bush (Ky.) 474.

Louisiana. — *Pickens v. Webster*, 31 La. Ann. 870.

Maryland. — *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236.

Michigan. — *Preston v. Ryan*, 45 Mich. 174.

Minnesota. — *Gillitt v. Truax*, 27 Minn. 528; *Erickson v. Paterson*, 47 Minn. 525.

Missouri. — *Selecman v. Kinnard*, 55 Mo. App. 635.

Nebraska. — *Johnson v. Walker*, 23 Neb. 736.

New Jersey. — *Westbrook v. Eager*, 16 N. J. L. 81.

New York. — *Whipple v. Foot*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442; *Stewart v. Doughty*, 9 Johns. (N. Y.) 112; *Hartwell v. Bissell*, 17 Johns. (N. Y.) 128; *Hare v. Follet*, (Supreme Ct.) 17 N. Y. Supp. 559.

North Carolina. — *Brittain v. McKay*, 1 Ired. L. (23 N. Car.) 265, 35 Am. Dec. 738; *Smith v. Tritt*, 1 Dev. & B. L. (18 N. Car.) 241, 28 Am. Dec. 565.

Pennsylvania. — *Stambaugh v. Yeates*, 2 Rawle (Pa.) 161; *Pattison's Appeal*, 61 Pa. St. 294, 100 Am. Dec. 637.

Texas. — *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284.

Sale of Crop Before Maturity. — An officer, after having levied upon a growing crop, may, in the absence of statutory limitation as to time of sale, proceed to sell it as soon as advertised; neither he nor the execution creditor is bound to finish the culture or else let it stand at their risk until maturity and sale. *Craddock v. Riddlesbarger*, 2 Dana (Ky.) 205.

The time at which a levy can be made, and of the sale of the crop thereunder, is regulated by statute in some states. The rule of the common law, however, as here stated, seems generally to be recognized. See cases cited above in this note.

Rule that No Sale until Crop Matured.—In two jurisdictions, however, it is held that crops do not become personality until fully matured and that until that time there can be no valid levy and sale.¹ Where levied on and sold before that time, the purchaser acquires no title to the crops as against a subsequent grantee of the land before the maturity of the crops.² But even in these states the crops when ripe, though ungathered, are personality and as such may be levied on and sold.³

(2) **Statutory Limitations.**—In some jurisdictions, statutes having reference to the maturity of the crop and limiting the common-law rule in this regard have been enacted. In some states the time in which the levy itself may be made has been limited;⁴ and in others, the limitation extends

In two jurisdictions, however, this doctrine does not prevail. See the succeeding note.

Equity of Redemption in Crops Not Subject to Levy and Sale.—Where a debtor mortgaged his crops, stipulating that the mortgagees might take possession at any time they might deem necessary for their security, and where they did take possession, it was held that a mere equity of redemption remained in the mortgagor, and that such equity was not liable to execution and sale. *Adams v. Tanner*, 5 Ala. 740.

Separate Execution Sales of Land and Crops—Rights of Purchasers.—Where an execution was levied on land and returned, and grain was afterwards sown thereon and another creditor levied on the grain and sold it, and the land was afterwards sold under the execution first levied on the land, it was held that the creditor who levied on the grain had a right to hold the proceeds as against the creditor who levied on the land. *Stambaugh v. Yeates*, 2 Rawle (Pa.) 161.

Taking Possession of Crop in Levying on Undivided Portion Thereof.—It was held in *Bernal v. Hovious*, 17 Cal. 542, 79 Am. Dec. 147, that an officer having an attachment against a person may levy on his undivided interest in the crop; and that to effect this he may take possession of the entire crop, though he can sell only the undivided interest of the execution debtor.

Purchaser's Right to Ingress and Egress.—And a person who purchased a crop at execution sale has free ingress and egress to and from the land to sever and remove the crop, and if this right is interfered with by the execution debtor the latter becomes liable to an action of trespass by the purchaser. *Brittain v. McKay*, 1 Ired. L. (23 N. Car.) 265, 35 Am. Dec. 738.

What Produce Is a Growing Crop.—The same distinction is made between *fructus industriales* and *fructus naturales* with regard to the liability of the produce to levy and sale, as is made between the two classes of growth when relating to a parol sale of them. *Craddock v. Riddlebarger*, 2 Dana (Ky.) 205.

As to what crops are *fructus industriales*, see *supra*, this title, *Fructus Industriales* and *Fructus Naturales*.

1. Crops Not Subject to Levy and Sale until Ripe.—Heard v. Fairbanks, 5 Met. (Mass.) 111, 38 Am. Dec. 394; Penhallow v. Dwight, 7 Mass. 34, 5 Am. Dec. 21; Ellithorpe v. Reidesil, 71 Iowa 315.

2. In Iowa, All Immature Crops Are Part of the Land on Which They Grow.—This doctrine, it

would seem, is not modified even to the extent of making the levy of an execution a lien which attaches pending the arrival of the crop at a state of maturity. In *Ellithorpe v. Reidesil*, 71 Iowa 315, though the levy and sale thereunder were both made before the crop had matured, the opinion would seem to indicate that both actions were illegal, and that a judgment creditor would acquire no lien by the one, or the purchaser at execution sale title by the other. See also *Burleigh v. Piper*, 51 Iowa 649, in which it was held that the levy of an execution so long before the officer can advertise and sell as to evince an intention on the part of the judgment creditor to hold the levy merely as security for his judgment, is not valid as against subsequently acquired liens. In this case also the court had expressly refrained from deciding whether a valid levy could have been made before the maturity of the crop. The court said: "The plaintiff insists that an unripe and growing crop is not subject to levy upon execution though raised by a tenant; and even if it were, that the mode of levy set forth in the instruction, and which was the mode employed, would be insufficient. In the view which we take of the case it is not necessary to determine either of these questions. * * * Conceding that a valid levy of an execution may be made upon an unripe and growing crop, and that the mode set forth in the instruction and employed in this case is not objectionable, we have still to determine whether the levy made can, in view of all the circumstances of the case, be sustained."

3. Levy on Matured Crops Valid.—*Nuckolls v. Pence*, 52 Iowa 581; *Barr v. Cannon*, 69 Iowa 20; *Heard v. Fairbanks*, 5 Met. (Mass.) 111, 38 Am. Dec. 394; *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21.

It Is Held in Massachusetts that though the crop may be attached if fit for harvest, yet the attaching officer must actually sever and take manual possession of the crop or the levy is invalid. *Heard v. Fairbanks*, 5 Met. (Mass.) 111, 38 Am. Dec. 394.

This rule, of course, cannot prevail generally, as immature crops may be attached. See *infra*, this section, *Sufficiency of Levy*.

4. Limitation as to Time of Levy.—In Tennessee (Code, § 3749) the right of a creditor to levy upon the growing crops of his debtor cannot be exercised "until the 15th of November after such crops mature." The crop, therefore, being exempt from levy until the 15th of November, is not subject to the lien of an execution which was issued before that date, so as to defeat a prior *bona fide* sale thereof by

only to the time of sale under the levy.¹

(3) *Sufficiency of Levy.* — The fact that crops are growing or standing at the time of levy becomes generally an all-important one in determining whether such possession has been taken by the officer levying the execution as the nature of the case admits of. Manual possession which could be accomplished only by actual severance or by taking possession of the land on which the crops are growing, manifestly is not essential to the validity of the levy. According to the weight of authority, proper notification to interested parties, and an indorsement of the levy on the writ, is all that is required;² but it has been held that actual and exclusive possession by the officer is requisite to the validity of the levy.³

b. PASS TO EXECUTOR OR ADMINISTRATOR. — Another respect in which growing crops are regarded as personalty relates to their disposition after the death of the owner. Where the owner of real estate plants crops and dies before harvest time, such crops are treated as personalty, and hence do not pass to the heir or devisee of the land, but to the executor or administrator, to be administered as personal assets.⁴

the owner. *Edwards v. Thompson*, 85 Tenn. 720, 4 Am. St. Rep. 807.

No Levy until Severance. — In *Evans v. Lamar*, 21 Ala. 333, an act (Clay's Dig. 210, § 43), was construed to prevent the lien of a *fiery facias* from attaching to a crop until there had been an actual severance of it from the land.

1. Limitation as to Time of Sale. — Under the *Minnesota* statute (Gen. Stat. of Minn. 1878, c. 66, § 315) providing that "a levy may be made upon grain or grass while growing, and upon any other unharvested crops, but no sale thereof shall be made under such levy, until the lien is ripe or fit to be harvested," it was held that a levy might be made on any growing crop after the seed was in the ground. *Gillitt v. Truax*, 27 Minn. 528.

2. Sufficiency of Levy. — Where an officer in levying an execution on a standing crop went into the field where it was growing, and notified interested parties of the levy, it was held that such levy was good as against such persons. *Barr v. Cannon*, 69 Iowa 20.

In *Johnson v. Walker*, 23 Neb. 736, it was held that an officer making a levy upon a field of growing corn need neither take manual possession thereof, nor do any other act in respect thereto which, were it not for the protection of the writ, would render him a trespasser.

And it was held in *California* that an attachment upon a growing crop was sufficiently levied by serving upon the attachment debtor a copy of the writ and of the statutory notice; and that, if the officer does nothing further until the crop is ripe, there is no abandonment of the attachment. *Raventas v. Green*, 57 Cal. 254.

3. Actual Possession Must Be Taken. — *Throop v. Maiden*, 52 Kan. 258. And see *Heard v. Fairbanks*, 5 Met. (Mass.) 111, 38 Am. Dec. 394, where it was held that a valid attachment can be levied on standing grain only when the officer actually severs it, and keeps it in his possession.

It should be observed, however, that in *Massachusetts* only crops which are ready for harvesting can be levied upon, and that severance and manual possession of such can readily be taken.

4. Crops Pass to Personal Representative. — *Georgia.* — *Thornton v. Burch*, 20 Ga. 791.

Kentucky. — *Singleton v. Singleton*, 5 Dana (Ky.) 87; *Parham v. Tompson*, 2 J. J. Marsh. (Ky.) 159.

Massachusetts. — *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21.

Pennsylvania. — *Pattison's Appeal*, 61 Pa. St. 294, 100 Am. Dec. 637.

South Carolina. — *Waring v. Purcell*, 1 Hill Eq. (S. Car.) 193.

Michigan. — *McGee v. Walker*, 106 Mich. 521.

Mississippi. — *Farley v. Hord*, 45 Miss. 96.

New York. — *Wadsworth v. Allcott*, 6 N. Y. 64; *Bradner v. Faulkner*, 34 N. Y. 347.

See *Kinsman v. Kinsman*, 1 Root (Conn.) 180, 1 Am. Dec. 37, in which it was held that grain growing upon land did not pass to the devisee under a provision of the will by which all of the personal estate of the testator was bequeathed to him; that, so far as the executor was concerned, such crops were personal property and might be administered by him, but that, so far as the devisee was concerned, they were not.

See generally the title EXECUTORS AND ADMINISTRATORS.

Rent Payable in Crops. — And where the owner of land has leased the same to a tenant whose rent is payable in a portion of the crops, and dies before the maturity thereof, the portion of the crops which was to come to him goes to the executor, instead of to the heir. *Wadsworth v. Allcott*, 6 N. Y. 64.

New York Statute. — Under N. Y. R. S. 82, § 6, growing crops are made assets for the payment of debts and legacies. If wanted for neither of these purposes, they go to the devisee of the land. *Bradner v. Faulkner*, 34 N. Y. 347.

Mississippi Statute. — In *Mississippi* the common-law rule that, upon the death of the owner of land, growing crops go to his personal representatives, and not to the heir, has been changed by statute. The personal representatives are entitled to the crops only when they have obtained an order from the probate court for their sale. *McCormick v. McCormick*, 40 Miss. 761.

Terms of Will to Be Considered. — Strict regard, however, must be paid to the terms of the will. The crops may be bequeathed along with the land, though not specially mentioned therein.¹

IV. MORTGAGE OF CROPS — 1. While Growing. — A crop is a proper subject of written mortgage at any time after the seed has been planted, and irrespective of the amount of labor necessary to be performed by the mortgagor before the fruit of his labor may be reaped.² This rule, of course, prevails in those jurisdictions where growing crops are part of the realty,³ as well as in those in which crops are treated as chattels, and subject to contract as such. In the latter jurisdictions, so far as the construction of statutes similar to the fourth clause of the fourth section of the statute of frauds is concerned, there may be a valid parol mortgage of growing crops.⁴

2. To Be Thereafter Planted. — Some conflict of authority exists, both as to the validity of a mortgage on unplanted crops, and in those jurisdictions where its validity is recognized, as to its effect. The doctrine that a man cannot grant that which he does not possess, as expressed by those two familiar

In North Carolina the Rule Is Different from That Stated in the Text. — Though, as between the heir and the executor, a growing crop goes to the latter, yet, as between the executor and the devisee of land, it goes to the devisee. *Smith v. Barham*, 2 Dev. Eq. (17 N. Car.) 420, 25 Am. Dec. 721, where the court said: "The crops growing on the land at the time of the testator's death go to the executor as against the heir, but as between the executor and the devisee the latter is entitled to them. The devisee takes the land by the intention of the testator, with everything on it; for as the devisee carries the land against the heir, so it does the crop against the executor."

1. Bequest of Crops — Construction of Will. — Where land upon which there is a growing crop is devised in such form as to manifest the intention of the testator to convey the crop to the devisee, it is put upon the same footing as any chattel specially bequeathed; it can neither be sold for the payment of legacies, nor for the payment of debts, unless the unbequeathed assets are insufficient for that purpose. *Stahl v. Wilbur*, 77 N. Y. 158.

2. Mortgage of Growing Crops — United States. — *Briggs v. U. S.*, 143 U. S. 346; *White v. Pulley*, 27 Fed. Rep. 436.

Alabama. — *Robinson v. Mauldin*, 11 Ala. 977; *Seay v. McCormick*, 68 Ala. 549; *Ellis v. Martin*, 60 Ala. 394; *Adams v. Tanner*, 5 Ala. 740; *Booker v. Jones*, 55 Ala. 266; *Mauldin v. Armistead*, 14 Ala. 702; *Wilkinson v. Ketler*, 69 Ala. 435.

Arkansas. — *Greer v. Turner*, 47 Ark. 17; *Meadow v. Wise*, 41 Ark. 285; *Jarratt v. McDaniel*, 32 Ark. 598; *Beard v. State*, 43 Ark. 284; *Parks v. Webb*, 48 Ark. 293.

California. — *Grangers' Business Assoc. v. Clark*, 84 Cal. 201; *Wilson v. Prouty*, 70 Cal. 196; *Rider v. Edgar*, 54 Cal. 127; *Martin v. Thompson*, 63 Cal. 3.

Georgia. — *Stephens v. Tucker*, 55 Ga. 543. *Idaho.* — *Shields v. Ruddy*, 2 Idaho 884; *Pierce v. Langdon*, 2 Idaho 878.

Illinois. — *Hansen v. Dennison*, 7 Ill. App. 73.

Indiana. — *Duke v. Strickland*, 43 Ind. 494.

Iowa. — *Riddle v. Dow*, 98 Iowa 7; *Luce v. Moorehead*, 73 Iowa 498, 5 Am. St. Rep. 695.

Kansas. — *Muse v. Lehman*, 30 Kan. 514.

Maine. — *Allen v. Delano*, 55 Me. 113, 92 Am. Dec. 573; *Bryant v. Pennell*, 61 Me. 108, 14 Am. Rep. 550.

Minnesota. — *Melin v. Reynolds*, 32 Minn. 52; *Close v. Hodges*, 44 Minn. 204.

Mississippi. — *Russell v. Stevens*, 70 Miss. 685.

New Hampshire. — *Cudworth v. Scott*, 41 N. H. 456.

North Carolina. — *Cotten v. Willoughby*, 83 N. Car. 75, 35 Am. Rep. 564; *Rawlings v. Hunt*, 90 N. Car. 270; *Woodlief v. Harris*, 95 N. Car. 211; *Weil v. Flowers*, 109 N. Car. 212; *Crinkley v. Egerton*, 113 N. Car. 142.

South Dakota. — *Coughran v. Sundback*, (S. Dak. 1897) 70 N. W. Rep. 644; *Advance Thresher Co. v. Schmidt*, (S. Dak. 1897) 70 N. W. Rep. 646.

Tennessee. — *Butler v. Hill*, 1 Baxt. (Tenn.) 375.

Texas. — *Cook v. Steel*, 42 Tex. 53; *McGee v. Fitzer*, 37 Tex. 27; *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284; *Silberberg v. Trilling*, 82 Tex. 523.

Vermont. — *Kimball v. Sattley*, 55 Vt. 285, 45 Am. Rep. 614.

What Is a Growing Crop. — By a deposit of the seed in the ground a growing crop is created, and as such is a valid subject of a mortgage. *Wilkinson v. Ketler*, 69 Ala. 435.

This is the only case among those cited above in which a growing crop has been defined, but the mortgages considered were given at various stages of the crops' growth.

Wisconsin — Mortgage Before Shoots Appear, Invalid. — It has been held in Wisconsin that a mortgage on a crop, when given before it is up, or before it has the appearance of a growing crop, is invalid. *Comstock v. Scales*, 7 Wis. 159.

3. Duke v. Strickland, 43 Ind. 494. See *supra*, this title, *Fructus Industriales and Fructus Naturales*.

4. In Alabama a Mortgage of a Growing Crop May Be Made by Parol. — *Stearns v. Gafford*, 56 Ala. 544.

In most of those states where growing crops may be sold by parol, a parol mortgage of them will be found to be prohibited by some statute other than the statute of frauds, as relating to the conveyance of an interest in lands.

maxims, *qui non habet ille non dat*, and *nemo dat quod non habet*, is held in some jurisdictions to invalidate a conveyance or mortgage of unplanted crops. On the other hand, it is held that a crop, to be planted on the mortgagor's land, has a "potential existence," and therefore vests potentially at the time of the execution of the mortgage, and actually (subject to divers limitations) when it comes into existence. The latter doctrine is supported both by the weight of authority and by reason, and will first receive attention.

a. JURISDICTIONS IN WHICH SUCH MORTGAGE IS EFFECTIVE. — The doctrine prevailing in *England*, in the *United States* courts, and probably in most of the states, is, that a crop yet to be planted is a proper subject of a mortgage, and that eventually such mortgage becomes effective against the mortgagor and those with record notice of its existence.¹

Title Passes. — In almost all of these jurisdictions, as soon as the crop grows the lien attaches, and the title to the crop passes to the mortgagee, as in the case of the mortgage of a growing crop.²

1. Effectiveness of Mortgage on Unplanted Crop

— *England.* — *Grantham v. Hawley*, Hob. 132.

United States. — *Briggs v. U. S.*, 143 U. S. 346; *Butt v. Ellett*, 19 Wall. (U. S.) 544.

Alabama. — *Jones v. Webster*, 48 Ala. 109; *Stearns v. Gafford*, 56 Ala. 544; *Whittleshoffer v. Strauss*, 83 Ala. 517; *Leslie v. Hinson*, 83 Ala. 266; *Smith v. Fields*, 79 Ala. 335.

Iowa. — *Norris v. Hix*, 74 Iowa 524; *Wheeler v. Becker*, 68 Iowa 723.

Maine. — *Shaw v. Gilmore*, 81 Me. 396.

Michigan. — *Dickey v. Waldo*, 97 Mich. 255.

Minnesota. — *Minnesota Linseed Oil Co. v. Maginnis*, 32 Minn. 193; *Ambuehl v. Matthews*, 41 Minn. 537; *Ludlum v. Rothschild*, 41 Minn. 218; *Walter A. Wood Mowing, etc., Mach. Co. v. Minneapolis, etc., Elevator Co.*, 48 Minn. 404; *Simmons v. Anderson*, 44 Minn. 487; *Miller v. McCormick Harvesting Mach. Co.*, 35 Minn. 399.

North Carolina. — *Rawlings v. Hunt*, 90 N. Car. 270; *Harris v. Jones*, 83 N. Car. 317; *Smith v. Coor*, 104 N. Car. 139; *Loftin v. Hines*, 107 N. Car. 360; *Weil v. Flowers*, 109 N. Car. 212; *Crinkley v. Egerton*, 113 N. Car. 142.

Tennessee. — *Watkins v. Wyatt*, 9 Baxt. (Tenn.) 250, 40 Am. Rep. 90.

In Arkansas crops to be planted may be mortgaged, and the lien attaches as soon as they are produced. *Senter v. Mitchell*, 16 Fed. Rep. 206. This rule, however, is based upon statutory enactment. Before the enactment of the statute the mortgage was void. See *infra*, this section, *Jurisdictions in Which Such Mortgage Is Invalid*.

In Idaho, also, the prevalence of this doctrine is due to statute. *Pierce v. Langdon*, 2 Idaho 878.

Reasons for the Rule. — In *Jones v. Webster*, 48 Ala. 109, where the court held that future crops were a proper subject of mortgage, Mr. Justice Saffold, in delivering the opinion, said: "As far as the judicial decisions go in determining the matter, the illustration of 'the next cast of a fisherman's net' is as expressive and significant as any other. The fisherman may sell the next cast of his net because, being a fisherman, it is his business to have a net, and to cast it within a reasonable time. It is more than probable that he will do so. But another

cannot sell it, because he has no control over the fisherman, and no reasonable expectation of being able to comply with his obligation. It is only possible that he may do so. If the mortgagors had undertaken to convey the future crops they might make, without possessing any land upon which to make them, and especially without the contemplation of the immediate acquisition of some, then, certainly, their conveyance would be without operation. In this case they had the land, and the crops conveyed were to be grown upon it during their possessory interest. The crops were an accretion or addition to the land which might very reasonably be expected to be made."

In *Shaw v. Gilmore*, 81 Me. 396, the court said: "It is a maxim of the common law that a man cannot grant that which he hath not; but it is well settled that he may assign that of which he is 'potentially but not actually possessed. He may make a valid sale of the wine that a vineyard is expected to produce, or of the grain a field may grow in a given time.'"

In *Grantham v. Hawley*, Hob. 132, it was held that a grant of corn, to be planted by the grantor on his land, was good. It was there said: "Though the lessor had it [the corn] not actually in him, nor certain, yet he had it potentially, for the land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant."

In *Butt v. Ellett*, 19 Wall. (U. S.) 544, the question was as to the effect of an instrument purporting to be a mortgage on a crop, the seed of which had not been sown. The court held that until the crop had started to grow the instrument was not a mortgage, but the court said: "When the crops grew, the lien attached and bound them effectually from that time."

What Words Held Sufficient to Convey. — Where the words of grant in a mortgage of unplanted crops are that the mortgagor "conveys a lien upon each and every of said crops," to be made upon certain land, such words constitute a valid mortgage on the crops. *Harris v. Jones*, 83 N. Car. 317.

2. Mortgage Passes Legal Title — United States. — *Briggs v. U. S.*, 143 U. S. 346.

Lien Created, but Title Not Changed. — In *Alabama*, when the crop grows an equitable lien attaches, but the legal title does not pass.¹ In this state, however, third persons are charged with record notice of the existence of the lien, and a conversion of the crop by purchase, levy of an execution, or otherwise, renders such third person liable in damages to the mortgagee for the value of the property converted.²

In *North Carolina* a mortgage of unplanted crops is not a valid mortgage on any crops, except those to be raised next season after the execution of the mortgage.³ If the conveyance is silent as to how long the mortgage is intended to continue, it is invalid except as to those raised the next year after its execution.⁴

b. JURISDICTIONS IN WHICH SUCH MORTGAGE IS INVALID. — In several states it is held that unless a crop is actually *in esse* at the time of the execution of the mortgage, the mortgage is invalid; and, this being so, no lien attaches in favor of the mortgagee after the crop comes into being.⁵ Hence it is at any time subject to attachment or execution against the mortgagor,⁶ or to sale by him.⁷ A new mortgage is necessary to convey the title, or to create

Iowa. — *Norris v. Hix*, 74 *Iowa* 525; *Wheeler v. Becker*, 68 *Iowa* 723.

Maine. — *Shaw v. Gilmore*, 81 *Me.* 396.

Minnesota. — *Minnesota Linseed Oil Co. v. Maginnis*, 32 *Minn.* 193; *Miller v. McCormick Harvesting Mach. Co.*, 35 *Minn.* 399; *Walter A. Wood Mowing, etc., Mach. Co. v. Minneapolis, etc., Elevator Co.*, 48 *Minn.* 404; *Simmons v. Anderson*, 44 *Minn.* 487.

North Carolina. — *Rawlings v. Hunt*, 90 *N. Car.* 270; *Harris v. Jones*, 83 *N. Car.* 318.

Tennessee. — *Watkins v. Wyatt*, 9 *Baxt. (Tenn.)* 250, 40 *Am. Rep.* 90.

1. Alabama—Lien Attaches, but Legal Title Does Not Pass. — *Wilkinson v. Ketter*, 69 *Ala.* 435; *Wetzler v. Kelly*, 83 *Ala.* 440; *Keith v. Ham*, 89 *Ala.* 590; *Marks v. Robinson*, 82 *Ala.* 69; *Whittleshoffer v. Strauss*, 83 *Ala.* 517; *Leslie v. Hinson*, 83 *Ala.* 266.

Hence a mortgagee of an unplanted crop cannot, after its growth, maintain a statutory claim-suit therefor. *Wetzler v. Kelly*, 83 *Ala.* 440.

2. In Alabama, Record of Such Mortgage Is Constructive Notice to third persons of the existence of such lien. *Smith v. Fields*, 79 *Ala.* 335; *Whittleshoffer v. Strauss*, 83 *Ala.* 517; *Leslie v. Hinson*, 83 *Ala.* 266. And the mortgagee may maintain an action on the case against a purchaser who, with constructive notice of the mortgage, buys the crop, or against the mortgagor selling it. *Whittleshoffer v. Strauss*, 83 *Ala.* 517; *Leslie v. Hinson*, 83 *Ala.* 266; *Smith v. Fields*, 79 *Ala.* 335; *Collier v. Faulk*, 69 *Ala.* 58.

3. Mortgage on Crop Unplanted Applies Only to Those of Next Season. — *State v. Garriss*, 98 *N. Car.* 733; *Wooten v. Hill*, 98 *N. Car.* 48; *Smith v. Coor*, 104 *N. Car.* 139.

4. Validity Limited to Current Year. — *Smith v. Coor*, 104 *N. Car.* 139; *Wooten v. Hill*, 98 *N. Car.* 48. This rule is based upon grounds of public policy.

5. Invalidity of Mortgage on Unplanted Crop — *Georgia.* — *Redd v. Burrus*, 58 *Ga.* 574; *Crine v. Tifts*, 65 *Ga.* 646; *Noyes v. Jenkins*, 55 *Ga.* 586.

Illinois. — *Stowell v. Bair*, 5 *Ill. App.* 104.

Kentucky. — *Hutchinson v. Ford*, 9 *Bush*

(*Ky.*) 318, 15 *Am. Rep.* 711; *Vinson v. Hallowell*, 10 *Bush (Ky.)* 538.

Nebraska. — *Cole v. Kerr*, 19 *Neb.* 553.

New Hampshire. — *Cudworth v. Scott*, 41 *N. H.* 456.

New York. — *Cressey v. Sabre*, 17 *Hun (N. Y.)* 121; *Rochester Distilling Co. v. Rasey*, 142 *N. Y.* 570, 40 *Am. St. Rep.* 635.

South Carolina. — *Moore v. Byrum*, 10 *S. Car.* 452, 30 *Am. Rep.* 58.

Wisconsin. — *Comstock v. Scales*, 7 *Wis.* 159.

Former Arkansas Doctrine. — See also *Tomlinson v. Greenfield*, 31 *Ark.* 557, in which it was held that a mortgage on an unplanted crop, if executed prior to the act of Feb. 11, 1875, was void.

Attempted Sale of Unplanted Crop. — And the doctrine laid down in the text applies with equal force where the conveyance of unplanted crops sought to sell rather than mortgage them. *Huntington v. Chisholm*, 61 *Ga.* 270.

6. Subject to Execution or Attachment by Creditors of Mortgagor. — *Redd v. Burrus*, 58 *Ga.* 574; *Stowell v. Bair*, 5 *Ill. App.* 104; *Cole v. Kerr*, 19 *Neb.* 553.

Where Part of Crop in Esse and Part Not. — Where the mortgage conveyed "all the hay and grain of every kind that grows on the farm on which I now live the present year," and where it appeared that when the mortgage was executed, all of the hay and a part of the grain was growing, and that a part of the grain had not been planted, it was held that the mortgage was a valid conveyance of the part planted, but void as to the balance, which was subject to attachment as the property of the mortgagor. *Cudworth v. Scott*, 41 *N. H.* 456.

And in *Cole v. Kerr*, 19 *Neb.* 553, where a recorded mortgage embraced live stock and crops to be planted, the court held that it was void as to the latter, which was subject to attachment as the property of the mortgagor.

7. Purchaser from Mortgagor Obtains Good Title. — *Hutchinson v. Ford*, 9 *Bush (Ky.)* 318, 15 *Am. Rep.* 711; *Comstock v. Scales*, 7 *Wis.* 159.

A recorded mortgage of crops which were unplanted at the time of its execution is invalid, and a subsequent purchaser thereof from the mortgagor obtains a good title thereto,

a lien,¹ unless there has been an actual delivery under the old mortgage, thereby making it an executed contract.²

3. Validity as Against Third Persons.—Actual notice of the existence of such mortgage by subsequent purchasers, creditors, or mortgagees will, of course, bind them.³

The Recording of a Mortgage Operates as a Constructive Notice of its existence, and if the crop is purchased, attached, or otherwise converted, the purchaser or creditor is liable to the mortgagee for the value thereof.⁴

Hutchinson v. Ford, 9 Bush (Ky.) 318, 15 Am. Rep. 711.

1. New Mortgage Necessary when Crops Come into Existence.—*Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 40 Am. St. Rep. 635; *Roy v. Goings*, 6 Ill. App. 162.

The New York Court of Appeals has recently decided that while such a mortgage might, as between the parties, be regarded as an executory agreement to give a lien when the property comes into existence, yet, until that is done, the prior mortgage is undoubtedly void, as against creditors of or purchasers from the mortgagor. *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 40 Am. St. Rep. 635.

2. When There Is Actual Delivery Mortgagee Acquires Title.—*Roy v. Goings*, 6 Ill. App. 162; *Moore v. Byrum*, 10 S. Car. 452, 30 Am. Rep. 58.

Though a mortgage on crops to be subsequently planted is not valid at the time of execution, yet where the mortgagee acquires actual possession of the crops before the rights of others, either his creditors or purchasers, have attached, title to the crops passes from the mortgagor, to the mortgagee. *Moore v. Byrum*, 10 S. Car. 452, 30 Am. Rep. 58.

Whether Delivery Should Be by Voluntary Act of Mortgagor.—If the mortgagee obtains possession through the act or assent of the mortgagor before the rights of others have intervened, the former obtains title. If, however, he takes possession for causes allowed by the terms of the mortgage, as to whether he obtains title, *quere*. *Roy v. Goings*, 6 Ill. App. 162.

Where There Was No Delivery.—Under the following state of facts the court held that there was no delivery of the crop to the mortgagee, and hence that it was subject to attachment by a creditor of the mortgagor: though in law a delivery to a common carrier is delivery to a consignee, yet where the consignee was not the mortgagee, but was a third person to whom the crop was assigned to be applied to the debt of the mortgagee, there was no delivery to the latter. *Redd v. Burrus*, 58 Ga. 574.

3. Actual Notice of Existence of Mortgage.—Where the description of crops in the mortgage was so indefinite that its record could not impart constructive notice to third parties, yet where a subsequent purchaser of lands on which the mortgaged crops were growing had actual knowledge of its existence the claim of the mortgagee of the crops was good as against him. *Luce v. Moorehead*, 77 Iowa 367.

4. Constructive Notice by Record of Mortgage.—*Smith v. Fields*, 79 Ala. 335; *Mitchell v. Badgett*, 33 Ark. 387; *Rider v. Edgar*, 54 Cal.

127; *Duke v. Strickland*, 43 Ind. 494; *Wright v. E. M. Dickey Co.*, 83 Iowa 332; *Pierce v. Langdon*, 2 Idaho 878; *Shields v. Ruddy*, 2 Idaho 884.

Contra.—It was held in *Nebraska* that where there was a recorded mortgage on growing corn, which was afterwards gathered and sold by the mortgagor, a dealer who in good faith purchased and received the grain took it free from the lien of the mortgage, as a recorded mortgage was not notice to him. *Gillilan v. Kendall*, 26 Neb. 82, 18 Am. St. Rep. 766.

Purchaser in Good Faith Charged with Notice After Harvest.—The record of a mortgage upon crops to be grown is notice of such lien upon the property, after the crops have been gathered and carried to market, as against a purchaser of the same in the market in good faith. *Wright v. E. M. Dickey Co.*, 83 Iowa 332.

Conversion by Purchaser from Mortgage.—Where ten acres of growing wheat were mortgaged, and the mortgagor, without the knowledge of the mortgagee, harvested, removed, and sold the wheat, which the purchaser thereof converted by mixing it with his own, it was held that the title to the wheat was in the mortgagee at the time of sale; that the record of the mortgage was constructive notice of its existence to the purchaser, and that the mortgagee might recover of the purchaser the value of the wheat purchased by identifying it as that which was mortgaged. *Duke v. Strickland*, 43 Ind. 494.

Continuance of Mortgage Lien After Severance.—A mortgage upon a growing crop continues to be a lien upon the crop after severance and removal from the land; and where such crop was attached the officer was liable to the mortgagee for the value thereof. *Rider v. Edgar*, 54 Cal. 127.

When Lease Operates as Mortgage—Priority of Mortgages.—The rule is, that, in the absence of actual notice by a subsequent mortgagee, the mortgage first filed for record has priority. This rule has application to a case where a lease, executed by the lessor, reserved to him a lien on the crop produced on the land. Such reservation is a chattel mortgage; and a written agreement, stipulating that the amount due for rent should be paid before removal of the crop, is a mortgage thereof. *Mitchell v. Badgett*, 33 Ark. 387.

Where Neither Actual Nor Constructive Notice.—A lease of land contained the following clause: "The party of the first part [the lessors] are to have full title, with the privilege of taking possession, at any and all times, of any and all products of the farm in payment of the balance due on the rent," etc. The court held that this clause, being merely a

4. Sufficiency of Description — *a*. AS RELATING TO PLACE OF GROWTH. — Where the property mortgaged is designated as all the crops,¹ or all the crops of a certain kind,² or a specified undivided interest of the mortgagor in the crops, to be raised on a designated tract of land,³ it is a sufficiently definite description of the crops mortgaged.⁴

Lands Must Be Designated with Certainty. — If, however, the mortgage does not designate with certainty the land on which the crops are to be raised, such a description is insufficient to charge subsequent purchasers, creditors, or mortgagees with notice of the mortgage, though it might be sufficient to bind the mortgagor.⁵ Where a recorded mortgage covers the crops grown during a

security for the money, operated as a chattel mortgage, and that, where the lease had never been filed as a chattel mortgage, the lessors could not recover the value of the crops levied on as the property of the lessee by an officer having no actual notice of the existence of such lien. *Johnson v. Crofoot*, 53 Barb. (N. Y.) 574.

1. All Crops on Certain Lands. — *Hansen v. Dennison*, 7 Ill. App. 73; *Norris v. Hix*, 74 Iowa 524; *Melin v. Reynolds*, 32 Minn. 52.

2. All Crops of Designated Kind on Certain Lands. — *Muse v. Lehman*, 30 Kan. 514.

3. Undivided Interest in Crops on Certain Lands. — *Zehner v. Aultman*, 74 Ind. 24; *Johnson v. Rider*, 84 Iowa 50; *Sims v. Mead*, 29 Kan. 124; *Melin v. Reynolds*, 32 Minn. 52.

4. Illustrations — Sufficient Description. — A mortgage made in February of all "the wheat and other crops now growing" on described lands, is a sufficient description, and covers all crops planted before the mortgage was executed. *Hansen v. Dennison*, 7 Ill. App. 73.

Where the property mortgaged was described as "thirty-five acres of winter wheat, now standing and growing on the southeast quarter of section No. 29, township No. 24, of range 1, east, in Harvey county, state of Kansas," it was held that the description of the property mortgaged was sufficient. *Muse v. Lehman*, 30 Kan. 514.

Construction of Mortgage — Entire Crop Conveyed. — A mortgage which conveyed "the entire crops of corn, cotton, fodder, cotton seed, and all other crops of every kind or description which may be made and grown during the present year on said lands, to the extent of one hundred bales of cotton, which is to be the first cotton picked," and which declared that the mortgagor "may mortgage to other parties any balance after such one hundred bales," conveys not only the one hundred bales of cotton to be raised, but all other crops as security for the delivery of the one hundred bales or their value. *Comer v. Lehman*, 87 Ala. 362.

Mortgage of Undivided Interest. — "One-half of all the crop growing" on described land means an undivided half of such crop, and such a description is sufficiently valid. *Melin v. Reynolds*, 32 Minn. 52.

A mortgage upon the "undivided two-thirds interest in any and all crops grown or to be grown" on described land, during a certain year, sufficiently describes the property mortgaged. *Johnson v. Rider*, 84 Iowa 50.

A chattel mortgage which describes the property mortgaged as "one-third of twenty-two acres of growing wheat, situate," etc.,

conveys an undivided one-third of such wheat, and is valid. *Zehner v. Aultman*, 74 Ind. 24.

Unnecessary that Mortgage Should Designate Method of Division. — When the mortgage covers the undivided interest of the mortgagor, it is unnecessary that the mortgage should designate the manner in which the interest conveyed should be separated from the balance. *Sims v. Mead*, 29 Kan. 124.

Mortgage of Undivided Portion of Crops by Purchaser Thereof. — And where an undivided portion of a growing crop is purchased, the purchaser has the same right to mortgage it as would have been possessed by his vendor. The title to it will pass by a mortgage of "all the right, title, and interest of the said A [the purchaser] in and to that certain crop," describing it. *Potts v. Newell*, 22 Minn. 561.

Clerical Mistake in Mortgage Corrected. — Where an instrument describes the crops mortgaged as "my entire crop of corn cotton seed fodder peas potatoes and cane," etc., that clause of the mortgage will be construed to read, "my entire crop of corn, cotton, (cotton) seed, fodder," etc. *Seay v. McCormick*, 68 Ala. 549.

Sufficiency of Description upon Prosecution for Selling Mortgaged Property. — Where a mortgage conveyed the "entire crop" of the mortgagor, "of every description, raised by him or caused to be raised by him annually," the uncertainty as to what the mortgage covers can be removed by parol evidence; and where the bill of exceptions fails to set out all of the evidence, the appellate court will presume that such evidence was furnished, and the mortgage properly admitted in evidence. *Varnum v. State*, 78 Ala. 28.

5. Designation of Lands to Bind Third Parties. — *Krone v. Phelps*, 43 Ark. 350; *Dodds v. Neel*, 41 Ark. 71; *Walter A. Wood Mowing, etc., Mach. Co. v. Minneapolis, etc., Elevator Co.*, 48 Minn. 404; *Wadena First Nat. Bank v. Hendrickson*, 61 Minn. 293; *Weil v. Flowers*, 109 N. Car. 212; *Crinkley v. Egerton*, 113 N. Car. 142.

Mortgage Void as to Lands Not Designated. — A mortgage on crops to be grown on described land, which contains a further provision that the mortgage is intended to cover all crops raised by the mortgagor on any other lands which he may cultivate that year, describes with sufficient certainty the crops to be raised on the described land, and is a valid lien thereon. But as to crops raised on other lands, it is void for uncertainty. *Weil v. Flowers*, 109 N. Car. 212; *Crinkley v. Egerton*, 113 N. Car. 142.

certain year on all land then owned by the mortgagor, and on all which are to be afterwards acquired or leased by him during the term, such description is sufficient to charge all third persons with notice of the existence of the mortgage.¹

b. AS RELATING TO SPECIFIC CROPS GROWN. — When the mortgage does not purport to cover all of the crops to be raised on the described tract of land, and the description of the property does not indicate to which portion of the whole crop the mortgage applies, it is invalid as to third persons.²

Description Too Indefinite to Be Remedied. — The same rule applies when the description of the property mortgaged is so deficient that the court cannot supply the defects without danger of making a different contract from that intended by the mortgagor; in such a case the mortgage is invalid.³

When Description Capable of Being Made Certain. — But when the description of the part mortgaged is such that it is capable of being made certain, the convey-

Erroneous Description. — A and B were copartners in farming operations on the west half of section 36, township 139, range 34. A resided on the farm, while B lived in a town some miles distant. B, describing himself as of the town, and as being in possession of the property mortgaged, executed a mortgage on a "half interest in 160 acres of wheat, to be grown on the northwest quarter of section 36, township 139, range 33, for the season of 1893." In an action in which a third party had intervened as a subsequent mortgagee, the court held that the description in this mortgage was not only insufficient, but misleading, and that B's mortgagee acquired no title as against the subsequent one. *Wadena First Nat. Bank v. Hendrickson*, 61 Minn. 293.

Parol Evidence to Supplement Description. — It was held, in *Smith v. Fields*, 79 Ala. 335, that a description of the mortgaged property as "my entire crop of corn and cotton" might be supplemented by parol evidence to show that the crop of corn and cotton mortgaged was that growing on land owned by the mortgagor at the time of the execution of the mortgage, and was sufficient after registration to charge subsequent purchasers with notice of its existence.

1. Description as Crops on Lands Owned or Rented by Mortgagor. — Where a description in the mortgage of crops to be thereafter raised was as follows: "A gives to B a lien on all crops raised on lands owned or rented by [the mortgagor A], during the present year," and where it appeared that the mortgagor owned all land on which the crops in dispute were raised, it was held that the description was sufficient and the mortgage valid. *Woodlief v. Harris*, 95 N. Car. 211.

Crops on Mortgagor's and Other Lands. — Where the property conveyed by the mortgage was "the entire crop grown by me the present year, or which I may aid in or cause to be grown on my lands, or any other lands that I may cultivate, or aid in or cause to be cultivated," the mortgage covered the interest of the mortgagor in cotton raised by his aid and assistance during the year on lands rented by him. *Cobb v. Daniel*, 105 Ala. 335.

But see *Paden v. Bellenger*, 87 Ala. 575, where this court held that a mortgage purporting to convey the mortgagor's "entire crop to be grown in the year 1887 on my own land or

any other land in E. county," did not cover a crop raised by him on land not owned by the mortgagor at the time of the execution of the mortgage but afterwards purchased by him.

2. Description Must Show the Portion of Crops Mortgaged. — *Dodds v. Neel*, 41 Ark. 70; *Krone v. Phelps*, 43 Ark. 350; *Pennington v. Jones*, 57 Iowa 37; *Walter A. Wood Mowing, etc., Mach. Co. v. Minneapolis, etc., Elevator Co.*, 48 Minn. 404; *Williamson v. Steele*, 3 Lea (Tenn.) 527, 31 Am. Rep. 652.

A mortgage of forty acres of wheat, to be grown on a described quarter section of land, no particular forty acres being designated, and seventy-five acres out of the quarter section having been sown, the forty acres of wheat sought to be mortgaged is incapable of identification, and the mortgage is void as against third parties. *Walter A. Wood Mowing, etc., Mach. Co. v. Minneapolis, etc., Elevator Co.*, 48 Minn. 404.

A mortgage of "all of a crop of ten acres of cotton to be grown" on a farm containing forty acres in cotton, is, as to strangers, void for uncertainty. Hence parol evidence tending to describe the ten acres meant, is not admissible. *Krone v. Phelps*, 43 Ark. 350.

A mortgage of a specified number of bales of cotton out of a greater number will not be good as against parties acquiring adverse rights, unless it furnishes the data for separating the mortgaged bales from the others. *Dodds v. Neel*, 41 Ark. 70.

A mortgage conveying so much of the mortgagor's growing crop as will be sufficient to make a certain number of bales weighing a certain number of pounds each, to be prepared for market and delivered by the mortgagor at a certain time, passes no title to the mortgagee as against a judgment creditor of the mortgagor, who levied an execution against a quantity of seed cotton in a pen before time for delivery to the mortgagor and before a separation of that sought to be conveyed from the balance. *Williamson v. Steele*, 3 Lea (Tenn.) 527, 31 Am. Rep. 652.

3. Word Specifying Kind of Crops Omitted in Description. — In construing a mortgage on growing crops there is no rule which justifies a court in supplying a word of the broadest signification, which could properly be used in connection with other words, for the word omitted. Hence, where the mortgage de-

ance is good, not only as against the mortgagor, but as against all persons with constructive notice.¹

c. AS RELATING TO TIME OF GROWTH. — If the mortgage fails to show the year, or the term of years, during which it is to have life, it is invalid.²

V. LANDLORD AND TENANT — 1. **Possession of Premises and Title to Crop in Tenant.** — A very familiar contract for the rental of farm lands is made where a landlord contracts to receive his rent in a portion of the farm products. In the absence of any specific contract between the landlord and tenant, by which the former seeks to change the general rule governing the relation, the tenant, of course, becomes the legal possessor of the demised premises during the term, and, until a division of the crops is made, the title to them is in him.³

scribed the property as "all the cut and growing and having grown" on the land, it will not be inferred that the word omitted was "crops," rather than hay, corn, oats, or something else. *Cray v. Currier*, 62 Iowa 535.

Where Court Will Supply Word. — But where it is manifest from the context what the word omitted was, the court will supply it. *Seay v. McCormick*, 68 Ala. 549.

1. Mortgage on Thirty Bales of Cotton, the First of Crop to Be Baled. — In *Senter v. Mitchell*, 16 Fed. Rep. 206, the property mortgaged was described as "30 bales of good lint cotton, the first picking of our crop of 1882, to average 450 pounds each." This description was sufficient to bind creditors and purchasers, as well as the mortgagor, after a separation of the property. As to this, the court remarked: "That hath certainty enough which may be made certain." The description is, '30 bales of good lint cotton, the first picking of our crop of 1882, to average 450 pounds each.' There is no difficulty here in identifying the particular bales covered by the mortgage; they are the first 30 picked and baled of the mortgagor's crop of 1882. These bales were capable of identification by the fact that they were the first baled of the crop of that year; and the lien of the mortgage fastened upon them as soon as the process of baling was completed."

Until Separation, Not Identified. — But until there has been a separation of the number of bales mortgaged from the balance, if the pickings should be mixed therewith, manifestly, no action of replevin would lie for the cotton. *Person v. Wright*, 35 Ark. 169.

Whether Capable of Identification, Question of Fact. — As between the mortgagor or his administrator and the mortgagee, the question whether the crop mortgaged has been separated and become capable of identification is one of fact. When it is, the mortgagee acquires title to it. *Stephens v. Tucker*, 55 Ga. 543.

2. Where No Time Within Which to Be Raised Designated. — *Barr v. Cannon*, 69 Iowa 20; *Egbert v. White*, 59 Iowa 464; *Pennington v. Jones*, 57 Iowa 37; *Shaw v. Gilmore*, 81 Me. 396.

A description of "all the grain, oats, wheat, flax and corn raised" on certain land, stating neither the year nor the term within which the crops were raised, or were to be raised, is insufficient to charge creditors of the mortgagor with notice of the mortgage. *Barr v. Cannon*, 69 Iowa 20.

Especially would this rule apply to a case where crops were unplanted at the time of the

execution of the mortgage. Third parties could not have constructive notice as to the crops of what year the mortgage was to attach. *Egbert v. White*, 59 Iowa 464.

3. Title to Crop in Tenant — *Arkansas*. — *Birmingham v. Rogers*, 46 Ark. 254; *Robinson v. Kruse*, 29 Ark. 575.

California. — *Walls v. Preston*, 25 Cal. 59.

Delaware. — *Williams v. Cleaver*, 4 Houst. (Del.) 453.

Georgia. — *Wadley v. Williams*, 75 Ga. 272.

Illinois. — *Sargent v. Courrier*, 66 Ill. 245; *Alwood v. Ruckman*, 21 Ill. 200; *Dixon v. Nicolls*, 39 Ill. 372, 89 Am. Dec. 312.

Indiana. — *Froust v. Hardin*, 56 Ind. 165, 26 Am. Rep. 18; *Lathrop v. Rogers*, 1 Ind. 554; *Woodruff v. Adams*, 5 Blackf. (Ind.) 317, 35 Am. Dec. 122; *Lacy v. Weaver*, 49 Ind. 373, 19 Am. Rep. 683.

Iowa. — *Townsend v. Isenberger*, 45 Iowa 670; *Rees v. Baker*, 4 Greene (Iowa) 461; *Blake v. Coats*, 3 Greene (Iowa) 548.

Kansas. — *Larkin v. Taylor*, 5 Kan. 433.

Maine. — *Symonds v. Hall*, 37 Me. 354, 59 Am. Dec. 53; *Dockham v. Parker*, 9 Me. 137, 23 Am. Dec. 547; *Turner v. Bachelder*, 17 Me. 257.

Maryland. — *Hoskins v. Rhodes*, 1 Gill & J. (Md.) 266.

Massachusetts. — *Warner v. Abbey*, 112 Mass. 355; *Cornell v. Dean*, 105 Mass. 435; *Darling v. Kelly*, 113 Mass. 29.

New Jersey. — *Doremus v. Howard*, 23 N. J. L. 390.

North Carolina. — *Walston v. Bryan*, 64 N. Car. 764; *Gordon v. Armstrong*, 5 Ired. L. (27 N. Car.) 409; *Deaver v. Rice*, 4 Dev. & B. L. (20 N. Car.) 431, 34 Am. Dec. 388; *Hatchell v. Kimbrough*, 4 Jones L. (49 N. Car.) 163; *Harrison v. Ricks*, 71 N. Car. 7; *Ross v. Swaringer*, 9 Ired. L. (31 N. Car.) 481.

Pennsylvania. — *Burns v. Cooper*, 31 Pa. St. 426; *Ream v. Harnish*, 45 Pa. St. 376.

Texas. — *Tignor v. Toney*, (Tex. Civ. App. 1896) 35 S. W. Rep. 881, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 897, 898.

Vermont. — *McLellan v. Whitney*, 65 Vt. 510.

Construction of Contract. — A contract between the owner of land and another person, by which the latter is to plant and cultivate a crop upon the land of the former, will be construed to create the relation of landlord and tenant, unless the intention to make them partners or tenants in common, or employer and employee, be clear and unmistakable. *Birmingham v. Rogers*, 46 Ark. 254.

Facts under Which Relation Existed. — A contract between a landowner and another, by

2. Termination of Tenancy While Crops Are Growing — a. WHEN TENANT ENTITLED TO CROPS — (1) Generally. — When a tenancy is for an uncertain duration and is terminated by a factor not referable to an act of the tenant, he, or, in case of his death, his representative, is entitled to all annual crops growing upon the premises at the time of the termination of the tenancy.¹ This right is known as the right to emblements.²

By "Annual Crop" Is Here Meant one which owes its existence to the annual industry of the lessee, even though the root itself may be perennial, which, to illustrate, is the case with a crop of hops.³ The nature of the growth to which this doctrine of emblements applies is treated of in another section.⁴

which the former demises to the latter the land for a specified term, and, in consideration of the demise, the latter agrees to plant and cultivate the land at his own expense, and to deliver on the premises to the landowner a portion of the crops as soon as harvested, and not to underlet or yield possession of the premises to any person other than the lessor, is a lease and not a contract of hire. *Walls v. Preston*, 25 Cal. 59.

Possession of Premises in Tenant. — Where the lessor is to receive his share of the crop on premises other than those let, the tenant alone can maintain trespass for a breach of the demised premises committed during his term. *Woodruff v. Adams*, 5 Blackf. (Ind.) 317, 35 Am. Dec. 122.

Conversion of Tenant's Crop by Landlord. — A mortgagee of a tenant's crop may, after the law-day of the mortgage, maintain trover against a landlord taking possession of it and converting it for rent. *Robinson v. Kruse*, 29 Ark. 575.

Subject to Execution as Property of Tenant. — And where there is to be a division of, and delivery by the tenant to the landlord of his portion of, the crops after a severance thereof, and where, prior to such delivery, the crops are levied on as the property of the tenant, the landlord can maintain no action for the crops. *Sargent v. Courier*, 66 Ill. 245; *Garland v. Hilborn*, 23 Me. 442.

See *Atkins v. Womeldorf*, 53 Iowa 150, where it was held that a creditor of a tenant cultivating land upon shares cannot by a levy of an attachment upon the growing crop deprive the landlord of the interest which he would acquire therein when matured. See also *infra*, this title, *Tenants in Common of Crop*.

Where Relation Exists. — In *Wadley v. Williams*, 75 Ga. 272, it was said that if the landowner contract with a person to work on the land, agreeing to give him a part of the crop for producing it, the title to the whole, until division, would be in the landowner; but that when the owner of the land turned it over to a person who is to farm thereon, and from the crop to be raised by him is to pay a certain proportion thereof, this creates the relation of landlord and tenant.

In some cases, the contract is so drawn as to make it doubtful whether the cultivator is a mere cropper or tenant of the landlord. See also, *infra*, this title, *Cropper*.

Landlord Cannot Maintain Suit for Crop Agreed to Be Delivered. — Where the tenant contracted to deliver to the landlord one-half of the wheat to be raised by him on the leased premises, and where the tenant delivered only one-third

thereof, retaining the remainder without separating it from his own share, the landlord could not maintain an action of replevin to recover the remaining portion of his share. *Lacy v. Weaver*, 49 Ind. 373, 19 Am. Rep. 683.

1. Tenancy Terminates in Term by Death, etc. — Crops Go to Tenant or Representative. — 2 Bl. Com. 145.

Alabama. — *Price v. Pickett*, 21 Ala. 741; *Weems v. Bryan*, 21 Ala. 303.

Connecticut. — *Bradley v. Bailey*, 56 Conn. 374, 7 Am. St. Rep. 316.

Georgia. — *Thornton v. Burch*, 20 Ga. 791.

Illinois. — *Simpkins v. Rogers*, 15 Ill. 397.

Iowa. — *Reilly v. Ringland*, 39 Iowa 106; *Dobbins v. Lusch*, 53 Iowa 304.

Maine. — *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438; *Sherburne v. Jones*, 20 Me. 70; *Davis v. Thompson*, 13 Me. 209; *Chesley v. Welch*, 37 Me. 106.

Maryland. — *Bevans v. Briscoe*, 4 Har. & J. (Md.) 139.

Massachusetts. — *Rising v. Stannard*, 17 Mass. 282.

Missouri. — *Towne v. Bowers*, 81 Mo. 491.

Nebraska. — *Sornberger v. Berggren*, 20 Neb. 399; *Monday v. O'Neil*, 44 Neb. 724.

New Hampshire. — *Davis v. Brocklebank*, 9 N. H. 73.

New York. — *Stewart v. Doughty*, 9 Johns. (N. Y.) 112; *King v. Wilcomb*, 7 Barb. (N. Y.) 263.

North Carolina. — *Gee v. Young*, 1 Hayw. (1 N. Car.) 17; *Humphries v. Humphries*, 3 Ired. L. (25 N. Car.) 362; *Poindexter v. Blackburn*, 1 Ired. Eq. (36 N. Car.) 286.

Pennsylvania. — *Comfort v. Duncan*, 1 Miles (Pa.) 229.

Tennessee. — *Hunt v. Watkins*, 1 Humph. (Tenn.) 498.

Virginia. — *Thompson v. Thompson*, 6 Munf. (Va.) 514.

2. Emblements have been defined as the right of a tenant to take and carry away after his tenancy has ended such annual products of the land as have resulted from his own care and labor. The term is also applied to the crops themselves. 1 Bouv. L. Dict. 587; 2 Taylor on Landlord and Tenant, § 534; *Reiff v. Reiff*, 64 Pa. St. 137.

3. Annual Crops. — *Latham v. Atwood*, Cro. Car. 515. So, too, are shrubs, planted and cultivated on leased land by a nurseryman, for sale. *Penton v. Robert*, 2 East 88; *King v. Wilcomb*, 7 Barb. (N. Y.) 263.

4. See *supra*, this title, *Fructus Industriales and Fructus Naturales — What Crops Are Fructus Industriales*.

When Doctrine Applies with Reference to Time of Planting Crops. — It does not apply to any fruits which are not the direct result of the lessor's annual labor; and, as is nearly always the case, if the crop must be sown annually, the right does not attach until the seed has been planted;¹ hence, the tenant will not be entitled to a credit in the nature of emblements for preparing the ground for the reception of seed.²

(2) *When Terminated by Act of God.* — That familiar legal maxim, *actus Dei nemini facit injuriam*, finds application where a life tenancy is terminated by the death of the tenant. His devisee of the crop, or his executor or administrator, as the case may be, is entitled to all crops which may have been planted at the time of such termination of the tenancy.³

(3) *When Terminated by Act of Lessor.* — If the tenancy be at the will of the lessor, and is terminated by him, the tenant is entitled to all crops the seed of which was planted prior to the termination of the estate by the lessor.⁴

(4) *Right of Entrance to Premises.* — Where the tenant is entitled to emblements, he has, on the maturity of the crop, the right of ingress, egress, and regress to and from the premises in order that he may sever and remove it.⁵

b. WHEN TENANT NOT ENTITLED TO CROPS — (1) *Termination of Estate by Tenant.* — Where the estate is of such a nature that it may be terminated by some act of the tenant, and where he does that act, he is not entitled to the crops growing on the premises when the estate is terminated;⁶ or, if the

1. Right to Emblements Does Not Attach until Seed Sown. — *Price v. Pickett*, 21 Ala. 741; *Gee v. Young*, 1 Hayw. (1 N. Car.) 17; *Stewart v. Doughty*, 9 Johns. (N. Y.) 112; *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567; *Thompson v. Thompson*, 6 Munf. (Va.) 514.

2. Not Entitled to Crop After Preparing Soil. — See cases cited in preceding note.

3. Life Tenancy Terminated by Death. — *Weems v. Bryan*, 21 Ala. 303; *Bradley v. Bailey*, 56 Conn. 374, 7 Am. St. Rep. 316; *Thornton v. Burch*, 20 Ga. 791; *Reilly v. Ringland*, 39 Iowa 106; *Bevans v. Briscoe*, 4 Har. & J. (Md.) 139; *Poindexter v. Blackburn*, 1 Ired. Eq. (36 N. Car.) 286; *Hunt v. Watkins*, 1 Humph. (Tenn.) 498.

4. Tenancy at Will Terminated by Lessor — Crops Go to Tenant — Illinois. — *Simpkins v. Rogers*, 15 Ill. 397.

Iowa. — *Reilly v. Ringland*, 39 Iowa 106; *Dobbins v. Lusch*, 53 Iowa 304.

Maine. — *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438; *Sherburne v. Jones*, 20 Me. 70; *Chesley v. Welch*, 37 Me. 106.

Massachusetts. — *Rising v. Stannard*, 17 Mass. 282.

Missouri. — *Towne v. Bowers*, 81 Mo. 491.

Nebraska. — *Monday v. O'Neil*, 44 Neb. 724.

New Hampshire. — *Davis v. Brocklebank*, 9 N. H. 73.

North Carolina. — *Humphries v. Humphries*, 3 Ired. L. (25 N. Car.) 362.

Reason for the Rule. — The reason given by Lord Coke why a tenant at will is entitled to the crops growing when the landlord terminates the estate is, "that the estate of the lessee is uncertain, and therefore lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed, in peace, albeit the lessor doth determine his will before it be ripe;" and he adds, "this is not only proper to a lessee at will, * * * but to every particular tenant that hath an estate uncertain." Co. Litt. 55a.

Tenant's Common-law Right to Emblements Not Abridged by Stipulation for Notice. — Where A leased a farm to B for a term of years, conditioned, however, that at any time during that period A might give B three months' notice to quit in case of sale by the former, and A sells the farm before the expiration of the five years, and B leaves the premises and the crop sown, the proceeds of which are taken by the lessor, the latter is liable to B for the same, not on the doctrine of the away-going crop under the custom of *Pennsylvania*, but as emblements by the common law under the lease, whether or not he received the stipulated notice to quit. *Comfort v. Duncan*, 1 Miles (Pa.) 229.

5. Tenant's Right of Egress to Remove Crop — Illinois. — *Simpkins v. Rogers*, 15 Ill. 397.

Iowa. — *Reilly v. Ringland*, 39 Iowa 106.

Maine. — *Davis v. Thompson*, 13 Me. 209; *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438.

Maryland. — *Bevans v. Briscoe*, 4 Har. & J. (Md.) 139.

Missouri. — *Towne v. Bowers*, 81 Mo. 491.

New Hampshire. — *Davis v. Brocklebank*, 9 N. H. 73.

New Jersey. — *Debow v. Colfax*, 10 N. J. L. 128.

New York. — *Stewart v. Doughty*, 9 Johns. (N. Y.) 108.

North Carolina. — *Humphries v. Humphries*, 3 Ired. L. (25 N. Car.) 362.

6. Tenant Terminating Estate by His Own Act Not Entitled to Crops. — *Bulwer v. Bulwer*, 2 B. & Ald. 470; *Maclary v. Turner*, 9 Houst. (Del.) 281; *Talbot v. Hill*, 68 Ill. 106; *Kiplinger v. Green*, 61 Mich. 340; *Debow v. Colfax*, 10 N. J. L. 128; *Hawkins v. Skeggs*, 10 Humph. (Tenn.) 31.

Where a doweress in possession of land had planted a crop, and in a suit for partition consented that her dower in the premises might be sold, she to receive one-seventh of the proceeds in lieu of her dower, it was held that

estate should be terminated through some default of the tenant, he is not entitled to emblements.¹

(2) *Where Term Is Certain.* — Where the term is certain and fixed in time, the tenant has no right to crops growing on the land at the time of the termination of the tenancy but maturing afterwards, for it was his own folly to sow when he knew that his estate must terminate before he could reap.²

c. EXCEPTIONS TO GENERAL RULE — CUSTOM OF JURISDICTION. — By a custom limited to a particular part of *England* and to particular sections of the *United States*, a tenant whose term expires prior to the maturity of certain kinds of crops planted by him during the term is entitled to such crops, which are known as "away-going crops."³ Where such a custom exists, it constitutes as much a part of the lease as if such an understanding were expressed therein.⁴

the growing crop passed to the purchaser, and that the doweress could not claim the same as emblements, as her estate was terminated by her own act. *Talbot v. Hill*, 68 Ill. 106.

Abandonment of Farm by Tenant. — Upon the abandonment of a farm by a tenant before the end of the term, the possessory right in whatever property is on the farm, including crops, reverts to the lessor. *Kiplinger v. Green*, 61 Mich. 340; *Maclary v. Turner*, 9 Houst. (Del.) 281.

Abandonment of Parsonage Land. — A parson who resigns his living and leaves the parsonage land is not entitled to crops growing thereon at the time of such abandonment. *Bulwer v. Bulwer*, 2 B. & Ald. 470; *Debow v. Colfax*, 10 N. J. L. 128.

Termination of Estate by Marriage. — Where land was devised to a wife by her husband during life or widowhood, and she afterwards married, she was not entitled to the growing crops at the time of such marriage. *Hawkins v. Skeggs*, 10 Humph. (Tenn.) 31.

1. Termination of Lease Through Tenant's Default. — *Davis v. Eyton*, 7 Bing. 154, 20 E. C. L. 83; *Howell v. Schenck*, 24 N. J. L. 89; *Samson v. Rose*, 65 N. Y. 411; *Hunter v. Jones*, 2 Brews. (Pa.) 370.

A tenant who is ejected for condition broken cannot re-enter to gather the crops left in the ground. *Hunter v. Jones*, 2 Brews. (Pa.) 370.

Where a lease had been granted on the condition that if the lessee contracted debts on which he should be sued to judgment and followed by execution, the lessor should re-enter, and the lessor having re-entered after judgment and execution, it was held that the tenant was not entitled to the emblements. *Davis v. Eyton*, 7 Bing. 154, 20 E. C. L. 83.

Where Subtenant Not Entitled to Emblements. — Where during the pendency of an action of ejectment brought by a lessor against his lessee under a condition of the lease giving the former a right to re-enter in the case of non-payment of rent, the lessee sublets to another, who, with knowledge of the facts, plants a crop upon the land, which is harvested, but not removed therefrom at the time the lessor is put into possession by the judgment in the ejectment suit, the crop belongs to the lessor. *Samson v. Rose*, 65 N. Y. 411.

Nor has the tenant of the mortgagor the right to emblements as against the mortgagee who enters for condition broken. *Howell v. Schenck*, 24 N. J. L. 89.

2. Tenancy to Terminate at Fixed Time. — *Wicks v. Jordan*, 2 Bulst. 213; *Davis v. Connop*, 1 Price 53; *Thomas v. Noel*, 81 Ind. 382; *Razor v. Qualls*, 4 Blackf. (Ind.) 286, 30 Am. Dec. 658; *Chesley v. Welch*, 37 Me. 106; *Clarke v. Rannie*, 6 Lans. (N. Y.) 210; *Whitmarsh v. Cutting*, 10 Johns. (N. Y.) 360; *Bain v. Clark*, 10 Johns. (N. Y.) 424; *Mason v. Moyers*, 2 Rob. (Va.) 606; *Harris v. Carson*, 7 Leigh (Va.) 632, 30 Am. Dec. 510.

Nor will the fact that one who is acting as the lessor's agent to receive the avails of a portion of the crop due from the tenant under the lease had permitted the lessee to sow the crop change the rule, where it does not appear that the agent had authority to extend the lease. *Clarke v. Rannie*, 6 Lans. (N. Y.) 210.

3. An Away-going Crop may be defined to be the crop sown during the last year of tenancy, but not ripe until after its expiration. The right to this is usually vested in the outgoing tenant, either by the express terms of the lease or contract, or by the usage or custom of the country; but in the absence of any contract or custom, and provided the law of emblements does not apply, the landlord is entitled to crops unsevered at the determination of the tenancy, as being a portion of the realty, and by virtue of that general maxim the exceptions to which we are now considering. *Broom's Legal Maxims*, 412.

4. Right by Custom to Away-going Crops. — *Wigglesworth v. Dallison*, 1 Doug. 205; *Boraston v. Green*, 16 East 71; *Holding v. Pigott*, 7 Bing. 465, 20 E. C. L. 201; *Templeman v. Biddle*, 1 Harr. (Del.) 522; *Van Doren v. Everitt*, 5 N. L. L. 528, 8 Am. Dec. 615; *Howell v. Schenck*, 24 N. J. L. 89; *Forsythe v. Price*, 8 Watts (Pa.) 282, 34 Am. Dec. 465; *Clark v. Harvey*, 54 Pa. St. 142; *Biggs v. Brown*, 2 S. & R. (Pa.) 14; *Diffield v. Jones*, cited in *Stultz v. Dickey*, 5 Binn. (Pa.) 289, 6 Am. Dec. 411; *Shaw v. Bowman*, 91 Pa. St. 414.

A custom that tenants, whether by parol or deed, shall have the away-going crop after the expiration of their terms, is good. *Wigglesworth v. Dallison*, 1 Doug. 201.

Contra. — But see *Harris v. Carson*, 7 Leigh (Va.) 632, 30 Am. Dec. 510, in which it was held that however general the usage or custom may be for the off-going tenant to have the away-going crop, it can have no force in this country on the ground of custom, because not immemorial.

3. Statutory Lien of Landlord on Crops — a. FOR RENT. — In most of the agricultural states of the Union a statutory lien on the crops grown by the tenant on the demised premises is given to the landlord to secure the payment of rent for the term during which the crops are raised.¹ These statutes, as relating to the length of time that the lien continues in force, as to when and what vendees of the tenant are affected with notice of the lien after a severance of the crop, and as to the proceeding for the enforcement of the lien, are as varied as the number of states in which the liens exist. The amendment of existing statutes, or the repeal of old and the enactment of new ones, is in constant progress. It would be impracticable and useless, therefore, to do more than to indicate the construction given to particular statutes in various jurisdictions at different times.² For the ascertainment of

Court Will Take Judicial Knowledge of Existence of General Custom. — A particular custom must be pleaded; a general custom will be judicially noticed. See the titles JUDICIAL NOTICE; USAGES AND CUSTOMS.

In Delaware the away-going tenant is entitled to the wheat crop by the general custom of the state. Not so of the oat crop. *Templeman v. Biddle*, 1 Harr. (Del.) 522.

The Pennsylvania Custom which entitles a tenant to the away-going crop after the termination of his tenancy is confined to grain sown in the fall and ripening in the summer after the expiration of the tenant's term. Where the tenant plants in the spring before the expiration of his term, he has no right to the crop of the spring grain, cut after the term has expired. *Demi v. Bossler*, 1 P. & W. (Pa.) 224.

A tenant may maintain an action of *quare clausum fregit* against his landlord for an injury done to his away-going crop after the expiration of the lease and after he had removed from the premises. *Forsythe v. Price*, 8 Watts (Pa.) 282, 34 Am. Dec. 465.

Not Entitled to Emblements as Against Title Superior to Landlord's. — Though a tenant for a term certain is by the custom of the state of *New Jersey* entitled to away-going crops, yet he has no right to them as against a person claiming by a title paramount to that of his landlord. *Howell v. Schenck*, 24 N. J. L. 89.

1. Lien of Landlord on Crops for Rent — Alabama. — *Stoelker v. Wooten*, 80 Ala. 610; *Robinson v. Lehman*, 72 Ala. 401; *Lavender v. Hall*, 60 Ala. 214; *Fitzsimmons v. Howard*, 69 Ala. 590; *Thompson v. Spinks*, 12 Ala. 155; *McDonald v. Morrison*, 50 Ala. 30.

Arkansas. — *Meyer v. Bloom*, 37 Ark. 43; *Hammond v. Harper*, 39 Ark. 248; *Nolen v. Royston*, 36 Ark. 561; *Buck v. Lee*, 36 Ark. 525; *Kurtz v. Dunn*, 36 Ark. 648; *Reavis v. Barnes*, 36 Ark. 575; *Franklin v. Meyer*, 36 Ark. 96.

Georgia. — *Thornton v. Carver*, 80 Ga. 397; *Duncan v. Clark*, 96 Ga. 263; *McDougal v. Sanders*, 75 Ga. 140; *Johnson v. Emanuel*, 50 Ga. 590; *Hobbs v. Davis*, 50 Ga. 213.

Illinois. — *Herron v. Gill*, 112 Ill. 247; *Watt v. Scofield*, 76 Ill. 261; *Mead v. Thompson*, 78 Ill. 62; *Hunter v. Whitfield*, 89 Ill. 229; *Goeting v. Outhouse*, 95 Ill. 346.

Indiana. — *Kennard v. Harvey*, 80 Ind. 37.

Iowa. — *Secrest v. Stivers*, 35 Iowa 580; *Pitkin v. Fletcher*, 47 Iowa 53; *Holden v. Cox*, 60 Iowa 449.

Louisiana. — *Knox v. Booth*, 19 La. Ann. 109.

Maryland. — *Hopper v. Haines*, 71 Md. 64.

Mississippi. — *Newman v. Greenville Bank*, 66 Miss. 323; *Roberts v. Sims*, 64 Miss. 597; *Westmoreland v. Wooten*, 51 Miss. 825.

Missouri. — *Hulett v. Stockwell*, 27 Mo. App. 328; *Knox v. Hunt*, 18 Mo. 243; *Chamberlain v. Heard*, 22 Mo. App. 417; *Haseltine v. Ausherman*, 87 Mo. 410.

North Carolina. — *Jones v. Jones*, 117 N. Car. 254; *Belcher v. Grimsley*, 88 N. Car. 88; *Slaughter v. Winfrey*, 85 N. Car. 159; *Evans v. Howell*, 84 N. Car. 460; *Durham v. Speeke*, 82 N. Car. 87.

South Carolina. — *Carter v. Du Pre*, 18 S. Car. 179; *Johnstone v. Manigault*, 13 S. Car. 403.

Tennessee. — *Biggs v. Piper*, 86 Tenn. 589; *Dougherty v. Kellum*, 3 Lea (Tenn.) 643; *Phillips v. Maxwell*, 1 Baxt. (Tenn.) 25; *Rutlege v. Walton*, 4 Yerg. (Tenn.) 458; *Ballantine v. Greer*, 6 Yerg. (Tenn.) 267; *Lawrence v. Jenkins*, 7 Yerg. (Tenn.) 494.

Texas. — *Rosenberg v. Shaper*, 51 Tex. 134.

2. Destruction of Landlord's Lien — Liability of Purchaser of Crop. — Under the *Alabama* statute, giving the landlord a statutory lien on the crop of the tenant to secure rent, an action on the case lies in favor of the landlord against the purchaser of the crop with notice of such lien, whereby it is lost and destroyed. *Stoelker v. Wooten*, 80 Ala. 610; *Thompson v. Powell*, 77 Ala. 391.

Superiority of Lien for Rent over Lien for Supplies. — Since, under the *South Carolina* statute (S. Car. Gen. Stat. 1882, § 2399), a lien on the tenant's crop for the payment of rent exists without agreement that there shall be a lien, a wife whose husband was her lessee obtains a lien superior to that given by her husband to another person for supplies furnished him; and she is not estopped from asserting her lien because she joined with her husband in signing the lien for supplies. *Carter v. Du Pre*, 18 S. Car. 179.

Superiority of Landlord's Lien to That of Mortgagee. — The landlord's lien on crops for rent, being in *Arkansas* superior to that of a mortgagee (*Meyer v. Bloom*, 37 Ark. 43), the latter cannot recover the crops when held by the former for payment of rent, until he first tenders the amount of rent due. *Buck v. Lee*, 36 Ark. 525.

Transfer of Rent Note Transfers to the Holder Lien. — Section 4283 of the Code of *Tennessee* provides that "the person entitled to the rent may recover from the purchaser of the crop, or any part of it, the value of the property, so that

the existing statutory law in this regard, the reader is referred to the statutes of the particular state.

it does not exceed the amount of the rent and damages." Hence the purchaser of a note given for rent acquires the landlord's lien, and under the laws of Tennessee may follow the crop into the hands of an innocent purchaser for value. *Biggs v. Piper*, 86 Tenn. 589.

Where Lien of Landlord Is Given on Crops Both of Tenant and Sub-tenant. — At common law no privity of contract existed between the landlord and sub-tenant. The statutory provision (Ala. Rev. Code, §§ 29 61-63), since modified so as to extend the lien to the crops of the sub-tenants (Ala. Code, § 3467), contains no provision by which the landlord can be so compelled to exercise his right of lien as to protect an inferior licence of the sub-tenant. *Robinson v. Lehman*, 72 Ala. 401.

Where Relation of Landlord and Tenant Does Not Exist. — Where a contract for the sale of land provides that it shall be void on the failure of the vendee to make payments thereon for two successive years, and that the vendee shall then pay rent, the vendor is not entitled to a landlord's lien on the crops before the expiration of the two years, since until then the relation of landlord and tenant does not exist. *Killebrew v. Hines*, 104 N. Car. 182.

Where Statute Gives Lien on the Crop, but No Action Against Purchaser. — The Acts of 1872 and 1873, making it penal for a tenant to remove any part of the crop until the lien is discharged, and giving a lien on all products raised to the landlord, do not give the latter a right of action against the purchaser of the produce for value. *Westmoreland v. Wooten*, 51 Miss. 825.

Where Statute Gives Action Against Purchaser. — Under *Iowa* Code, § 2017, giving the landlord a lien on his tenant's crop for rent, the lien will follow the crop into the hands of a purchaser from the tenant. If the crop has been consumed by the purchaser, he is liable to the landlord in damages. *Holden v. Cox*, 60 Iowa 449.

The same rule prevails in *Tennessee*. *Davis v. Wilson*, 86 Tenn. 519.

Levy of Distress Warrant for Rent Not Essential to Enforcement of Lien. — Under the *Illinois* statute the levy of a warrant distraining for rent by the landlord is not the exclusive remedy for the assertion of the lien. Where he takes possession of the harvested crops of his tenant, he has a right to the same as against a purchaser thereof from the tenant, to the amount of the rent due him. *Hunter v. Whitfield*, 89 Ill. 229.

Mode of Procedure to Enforce Lien — Cumulative Remedies. — Section 3023 of *Missouri* Rev. Stat. declares that the landlord shall have a lien upon all crops grown upon the demised premises for the rent that shall accrue during the year, and that such lien shall continue for eight months after the rent shall become due. Another section (3091 Rev. Stat.) authorizes the landlord, when he deems his rent in danger by threatened removal from the premises, to resort to an action of attachment. This latter remedy is merely permissive, and not exclusive. The lien may be enforced by an

action, as any other lien given, at law or in equity. *Hulett v. Stockwell*, 27 Mo. App. 328.

Where Rent Payable in Portion of Crop. — Where the rent is payable in a portion of the crop, instead of money, the landlord of course has a lien upon the whole crop for the payment of the part due. *Secrest v. Stivers*, 35 Iowa 580.

Agreement to Pay as Rent Amount of Taxes Levied on Land Sufficiently Definite. — An agreement of a tenant to pay the landlord as rent the amount of taxes which might be levied on a specified tract of land during the ensuing year is sufficiently certain as to the amount of rent to be paid to secure the landlord the lien given him by the *Mississippi* statute. *Roberts v. Sims*, 64 Miss. 597.

Taking and Failing to Record Mortgage by Landlord Does Not Defeat Statutory Lien. — By taking a mortgage which, from the failure to record it, cannot be enforced, a landlord does not lose his statutory lien upon the crops of his tenant for rent. *Pitkin v. Fletcher*, 47 Iowa 53.

Lien Covers Costs of Legal Proceedings to Enforce It. — The *North Carolina* statute (Act of 1876-77, c. 283), giving the landlord a lien, extends to and includes not only the amount of rent, but the costs of the legal proceedings which may be necessary to enforce the lien. *Slaughter v. Winfrey*, 85 N. Car. 159.

Such Lien Enforceable After Removal of Crop as Against Bona Fide Purchaser. — The *Mississippi* Code, § 1301, gives a landlord a lien on all the agricultural products of the leased premises, and provides that such lien shall be paramount to all other liens, claims, or demands of any kind upon the products. Another section provides that such lien shall be superior to the rights of the mortgagee. The court held that, under these sections, the lien may be enforced after the removal of the agricultural products from the premises, and that it will prevail against a bona fide purchaser for value. *Newman v. Greenville Bank*, 66 Miss. 323.

In *North Carolina* the same rule prevails under Act of 1876-77, c. 283. *Belcher v. Grimsley*, 88 N. Car. 88.

And so it does in *Indiana*, *Kennard v. Harvey*, 80 Ind. 37; in *Tennessee*, *Biggs v. Piper*, 86 Tenn. 589; and in *Iowa*, *Holden v. Cox*, 60 Iowa 449.

Not Good as Against Bona Fide Purchaser. — But in *Georgia*, Code, § 1977, conferring upon landlords a "special lien for rent on crops made on land rented from them, superior to all other liens except liens for taxes," was held not to make such lien good as against a bona fide purchaser for value. *Thornton v. Carver*, 80 Ga. 397.

Lien Exists Though Rent to Be Credited in Payment of Purchase Price. — Where there was an agreement between persons on a contract to convey land, but where there was default in payments under the contract therefor, an agreement by which the vendee was to pay rent for the premises is valid; and though the contract to purchase was not abandoned, the crops, under N. Car. Code, § 1754, are subject to the

b. FOR SUPPLIES FURNISHED TO MAKE CROP. — In some states the landlord is given a lien on the crops of the tenant, not only to secure the payment of rent, but to secure the repayment of any money advanced the tenant by him as necessary to enable the former to make his crops, or to secure him for supplies or implements furnished the tenant by him.¹

c. SUPERIORITY OF LANDLORD'S LIEN. — These liens of the landlord usually have preference over all other liens, whether acquired before or after such lien.²

4. Where Stipulated that Title to Crop Shall Be in Landlord. — It is, it seems, competent for the landlord and tenant to stipulate that the legal title, control, and possession of the crops shall be in the former until the performance of certain covenants by the tenant, or until there has been a division of the crops, and such reservation does not operate merely as a mortgage to secure the landlord, but the crops can neither be sold by the tenant, nor levied on by his creditors.³ This doctrine, however, is denied in several

landlord's lien, but the amount paid for rent must be applied in discharge of the payment due on the contract to convey. *Jones v. Jones*, 117 N. Car. 254.

1. Landlord's Lien for Supplies to Make Crops — *Alabama*. — *Leslie v. Hinson*, 83 Ala. 266; *Gunter v. DuBose*, 77 Ala. 326; *Bell v. Hurst*, 75 Ala. 44; *Cockburn v. Watkins*, 76 Ala. 486; *Thompson v. Powell*, 77 Ala. 391; *Martin v. Blanchett*, 77 Ala. 288; *Brown v. Hamil*, 76 Ala. 506; *Fitzsimmons v. Howard*, 69 Ala. 590. *Arkansas*. — *Tinsley v. Craige*, 54 Ark. 346. *Florida*. — *Cathcart v. Turner*, 18 Fla. 837. *Georgia*. — *Ware v. Blalock*, 72 Ga. 804; *Scott v. Pound*, 61 Ga. 579.

Mississippi. — *Strauss v. Baley*, 58 Miss. 131; *Okolona Sav. Inst. v. Trice*, 60 Miss. 262; *Newman v. Greenville Bank*, 66 Miss. 323; *Lumley v. Gilruth*, 65 Miss. 23.

North Carolina. — *Brewer v. Chappell*, 101 N. Car. 251; *Ledbetter v. Quick*, 90 N. Car. 276.

Tennessee. — *Lewis v. Mahon*, 9 Baxt. (Tenn.) 374; *Dougherty v. Kellum*, 3 Lea (Tenn.) 643.

Texas. — *Rosenberg v. Shaper*, 51 Tex. 134.

Landlord Not Entitled to Lien when Surety for Tenant. — For the landlord to have a lien upon the tenant's crops for supplies, he must furnish the articles, and is not entitled to a lien merely because he becomes the tenant's surety for the price of his supplies to others. If the landlord is the real purchaser for the tenant, he is entitled to a lien, notwithstanding that a joint note may be given by both for the purchase price. What the truth is in its substance is a question for the jury. *Scott v. Pound*, 61 Ga. 579.

2. Priority of Landlord's Lien — *Alabama*. — *Leslie v. Hinson*, 83 Ala. 266; *Wells v. Thompson*, 50 Ala. 84; *Shields v. Atkinson*, 67 Ala. 244; *Lake v. Gaines*, 75 Ala. 143; *Brown v. Hamil*, 76 Ala. 506; *Hamilton v. Maas*, 77 Ala. 283.

Arkansas. — *Tomlinson v. Greenfield*, 31 Ark. 557.

Florida. — *Cathcart v. Turner*, 18 Fla. 837.

Georgia. — *Thornton v. Carver*, 80 Ga. 397; *Colclough v. Mathis*, 79 Ga. 394; *Alston v. Wilson*, 64 Ga. 482; *Smith v. Fouche*, 55 Ga. 120; *Davis v. Meyers*, 41 Ga. 95; *Durdin v. Hill*, 75 Ga. 228, 58 Am. Rep. 467.

Illinois. — *Thompson v. Mead*, 67 Ill. 395.

Louisiana. — *Duplantier v. Wilkins*, 19 La. Ann. 112.

Mississippi. — *Storm v. Green*, 51 Miss. 103; *Arbuckle v. Nelms*, 50 Miss. 557; *Roberts v. Sims*, 64 Miss. 597; *Strauss v. Baley*, 58 Miss. 131; *Paine v. Aberdeen Hotel Co.*, 60 Miss. 360; *Okolona Sav. Inst. v. Trice*, 60 Miss. 262; *Newman v. Greenville Bank*, 66 Miss. 323.

North Carolina. — *Brewer v. Chappell*, 101 N. Car. 251; *Ledbetter v. Quick*, 90 N. Car. 276; *Branch v. Galloway*, 105 N. Car. 193; *Montague v. Mial*, 89 N. Car. 137.

South Carolina. — *Kennedy v. Reames*, 15 S. Car. 548.

Tennessee. — *Davis v. Wilson*, 86 Tenn. 519; *Phillips v. Maxwell*, 1 Baxt. (Tenn.) 25; *Hill v. George*, 1 Head (Tenn.) 394.

Texas. — *Mathews v. Burke*, 32 Tex. 419; *Jones v. Avant*, 41 Tex. 650; *Rosenberg v. Shaper*, 51 Tex. 134.

3. Stipulation that Title to Crop in Landlord — *Massachusetts*. — *Lewis v. Lyman*, 22 Pick. (Mass.) 437.

Missouri. — *Edelen v. Strong*, 34 Mo. App. 287.

Nebraska. — *Sanford v. Modine*, (Neb. 1897) 71 N. W. Rep. 740, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 895, note.

New Hampshire. — *Moulton v. Robinson*, 27 N. H. 550.

Oregon. — *Fox v. McKinney*, 9 Oregon 493.

South Dakota. — *Consolidated Land, etc., Co. v. Hawley*, 7 S. Dak. 229, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 895, note.

Vermont. — *Smith v. Atkins*, 18 Vt. 461; *Bellows v. Wells*, 36 Vt. 599; *Esdon v. Colburn*, 28 Vt. 631, 67 Am. Dec. 730; *Pelton v. Draper*, 61 Vt. 364; *Gray v. Stevens*, 28 Vt. 1, 65 Am. Dec. 216.

Reservation of Title to Crop Does Not Operate as Mortgage. — A lease contained the following stipulation: "And the said party of the second part, in consideration of the said lease, binds himself to pay unto the party of the first part, the sum of \$700, in U. S. gold coin, on or before the first day of October, 1880, and for security of said rental of \$700 the party of the second part binds himself, his executors or administrators, to store the entire crop of wheat, oats, or other cereals, in the warehouse at Turner or Salem, in the name of the party of

jurisdictions.¹

VI. CROPPER. — The Term "Cropper" is applied to a person hired by the landowner to cultivate the land, receiving for his compensation a portion of the crops raised.²

Title to Land and to Crop. — The legal possession to the land, as well as the title to the entire crop, is in the owner of the soil. The possession of the cropper being merely that of a servant, and incident to his right and duty of entering the close for the purpose of planting, cultivating, and gathering the crop, it is not the legal possession of premises which usually gives the pos-

the first part, it to be and remain his sole property until the said \$700 has been paid." The court held that such stipulation did not make the instrument a chattel mortgage, for it was competent for the landlord to reserve the title to the crops to be grown on the land. *Fox v. McKinney*, 9 Oregon 493.

Where the lessee conveyed to his lessor, by an instrument executed with all the solemnities and formalities of the lease itself, all the crops to be grown on the land during the term to be held by him as his property until rent should be paid, it was held that the parties were placed in just the same condition as though the lease had contained a reservation of the crops. *Bellows v. Wells*, 36 Vt. 599.

Passage of Title After Performance of Condition. — One of the articles of a contract leasing land for farm purposes provided that the title to the crops raised by B, the farmer, should remain in A, the landowner, until B had performed the covenants in another article. The latter article contained an agreement by A to deliver a portion of the crop to B, "upon the full performance by [him] of all the stipulations and covenants in this article above specified." The court held that the covenants in the two articles were independent of others, which were broken, and that A, having complied with them, was entitled to his portion of the crop. *Wallace v. Maples*, 72 Cal. 356.

In *California*, however, an attempted reservation of title to crops by the landlord to secure the performance of covenants or of rent agreed to be paid, operates only as a lien. See the case of *Stockton Sav., etc., Soc. v. Purvis*, 112 Cal. 236, decided subsequently to the case above cited.

1. In *North Carolina* the court held that a reservation of crops by the landlord in a lease was ineffectual to divest the tenant of title to the crops when they came into existence. In *Ross v. Swaringer*, 9 Ired. L. (31 N. Car.) 481, the court said: "The contract on the part of the intestate, as to the payment of the rent, was executory from the very nature of rent. For, in speaking of rents, Lord Coke says: 'The lessor cannot reserve parcel of the annual profits, as the vesture or herbage of the land, or the like; for that would be repugnant to the grant. Co. Litt. 142.' It would be an exception of a part of the thing already granted and inconsistent with the grant. Therefore, such contracts as the present are necessarily construed, neither as exceptions or reservations, but as covenants or agreements of the lessee to give, as rent, as many bushels of corn as the half of the crop may amount to, or deliver, as rent, the one-half of the corn that may be made on the land."

In *California* such a reservation operates merely as a mortgage. Hence, under a contract of rental, embracing an agreement that crops to be raised on the premises should be owned by the landlord and stored in his name and sold by him, the proceeds to be applied first to the payment of rent, and the surplus to be paid to the tenant, it was held that the landlord at most acquired a lien on the crops for rent, and not title thereto as against creditors of the lessee. *Stockton Sav., etc., Soc., v. Purvis*, 112 Cal. 236, *disapproving Smith v. Atkins*, 18 Vt. 461; *Esdon v. Colburn*, 28 Vt. 631, 67 Am. Dec. 730, and *Andrew v. Newcomb*, 32 N. Y. 417; and *limiting and explaining Howell v. Foster*, 65 Cal. 169, and *Wentworth v. Miller*, 53 Cal. 9.

In *Maine*, where a farm was leased with an agreement that the title to hay should remain in the lessor as security until the rent should be paid, but where no actual delivery of it was made, the hay was held liable to the levy of execution by the judgment creditors of the tenant. *Bailey v. Fillebrown*, 9 Me. 12, 23 Am. Dec. 529.

Measure of Damages for Breach of Contract. — Where a landowner agrees with another that the latter shall cultivate the land of the former, the landowner supplying all seeds, labor, machinery, etc., the title to the crops to remain in the landowner, and that the cultivator shall receive one-fourth of the crops produced, and the landowner three-fourths, the agreement is in the nature of an adventure, and the measure of the damages to which the cultivator is entitled upon a breach of the agreement upon the part of the landowner, is not the value of his services in sowing and harvesting the crop, but the value of his share thereof. *Bowers v. Graves*, 8 S. Dak. 385, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 897, 899.

2. A Cropper is one hired to work land, and to be compensated by a share of the produce. Such a contract gives him no legal possession of the premises further than as a hireling. *Steel v. Frick*, 56 Pa. St. 172, *per* Thompson, J. See also *Adams v. McKesson*, 53 Pa. St. 81, 91 Am. Dec. 183; *McCormick v. Skiles*, 163 Pa. St. 590, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 887, 889.

If one hires a man to work his farm, and gives him a share of the produce, he is a cropper. He has no interest in the land, but receives his share as the price of his labor. *Rogers, J., in Fry v. Jones*, 2 Rawle (Pa.) 12.

When Landlord and Cropper Tenants in Common of Crops. — A contract "for working a farm on shares" occasionally is of such nature that the landlord and the cropper are tenants in common of the crop until there has been a division

essor the title to the produce. He has no property in his share of the crop until the division, which is made by the owner of the soil.¹

VII. TENANTS IN COMMON OF CROP.—The ordinary relation of "landlord and tenant," by which the tenant has title to the entire crop until division, frequently at the ultimate expense of the landlord, and the ordinary relation of "cropper and landowner," by which the former may suffer by the latter's disposition of the crop before a delivery to him of his portion, has popularized what is known as the "cultivation of crops upon shares." Under such an agreement the landowner, who is to have a specific portion of the crop raised, and the cultivator are tenants in common of the crop until a division, and each is effectually protected from the bad faith of the other.²

of the specific product. The agreement under which a tenancy in common of the crop is created is often such that, except for the stipulation as to the joint tenancy of the crop, the cultivator would be a "cropper," as defined in the text. See *infra*, this title, *Tenants in Common of Crop*.

1. Possession of Land and Crop as Between Landowner and Cropper—*Arizona*.—Romero *v.* Dalton, (Arizona 1886) 11 Pac. Rep. 863; Gray *v.* Robinson, (Arizona 1893) 33 Pac. Rep. 712.

Arkansas.—Christian *v.* Crocker, 25 Ark. 327, 99 Am. Dec. 223; Hammock *v.* Creekmere, 48 Ark. 264; Ponder *v.* Rhea, 32 Ark. 436; Sentell *v.* Moore, 34 Ark. 687.

Georgia.—Bryant *v.* Pugh, 86 Ga. 525; Appling *v.* Odom, 46 Ga. 583.

Illinois.—Chase *v.* McDonnell, 24 Ill. 236.

Minnesota.—Porter *v.* Chandler, 27 Minn. 301, 38 Am. Rep. 293.

New York.—Andrew *v.* Newcomb, 32 N. Y. 417.

North Carolina.—Ross *v.* Swaringer, 9 Ired. L. (31 N. Car.) 481; Haywood *v.* Rogers, 73 N. Car. 320; Neal *v.* Bellamy, 73 N. Car. 384; Denton *v.* Strickland, 3 Jones L. (48 N. Car.) 61; Hare *v.* Pearson, 4 Ired. L. (26 N. Car.) 76; Brazier *v.* Ansley, 11 Ired. L. (33 N. Car.) 12, 2 Am. Dec. 408; State *v.* Burwell, 63 N. Car. 661.

Pennsylvania.—Adams *v.* McKesson, 53 Pa. St. 81, 91 Am. Dec. 183; McCormick *v.* Skiles, 163 Pa. St. 590, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 887, 889.

South Carolina.—Rogers *v.* Collier, 2 Bailey L. (S. Car.) 581, 23 Am. Dec. 153; Carpenter *v.* Strickland, 20 S. Car. 1; Richey *v.* Du Pre, 20 S. Car. 6; McCutchen *v.* Crenshaw, 40 S. Car. 511, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 887, 902.

Texas.—Tignor *v.* Toney, (Tex. Civ. App. 1896) 35 S. W. Rep. 881, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 899, 900.

Vermont.—Warner *v.* Hoisington, 42 Vt. 94.

Construction of Contract.—A contract requiring laborers to take in charge, plant, cultivate, and manure the several parcels of land designated by the landowner, according to the directions of the landowner and his agent, to house the crops, and see that no portion was removed until the owner had deducted for himself the amounts stated, to be of good moral behavior, and to be respectful to the proprietor, his family, and agent, does not create the relation of landlord and tenants, but of employer and laborers, and the laborers have no such interest in the soil or crops as will support a lien to a merchant for advances.

McCutchen *v.* Crenshaw, 40 S. Car. 511, *citing* 4 AM. AND ENG. ENCYC. OF LAW 887, 902.

Difference Between Tenant and Cropper.—A definition, both concise and comprehensive, by which a tenant may be distinguished from a "cropper," was laid down by Rodman, J., in *Harrison v. Ricks*, 71 N. Car. 7. It is there said: "The difference between a tenant and a cropper is clear. A tenant has an estate in the land for the term, and consequently he has a right of property in the crops. If he pays a share of the crop for rent, it is he that divides off to the landlord his share, and until such division the right of property and of possession in the whole is his. * * * A cropper has no estate in the land; that remains in the landlord. Consequently, although he has, in some sense, the possession of the crop, it is only the possession of a servant, and is in law that of the landlord. The landlord must divide off to the cropper his share. In short, he is a laborer receiving pay in a share of the crop."

2. Agreement by Which Parties Tenants in Common of Crops—*Alabama*.—Williams *v.* Nolen, 34 Ala. 167; Thompson *v.* Mawhinney, 17 Ala. 362, 52 Am. Dec. 176; Strother *v.* Butler, 17 Ala. 733; Smyth *v.* Tankersley, 20 Ala. 212, 56 Am. Dec. 193; Brown *v.* Coats, 56 Ala. 439; Smith *v.* Rice, 56 Ala. 417.

Arkansas.—Ponder *v.* Rhea, 32 Ark. 435.

Maryland.—Ferrall *v.* Kent, 4 Gill (Md.) 209.

Massachusetts.—Walker *v.* Fitts, 24 Pick. (Mass.) 191.

Michigan.—Fiquet *v.* Allison, 12 Mich. 328, 86 Am. Dec. 54.

Mississippi.—Betts *v.* Ratliff, 50 Miss. 561.

New Hampshire.—Daniels *v.* Brown, 34 N. H. 454, 69 Am. Dec. 505.

New Jersey.—Guest *v.* Opdyke, 31 N. J. L. 552; Edgar *v.* Jewell, 34 N. J. L. 259.

New York.—Oakley *v.* Schoonmaker, 15 Wend. (N. Y.) 228; Bradish *v.* Schenck, 8 Johns. (N. Y.) 151; Otis *v.* Thompson, Hill & D. Supp. (N. Y.) 131; Foote *v.* Colvin, 3 Johns. (N. Y.) 216, 3 Am. Dec. 478; Harrower *v.* Heath, 19 Barb. (N. Y.) 331; Dinehart *v.* Wilson, 15 Barb. (N. Y.) 595.

Oregon.—Cooper *v.* McGrew, 8 Oregon 327.

South Dakota.—Consolidated Land, etc., Co. *v.* Hawley, 7 S. Dak. 229, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 895, note.

Texas.—Tignor *v.* Toney, (Tex. Civ. App. 1896) 35 S. W. Rep. 881, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 896, 897.

Unity of Possession Necessary to Create Tenants in Common of Crops.—It was held in *Thompson v. Mawhinney*, 17 Ala. 362, 52 Am. Dec. 176, that one of the essential attributes of a tenancy

May Maintain Trespass Jointly Against Third Person. — The possession of crops by the landowner and cultivator being joint, they may maintain a joint action of trespass against a third person who cuts and carries away the crop.¹

VIII. PARTNERSHIP BETWEEN CULTIVATORS. — Where an agreement is made between two or more persons to plant land for the purpose of gain, the profits to be divided among them in an agreed proportion, a partnership exists between them.² It is manifestly immaterial whether the land on which the

in common of crops is that there shall be a unity of possession between the tenants. By unity of possession, however, is meant the right of the landowner to such possession, rather than actual assumption of it by him.

See other cases cited in this note, in nearly all of which the cultivator actually had possession.

Construction of Contract as to Relation Created. — Where the landowner lets a portion of his lands, and the cultivator a part of his labor, and where there is no evidence as to what was the intention of the parties as to whether the relation of landlord and tenant should exist between them, the court will not presume that such was the intention. Under such circumstances the parties are tenants in common of the crop. *Ponder v. Rhea*, 32 Ark. 435.

Contracts Creating Tenancy in Common of Crop. — A contract between the landowner and another for the cultivation of the land, by which it is agreed that each shall furnish a certain amount of stock, and that the crop shall be divided between them, creates a tenancy in common in the crop, but not the relation of landlord and tenant between the parties. *Brown v. Coats*, 56 Ala. 439.

Where A planted wheat on shares on B's land, and was to have possession of the land and do certain other farm duties upon shares of other products, and where it did not appear that it had been agreed that A's rights to a portion of the wheat should be forfeited by reason of his non-fulfilment of other duties, and where no evidence of damages from any such non-fulfilment was introduced, the court held that A was a tenant in common of the crop with B. *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54.

Right of Landlord to Distrain for Rent. — Where the lessee of land agrees with another to work the land on shares, the latter becomes a tenant in common of the lessee of the crop raised. The landlord may, however, distrain the entire crop for rent, irrespective of the lessee's contract creating a joint tenancy of the crop between him and the cultivator. *Guest v. Opdyke*, 31 N. J. L. 552.

When Tenant in Common of Crops Becomes Trespasser. — Since under such contract the landlord and cultivator are tenants in common of the crops raised, trespass does not lie against the latter by the former when he enters and carries away the crops of which they are cotenants. If, however, the right to enter the premises is abused by a resort to violence to effect the object, the cultivator is a trespasser *ab initio*, and liable not only for the entry, but for the share of the landowner's crop carried away. *Daniels v. Brown*, 34 N. H. 454, 69 Am. Dec. 505.

Where Relation Created by Novation. — Where A, the landowner, contracted with B and C to farm his land for a year, and where, after the

crops were planted, C and one D applied to A for his consent that D should buy C's interest, and take his place under the contract to work the land, and where A consented to such substitution and thereafter ratified it, it was held that this was a novation binding on all parties, and that its effect was to release C from any liability to A; that since, by the original agreement, A, B, and C became tenants in common of the crops, after substitution a new tenancy in common of the crops was created between A, B, and D, which lasted to the end of the term. *Harrower v. Heath*, 19 Barb. (N. Y.) 331.

When Landowner Acquiesces in Conversion of Crop — Non-liability of Cotenant. — Under a contract for the working of a farm on shares, the plaintiff, the owner of the farm, was to have one-half of the grain raised after it was threshed and divided, and the defendant was to have the use of the plaintiff's barn to put the grain in. After it had been gathered and placed in the barn, but before being threshed, a part of it was levied on under attachment against the plaintiff and carried by the officer away from the barn. After judgment against him the plaintiff paid the debt, but the grain was not returned to the barn by the officer. It was held in an action by the plaintiff against the defendant for his not delivering half of the grain, that, as the plaintiff had not restored the grain to the barn so that it might be threshed, and had not commenced a joint action against the officer in the name of himself and the defendant, he had virtually given notice to the defendant that he looked to the officer for his portion taken, and would not call upon the defendant to furnish it, hence the action could not be sustained. *Walker v. Fiitts*, 24 Pick. (Mass.) 101.

1. Joint Action by Cotenants of Crop for Conversion or Injury to the Same. — *Foote v. Colvin*, 3 Johns. (N. Y.) 216, 3 Am. Dec. 478. See also cases cited in the preceding note, in many of which a joint action was said to be the proper one, though in none of them was the question directly involved.

One Tenant in Common Cannot Sue the Other for Conversion. — One who is cultivating the land of another under a contract by which the parties are tenants in common of the crop, cannot maintain an action against the landowner for the conversion of the crop, without showing that the crops have been destroyed, or something done equivalent to their destruction. *Tignor v. Toney*, (Tex. Civ. App. 1896) 35 S. W. Rep. 88r.

2. Partnership. — Identically the same general rules, of course, prevail for ascertaining whether under the facts of the particular case a partnership exists between the parties under an agreement by which land is to be cultivated for profit, as do in other cases. See the title **PARTNERSHIP**.

farming operations are to be conducted is owned jointly by all of the parties or solely by one, or whether by none and simply held under a lease; so, too, is the proportionate division of the profits, or the proportionate contribution of capital or labor to the joint venture, immaterial.

Criterion of Existence of Partnership. — The criterion by which it may be ascertained whether a partnership exists under the agreement is whether each interest is to bear a proportionate share of the losses and each to receive a proportionate share of the gains. If so, the parties to the agreement are partners, instead of landowner and cropper, or merely cotenants of the crop. As established by these tests, agreements under which partnerships existed will be found in the notes;¹ as well as cases in which one or more of these essential elements were lacking, and consequently no partnership existed.²

IX. STATUTORY LIENS — 1. Agricultural Liens. — Persons making advances to one engaged in farming operations have by statute in some states a lien upon crops which may be grown during the succeeding year, provided an agreement to that effect is made in writing, and, in most states, recorded.³

1. Where the Essential Elements of Partnership Exist. — *McCrary v. Slaughter*, 58 Ala. 230; *Autrey v. Frieze*, 59 Ala. 587; *Holifield v. White*, 52 Ga. 567; *Reynolds v. Pool*, 84 N. Car. 37, 37 Am. Rep. 607; *Curtis v. Cash*, 84 N. Car. 41; *Lewis v. Wilkins*, Phil. Eq. (62 N. Car.) 303.

Where two persons enter into an agreement by which one is to furnish land and stock, and the other his personal skill, the expense of planting operations to be borne ratably between them, and the crop to be thereafter divided, the parties to such an agreement are partners, and not merely tenants in common. *Autrey v. Frieze*, 59 Ala. 587; *Holifield v. White*, 52 Ga. 567.

And where one is to furnish all the money and to be repaid out of the profits to be divided, they are partners. *Reynolds v. Pool*, 84 N. Car. 37, 37 Am. Rep. 607.

Exclusive Ownership of Property Does Not Change Relation. — A joint undertaking and community of profit and loss, in the results of the business, constitute a partnership, although each partner retains the exclusive ownership of the separate property contributed by him to the use of the partnership. *McCrary v. Slaughter*, 58 Ala. 230.

Where Partnership Presumed. — Where two men, living on the same place, farm together under an agreement by which one furnishes the land and stock, and feed for the latter, and the other the laborers to superintend the work, the crop to be divided between them, and nothing more appears, as to third persons, they are partners. *Adams v. Carter*, 53 Ga. 160.

2. Where the Essential Elements of Partnership Do Not Exist. — *Christian v. Crocker*, 25 Ark. 327, 99 Am. Dec. 223; *Donnell v. Harshe*, 67 Mo. 170; *Johnson v. Hoffman*, 53 Mo. 504.

Facts under Which Relations Are Either Landowner and Cropper or Cotenants of Crop, and Not Partners. — Where a person contracts with another, agreeing that the latter may have for his services a certain portion of the crops, the cultivator is not thereby made a partner. In such case though his share of the profit is undivided at the time, it is capable of being reduced to a certainty and is in the nature of

wages. *Christian v. Crocker*, 25 Ark. 327, 99 Am. Dec. 223; *Donnell v. Harshe*, 67 Mo. 170.

In the case last cited, which was reversed because the lower court had held that such an agreement constituted the parties partners, the court said: "A definition of partnership, broad enough to embrace all cases and narrow enough to exclude such as ought to be excluded, has been found a very difficult and embarrassing task to those writers who have published books on the subject. The courts have been embarrassed also in nice refinements about partnerships *per se*, and partnerships which are only as to creditors. Indeed, Judge Story, after a prolonged examination of these distinctions, seems to conclude that the intention of the parties ought to be the controlling circumstance to determine their relations, and, therefore, where the profits and losses are to be shared by the parties in fixed proportions, and, to use his language, 'each is intended to be clothed with the powers and rights and duties and responsibilities of a principal, either as to the capital stock or the profits, or both, there may be a just ground to assert, in the absence of all controlling stipulations and circumstances, that they entered a partnership.' This, it will be perceived, is quite indefinite. It is essential to a partnership that there be a community of interest in the subject of it, and this community of interest must not be that of mere joint tenants or tenants in common. When the effect of the agreement is, as propounded in the instruction, that one should occupy and cultivate the farm, and the crops should be divided equally between the occupant and the owner, no partnership is necessarily intended or created."

3. Agricultural Lien — In Favor of Persons Making Advances for Future Crops — Alabama. — *Stern v. Simpson*, 62 Ala. 194; *Watson v. Auerbach*, 57 Ala. 353; *Abraham v. Carter*, 53 Ala. 8; *Beard v. Woodard*, 78 Ala. 317; *Collier v. Faulk*, 69 Ala. 58; *Flexner v. Dickerson*, 65 Ala. 129; *Griel v. Lehman*, 59 Ala. 419; *Grady v. Hall*, 59 Ala. 341; *Schuessler v. Gains*, 68 Ala. 556.

Arkansas. — *Airey v. Weinstein*, 54 Ark. 443.
Georgia. — *Speer v. Hart*, 45 Ga. 113.

Advances of Money. — It has been held that where money is furnished, even though used to make the crop, its repayment is not secured by the agricultural lien.¹ An examination of the various statutes, however, will show that, gener-

Illinois. — *Brown v. Thomas*, 14 Ill. App. 428.

Louisiana. — *Benton v. Mahan*, 30 La. Ann. 1401; *Gay v. Daigre*, 30 La. Ann. 1007; *Bank of America v. Fortier*, 27 La. Ann. 243; *Flower v. Skipwith*, 45 La. Ann. 895; *Payne v. Spiller*, 23 La. Ann. 248; *White v. Bird*, 23 La. Ann. 270; *Waddell's Succession*, 44 La. Ann. 361; *Laloire v. Wiltz*, 31 La. Ann. 436.

Minnesota. — *Smith v. Roberts*, 43 Minn. 342; *Kelly v. Seely*, 27 Minn. 385; *Nash v. Brewster*, 39 Minn. 530; *Warder-Bushnell, etc., Co. v. Minnesota, etc., Elevator Co.*, 44 Minn. 390.

Mississippi. — *Howard v. Simmons*, 43 Miss. 75; *Stewart v. Hollins*, 47 Miss. 708; *Herman v. Perkins*, 52 Miss. 813.

North Carolina. — *Gay v. Nash*, 84 N. Car. 333; *Reese v. Cole*, 93 N. Car. 87; *Knight v. Rountree*, 99 N. Car. 389; *Wooten v. Hill*, 98 N. Car. 48; *Patapsco Guano Co. v. Magee*, 86 N. Car. 350; *Gwathney v. Etheridge*, 99 N. Car. 571; *Rawlings v. Hunt*, 90 N. Car. 270.

North Dakota. — *Joslyn v. Smith*, 2 N. Dak. 53.

South Carolina. — *Whilen v. Pearce*, 27 S. Car. 44; *Warren v. Lawton*, 14 S. Car. 476; *Cureton v. Gilmore*, 3 S. Car. 46; *Sease v. Dobson*, 34 S. Car. 345.

Supplies Must Be Furnished After or At Time of Execution of Agreement. — In *Knight v. Rountree*, 99 N. Car. 389, it was held that the validity of an agricultural lien for supplies advanced is dependent upon the time of the agreement by which the lien is fixed; the agreement must be prior to or contemporaneous with the furnishing of advances, otherwise the lien is invalid as to third parties.

Contra. — In *Stallings v. Harrold*, 60 Ga. 478, the court held that the lien, though not created when the supplies were furnished, which was in the spring, nor until the middle of the succeeding November, was, notwithstanding, operative as a lien upon the crops of that year, and took precedence of a general judgment rendered in March.

Lien Cannot Be Created by Parol. — Under the *Arkansas* statute, a lien given a person furnishing supplies to the planter cannot be enforced unless in writing, or unless accompanied by a transfer of actual possession. *Alexander v. Pardue*, 30 Ark. 359.

Lien for Advances Limited to Current Crop. — A debt secured by a lien on a crop for advances must be paid from the proceeds of the crop on which the advances were made. The lien does not extend to the proceeds of crops of subsequent years. *Waddell's Succession*, 44 La. Ann. 361.

Advances Not Needed in Making Crop Not Secured by Lien. — To constitute a valid crop lien, the advances made must be to aid in making the crops to which the lien attaches, and used for that purpose. Advances which are for other uses will not be allowed as a lien on the crops. *Marcus v. Robinson*, 76 Ala. 550; *Watson v. Auerbach*, 57 Ala. 353; *Saulsbury v. Eason*, 47

Ga. 617; *Spear v. Hart*, 45 Ga. 113; *Hewitt v. Williams*, 47 La. Ann. 742; *Wood v. Calloway*, 21 La. Ann. 471; *Woodlief v. Harris*, 95 N. Car. 211.

Only Includes Such Advances as Mentioned in the Statute. — The *Alabama* statute giving a lien for advances to make crops, which displaces all other liens, though of prior date, except that of the landlord, is to be strictly construed, and the note or obligation is required to conform to the requirements of the statute. The lien can only be created as security for a debt having for its consideration an advance of one or more of the articles mentioned in the statute. However essential other things may be to make a crop, the statutory lien cannot be extended to include them, and the advances must be made at the time of the execution of the instrument. Contemplated future advances are not embraced. *Evans v. English*, 61 Ala. 416; *Tison v. People's Sav., etc., Assoc.*, 57 Ala. 323; *Schuessler v. Gains*, 68 Ala. 556; *Boyett v. Potter*, 80 Ala. 476; *Comer v. Daniel*, 69 Ala. 434.

Strict Construction of Statutory Lien. — Under the *Alabama* Code, § 3286, giving a lien for advances to make crops priority over all other liens except that of the landlord, the obligation creating the lien must conform to the statute, and cannot extend the lien to property not specially mentioned in the statute, however necessary such property may be to make the crop. *Boyett v. Potter*, 80 Ala. 476.

Where Mortgage Not Within Terms of Statute. — Under a mortgage on a crop for supplies where it does not appear how, or on what account, or for what purpose the supplies were furnished, the mortgagee acquires no preference over a prior mortgage under *North Carolina* Code, § 1799, which provides a preference for advances "for supplies." *Brown v. Miller*, 108 N. Car. 395.

Crops Subject to the Lien May Be Transferred. — The statutory lien on a crop for advances is a mere charge or incumbrance, the right of property or possession not being changed, but remaining in the party raising the crop; he may transfer it, the transfer being subject and subordinate to the lien. *Stern v. Simpson*, 62 Ala. 104.

What the Agreement Creating Lien Must Show. — For the validity of a statutory lien on crops for advances the instrument creating the lien must designate specifically of what the advances consist, as well as the lands on which the crops are to be grown; otherwise the agreement is void for uncertainty. *Beard v. Woodard*, 78 Ala. 317; *Schuessler v. Gains*, 68 Ala. 556; *Gwathney v. Etheridge*, 99 N. Car. 571; *Lavin v. Bradley*, 1 N. Dak. 291.

A Mere Cropper has no such interest in the soil or crops as will support a lien to a merchant for advances. *McCutchen v. Crenshaw*, 40 S. Car. 511.

1. Money Advanced. — *McLester v. Somerville*, 54 Ala. 670; *Saulsbury v. Eason*, 47 Ga. 617; *Wood v. Calloway*, 21 La. Ann. 471.

ally, they are sufficiently broad to cover an advance of money which is devoted to making the crop.¹

2. Lien of Farm Laborers. — In some of the states a laborer, employed by the owner of the farm to assist him in the cultivation of crops, or to cultivate the crops for him, has a lien on the crops for the amount due him for such labor.²

3. Priority of Liens. — Generally the statute gives such liens a priority to all other liens, except that of the landlord, then existing or thereafter attaching.³

X. HUSBAND AND WIFE — 1. Crops Grown on Land Owned by Wife. — Crops cultivated by the husband on land owned by the wife are the property of the wife, and are not subject to the levy of an execution as the property of the husband; ⁴ and if the land be held by entirety by the husband and wife, the crops raised thereon by them are held in the same manner, and are not subject to levy and sale under an execution against the husband.⁵

2. Crops Grown on Land Owned by Husband. — Crops raised on land of the husband, by the agency or solely through the financial efforts of the wife, are notwithstanding the property of the husband, and subject to execution as such.⁶

XI. RELATION OF TRESPASSER TO CROPS SOWN BY HIM. — Where a crop is sown by a trespasser, it, of course, before maturity or severance, belongs to

1. See the various state statutes.

2. **Laborer's Lien** — *Alabama*. — *Wilson v. Taylor*, 89 Ala. 368; *Johnston v. Hannah*, 66 Ala. 127.

Arkansas. — *Emerson v. Hedrick*, 42 Ark. 263; *Burgie v. Davis*, 34 Ark. 179.

Louisiana. — *Saloy v. Dragon*, 37 La. Ann. 71; *Lalanne v. Goodbee*, 25 La. Ann. 481; *Bouligny v. Lacour*, 24 La. Ann. 76.

Mississippi. — *Buck v. Payne*, 52 Miss. 271; *Lumley v. Thomas*, 65 Miss. 97; *Hester v. Allen*, 52 Miss. 162.

Agreement Between Lessor and Lessee Does Not Create Laborer's Lien. — In a state where there is no statutory laborer's lien, a provision in a lease reserving to the lessor the title to the crop until the payment of all laborer's claims and liens, does not create a lien in favor of a farm laborer who was not a party to the lease, for work done by him. *Lawrence v. Phy*, 27 Oregon 506.

Construction of Mississippi Statute. — Sec. 2682, Code of 1892, provides that every employee "or other person" who may aid by his labor to make, gather, or "prepare" any crop for market, shall have a lien thereon for his wages, paramount to all other liens except that of the landlord. Under this section a ginner, who gins cotton for market, has a lien on the cotton ginned for his labor, as against the mortgagee of the cotton. *Irwin v. Miller*, 72 Miss. 174.

Construction of Washington Statute. — Under chapter 75, Laws of 1891, providing a lien for farm laborers, no lien can be obtained for work performed by a team, but one can be maintained for the labor of a person and a team, if there is no separate specification of contract price for each. *Essency v. Essency*, 10 Wash. 375.

Overseer of Farm Embraced by Mississippi Statute. — A *Mississippi* statute giving to "every employee, laborer, cropper, part-owner, or other person, who may aid by his labor to make, gather, or prepare for sale" any crop, a lien for his wages, or interest therein, includes an "overseer" on the farm on which the crop

was raised. *Weise v. Rutland*, 71 Miss. 933.

Where Person Is Not Laborer on Farm. — An employee on one farm, who for a few days supervises laborers sent therefrom to another farm of his employer, is not within the meaning of the *Mississippi* statute a laborer or employee on the latter place, and hence would not be entitled to a lien on crops grown thereon. *Terry v. Groves*, 71 Miss. 539.

3. Priority of Lien — *Alabama*. — *Stern v. Simpson*, 62 Ala. 194; *Hamilton v. Maas*, 77 Ala. 283; *Evans v. English*, 61 Ala. 416.

Georgia. — *Stallings v. Harrold*, 60 Ga. 478.

Mississippi. — *Herman v. Perkins*, 52 Miss. 813; *Leak v. Cook*, 52 Miss. 799.

North Carolina. — *Wooten v. Hill*, 98 N. Car. 48; *Dail v. Freeman*, 92 N. Car. 351; *Carr v. Dail*, 114 N. Car. 284; *Killebrew v. Hines*, 104 N. Car. 182.

South Carolina. — *Visanska v. Bradley*, 4 S. Car. 288.

4. Crops Grown on Wife's Land Are Wife's Property. — *Knapp v. Smith*, 27 N. Y. 277; *Rush v. Vought*, 55 Pa. St. 437, 93 Am. Dec. 769; *Feller v. Alden*, 23 Wis. 301, 99 Am. Dec. 173; *Dayton v. Walsh*, 47 Wis. 113, 32 Am. Rep. 757.

Contra. — But see *Moreland v. Myall*, 14 Bush (Ky.) 474, where it was held that crops raised on the land of the wife were personal property, and not a part of the realty; that under the common-law rule all personal property belonging to the wife at the time of her marriage, or thereafter acquired by her, vested in her husband; that crops raised on her land were his property and subject to execution as such. Under the rule here laid down, the crops would be subject to execution against the husband, though the land was a part of the wife's statutory separate estate, and though the husband had no part in the cultivation of the crops.

5. *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254.

6. *Hamilton v. Booth*, 55 Miss. 60, 30 Am. Rep. 500.

the owner of the land on which it is sown;¹ but if it is not only sown, but cultivated and severed, it becomes the personal property of the trespasser, even as against the owner of the land.² If, however, the growth severed is such as comes by the act of God — as trees and grass — rather than such as owes its existence solely to the industry of the trespasser,³ the latter acquires no title to it by severance.⁴

XII. MEASURE OF DAMAGES FOR INJURY TO CROPS — 1. Total Destruction. —

The measure of damages for the total destruction of a growing or standing crop is the money value of the crop in the condition it was at the time and at the place of destruction.⁵

1. Crops Sown by Trespasser — No Title until Severance. — *Crotty v. Collins*, 13 Ill. 567; *Lindsay v. Winona, etc.*, R. Co., 29 Minn. 411, 43 Am. Rep. 228.

To sustain this self-evident proposition, it is deemed useless to re-cite authorities. See *supra*, this title, *Growing Crops — For What Purposes Part of Realty*.

Where the Planter of Crops Regarded as Trespasser. — After an agreement to lease has been made, but where the landowner notified the prospective lessee that he could not take possession until the execution of the lease, which is made dependent upon his giving security for rent, and the latter takes possession in defiance of the notice, and cultivates a part of the premises at the same time with the owner, he becomes a trespasser; and if the owner harvests and retains a portion of the crop planted by him he cannot recover the value thereof. *Crotty v. Collins*, 13 Ill. 567.

2. Fructus Industriales — Title in Trespasser after Severance. — *Lindsay v. Winona, etc.*, R. Co., 29 Minn. 411, 43 Am. Rep. 228; *Adams v. Leip*, 71 Mo. 597; *Jenkins v. McCoy*, 50 Mo. 348; *McAllister v. Lawler*, 32 Mo. App. 91. See also *Morgner v. Biggs*, 46 Mo. 65.

Severance After Judgment in Ejectment. — But if the crop be severed after judgment in ejectment and ouster under execution, the severer cannot acquire title to it. In such case the owner of the land may maintain an action of replevin for it. *Oyster v. Oyster*, 32 Mo. App. 270.

3. Fructus Industriales — Fructus Naturales. — See *supra*, this title, *What Crops Are Fructus Industriales*.

4. Trespasser Does Not Acquire Title to Fructus Naturales by Severance. — A trespasser cut grass growing on the land of a railroad company, and also planted, cultivated, and gathered a crop of wheat thereon, both of which he removed to his adjoining land. The servants of the railroad company negligently set fire to dry grass on the land of the latter, which spread over and reached the land of the plaintiff, destroying the grass and wheat stored by him. The court held that the railroad company was liable for the destruction of the wheat, but not of the grass, as its severance and removal did not divest the defendant of the ownership of it. *Lindsay v. Winona, etc.*, R. Co., 29 Minn. 411, 43 Am. Rep. 228. In making this distinction, which is one of importance, the court said: "It seems to us more consistent with principle and justice, even where the controversy is between the owner and wrongdoer, and whether the entry by the latter amounts to a disseizin or a mere trespass, that, with respect to crops

sowed and gathered by the wrongdoer which are the result wholly of his act, the sole remedy of the owner should be in damages done to, and for withholding possession of, the land, and that the right to follow the thing severed should be confined to those things which were upon the land at the time of the wrongful entry, or which would have existed without the act of the trespasser."

5. Measure of Damages when Crop Totally Destroyed — Alabama. — *Gresham v. Taylor*, 51 Ala. 505.

Arkansas. — *St. Louis, etc.*, R. Co. v. *Lyman*, 57 Ark. 512; *St. Louis, etc.*, R. Co. v. *Yarborough*, 56 Ark. 612; *St. Louis, etc.*, R. Co. v. *Paup*, (Ark. 1893) 22 S. W. Rep. 213.

Colorado. — *Colorado Consol. Land, etc.*, Co. v. *Hartman*, 5 Colo. App. 150.

Illinois. — *Ohio, etc.*, R. Co. v. *Nuetzel*, 43 Ill. App. 108; *Kankakee, etc.*, R. Co. v. *Horan*, 17 Ill. App. 650; *Chicago, etc.*, R. Co. v. *Ward*, 16 Ill. 522.

Indiana. — *Chicago, etc.*, R. Co. v. *Barnes*, 10 Ind. App. 460.

Iowa. — *Smith v. Chicago, etc.*, R. Co., 35 Iowa 518; *Drake v. Chicago, etc.*, R. Co., 63 Iowa 302, 50 Am. Rep. 746.

Michigan. — *Loomis v. O'Neal*, 73 Mich. 582.

Minnesota. — *Lommelund v. St. Paul, etc.*, R. Co., 35 Minn. 412; *Byrne v. Minneapolis, etc.*, R. Co., 38 Minn. 212, 8 Am. St. Rep. 668.

Missouri. — *Hosli v. Yokel*, 57 Mo. App. 622.

New York. — *Richardson v. Northrup*, 66 Barb. (N. Y.) 85.

Texas. — *Sabine, etc.*, R. Co. v. *Smith*, 73 Tex. 1; *Gulf, etc.*, R. Co. v. *Nicholson*, (Tex. Civ. App. 1894) 25 S. W. Rep. 54; *Gulf, etc.*, R. Co. v. *Carter*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1023; *Gulf, etc.*, R. Co. v. *Pool*, 70 Tex. 713; *Gulf, etc.*, R. Co. v. *Haskell*, 4 Tex. Civ. App. 550; *Sabine, etc.*, R. Co. v. *Joaquim*, 58 Tex. 456; *Texas, etc.*, R. Co. v. *Young*, 60 Tex. 201; *Texas, etc.*, R. Co. v. *Bayliss*, 62 Tex. 570; *Sabine, etc.*, R. Co. v. *Johnson*, 65 Tex. 389; *Trinity, etc.*, R. Co. v. *Schofield*, 72 Tex. 496; *Houston, etc.*, R. Co. v. *Adams*, 63 Tex. 200; *Galveston, etc.*, R. Co. v. *Parr*, 8 Tex. Civ. App. 280.

Wisconsin. — *Folsom v. Apple River Log Driving Co.*, 41 Wis. 602.

In an action against the owner of hogs for injuries done by them to the plaintiff's crops, he cannot show what amount of crops he would have made without the injury; but the damages would be the value of the crops at the time of their destruction, or so far as they were injured. *Gresham v. Taylor*, 51 Ala. 505.

A person peaceably entered on premises, the title to which was in controversy under a *bona*

2. Partial Loss. — Where, however, there is only a partial destruction of a growing crop, the measure of damages therefor is the depreciation in value of the crop as a whole, whether occasioned by the destruction of a part or by injury to the whole.¹

vide claim of title, and cut and removed standing grass thereon. The title having been subsequently adjudged against him, it was held, in an action against him for the conversion of the hay, that the proper measure for damages was the value of the standing grass and not the value of the hay after it was removed. *Hinman v. Heyderstadt*, 32 Minn. 250.

Where Part Destroyed and Part Saved. — In an action for damages against a railway company for injuries caused to growing crops in consequence of a failure to construct cattleguards, the measure of recovery is the market value of the crops, when matured, less the expense of fitting them for the market from the time of the injury, and diminished by whatever the value of the portion saved, if any, may be. *Smith v. Chicago, etc., R. Co.*, 38 Iowa 518.

Method of Arriving at Value of Crop at Time of Destruction. — The correct method of arriving at the value of standing crops when destroyed is embodied in the following instructions: "For the destruction of growing crops, the value at the time of the trespass, or at the time of the overflow, by which said crops were destroyed, is the measure of damage. The value at maturity, and the labor necessary to put the crops in condition for market, are the data from which to estimate its value. The value of the crop at maturity would be its value at the nearest market. Should you find from the evidence that, by negligence or failure aforesaid, the crops of plaintiff were wholly destroyed, or were destroyed to such an extent as to be generally regarded as worthless, then plaintiff's damage, if any, would be the value of said crops at maturity, less the cost of the labor, care, and attention necessary to put the crop in condition for the nearest market." *Gulf, etc., R. Co. v. Carter*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1023.

Measure of Damages by Negligently Flooding Land. — When the damage done consists not only in the destruction of produce, but in injury to land, for instance, where flooded, the measure of damages is the value of the produce destroyed, plus the injury done to the land. *Sabine, etc., R. Co. v. Johnson*, 65 Tex. 389; *Trinity, etc., R. Co. v. Schofield*, 72 Tex. 496.

Damages by Overflow to Crops. — The damages recoverable from the destruction of growing crops by overflow are to be ascertained from a consideration of the circumstances existing at the time of its destruction. Accordingly, where the evidence showed that the crop was destroyed by backwater from a railway embankment, but that a few days afterwards there was a general overflow which would have destroyed the crop had the embankment not been erected, a verdict for damages based upon the erroneous assumption that the crop would have matured will be set aside. *St. Louis, etc., R. Co. v. Yarbrough*, 56 Ark. 618.

Cost of Producing the Crop Inadmissible to Prove Damages. — In an action to recover for the destruction of a growing crop, evidence of the

cost of the sowing and cultivating the ripe crop so far towards maturity as the one destroyed, is inadmissible to show damages. *Chicago, etc., R. Co. v. Barnes*, 10 Ind. App. 460.

When Crop Young, Market Value Not Criterion of Measure of Damages. — Where the crop is young and green, not fit to gather, and thus has little or no market value, that is not the measure of damages for its destruction. The value of the crop is a matter of estimate, or conclusion of the mind, to be arrived at from all the facts which would affect the conclusion, an important one of which is the right of the owner to cultivate, mature, and harvest it at the proper time. *Economy Light, etc., Co. v. Cutting*, 49 Ill. App. 422.

Measure of Damages for Conversion of Standing Crops. — A tenant in common of crops, on being put out of possession by his cotenant, the landlord, may recover the value of his share of the crops harvested, after deducting the cost of harvesting. *Loomis v. O'Neal*, 73 Mich. 582.

Measure of Damages for Preventing Making of Crop. — The measure of damages against a railroad company, which as a naked trespasser upon enclosed land so uses its possession as to prevent the making of crops, is not the estimated value of the crops when made, but the rental value of the land and every other specific injury directly inflicted. *Houston, etc., R. Co. v. Adams*, 63 Tex. 200.

Breach of Contract to Harvest Crop. — Where the petition alleged that by reason of a breach of contract to harvest oats they were entirely lost and destroyed, the appellate court, where none of the evidence is produced, cannot say that there was error in refusing to instruct the jury that the measure of damages was the difference between the contract price and what it would have cost to have had the work done by the plaintiff, and in instructing them that if the plaintiff took all reasonable precaution and still lost the oats through the defendant's failure to perform that contract, he might recover the market value of the oats lost. *Houser v. Pearce*, 13 Kan. 105.

Diversion of Water from a Stream Preventing Irrigation. — In an action for damages against an upper riparian owner by a lower one, for the loss of a hop crop by reason of the diversion of the water in the stream so as to deprive the irrigating ditches of a riparian proprietor of water, the measure of damages is the market value of the crop alleged to be lost over the cost of producing, harvesting, and marketing it. *Shotwell v. Dodge*, 8 Wash. 337.

1. Where Crops Are Damaged. — *Gresham v. Taylor*, 51 Ala. 505; *Smith v. Chicago, etc., R. Co.*, 38 Iowa 518; *Roberts v. Cole*, 82 N. Car. 292; *Gulf, etc., R. Co. v. Nicholson*, (Tex. Civ. App. 1894) 25 S. W. Rep. 54; *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 456; *Trinity, etc., R. Co. v. Schofield*, 72 Tex. 496; *Folsom v. Apple River Log Driving Co.*, 41 Wis. 602.

The measure of damages for crops partially destroyed is the difference between their actual

CROP-TIME. — “Crop-time” means that portion of the year which is occupied in making and gathering the crops.¹

CROSS. (See also the title **CROSSINGS**, *post*; and see **ACROSS**, vol. I, p. 574; **INTERSECT**. As to the meaning of “cross” in the election law provisions for the marking of ballots, see the title **ELECTIONS**. As to the use of a cross by illiterates in the place of a signature, see the title **MARK**.) — “Cross,” when used as a verb, may and does frequently mean to intersect; as, to lay one body across another, or to cross a word in writing. It also means to pass from side to side, to pass or move over; as, to cross a road or river. As a preposition it means over, from side to side.²

value immediately before and after the injury. *Gulf, etc., R. Co. v. Nicholson*, (Tex. Civ. App. 1894) 25 S. W. Rep. 54.

An instruction that the measure of damages was the difference between what the crop would have made and what was made, is erroneous. Where crops have been damaged, the measure of damages is such sum as will cover the injury done to the crop, to be ascertained by the jury without reference to the conjectural value of the crop if it had not been damaged. *Roberts v. Cole*, 82 N. Car. 292.

Liability to Tenant for Injury to Crop. — A tenant, who, with notice of the location of a railroad over the premises, plants a crop thereon before the condemnation damages are paid or secured, or notice of entry given, may recover damages from the railroad for injury to his crops. The company does not discharge its liability by payment to the landlord in condemnation proceedings. *Lafferty v. Schuylkill River East Side R. Co.*, 124 Pa. St. 297.

Measure of Damages to Ensue After Verdict. — In an action of trespass it appeared that the defendant, without necessity or excuse, drove over the plaintiff's fields where crops were growing, and thereby injured the grass, grain, etc. The court held that though, strictly speaking, the plaintiff ought not to have recovered damages except for such injury as the crop had received up to the time of trial, still it refused to set aside the verdict, which was exclusive of all prospective damages to the crops growing, on the ground that such recovery would be a bar to any suit for future damages. *Throop v. Fowler*, 15 U. C. Q. B. 365.

1. *Martin v. Chapman*, 6 Port. (Ala.) 344. This case arose between a planter and an overseer, as to the services to be rendered by the latter. See generally the title **CROPS**, *ante*.
2. *People v. New York Cent. R. Co.*, 25 Barb. (N. Y.) 202, *affirmed* 13 N. Y. 78.

“Cross the Lake.” — Where an act provides that no person shall *cross* a lake within three miles of a certain bridge without paying toll, it applies also to a person *crossing* on ice, but not to one who does not enter the lake within three miles of the bridge. *Cayuga Bridge Co. v. Stout*, 7 Cow. (N. Y.) 33. See generally the titles **BRIDGES**, vol. 4, p. 945; **FERRIES**.

“Cross the Bar.” — Where a boundary is described as “*crossing* the bar” between two islands, “*crossing* the bar” means passing clear across the entire width of the bar on the line of low water, and drawing the subsequent boundary-line from the farther edge or limit of the bar on that line of low water. *Bremen v. Bristol*, 66 Me. 357. See generally the title **BOUNDARIES**, vol. 4, p. 756.

“Cross a Road.” (See generally the title

TURNPIKE COMPANIES.) — The exemption from payment of toll, of a passenger “*crossing* a road and not going one hundred yards thereon,” applies only to persons actually *crossing* the road. *Phillips v. Harper*, 2 Chit. Rep. 412, 18 E. C. L. 383.

But it was held to apply to a person going along a road and continuing thereon till he reached a lane turning off on the same side on which he had entered. *Major v. Oxenham*, 5 Taunt. 340.

Cross Street. — A statute provided that damages incurred in extending a street should be paid by the real estate fronting on either side of the extension, and of the original street, to a point to be fixed by the council; provided that in all cases the real estate fronting on a *cross* street and within one hundred feet of such street proposed or improved, should be assessed according to the frontage on such *cross* street. It was held that the language of the proviso did not contemplate the assessment of any street upon one side alone. *Schumacker v. Toberman*, 56 Cal. 510. See generally the title **SPECIAL ASSESSMENTS**.

Railroads. (See also the titles **CROSSINGS**, *infra*; **RAILROADS**.) — In *People v. New York Cent. R. Co.*, 25 Barb. (N. Y.) 202, *affirmed* 13 N. Y. 78, it was held that an act which required signals to be sounded at any place where a railroad should *cross* any traveled road was not to be construed as requiring the signals only when the railroad and highway *crossed* upon the same level, *i. e.*, at a grade *crossing*. The court said: “Words should be taken as used in their popular and most obvious sense; and while *cross*, when used as a verb, may and does frequently mean to intersect, as to lay a body *across* another, or to *cross* a word in writing, and should, when used in some connections, receive that construction, it is equally true that it also means, as defined by lexicographers as well as in ordinary parlance, ‘to pass from side to side;’ ‘to pass or move over,’ as to *cross* a road or a river, which may be done by passing upon a bridge elevated above the level of the road or river passed. As a preposition it means ‘over,’ ‘from side to side.’ In ordinary and popular phrase the word is used indifferently to express the passing from side to side of a given object, whether the passage is effected by moving directly upon the object crossed, or by passing over it at an elevation. A bridge is said to *cross* a river; a man is said to have *crossed* a river, who has passed over it upon a bridge which does not come in contact with the river. Whether these phrases are or are not strictly accurate, is not material. They convey a definite idea to the mind, and are,

CROSS BILL.—See 5 ENCYC. OF PLEADING AND PRACTICE, p. 624.

CROSS CHECK. (See generally the title CHECKS, vol. 5, p. 1028.)—The negotiability of a check may be restrained by crossing it. When a check bears across its face two parallel lines, with or without the words "and company," or an abbreviation thereof, it is said to be crossed generally. When it bears across its face the name of a banker, it is said to be crossed specially, and to be crossed to that banker. To a crossing, whether general or special, may be added the words, "not negotiable."¹

and were at the time of the passing of the act in question, well understood as a part of the language of the people, and as a recognized expression in common use. The hazards to be provided against were twofold: (1) the danger of actual collision at the crossing, and (2) that of damage by the frightening of teams traveling upon the public highway; and to guard against the latter peril it was as important to provide for a proper warning when the railroad passed over the highway at an elevation which allowed a passage upon the highway underneath, as when it passed upon the same level, to enable those passing upon the highway to place their teams in such positions of security as would best guard against injury from their fright. But whatever may have been the reason, it is sufficient that the legislature have deemed the performance of this duty, which is not onerous upon the company, sufficiently beneficial to the public to secure its performance by the imposition of a penalty."

But where a *Texas* statute provided that certain signals should be given by trains at a place where the railroad should *cross* any public road, and the train should stop in approaching a place where two railroads *cross*, and also provided for the ringing of the bell till "the road or street was *crossed*," it was held that the statute applied only to grade *crossings*. The court said: "The act of 1883 above quoted uses the word *cross* twice as a verb, in the same sentence, without any intimation that it is used in a different sense in one place from what it is in another. The last use of the word evidently refers only to cases where railroads *cross* each other at grades, for it would be entirely useless, and annoying to the traveling public, to require a train to come to a full stop before passing under or over another railroad's track, as no collision is in such cases possible." *Missouri, e. c., R. Co. v. Thomas*, 87 Tex. 282.

Same—Restoration of Highway—Intersect. (See also INTERSECT; and see the titles HIGHWAYS; RAILROADS.)—A railroad charter provided that where it should be necessary for the construction of the road that it should intersect or *cross* any stream or highway, it should be lawful for said company to construct such railroad across or upon the same, but the company should restore said stream or road thus intersected, to its former state. The railroad was located for two miles close beside the turnpike, the traveled path of which was in some places changed to make room for the road. It was held that the case was not one of the intersecting of a highway by the railroad, that term applying only to the case of a railroad *crossing* a highway. The court said: "The railroad does not *cross* this highway. The word 'intersect' ordinarily means the

same as to *cross*; literally, to cut into or between. The two words seem to be used in the same sense, as is apparent from the fact that the word 'intersected' only is used in the latter part of the quotation; whereas, if they were used in different senses, we should expect to find the words 'or *crossed*' also used. But if it be conceded that the word 'intersect' is to be understood in the sense of touching, or coming in contact with, we think it cannot be extended so as to embrace a case like this, where the lay-out of the railroad covers a portion of the lay-out of the highway without disturbing or interfering with the traveled part of the highway." *State v. New Haven, etc., Co.*, 45 Conn. 344.

Railroad Crossing at Right Angles.—The provision of the *Alabama* Code that railroad companies "may construct their roads so as to *cross* each other, if necessary," does not limit the right of *crossing* to an intersection at right angles. It would be a strict and unreasonable construction to hold that no discretion should be allowed in regulating such an arrangement, since the power to do an act means the power to do it in a mode that is just, reasonable, and satisfactory, taking into consideration the peculiar circumstances of each case. *Alabama G. S. R. Co. v. South, etc., Alabama R. Co.*, 84 Ala. 570, 5 Am. St. Rep. 402.

1. Cross Checks.—When a check is *crossed* generally, the banker on whom it is drawn must not pay it across the counter, but can only pay it to another banker; in other words, the holder of such a check cannot obtain payment of it unless he has an account with some banker. When a check is *crossed* specially, the banker on whom it is drawn can only pay it to the banker to whom it is *crossed*; in other words, the holder of that check cannot obtain payment of it unless he has an account with the banker to whom it is *crossed*. When a check bears the words "not negotiable," in addition to the *crossing*, the holder of it cannot give a transferee a better title than he has himself. See Sweet's Law Dict.; English Crossed Checks Act, 1876, *repealing* 19 & 20 Vict., c. 25, and 21 & 22 Vict., c. 79. The law as to *crossed checks* in *England* is now contained in sections 76-82 of the Bills of Exchange Act of 1882. See also *Matthiessen v. London, etc., Bank*, 5 C. P. Div. 7; *Kleinwort v. Comptoir Nat. d'Escompte de Paris*, (1894) 2 Q. B. 157; *Clarke v. London, etc., Banking Co.*, (1897) 1 Q. B. 552.

In *Lacave v. Crédit Lyonnais*, (1897) 1 Q. B. 148, it was held that a bank having branches in London and Paris, which paid a *cross check* drawn upon its London branch, through the Paris branch to which it was presented for payment by one who was not the true owner, was liable for its value to the owner. The

CROSS COMPLAINT.— See 5 ENCYC. OF PLEADING AND PRACTICE, p. 673.

CROSS DEMANDS.— See the title SET-OFF, RECOUPMENT, AND COUNTER-CLAIM.

CROSS EXAMINATION.— See the title EXAMINATION OF WITNESSES, 8 ENCYC. OF PLEADING AND PRACTICE, p. 70.

CROSS REMAINDERS.— See the title REMAINDERS AND EXECUTORY INTERESTS.

court said: "First of all I will consider the case with respect to English law and what was done in England. The cheque, as I have pointed out, was *crossed*, and it was drawn on the Crédit Lyonnais, 40 Lombard Street, London; and the defendants say that so far as their conduct is impugned by reason of their having cashed or paid in London a cheque, *crossed*, and so drawn on them, and coming to them from another bank, they are within the protection of the 80th section of the Bills of Exchange Act, which is as follows: 'Where the banker on whom a *crossed cheque* is drawn' (that is the position of the defendants in this case, so far as their action here in London is concerned) 'in good faith and without negligence pays it, if *crossed* generally' (that is the case here) 'to a banker' [the learned judge read the remainder of section 80]. Now the bank in London say, 'If and so far as you are charging us with converting this cheque, in that we have paid it to another bank, we are protected by the 80th section. We are the bank on whom the cheque was drawn. It was a *crossed cheque*, and therefore, whether it came to us with or without a forged indorsement, we are placed, by reason of what we have done, in the same position as if we had paid it to the true owner thereof.' Then we have to see whether there is any other part of the conduct of the defendants which can be made the subject-matter of an action in England. That obliges us to look at the other various stages of the transaction. The cheque, we have seen, was brought to the Paris branch of the defendants' bank, by one Ponce. Ponce was not a customer of that bank. It was received by them from him for the purpose of collection, and after an interval of two or three days, in which time they sent the cheque to London, and there received payment by an entry in the books, and received then an intimation from the London bank apprising them of the fact that the cheque was a good one, they then, and not until then, paid Ponce the amount. That being so, it is quite clear that, if this transaction had taken place in England, the collecting bank — that is, the Paris branch — would have had no defense to the action;

and, inasmuch as the Paris branch and the head office are all one bank for the purpose of this action, all represented by one defendant, the defendants, if they relied on English law to justify what was done in Paris, would fail, because they do not come within the protection of the eighty-second section, which is the section of the act which deals with the position of the collecting bank upon a *crossed cheque*. [The learned judge read section 82.] Now, I am clearly of opinion on the facts that Ponce was not a customer of the bank. Sir Robert Reid contended that the section could not be taken to limit the protection to the case of the cheque being collected for a customer in the ordinary sense, that is, a person who kept an account at the bank. He says 'the customer' must be used in a larger sense of the word, and, practically, as far as I could see, must be taken to mean any one. I cannot see any dividing line between a person who has an account, and any one who chooses to come with a cheque and ask the bank to collect it for him. Sir Robert Reid contended that it must have that larger meaning. He admitted that if it had not that larger meaning, Ponce could not be brought within the definition of 'customer.' He called the attention of the court to a decision which undoubtedly decided that no one but a customer in the proper sense of the word, a person having an account at the bank, would be entitled to the benefit of the section. That is the case of *Mathews v. Williams*, 10 Reports 210, 63 L. J. Q. B. 494, decided in the year 1894. I do not think it would have required the authority of that decision to convince me that the act means what it says, and that protection is only given, for obvious reasons, to a bank which does collect for a customer in the real sense. if he is a person who has an account at the bank; at all events, if he is a person whose relations are much nearer and closer than those of Ponce in this case. Therefore, if the acts done by the bank, taking them as a whole, had all taken place in England, there is no doubt whatever that they would stand unprotected by any provisions in the Bills of Exchange Act in respect of what was done by the collecting bank."

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BY ROBERT GRATTAN.

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CROSS-REFERENCES.

As to what amounts to Contributory Negligence on the part of travelers at railroad crossings, see the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 427.
For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see

the following titles: CARRIERS OF PASSENGERS, vol. 5, p. 474; *COMPARATIVE NEGLIGENCE*, vol. 6, p. 360; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368; *CORPORATIONS*, vol. 7, p. 620; *DAMAGES*, *post*; *DEATH BY WRONGFUL ACT*, *post*; *ELECTRIC RAILWAYS*; *EMINENT DOMAIN*; *HIGHWAYS*; *INJUNCTIONS*; *INJURIES TO ANIMALS*; *PRIVATE WAYS*; *RAILROADS*; *STATIONS (RAILROAD)*; *STREETS: STREET RAILWAYS*.

I. DEFINITION. — A Crossing, as the word is employed in this title, is the intersection of a railroad track or right of way, with a public highway, a private road, or another railroad. Thus used, the term is one of description, rather than of definition.

Includes Approaches. — As applied to the intersection of a common highway and a railroad, and as generally used in the statutes, it means the entire structure including the approaches,¹ although a part of the structure may be outside of the railroad's lands, or the place where the roads actually cross each other.²

II. RAILROADS CROSSING RAILROADS — **1. Right to Cross.** — Every railroad corporation holds the land covered by its right of way subject to the right of the public to have other roads constructed across it whenever the public exigency demands it.³ If this were not so, the grant of a privilege to con-

1. Approaches Included. — *Farley v. Chicago*, etc., R. Co., 42 Iowa 234; *Moberly v. Kansas City*, etc., R. Co., 17 Mo. App. 537; *Roxbury v. Central Vermont R. Co.*, 60 Vt. 121.

2. Roxbury v. Central Vermont R. Co., 60 Vt. 121.

3. Right to Cross — *United States*. — *Northern Pac. R. Co. v. St. Paul*, etc., R. Co., 1 McCrary (U. S.) 302; *Union Pac. R. Co. v. Burlington*, etc., R. Co., 1 McCrary (U. S.) 452.

California. — *Market St. R. Co. v. Central R. Co.*, 51 Cal. 583.

Connecticut. — *New York*, etc., R. Co. v. *Boston*, etc., R. Co., 36 Conn. 196.

Illinois. — *Lake Shore*, etc., R. Co. v. *Chicago*, etc., R. Co., 97 Ill. 506, 2 Am. & Eng. R. Cas. 440; *Chicago*, etc., R. Co. v. *Joliet*, etc., R. Co., 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62; *East St. Louis Connecting R. Co. v. East St. Louis Union R. Co.*, 108 Ill. 265, 17 Am. & Eng. R. Cas. 163. See also *St. Louis*, etc., R. Co. v. *Springfield*, etc., R. Co., 96 Ill. 274, 2 Am. & Eng. R. Cas. 487; *Chicago*, etc., R. Co. v. *Chicago*, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150.

Indiana. — *Newcastle*, etc., R. Co. v. *Peru*, etc., R. Co., 3 Ind. 464.

Iowa. — *Chicago*, etc., R. Co. v. *Chicago*, etc., R. Co., 91 Iowa 16.

Massachusetts. — *Fitchburg R. Co. v. New Haven*, etc., Co., 134 Mass. 547, 14 Am. & Eng. R. Cas. 95.

Michigan. — *Toledo*, etc., R. Co. v. *Detroit*, etc., R. Co., 62 Mich. 564, 4 Am. St. Rep. 875, 28 Am. & Eng. R. Cas. 272.

Missouri. — *Kansas City Suburban Belt R. Co. v. Kansas City*, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 624.

New Jersey. — *Morris*, etc., R. Co. v. *Central R. Co.*, 31 N. J. L. 205.

New York. — *Brooklyn Cent.*, etc., R. Co. v. *Brooklyn City R. Co.*, 33 Barb. (N. Y.) 420. See also *New York*, etc., R. Co. v. *Forty-Second St.*, etc., R. Co., 50 Barb. (N. Y.) 309.

North Carolina. — *Richmond*, etc., R. Co. v. *Durham*, etc., R. Co., 104 N. Car. 658, 40 Am.

& Eng. R. Cas. 488. See also *North Carolina*, etc., R. Co. v. *Carolina Cent. R. Co.*, 83 N. Car. 489.

Ohio. — *Lake Shore*, etc., R. Co. v. *Cincinnati*, etc., R. Co., 30 Ohio St. 604.

South Carolina. — *South Carolina R. Co. v. Columbia*, etc., R. Co., 13 Rich. Eq. (S. Car.) 339.

See also *Baltimore*, etc., R. Co. v. *Pittsburg*, etc., R. Co., 17 W. Va. 812.

See also the title *EMINENT DOMAIN*; and *infra*, this section, *Source of Right*.

Express Power in Charter Not Necessary. — It is not necessary in order to authorize one railroad to cross the track of another that any express powers to do so should be given by charter to the former. *Morris*, etc., R. Co. v. *Central R. Co.*, 31 N. J. L. 205.

Priority of Charter. — Neither the priority of one charter over the other, nor the prior location or construction of a railroad thereunder affects this right. *Lake Shore*, etc., R. Co. v. *Cincinnati*, etc., R. Co., 30 Ohio St. 604.

Land Held by Railroad Is Subject to Others' Right to Cross. — A provision that a railroad company "shall be deemed to be seized and possessed of the land" appraised by the commissioners cannot exclude a new company from acquiring a right of way across its track except at the older road's dictation. *Central Vermont R. Co. v. Woodstock R. Co.*, 50 Vt. 452. And so one railroad is not restricted in its right to cross the tracks of another, as authorized by law, because the title of the latter company to its land was derived from the commonwealth. *Western Pennsylvania R. Co.'s Appeal*, 99 Pa. St. 155.

In *Richmond*, etc., R. Co. v. *Louisa R. Co.*, 13 How. (U. S.) 71, the court said: "The grant of a franchise is of no higher order and confers no more sacred title, than a grant of land to an individual, and when the public necessities require it the one as well as the other may be taken for public purposes on making suitable compensation." See also *Chicago*, etc., R. Co. v. *Lake*, 71 Ill. 333.

struct a railroad across or through a state would be an obstacle in the way of its future prosperity.¹

But This Right Is Subject to Restrictions, and the use by the intersecting railroad for the purpose of crossing must not be inconsistent with the use of the road under the franchise of the company operating the intersected road.²

2. Nature of Right. — The use of a railroad track for the mere purpose of crossing takes no property from the one road to give to another, but gives the one simply a limited easement in the property of the other, to be enjoyed in conjunction with the equal right of user of the intersected road.³

Not an Arbitrary Right. — The right of crossing is not an arbitrary one, to be exercised in the discretion of the company seeking the privilege;⁴ the court or board of commissioners appointed for such purpose being authorized to determine the necessity of crossing, and whether the same is required by public interests.⁵

1. Chicago, etc., R. Co. v. Joliet, etc., R. Co., 105 Ill. 388, 44 Am. Rep. 799, *quoted in* Chicago, etc., R. Co. v. Chicago, 140 Ill. 317, 50 Am. & Eng. R. Cas. 150.

2. **Consistent Use.** — A railroad has a right to secure a crossing for its roadbed and cars, and make the necessary connections with another company's track for the purpose of crossing; and it may also secure the right to cross the second company's road with side tracks, and obtain the use of its right of way for the location of switches, provided such use is not inconsistent with the use of the road under the second company's franchise. Toledo, etc., R. Co. v. Detroit, etc., R. Co., 62 Mich. 564, 4 Am. St. Rep. 875, 28 Am. & Eng. R. Cas. 272.

Limitation on Right to Take Franchise for New Use. — To warrant the taking of property which has already been appropriated to a public use, for another public use, it is essential that the new use be a different one, and also that the change be for the benefit of the public. Lake Shore, etc., R. Co. v. Chicago, etc., R. Co., 97 Ill. 506, 2 Am. & Eng. R. Cas. 440. In this case it is said that whether the new use be different from the present use, is for the courts to decide. But when the new use may be in its nature a public benefit, whether the change will be for the benefit of the public is a political question to be determined by the legislature.

3. **Right Acquired in Intersected Road Is a Mere Easement.** — National Docks, etc., R. Co. v. United New Jersey R., etc., Co., 53 N. J. L. 217, 26 Am. St. Rep. 421; National Docks, etc., Connecting R. Co. v. Pennsylvania R. Co., 54 N. J. Eq. 142.

The right to cross involves no exclusive use of the property. It is a right of way only, "and the place of crossing remains in the common use of the parties for the exercise of their several franchises." New Jersey Southern R. Co. v. Long Branch Com'rs, 39 N. J. L. 28; Lehigh Valley R. Co. v. Dover, etc., R. Co., 43 N. J. L. 528, 14 Am. & Eng. R. Cas. 87.

A railroad crossing within the meaning of the Pa. Act of June 19, 1871, § 2 (P. L. 1861), is such a crossing only as appropriates no part of the land or right of way of the company whose track is to be crossed, to the exclusive use of the company seeking to cross. Sharon R. Co.'s Appeal, 122 Pa. St. 533, 9 Am. St. Rep. 133.

Right May Be Acquired for Any Purpose Consistent with Former Use. — A right of way over level crossings constructed by a company is not restricted to the purposes for which communication was necessary at the time the railway was made, but there is a right of way for all purposes which will not interfere with the proper working of the railway. United Land Co. v. Great Eastern R. Co., 33 L. T. N. S. 292, 44 L. J. Ch. 685, L. R. 10 Ch. 586, 23 W. R. 896, *affirming* L. R. 17 Eq. 158, 43 L. J. Ch. 363, 22 W. R. 126.

Appropriation of Exclusive Use. — While under the Missouri statutes and constitution a railroad company accepts its charter and franchises and owns and uses its tracks, subject to the power of the state to authorize the construction of other railroads across its tracks, no railroad can be constructed so as to appropriate the exclusive possession of such tracks or deprive the company of its proper use of the same. Kansas City Suburban Belt R. Co. v. Kansas City, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 624.

4. **Not an Arbitrary Right.** — Matter of St. Paul, etc., R. Co., 37 Minn. 167, 30 Am. & Eng. R. Cas. 294; United New Jersey R., etc., Co. v. National Docks, etc., R. Co., 52 N. J. L. 90, 44 Am. & Eng. R. Cas. 226; Chicago, etc., R. Co. v. Chicago, etc., R. Co., 91 Iowa 16. See also *infra*, this section, *Abuse of Right*.

5. **Determination of Necessity of Crossing.** — Matter of St. Paul, etc., R. Co., 37 Minn. 167, 30 Am. & Eng. R. Cas. 294; Union Pac. R. Co. v. Burlington, etc., R. Co., 1 McCrary (U. S.) 452; Matter of Minneapolis, etc., R. Co., 39 Minn. 162; Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., 116 Ind. 578, 37 Am. & Eng. R. Cas. 430; Richmond, etc., R. Co. v. Durham, etc., R. Co., 104 N. Car. 658, 40 Am. & Eng. R. Cas. 488. See also *infra*, this section, *Manner of Crossing*.

Branch and Spur Tracks. — Where the record in proceedings for the appointment of commissioners to condemn a crossing for one railroad over the track of another shows that the construction of certain branches and spur tracks laid down on the map and survey is essential to any successful operation of the petitioner's road, such branches and spurs must be held to be necessary for public use. How. Stat. Mich., § 3332. Toledo, etc., R. Co. v. East Saginaw, etc., R. Co., 72 Mich. 206, 36 Am. & Eng. R. Cas. 553.

3. Source of Right. — The right of one railroad to cross another is derived from several sources, which may be enumerated as follows.

a. RIGHT OF EMINENT DOMAIN. — The principal source of such right is derived from the sovereign power vested in the people, by which they can, for any public purpose, take possession of property upon paying just compensation therefor.¹

b. BY CONSTITUTIONAL PROVISION. — The right of crossing has also been recognized in many cases by constitutional provisions.²

Elements to Be Considered in Determining Necessity. — In passing upon this question the court or board of commissioners should take into consideration the interest of all parties concerned, and their determination in each case must necessarily depend upon the existing state of facts and circumstances involved. *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 20 Am. & Eng. R. Cas. 309.

1. Right to Cross Founded in Right of Eminent Domain. — *United States.* — *Northern Pac. R. Co. v. St. Paul, etc., R. Co.*, 1 McCrary (U. S.) 302.

Connecticut. — *New York, etc., R. Co. v. Boston, etc., R. Co.*, 36 Conn. 196.

Illinois. — *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 96 Ill. 125, 2 Am. & Eng. R. Cas. 437; *St. Louis, etc., R. Co. v. Springfield, etc., R. Co.*, 96 Ill. 274, 2 Am. & Eng. R. Cas. 487; *Chicago, etc., R. Co. v. Illinois Cent. R. Co.*, 113 Ill. 156; *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 100 Ill. 21, 2 Am. & Eng. R. Cas. 454; *St. Louis, etc., R. Co. v. Springfield, etc., R. Co.*, 96 Ill. 274, 2 Am. & Eng. R. Cas. 487. See also *Chicago, etc., R. Co. v. Joliet, etc., R. Co.*, 105 Ill. 389, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62.

Indiana. — *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 116 Ind. 578, 37 Am. & Eng. R. Cas. 430.

Michigan. — *Toledo, etc., R. Co. v. Detroit, etc., R. Co.*, 62 Mich. 564, 4 Am. St. Rep. 875, 28 Am. & Eng. R. Cas. 272.

New Jersey. — *State v. Easton, etc., R. Co.*, 36 N. J. L. 181; *United New Jersey R., etc., Co. v. National Docks, etc., R. Co.*, 52 N. J. L. 90, 44 Am. & Eng. R. Cas. 226; *National Docks, etc., R. Co. v. United New Jersey R., etc., Co.*, 53 N. J. L. 217, 26 Am. St. Rep. 421.

Virginia. — *Alexandria, etc., R. Co. v. Alexandria, etc., R. Co.*, 75 Va. 780, 40 Am. Rep. 743.

Washington. — *Seattle, etc., R. Co. v. State*, 7 Wash. 150, 38 Am. St. Rep. 866.

See also *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 20 Am. & Eng. R. Cas. 309; *Northern R. Co. v. Concord, etc., R. Co.*, 27 N. H. 183.

One company may condemn the right to cross the lands of another company of the same character, although those lands be necessary for the railroad purposes of the latter company. *National Docks, etc., R. Co. v. United New Jersey R., etc., Co.*, 53 N. J. L. 217, 26 Am. St. Rep. 421.

Application for Additional Facilities. — Where a right of one company to cross another company's road by two tracks has been acquired by purchase, and limited to a right of way thirty feet wide, and it does not appear that the relinquishment for the future of any right of further application for additional facilities

of crossing in any way entered into the amount of compensation which was arranged, and the right to lay additional tracks across the same road is sought by condemnation, the company seeking to condemn will not be required to surrender its rights acquired by the purchase in order that it may have the condemnation sought and have compensation assessed for the four tracks in that proceeding. *Chicago, etc., R. Co. v. Illinois Cent. R. Co.*, 113 Ill. 156.

Condemning Route Generally. — By the terms of the general railroad law of *New Jersey* a company organized thereunder may condemn the "located route" of an existing railroad only for the purpose of crossing the same; and where a petition of such a company for the appointment of commissioners shows that it seeks to condemn a part of such a route generally, and not merely for the purpose of crossing, an order made thereon will be set aside. *United New Jersey R., etc., Co. v. National Docks, etc., R. Co.*, 52 N. J. L. 90, 44 Am. & Eng. R. Cas. 226.

Illinois. — The sixth clause of section 19 of the general railroad law of Illinois, 1872, confers power upon any railroad corporation formed under that act, to cross, intersect, etc., any other railroad before constructed, at any point in its route, and upon the grounds of such other railway company; and provides that if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings, etc., the same shall be ascertained and determined in the manner provided by law, which has been held to mean a proceeding under the Eminent Domain Act. *Chicago, etc., R. Co. v. Illinois Cent. R. Co.*, 113 Ill. 156.

Federal Charter. — The charter of the *Northern Pacific* railroad, obtained from the general government, does not exempt its right of way from the operation of the laws of a state, and forbid a railroad organized under the general laws of that state from exercising the right of eminent domain to effect a crossing. *Northern Pac. R. Co. v. St. Paul, etc., R. Co.*, 1 McCrary (U. S.) 302; *Union Pac. R. Co. v. Burlington, etc., R. Co.*, 1 McCrary (U. S.) 452; *Union Pac. R. Co. v. Leavenworth, etc., R. Co.*, 29 Fed. Rep. 728.

Permitting Crossing Does Not Impair Obligation of Contract. — Whatever damage may result therefrom, the exercise of such right cannot be considered as the impairment of the obligation of a contract within the meaning of the constitution of the United States. *Baltimore, etc., Turnpike Co. v. Union R. Co.*, 35 Md. 224.

2. Constitutional Provisions. — *Missouri, etc. R. Co. v. Texas, etc., R. Co.*, 10 Fed. Rep. 497, 6 Am. & Eng. R. Cas. 597; *Memphis,*

c. BY STATUTE. — In other cases such right has been especially provided for by legislative enactment.¹ Such statutes are held constitutional and not

etc., R. Co. *v.* Birmingham, etc., R. Co., 96 Ala. 571; Elizabethtown, etc., R. Co. *v.* Ashland, etc., St. R. Co., 96 Ky. 347; Kansas City Suburban Belt R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 624; Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504; Pittsburg, etc., R. Co. *v.* Southwest Pennsylvania R. Co., 77 Pa. St. 173; Northern Cent. R. Co.'s Appeal, 103 Pa. St. 621; Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193; San Antonio, etc., R. Co. *v.* State, 79 Tex. 264, 45 Am. & Eng. R. Cas. 586.

Construction of Constitutional Provisions — *Alabama*. — Section 21, art. 14, of the Constitution of Alabama, providing that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," construed in connection with section 7 of the same article of the constitution, which provides that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for the property taken, injured, or destroyed," etc., does not authorize one railroad to cross the track of another without making just compensation. Memphis, etc., R. Co. *v.* Birmingham, etc., R. Co., 96 Ala. 571.

Missouri. — Section 2741 of the Missouri Rev. Stat. 1889, providing that the right to appropriate lands held by any corporation shall not interfere with the uses to which by law the corporation holding the same is authorized to put its lines of railroad, has no application whatever to railroad crossings, which are controlled absolutely by the constitutional provision that every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad, and by § 2543 of the Rev. Stat. 1889, expressly authorizing any railroad to cross, intersect, join, or unite its road with any other railroad. Kansas City Suburban Belt R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 624.

1. By Statute — *United States*. — Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 4 Woods (U. S.) 360, 6 Am. & Eng. R. Cas. 597.

Alabama. — Memphis, etc., R. Co. *v.* Birmingham, etc., R. Co., 96 Ala. 571, 57 Am. & Eng. R. Cas. 639.

Connecticut. — New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 106; New York, etc., R. Co. *v.* Bridgeport Traction Co., 65 Conn. 470.

Illinois. — Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506, 2 Am. & Eng. R. Cas. 440; Illinois Cent. R. Co. *v.* Chicago, etc., R. Co., 122 Ill. 473, 30 Am. & Eng. R. Cas. 287; Chicago, etc., R. Co. *v.* Illinois Cent. R. Co., 113 Ill. 156; East St. Louis, etc., R. Co. *v.* Belleville City R. Co., 159 Ill. 544. See also Central City Horse R. Co. *v.* Fort Clark Horse R. Co., 81 Ill. 523.

Iowa. — Chicago, etc., R. Co. *v.* Chicago, etc., R. Co., 91 Iowa 16.

Massachusetts. — Fitchburg R. Co. *v.* New Haven, etc., Co., 134 Mass. 547, 14 Am. & Eng. R. Cas. 95.

Michigan. — Toledo, etc., R. Co. *v.* Detroit, etc., R. Co., 62 Mich. 564, 4 Am. St. Rep. 875, 28 Am. & Eng. R. Cas. 272.

Missouri. — Kansas City Suburban Belt R. Co. *v.* Kansas City, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 624.

Montana. — Butte, etc., R. Co. *v.* Montana Union R. Co., 16 Mont. 504.

New Jersey. — *In re* Atlantic Highlands, etc., Electric R. Co., (N. J. 1896) 35 Atl. Rep. 387; United New Jersey R., etc., Co. *v.* National Docks, etc., R. Co., 52 N. J. L. 90.

New York. — Matter of Lockport, etc., R. Co., 77 N. Y. 557; Matter of Boston, etc., R. Co., 79 N. Y. 64; Sixth Ave. R. Co. *v.* Kerr, 45 Barb. (N. Y.) 138; Buffalo, etc., R. Co. *v.* New York, etc., R. Co., 72 Hun (N. Y.) 583; Geneva, etc., R. Co. *v.* New York Cent., etc., R. Co., 90 Hun (N. Y.) 9.

Ohio. — Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 Ohio St. 604, 16 Am. Ry. Rep. 291.

Pennsylvania. — Delaware, etc., R. Co. *v.* Wilkes-Barre, etc., R. Co., 1 Pa. Dist. Rep. 627.

Texas. — San Antonio, etc., R. Co. *v.* State, 79 Tex. 264, 45 Am. & Eng. R. Cas. 586.

Vermont. — Central Vermont R. Co. *v.* Woodstock R. Co., 50 Vt. 452.

See also Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 780, 40 Am. Rep. 743, 10 Am. & Eng. R. Cas. 23.

Construction of Statutes — *Illinois*. — Under the Illinois Railroad Act of March 1, 1872, each railroad company organized under that act is expressly authorized "to cross and intersect any other railway, before constructed, at any point on its route, and upon the grounds of such other railway company." Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 518, 2 Am. & Eng. R. Cas. 440; Chicago, etc., R. Co. *v.* Illinois Cent. R. Co., 113 Ill. 156.

Under this statute the corporation seeking the right of way, when the parties cannot agree, must select the place and manner of the proposed crossing. Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 518, 2 Am. & Eng. R. Cas. 440; East St. Louis Connecting R. Co. *v.* East St. Louis Union R. Co., 108 Ill. 265.

New York. — The legislature has power to pass an act authorizing parties, to whom the right to construct a railroad is given, to run upon, intersect, or use any portion of other railroad tracks upon making due compensation therefor. Matter of Kerr, 42 Barb. (N. Y.) 119.

Street and Steam Railways. — The New York Railroad Law (Laws of 1890, c. 565, § 12, as amended by Laws of 1892, c. 676) authorizing the crossing of one railroad by another, and prescribing the proceedings by which such right may be enforced, applies to street surface railroads seeking to cross steam railroads. Buffalo, etc., R. Co. *v.* New York, etc., R. Co., 72 Hun (N. Y.) 583.

More than One Crossing. — Under the New York Railroad Act (Laws 1850, c. 140), the petitioning road is entitled to the benefit of the act notwithstanding the fact that the proposed

violative of the original charter contract entered into on the part of the state.¹ Where, however, the provisions of the statute conflict with constitutional provisions, are unjust,² or against public policy, they will be held unconstitutional and void.³

By Implication. — A legislative charter or the grant of a right to construct a road along a certain route, may by necessary implication confer the power of crossing other roads where a crossing is requisite to carry out this grant of the franchise.⁴

intersecting road is parallel to its road in many places, because the company is not restricted to one crossing of the tracks. Matter of Boston, etc., R. Co., 79 N. Y. 64, modifying 58 How. Pr. (N. Y. Supreme Ct.) 167.

Limitation of Right. — The power to take the right of way, or any part of the right of way, of another company is expressly limited by the statute, however, to the purposes of crossing, intersecting, and uniting, or, more shortly stated, to the "connections" of the two roads. Illinois Cent. R. Co. v. Chicago, etc., R. Co., 122 Ill. 473, 30 Am. & Eng. R. Cas. 287.

1. Street Railroads — No Provision for Compensation. — The 18th section of the Pa. Act of May 14, 1889, which authorizes street railways "to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise, now or hereafter built," is constitutional, although it does not provide for making or securing compensation to the corporation whose railroad is crossed. Delaware, etc., R. Co. v. Wilkes-Barre, etc., R. Co., 1 Pa. Dist. Rep. 627. Nor is the aforesaid section inconsistent with nor does it repeal that provision of the Act of June 19, 1871, which gives courts of equity jurisdiction "to ascertain and define by their decree the mode of such crossing which will inflict the least practicable injury upon the rights of the company owning the road which is intended to be crossed." Delaware, etc., R. Co. v. Wilkes-Barre, etc., R. Co., 1 Pa. Dist. Rep. 627.

Crossing Pending Determination of Commissioners. — Chapter 239, New York Laws 1893, providing that the court shall upon application direct that a street railroad be permitted to cross the track of another railroad pending the determination by commissioners of the points and manner of crossing, on giving bond to conform to the requirements imposed by the commissioners as to such points and manner of crossing and the compensation to be made, is not unconstitutional. Buffalo, etc., R. Co. v. New York, etc., R. Co., 72 Hun (N. Y.) 587.

Not a Compulsory Taking of Land. — Where the right given to a railway company by its special act to cross the line of another company is the right of taking an easement, the exercise of such right is not a compulsory taking of "lands," within the Lands Clauses Act 1845, § 16. Great Western R. Co. v. Swindon, etc., Extension R. Co., L. R. 9 App. 787, 53 L. J. Ch. Div. 1075, 51 L. T. N. S. 798, 32 W. R. 957, 48 J. P. 821, affirming 22 Ch. Div. 677, 53 L. J. Ch. Div. 306, 47 L. T. N. S. 709, 31 W. R. 479.

2. Appeal from Assessment. — By section 7 of art. 14 of the Constitution of Alabama, the general assembly is prohibited from depriving any person of an appeal from any preliminary

assessment of damages made by reviewers, or otherwise, and consequently an act which provides that the determination of arbitrators as to the crossing of a railroad is final is invalid. Memphis, etc., R. Co. v. Birmingham, etc., R. Co., 96 Ala. 571, 57 Am. & Eng. R. Cas. 639.

Payment by Intersected Road. — How. Mich. Stat., § 3350, as amended by art. 174, Laws of 1883, in so far as it provides for the payment by the railroad company whose road is crossed, of any part of the expense of making such crossing, is unconstitutional. Toledo, etc., R. Co. v. Detroit, etc., R. Co., 62 Mich. 564, 4 Am. St. Rep. 875, 28 Am. & Eng. R. Cas. 272.

3. Special Legislation. — A statute restricting railroads incorporated under the general railroad law of the state from crossing or intersecting other railroads terminating in any city of a class specified in the statute, was held to be contrary to public policy because in the nature of special legislation, tending to benefit particular localities at the expense of the commerce of the state in general. Aurora, etc., R. Co. v. Lawrenceburgh, 56 Ind. 80.

4. By Implication. — Perry County R. Extension Co. v. Newport, etc., R. Co., 150 Pa. St. 193; United New Jersey R., etc., Co. v. National Docks, etc., R. Co., 52 N. J. L. 90, 41 Am. & Eng. R. Cas. 226. See also Newcastle, etc., R. Co. v. Peru, etc., R. Co., 3 Ind. 464.

No express grant is necessary. Morris, etc., R. Co. v. Central R. Co., 31 N. J. L. 205; State v. Easton, etc., R. Co., 36 N. J. L. 181.

The enactment of a statute authorizing a railroad corporation to construct a road over a given route, necessarily involves a determination of the legislature that the public exigency demands such road; and so where a street railroad was granted the right to construct its line on a certain street, a bill brought by a steam railroad company to restrain it from crossing their right of way upon a level was dismissed. Lynn, etc., R. Co. v. Boston, etc., R. Corp., 114 Mass. 88.

Implication Arising from Necessity. — It has been said: "A franchise is property, and as such may be taken by a corporation having the right of eminent domain; but in favor of such right there can be no implication unless it arises from a necessity so absolute that without it the grant itself will be defeated. It must also be a necessity that arises from the very nature of things, over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy." Per Gordon, J., in Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150, 3 Am. & Eng. R. Cas. 517.

In Worcester, etc., R. Co. v. Railroad Com'rs, 118 Mass. 567, the court said: "The grant of a right to extend, locate, construct,

d. BY AGREEMENT. — Another mode by which the right of crossing may be acquired is by agreement between the parties in interest,¹ and such agreement should always be sought before proceedings for condemning a right of way are instituted.²

Enforcement of Contract. — Where a valid and binding contract has in such cases been entered into by the intersecting roads, the same may be enforced specifically in a court of equity, and justice rendered between the parties as the terms thereof may dictate.³

and maintain a railroad is doubtless sufficient to authorize the taking of the lands necessary for that purpose, when there is nothing in the statutes to restrict its effect; but no franchise granted to one railroad corporation confers the right, without express terms or necessary implication, to appropriate to its use lands already devoted to a like use by the location of another railroad." See also *Housatonic R. Co. v. Lee*, etc., R. Co., 118 Mass. 391.

1. By Agreement. — In a contract between two companies for the right of way, where the track of one crosses the other, a stipulation that it shall have "the perpetual and free use of the right of way" of the other, within the distance specified, not only contemplates its uninterrupted use, but also relieves it from the payment of compensation. *Alabama G. S. R. Co. v. South*, etc., *Alabama R. Co.*, 84 Ala. 570, 5 Am. St. Rep. 401.

Consent in Writing. — Where a company intends to cross with its line another railway, the consent in writing of the owner of such railway is necessary under a provision in the company's act that nothing therein should authorize it to enter the lands of any person without his previous consent, and also providing the procedure for establishing a railway crossing, and for making compensation. *Clarence R. Co. v. Great North of England*, etc., R. Co., 13 M. & W. 706, 3 Ry. Cas. 426, 7 Jur. 65, 3 G. & D. 389, 4 Q. B. 46, 45 E. C. L. 46, 12 L. J. Q. B. 145.

Consideration. — A tripartite agreement between an incorporated land company and two railroad companies, whose tracks ran through its lands and crossed each other, by which the right of way and place of intersection are established, is supported by the twofold consideration of benefit to one party and detriment to the other, when it appears that the railroad company seeking to avoid it acquired valuable rights under it, and that the other company had, in consequence of it, abandoned another crossing previously selected. *Alabama G. S. R. Co. v. South*, etc., *Alabama R. Co.*, 84 Ala. 570, 5 Am. St. Rep. 401.

License. — Where a railroad company gives parol permission to another company to enter its right of way to connect the tracks of the two companies, only a license is granted, which may be revoked at pleasure, although valuable improvements have been made on the faith of it. *Richmond*, etc., R. Co. v. *Durham*, etc., R. Co., 104 N. Car. 658, 40 Am. & Eng. R. Cas. 488.

2. Effort to Agree a Condition Precedent. — *Seattle*, etc., R. Co. v. *State*, 7 Wash. 150, 38 Am. St. Rep. 866; *Lake Shore*, etc., R. Co. v. *Cincinnati*, etc., R. Co., 116 Ind. 578, 37 Am. & Eng. R. Cas. 430; *Matter of Saratoga Electric R. Co.*, 58 Hun (N. Y.) 287; *Matter of Boston*, etc., R. Co., 79 N. Y. 69.

It is essential that there should have been an effort made by the companies to agree, not only as to compensation, but also as to the point or manner of crossing. *Lake Shore*, etc., R. Co. v. *Cincinnati*, etc., R. Co., 116 Ind. 578, 37 Am. & Eng. R. Cas. 430.

Condition Precedent to Authority to Appoint Commissioners. — Under N. Y. Railroad Act 1850, c. 140, § 28, subd. 6, relating to the crossing of the track of one railroad company by another, an effort to agree between two companies is a condition precedent to the authority of the court to appoint commissioners. *Matter of Boston*, etc., R. Co., 79 N. Y. 69; *Matter of Lockport*, etc., R. Co., 77 N. Y. 557. See also *Seattle*, etc., R. Co. v. *State*, 7 Wash. 150, 38 Am. St. Rep. 866.

Negotiations with Agent. — Negotiations relative to the crossing of one road by another, had with the general manager, vice-president, and attorney of the road sought to be crossed, when such officers assume to negotiate for their company and no notice is given to the person with whom they confer that they have not authority to act, constitute an effort to agree with such company, within the requirement of the statute relating thereto. *Matter of Saratoga Electric R. Co.*, 58 Hun (N. Y.) 287.

Agreement with Lessee. — A voluntary agreement entered into on the part of a lessee of a railroad with a company petitioning for a right to cross the track of the former is binding upon such lessee but not upon the lessor as to the reversionary interest. *Matter of Boston*, etc., R. Co., 79 N. Y. 69.

Presumption of Waiver. — If objections are seasonably and appropriately made in proceedings for the condemnation of lands of one railway company by another, that the company failed to make the necessary attempt to acquire right of way by agreement, there is no room for the presumption that the landowner has waived such effort to agree. *Lake Shore*, etc., R. Co. v. *Cincinnati*, etc., R. Co., 116 Ind. 578, 37 Am. & Eng. R. Cas. 430.

Burden of Proof. — Where there is an allegation that the two companies interested in the crossing of a railroad track were unable to agree upon the points and method of crossing and the compensation to be paid for the same, such allegations need not be proven unless put in issue. *Matter of Boston*, etc., R. Co., 79 N. Y. 64.

The burden of proof is upon the petitioning company with respect to the issue as to whether the two companies failed to agree as to the method and place of making the crossing. *Matter of Lockport*, etc., R. Co., 77 N. Y. 557, 632.

3. Enforcement of Contract. — *Rome*, etc., R. Co. v. *Ontario Southern R. Co.*, 16 Hun (N. Y.) 445.

And such an agreement may be set up as a

4. Abuse of Right — a. IN GENERAL. — Although the right of one railroad to cross another is distinctly recognized at law, yet the road proposing the intersection will not be allowed to cross at the place and in the manner of its own adoption.¹

b. RESPECTIVE RIGHTS TO BE CONSULTED. — While the rights of the road first constructed are to be primarily regarded and protected, the rights of the crossing road are also to receive a reasonable degree of care and consideration.²

bar to proceedings, under N. Y. Laws of 1850, c. 140, § 28, to acquire the right to cross and intersect the road, instituted by the successors under such foreclosure proceedings. *Rome, etc., R. Co. v. Ontario Southern R. Co.*, 16 Hun (N. Y.) 445.

Indefiniteness of Terms — Contemporary Construction. — Where the contract sought to be enforced, providing for the right of way and intersection of two railroads, contains a stipulation that one company shall have the free use of the other's right of way, "in a manner to be hereafter determined by deed," but no deed is ever executed, the uncertainty and indefiniteness of the stipulation, if objectionable, is obviated by proof of the contemporaneous construction of the parties in execution of the contract, one being placed in possession of the right of way selected, and the other acquiescing in that possession, without objection, for more than nine years. *Alabama G. S. R. Co. v. South, etc., Alabama R. Co.*, 84 Ala. 570, 5 Am. St. Rep. 401.

1. Abuse of Right. — *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 91 Iowa 16; *National Docks, etc., Connecting R. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 142; *Seattle, etc., R. Co. v. State*, 7 Wash. 150, 38 Am. St. Rep. 866. See *infra*, this section, *Manner of Crossing*.

The manner of crossing is not to be destructive of the ability of the road crossed to exercise its franchises fully, fairly, and freely. *National Docks, etc., R. Co. v. United New Jersey R., etc., Co.*, 53 N. J. L. 217, 26 Am. St. Rep. 421; *National Docks, etc., Connecting R. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 142.

In *National Docks, etc., Connecting R. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 142, the court said: "A method of crossing which would put into disuse all the tracks of an important trunk line for an indefinite period could hardly be justified by any conceivable difficulty in otherwise executing the work, and the proposed disuse might be so entire, and its period so prolonged, as to become practically the taking of an exclusive right, which power, as already observed, does not exist. On the other hand, a plan which involved but a slight interruption of traffic on the elder road might be justified, although such interruption could be avoided by the adoption of a more expensive or inconvenient method of crossing."

Compelling Alteration of Grade. — The general railroad law does not authorize a company organized thereunder to adopt a plan of crossing an existing railroad which will compel an alteration of its grade in order to its continued operations; but the crossing authorized to be acquired by condemnation is one where the previously existing use of the spot as a rail-

road continues in co-operation with the use by the new railroad. *United New Jersey R., etc., Co. v. National Docks, etc., R. Co.*, 52 N. J. L. 90, 44 Am. & Eng. R. Cas. 226.

Longitudinal Crossing. — Authority to a railroad company "to cross, intersect, join, and unite its railways with any other railway before constructed at any point in its route," is not to be construed to authorize a condemnation longitudinally for a number of miles. *Illinois Cent. R. Co. v. Chicago, etc., R. Co.*, 122 Ill. 473, 30 Am. & Eng. R. Cas. 287.

Use of Only One Track at a Time. — Where a railway in process of construction crosses or parallels an existing railway, it must accommodate itself to the established way of the latter, and cannot be so constructed as to overlap the existing tracks or right of way longitudinally, so that either track cannot be operated when the other is in use. *Seattle, etc., R. Co. v. State*, 7 Wash. 150, 38 Am. St. Rep. 866.

2. Slight Inconvenience to Intersected Road Permitted. — A comparatively slight injury or inconvenience to the intersected road need not be avoided when the avoidance would necessarily inflict a great injury on the crossing road or would involve an unreasonable expenditure of money out of all proportion to the damage done. *Baltimore, etc., R. Co. v. Philadelphia, etc., R. Co.*, 17 Phila. (Pa.) 396.

In a controversy between two railroads the plaintiff proposed to cross the defendant's tracks by means of a bridge supported upon abutments built entirely outside of the latter's right of way, and iron pillars standing in the spaces between the main track and certain side tracks (of which there were eight at that point) adjacent thereto and in the spaces between the side tracks. The defendant objected to the pillars altogether, alleging that they would necessarily be so near to the tracks as to be dangerous. It appearing that a bridge with terminal supports only would be required to have a span of 317 feet — greater than that of any similar bridge in this country — and that it would cost fifty per cent more than one of the kind proposed, and that the pillars would leave ample room for the safe movement of cars, the court was of the opinion that the erection of the pillars should be permitted. *Baltimore, etc., R. Co. v. Philadelphia, etc., R. Co.*, 17 Phila. (Pa.) 396.

Crossing Over Yard. — It being found that a proposed construction of the plaintiff company's road across the defendant company's yard, upon an elevated structure occupying but a trifling part of the yard, would cause comparatively little injury, easily compensated in damages, and was absolutely necessary, the plaintiff's right to effect such crossing was sustained and enforced. *Pittsburgh Junction R. Co. v. Allegheny Valley R. Co.*, 146 Pa. St. 297.

It cannot, however, appropriate for its road.

Elements to Be Considered.—In choosing the point of intersection, an effort should be made to combine the greatest public benefit and the least private injury,¹ and whether a certain manner of crossing is compatible with the greatest public benefit and the least private injury is a question of fact to be determined with reference to the circumstances proved.²

c. INJUNCTION AGAINST INJURIOUS CROSSING.—Where the intersection will materially interfere with vested rights, and prove particularly injurious to the intersected road, equity will enjoin such crossing.³

a part of the yard of another company reasonably necessary for the corporate purposes of the latter, merely for the sake of convenience or to save expense and in the absence of any actual necessity for such appropriation. *Pittsburgh Junction R. Co. v. Allegheny Valley R. Co.*, 146 Pa. St. 297. See also *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. St. 511, 9 Am. St. Rep. 128.

Burden of Proof.—The rights of the crossing railroad are secondary to those crossed, and the crossing company must show by evidence that no unnecessary injury is inflicted on the other by a grade crossing, and that such crossing cannot reasonably be avoided. *Pittsburgh, etc., R. Co. v. Southwest Pennsylvania R. Co.*, 77 Pa. St. 173.

1. Elements to Be Considered.—Upon due compensation, the present use of the lands for the railroad crossed must yield to any necessary interference by the crossing road, which will not destroy the reasonably fair enjoyment and exercise of the franchises of the company whose lands are crossed. *National Docks, etc., R. Co. v. United New Jersey R., etc., Co.*, 53 N. J. L. 217, 26 Am. St. Rep. 421.

Under a statute authorizing the court to prescribe a location for the crossing of one railroad by another, the company whose land is taken for that purpose can have only the place and manner of a necessary crossing, so ordered as to be as little injurious to it as is consistent with the accomplishment of the purpose, regard being had for the necessities of both corporations and the public. *Matter of Minneapolis, etc., R. Co.*, 39 Minn. 162. See also *In re Atlantic Highlands, etc. Electric R. Co.*, (N. J. 1896) 35 Atl. Rep. 387.

Impairing Buildings.—It seems that the action of the commissioners appointed under the New York statute, for the purpose of locating the crossing of one railroad over the track of another, is unauthorized and subject to review when such location materially impairs the buildings and facilities of the company whose track is crossed, and where it appears that exclusive occupation of such buildings is necessary by the companies owning them. *Matter of Boston, etc., R. Co.*, 79 N. Y. 64, *modifying* 55 How. Pr. (N. Y. Supreme Ct.) 167.

2. Question of Fact.—*California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 20 Am. & Eng. R. Cas. 309.

"It is the policy of the law, therefore, to see that the ability of an existing corporation to serve the public shall not be unnecessarily impaired. It is equally the policy of the law that the service which the new corporation proposes to render shall not be lessened or impaired by unreasonable expense, or by unreasonably inferior methods of construction or

operation. The degree in which each company must yield its own convenience and private interests must be determined by what is the most reasonable course to be taken to preserve the continuity of the existing public service on the one hand, and securing the best and most efficient service from the new corporation on the other hand." *National Docks, etc., Connecting R. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 142.

Two Crossings.—A railroad company should not be allowed to construct its tracks so as to cross the track of another on the same plane at two different points within two hundred and ninety feet, and less than a mile from another crossing of the same road, except under some paramount necessity for the service of the public or the state. *Missouri, etc., R. Co. v. Texas, etc., R. Co.*, 4 Woods (U. S.) 360, 10 Fed. Rep. 497.

Dangerous Crossing.—In *Morris, etc., R. Co. v. Central R. Co.*, 31 N. J. L. 205, it was suggested that the crossing would be attended with danger and consequently should not be allowed. In passing upon the question the court said: "It is sufficient to say that it is a danger that can be avoided by the exercise of the proper care on the part of both companies."

3. Injunction.—*Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 91 Iowa 16.

Unauthorized Crossing.—Where a crossing is attempted in a manner or at a place not authorized by law it will be enjoined. *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150; *Central Vermont R. Co. v. Woodstock R. Co.*, 50 Vt. 452; *Missouri, etc., R. Co. v. Texas, etc., R. Co.*, 4 Woods (U. S.) 360.

A court of equity may restrain the exercise of the right of crossing intersecting lines conferred on railroads by *Texas Const.*, art. 10, § 1, until, by proper legal proceedings, it has been established under the proper limitations and conditions. *Missouri, etc., R. Co. v. Texas, etc., R. Co.*, 4 Woods (U. S.) 360, 10 Fed. Rep. 497.

Temporary Injunction.—In an action by a stockholder to enjoin a railroad corporation from intersecting the road of the railroad corporation of which the plaintiff is a member, a temporary injunction may be granted, without notice to the corporation about to make the intersection. Such injunction does not suspend the general and ordinary business of such corporation, within the meaning of *New York Code Civ. Pro.*, § 1809. *Howlett v. New York, etc., R. Co.*, 14 Abb. N. Cas. (N. Y. Supreme Ct.) 328.

Waiver of Right.—Where a railroad company has been enjoined from constructing a grade crossing, and afterwards constructs an overhead crossing at the same point, it waives.

When Injunction Will Be Refused. — But an injunction will not be granted on account of mere inconvenience or where the injury may be easily compensated in damages.¹

5. Manner of Crossing — a. DUTY OF INTERSECTING ROADS. — It is the duty of every company whose railroad shall be intersected by any new railroad to unite with the owners of such new road in forming such connections, and grant facilities in furtherance of the objects of intersection.²

b. SUBMISSION OF QUESTION TO COURT. — If the respective companies cannot agree as to the place and manner of crossing, the question is usually submitted to the court upon a petition filed for such purpose.³ Upon consideration of the petition thus presented, and upon being advised that such a

all right to the grade crossing, and its right to such will not be considered on appeal. *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 91 Iowa 16.

Entire Right of Way Not Secured. — Where a railroad company is proceeding in good faith with the construction of its road with apparent ability to perform properly its work it will not be restrained from crossing another road merely because it has not yet secured a right of way over its entire route. *National Docks, etc., R. Co. v. Pennsylvania R. Co.*, (N. J. 1895) 30 Atl. Rep. 1102.

1. Injuries Capable of Compensation. — Where a railway company has acquired, by agreement, the right to lay two railroad tracks across a railroad previously constructed, and it seeks to condemn, under the Eminent Domain Act, an additional strip on which to construct two other of its tracks across the same road, the fact that it will produce an obstruction and an inconvenience to the company whose road is sought to be crossed is no reason for enjoining the proceeding to condemn, as all the damages caused thereby, when ascertained, will have to be paid, and it will be presumed that they will be fully awarded. *Chicago, etc., R. Co. v. Illinois Cent. R. Co.*, 113 Ill. 156.

Resisting Crossing by Force. — In an application for an injunction to restrain one railroad from crossing another, the fact that the plaintiff will resist the crossing by force, and so possibly cause bloodshed, is not cause in itself for granting the application; neither is it a bar to the application if otherwise proper. *Canadian Pac. R. Co. v. Northern Pac., etc., R. Co.*, 5 Manitoba L. Rep. 301.

Remedy at Law. — Where, pending an appeal from the award, the railroad company enters upon lands condemned, without paying or depositing the compensation as required by law, its act is a naked trespass for which the landowner has an adequate remedy by an action at law; and an injunction will not be granted unless it is shown that irreparable injury will be inflicted. It was so held, where one company entered upon the roadbed of another and constructed its track thereon. *Mobile, etc., R. Co. v. Alabama Midland R. Co.*, 87 Ala. 520, 39 Am. & Eng. R. Cas. 117.

2. Duty of Intersecting Roads. — *Matter of Lockport, etc., R. Co.*, 77 N. Y. 557; *Matter of Boston, etc., R. Co.*, 79 N. Y. 64; *Buffalo, etc., R. Co. v. New York, etc., R. Co.*, 72 Hun (N. Y.) 583. See also *State v. St. Paul, etc., R. Co.*, 40 Minn. 353, *construing Minnesota Gen.*

Laws, 1887, cc. 10 and 14, and holding that c. 14 was impliedly repealed by c. 10, which was approved after c. 14.

3. Submission to Court — California. — *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 20 Am. & Eng. R. Cas. 309.

Illinois. — *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 97 Ill. 506, 2 Am. & Eng. R. Cas. 440; *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 100 Ill. 21, 2 Am. & Eng. R. Cas. 454.

Indiana. — *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 116 Ind. 578, 37 Am. & Eng. R. Cas. 430.

Michigan. — *Toledo, etc., R. Co. v. Detroit, etc., R. Co.*, 62 Mich. 564, 4 Am. St. Rep. 875, 28 Am. & Eng. R. Cas. 272; *Flint, etc., R. Co. v. Detroit, etc., R. Co.*, 64 Mich. 350; *Toledo, etc., R. Co. v. East Saginaw, etc., R. Co.*, 72 Mich. 206, 36 Am. & Eng. R. Cas. 553.

Minnesota. — *Winona, etc., R. Co. v. Chicago, etc., R. Co.*, 50 Minn. 300.

New Jersey. — *United New Jersey R., etc., Co. v. National Docks, etc., R. Co.*, 52 N. J. L. 90, 44 Am. & Eng. R. Cas. 226; *National Docks, etc., R. Co. v. United New Jersey R., etc., Co.*, 53 N. J. L. 217, 26 Am. St. Rep. 421.

New York. — *Matter of Lockport, etc., R. Co.*, 77 N. Y. 557, *reversing* 15 Hun (N. Y.) 365; *Matter of Boston, etc., R. Co.*, 79 N. Y. 64.

North Carolina. — *Richmond, etc., R. Co. v. Durham, etc., R. Co.*, 104 N. Car. 658, 40 Am. & Eng. R. Cas. 488.

Pennsylvania. — *Pennsylvania Schuylkill Valley R. Co. v. Philadelphia, etc., R. Co.*, 20 Phila. (Pa.) 420.

See also the title EMINENT DOMAIN, ENCYC. OF PL. AND PR., vol. 7, p. 460.

The corporation seeking the right of way, when the parties cannot agree, must select the place and manner of the proposed crossing, and the character and conditions of the use sought. *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 97 Ill. 506, 2 Am. & Eng. R. Cas. 440.

Bona Fide Effort to Agree. — The effort to agree must be a *bona fide* one, showing an attempt to purchase by treaty between the parties the property and franchises described in the petition, and a failure to do so, before other proceedings are taken. *Toledo, etc., R. Co. v. Detroit, etc., R. Co.*, 62 Mich. 564, 4 Am. St. Rep. 875, 28 Am. & Eng. R. Cas. 272. See also *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 116 Ind. 578, 37 Am. & Eng. R. Cas. 430.

crossing will benefit the public, the court will determine the place and manner of crossing and the compensation to be paid.¹ And in determining the manner of crossing the court may make a decree to meet the necessities of the case, although it may necessitate the doing of some act by one of the parties.²

c. DETERMINATION BY COMMISSIONERS. — Where the court does not feel itself competent to act, or where the determination of such matters has been left by statute to other hands, the court will appoint commissioners for the consideration of the questions in issue.³

1. **Determination of Court.** — South Carolina R. Co. v. Columbia, etc., R. Co., 13 Rich. Eq. (S. Car.) 339; *In re* Atlantic Highlands, etc., Electric R. Co., (N. J. 1896) 35 Atl. Rep. 387; Seattle, etc., R. Co. v. State, 7 Wash. 150, 38 Am. St. Rep. 866; Baltimore, etc., R. Co. v. Hanover, etc., St. R. Co., 2 Pa. Dist. Rep. 774. See *infra*, this section, *Grade Crossings*.

Where two railway companies possess a community of interest in the land on which they cross each other, and disagree as to their respective rights of use of the same, the court of chancery will control and direct the use of the land by them, according to their respective rights. National Docks, etc., R. Co. v. Pennsylvania R. Co., (N. J. 1895) 30 Atl. Rep. 1102.

Change of Location. — In proceedings under the Minnesota statute (Laws 1879, c. 35, § 3) to condemn a crossing over another railroad the court is not confined to the precise location mentioned in the petition. State v. District Ct., 35 Minn. 461.

Under the New Jersey statute (P. L. 1895, p. 462), it has been held, however, that upon an application of such nature the chancellor, even to avoid a grade crossing, cannot change the location of the crossing to a point which he considers better for the public. *In re* Atlantic Highlands, etc., Electric R. Co., (N. J. 1896) 35 Atl. Rep. 387.

Pennsylvania Statute. — The Pa. Act of June 19, 1871, providing for control by the court of crossings where one railroad crosses another, applies to street railways. Baltimore, etc., R. Co. v. Hanover, etc., St. R. Co., 2 Pa. Dist. Rep. 774; Pennsylvania R. Co. v. Conshohocken R. Co., 4 Pa. Dist. Rep. 12.

This act imposes on the court in such cases a threefold duty: (1) to ascertain the mode of crossing which will least injure the company whose road is to be crossed; (2) to compel by its decree the adoption of that mode; (3) to prevent by its process a crossing at grade, if any other be reasonably practicable. Baltimore, etc., R. Co. v. Hanover, etc., St. R. Co., 2 Pa. Dist. Rep. 774. See also Perry County R. Extension Co. v. Newport, etc., R. Co., 150 Pa. St. 193; Scranton, etc., Traction Co. v. Delaware, etc., Canal Co., 1 Pa. Super. Ct. Rep. 409.

The equitable powers conferred upon the courts of common pleas by Pa. Act of June 19, 1871, § 2 (P. L., p. 1861), in regard to railroad crossings, cannot be invoked in favor of a company whose primary object is to appropriate the lands or right of way of another company, the crossing of its tracks being a mere incident. Sharon R. Co.'s Appeal, 122 Pa. St. 533, 9 Am. St. Rep. 133.

2. **Mandatory Decree.** — Pennsylvania R. Co. v. Conshohocken R. Co., 4 Pa. Dist. Rep. 12, 15 Pa. Co. Ct. Rep. 454.

The court may not only prescribe the place, angle, and elevation of the crossing, but also that the petitioning company shall do what to the court shall seem reasonably practicable to make and keep the crossing safe for the trains of the other company and for the public, and for that purpose may require it to construct and maintain a known and approved device to enable trains to pass a crossing without danger of collision. Winona, etc., R. Co. v. Chicago, etc., R. Co., 50 Minn. 300.

Watchmen. — Courts of equity, by the Pennsylvania Act of 1871, have power to impose regulations looking to the safety of the public in reference to watchmen, etc. Pennsylvania R. Co. v. Braddock Electric R. Co., 1 Pa. Dist. Rep. 111.

3. **Determination by Commissioners.** — Union Pac. R. Co. v. Leavenworth, etc., R. Co., 29 Fed. Rep. 731; Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co., 116 Ind. 578, 37 Am. & Eng. R. Cas. 430; Toledo, etc., R. Co. v. Detroit, etc., R. Co., 62 Mich. 564, 4 Am. St. Rep. 875, 28 Am. & Eng. R. Cas. 272; Matter of Minneapolis, etc., R. Co., 36 Minn. 481, 30 Am. & Eng. R. Cas. 279; Matter of St. Paul, etc., R. Co., 37 Minn. 164, 30 Am. & Eng. R. Cas. 294; Kansas City Suburban Belt R. Co. v. Kansas City, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 624; Matter of Lockport, etc., R. Co., 77 N. Y. 557; Matter of Boston, etc., R. Co., 79 N. Y. 64; Boston, etc., R. Co. v. Troy, etc., R. Co., 58 How. Pr. (N. Y. Supreme Ct.) 167; Matter of Saratoga Electric R. Co., 58 Hun (N. Y.) 287; Buffalo, etc., R. Co. v. New York, etc., R. Co., 72 Hun (N. Y.) 587; Richmond, etc., R. Co. v. Durham, etc., R. Co., 104 N. Car. 658, 40 Am. & Eng. R. Cas. 488; Central Vermont R. Co. v. Woodstock R. Co., 50 Vt. 452.

Discretion of Commissioners. — The power of commissioners under the N. Y. Railroad Act of 1850 to decide as to the point and manner of crossing tracks of disagreeing railroad companies gives such commissioners discretion to determine the spot and the method of its accomplishment. Boston, etc., R. Co. v. Troy, etc., R. Co., 58 How. Pr. (N. Y. Supreme Ct.) 167. See also Maine Cent. R. Co. v. Waterville, etc., R. Co., 89 Me. 328.

Arbitrators. — Under the Alabama statute, the point of crossing is determined by arbitrators appointed by the probate court. Memphis, etc., R. Co. v. Birmingham, etc., R. Co., 96 Ala. 571.

English Statute. — The order of a judge appointing arbitrators to settle the terms on which one railway shall cross another, under the powers given to him by 14 & 15 Vict., c. 51, § 9, subsection 15, cannot be reversed by the court. *In re* Buffalo, etc., R. Co., 14 U. C. Q. B. 397, affirming 2 Ont. Pr. Rep. 88.

Duty of Commissioners. — The commissioners should provide for all the details of construction and operation which would ordinarily have been provided for between the companies themselves had they been able to agree.¹

Award of Commissioners. — The award of the commissioners stands as a contract between the parties, and they have the same rights under it, and may enforce it in the same manner, as if it had been a voluntary agreement.²

Setting Aside Award. — It being presumed that a fair and impartial hearing was had before the commissioners, and that all questions as between the parties were fully disposed of, the award of the commissioners will not be lightly set aside,³ unless it be made to appear that the award as rendered was grossly inadequate or unjust and in derogation of the lawful rights of one of the contending parties.⁴

1. Duty of Commissioners. — Chicago, etc., R. Co. v. Kansas City, etc., R. Co., 110 Mo. 510; Buffalo, etc., R. Co. v. New York, etc., R. Co., 72 Hun (N. Y.) 583; Matter of Lockport, etc., R. Co., 19 Hun (N. Y.) 38. See also Kansas City Suburban Belt R. Co. v. Kansas City, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 624.

The commissioners have power to provide in the award that temporary pile piers, permitted by them to be used in a bridge for the crossing, should be replaced within a year by stone masonry. Chicago, etc., R. Co. v. Kansas City, etc., R. Co., 110 Mo. 510.

Questions for Commissioners Should Not Be Passed on by Court. — The commissioners under the *New York* statute are the tribunal by which all questions in regard to the place and manner of crossing are to be determined, in view among other things of the motive power employed and the mode of its application, etc.; and such questions are not to be passed upon by the court on application for the appointment of commissioners, or by a referee to whom such application may be referred. Buffalo, etc., R. Co. v. New York, etc., R. Co., 72 Hun (N. Y.) 583.

The question whether the crossing will interfere with the road crossed is also for the consideration of the commissioners. Hornells-ville Electric R. Co. v. New York, etc., R. Co., 83 Hun (N. Y.) 407.

2. Award of Commissioners. — Chicago, etc., R. Co. v. Kansas City, etc., R. Co., 110 Mo. 510. See *supra*, this section, *Enforcement of Contract*.

3. Setting Aside Award. — A report of commissioners will not be set aside, where there is nothing in the record to show prejudice to the defendant company, because it leaves it optional with the plaintiff company to make connections at either line of the street crossed by the defendant company, instead of fixing the point definitely at one of these places. St. Louis Transfer R. Co. v. St. Louis, etc., R. Co., 100 Mo. 419.

Nor will such report be set aside on appeal for the reason that the commissioners made no award of damages to the defendant company, where the record does not show the preservation of the evidence offered upon this objection to the report. St. Louis Transfer R. Co. v. St. Louis, etc., R. Co., 100 Mo. 419.

View of Premises. — While it is the duty of the commissioners appointed under *Missouri* Rev. Stat. 1879, § 765, for the purpose of deter-

mining the points and manner of the crossing and joining, etc., of two railroads and the compensation therefor, to view the premises, yet it is not required that such fact be recited in their report. St. Louis Transfer R. Co. v. St. Louis, etc., R. Co., 100 Mo. 419.

Examination of Witnesses. — Under the *New Jersey* law, the fact that commissioners appointed to assess damages examined persons under oath to obtain information, and refused to hear others because they were not sworn, is not alone sufficient to set aside the award. Lehigh Valley, etc., R. Co. v. Dover, etc., R. Co., 43 N. J. L. 528, 14 Am. & Eng. R. Cas. 87, *distinguishing* Van Wicke v. Camden, etc., R. Co., 14 N. J. L. 162. See also Coster v. New Jersey, etc., R. Co., 24 N. J. L. 730, *affirming* 23 N. J. L. 227.

Right of Trial by Jury. — Where companies have not been able to agree as to the terms upon which one company may lay its tracks across the line of the other, and commissioners have been appointed, the report of such commissioners upon the questions of the mode and manner of crossing, as well as the compensation, will not be set aside and the questions determined by a jury, under the statutory provision that the right of trial by jury shall be held inviolate in all trials of claims for compensation, when in the exercise of the right of eminent domain any incorporated company shall be interested for or against the exercise of such right; the statutory provision having reference only to the question of damages. Kansas City Suburban Belt R. Co. v. Kansas City, etc., R. Co., 118 Mo. 599, 57 Am. & Eng. R. Cas. 624.

Enjoining Proceedings of Commissioners. — An injunction will not lie from a court of equity to enjoin commissioners, who are appointed to condemn the right of one railroad to cross the tracks of another, from considering a certain plan of crossing, which is alleged to be different from that described in the petition, the respondent having denied that there was any material difference between the two plans. Pennsylvania R. Co. v. National Docks, etc., R. Co., 56 Fed. Rep. 697.

4. Unjust Award. — Flint, etc., R. Co. v. Detroit, etc., R. Co., 64 Mich. 350.

In *Maine Cent. R. Co. v. Waterville, etc., R. Co.*, 89 Me. 328, the court said: "It seems to us that the evident intention of the legislature was to leave the whole question of how railroad crossings should be constructed and maintained, and how the expense of such cross-

d. BY BRIDGE, TUNNEL, OR AT GRADE—(1) *In General.*—A crossing by one railroad over the track of another may be by tunnel, an overhead bridge, or a passage across the rails at grade.¹

(2) *Grade Crossings.*—While a crossing at grade is not absolutely prohibited, such crossings are, as a rule, looked upon with disfavor by the law;² and where any other reasonable and practicable route presents itself, a right of crossing at grade will be denied.³

ings should be borne, in the first instance, to the sound judgment and discretion of the railroad commissioners, and we think that their decision should not be altered or reversed unless manifestly illegal or unjust."

Award Transferring Property.—A provision in the report permitting the plaintiff to occupy a certain incomplete switch of the defendant for the space of two hundred and fifty feet, and in effect condemning that much of the defendant's side track and appropriating the same to the use of the plaintiff, was held to be unauthorized by the order of the court appointing the commissioners, and an exception to the report on that ground should have been sustained. *St. Louis Transfer R. Co. v. St. Louis, etc., R. Co.*, 100 Mo. 419.

1. Three Modes of Crossing.—*United New Jersey R., etc., Co. v. National Docks, etc., R. Co.*, 52 N. J. L. 90, 44 Am. & Eng. R. Cas. 226.

By Bridge.—Where a company desires to cross a street at a point occupied by another railroad, the state railroad crossing board may, under *How. Stat. Mich.*, § 3301, require such company to carry its tracks above those of the other company by means of a bridge, and to provide a passageway upon such bridge for teams and pedestrians, the cost of such passageway to be borne by the two companies equally. *Fort Street Union Depot Co. v. State R. Crossing Board*, 81 Mich. 248, 45 Am. & Eng. R. Cas. 113.

2. Grade Crossings.—*United States.*—*Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 219.

Iowa.—*Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 91 Iowa 16.

Massachusetts.—*Fitchburg R. Co. v. New Haven, etc., Co.*, 134 Mass. 547, 14 Am. & Eng. R. Cas. 95.

New Jersey.—*In re Atlantic Highlands, etc., Electric R. Co.*, (N. J. 1896) 35 Atl. Rep. 387.

Pennsylvania.—*Pittsburg, etc., R. Co. v. South-west Pennsylvania R. Co.*, 77 Pa. St. 173; *Northern Cent. R. Co.'s Appeal*, 103 Pa. St. 621; *Pennsylvania R. Co.'s Appeal*, 116 Pa. St. 55; *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. St. 511, 9 Am. St. Rep. 128, 28 Am. & Eng. R. Cas. 266; *Perry County R. Extension Co. v. Newport, etc., R. Co.*, 150 Pa. St. 193; *Pennsylvania R. Co. v. Braddock Electric R. Co.*, 152 Pa. St. 126, 55 Am. & Eng. R. Cas. 1; *Pennsylvania Schuylkill Valley R. Co. v. Philadelphia, etc., R. Co.*, 160 Pa. St. 277; *Altoona, etc., Connecting R. Co. v. Tyrone, etc., R. Co.*, 160 Pa. St. 623; *Scranton, etc., Traction Co. v. Delaware, etc., Canal Co.*, 1 Pa. Super. Ct. Rep. 409; *Baltimore, etc., R. Co. v. Hanover, etc., St. R. Co.*, 2 Pa. Dist. Rep. 774; *Delaware, etc., Canal Co. v. Scranton, etc., Traction Co.*, 4 Pa. Dist. Rep. 287; *Delaware, etc., R. Co. v. Lackawanna, etc., R. Co.*, 3 Lack. Jur. (Pa.) 413; *Baltimore, etc., R.*

Extension Co.'s Appeal, 10 W. N. C. (Pa.) 530, 3 Am. & Eng. R. Cas. 242; *Moosic Mountain Coal Co.'s Appeal*, (Pa. 1888) 13 Atl. Rep. 915.

See also *Toledo, etc., R. Co. v. Detroit, etc., R. Co.*, 63 Mich. 645, 28 Am. & Eng. R. Cas. 280.

In the case of *Pittsburg, etc., R. Co. v. South-west Pennsylvania R. Co.*, 77 Pa. St. 173, the court, by *Mercur, J.*, said: "The evident intentment of the statute is to discourage crossing at grade. This is a question in which the company whose road is to be crossed is not the only party liable to injury thereby. It involves the safety and security of the public. Crossings at grade are always attended with danger. As our population becomes more dense, travel and traffic will increase, and the injuries resulting from grade crossings will be multiplied. Each succeeding year will increase the necessity for avoiding them. Their construction should now and henceforth be discouraged." *Pennsylvania R. Co.'s Appeal*, 116 Pa. St. 84.

Crossing at Grade Necessary.—One railroad will not be prohibited crossing another at grade when it appears that the crossing is necessary to the successful operation of the plaintiff's road and will not seriously interfere with the defendant's, and that the city authorities have consented to the crossing, it being on a street in an outlying portion of a city. *Pennsylvania R. Co.'s Appeal*, 116 Pa. St. 55.

Where one road was desirous of crossing another, and it was shown that an overhead crossing would change the grade of a number of streets and would cost more than five times as much as a grade crossing, it was held that under such circumstances, and in view of the fact that the crossing was visible on both roads for almost a mile, it was not practicable to avoid a grade crossing. *Pennsylvania Schuylkill Valley R. Co. v. Philadelphia, etc., R. Co.*, 160 Pa. St. 277.

3. Another Route Practicable.—*In re Atlantic Highlands, etc., Electric R. Co.*, (N. J. 1896) 35 Atl. Rep. 387; *Perry County R. Extension Co. v. Newport, etc., R. Co.*, 150 Pa. St. 193, 55 Am. & Eng. R. Cas. 12; *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. St. 511, 9 Am. St. Rep. 128, 28 Am. & Eng. R. Cas. 266; *Northern Cent. R. Co.'s Appeal*, 103 Pa. St. 621; *Baltimore, etc., R. Co. v. Hanover, etc., St. R. Co.*, 2 Pa. Dist. Rep. 774; *Baltimore, etc., R. Extension Co.'s Appeal*, 10 W. N. C. (Pa.) 530, 3 Am. & Eng. R. Cas. 242; *Scranton, etc., Traction Co. v. Delaware, etc., Canal Co.*, 1 Pa. Super. Ct. Rep. 409. See also *Pennsylvania Schuylkill Valley R. Co. v. Philadelphia, etc., R. Co.*, 160 Pa. St. 277.

Illinois.—In the state of Illinois it is the policy of the law to allow a new railroad to cross on the track of an old one at grade, but at the same time the legislature has clearly

Presumption of Law. — The *prima facie* presumption of law is that a crossing at grade can be reasonably avoided, and the burden of proving that it cannot in any particular case is on the company seeking such a crossing.¹

(3) *Jurisdiction of Courts of Equity.* — In the absence of statute regulating the place and manner of crossing, courts of equity are empowered to determine the relative rights of the companies with respect to the construction of the same.² And where the rights of the public or one or the other of the intersecting lines will be materially injured, a court of equity may enjoin such crossing.³

shown that it is intended that a railroad should not cross at grade in all instances. If a new road can, at small expense, cross at a different level the track of another road, it should be required to do so, particularly in cases where a grade crossing would jeopardize life and property. Additional expense should be apportioned between the roads. *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 219.

By the Pa. Act of 1871 the rights of crossing railroads are secondary to those of the roads crossed, and the crossing company must show that no unnecessary injury is inflicted on the other by crossing at grade, and that such crossing cannot be reasonably avoided. The intent of the act is to discourage grade crossings involving danger to the public as well as injury to the company whose road is crossed. *Pittsburg, etc., R. Co. v. South-west Pennsylvania R. Co.*, 77 Pa. St. 173.

Pennsylvania Constitutional Provisions. — The provision in the Pennsylvania Constitution of 1874 that every railroad company shall have the right "to intersect, connect with, or cross any other railroad," does not change the policy of the state as embodied in the Act of June 19, 1871, to prevent railroad crossings at grade where that is reasonably practicable. *Northern Cent. R. Co.'s Appeal*, 103 Pa. St. 621.

The same constitution, art. 17, § 1, authorizing the crossing of railroads, does not declare whether the crossing shall be at grade or not; that is left to legislation and judicial decision. *Pittsburg, etc., R. Co. v. South-west Pennsylvania R. Co.*, 77 Pa. St. 173. See also *Perry County R. Extension Co. v. Newport, etc., R. Co.*, 150 Pa. St. 193.

Pennsylvania Statute. — The Pa. Act of May 14, 1889, P. L., p. 211, providing that any street railway company incorporated under that act shall have the right in its construction to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise, is subject to the Act of June 19, 1871, P. L., p. 1360, giving the courts power to regulate grade crossings and directing them to prevent crossings at grade when reasonably practicable. *Pennsylvania R. Co. v. Braddock Electric R. Co.*, 152 Pa. St. 116, reversing 1 Pa. Dist. Rep. 626.

Massachusetts Statute. — Mass. Stat. of 1872, c. 53, § 12, and c. 180, § 3, relating to railroads thereafter "constructed" crossing at grade, do not apply to a railroad corporation which prior to the passage of these statutes had located the line of its road, exercised its right of taking land for the use of its road, and incurred liability for land damages and expense in laying the roadbed, in rock excavation, in the construction of abutments for a bridge, and in the building of a long bridge at grade

in the immediate vicinity of the point where it intended to cross another railroad at grade, although the railroad and the crossing at grade were not completed. *Atty.-Gen. v. Ware River R. Co.*, 115 Mass. 400.

1. Burden of Proof. — *Moosic Mountain Coal Co.'s Appeal*, (Pa. 1888) 13 Atl. Rep. 915.

Factors to Be Considered. — The practicability of crossings other than at grade depends almost entirely upon the circumstances of each particular case. Among the factors to be considered are the location and surroundings of the proposed crossing, the character of the roads, and the use made and intended to be made of them, the increased cost of construction and expenses of operation, the public safety and convenience, and the interest and convenience of the road intended to be crossed. *Altoona, etc., Connecting R. Co. v. Tyrone, etc., R. Co.*, 160 Pa. St. 623.

2. Jurisdiction of Courts of Equity. — *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 219; *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 91 Iowa 16; *In re Atlantic Highlands, etc., Electric R. Co.*, (N. J. 1896) 35 Atl. Rep. 387; *National Docks, etc., R. Co. v. United New Jersey R., etc., Co.*, 53 N. J. L. 217, 26 Am. St. Rep. 421; *Du Bois Traction Pass. R. Co. v. Buffalo, etc., R. Co.*, 149 Pa. St. 1; *Cornwall, etc., R. Co.'s Appeal*, 125 Pa. St. 232, 11 Am. St. Rep. 889, 42 Am. & Eng. R. Cas. 233; *Altoona, etc., Connecting R. Co. v. Tyrone, etc., R. Co.*, 160 Pa. St. 623, 34 W. N. C. (Pa.) 174; *Perry County R. Extension Co. v. Newport, etc., R. Co.*, 150 Pa. St. 193; *Scranton, etc., Traction Co. v. Delaware, etc., Canal Co.*, 1 Pa. Super. Ct. Rep. 409; *Pennsylvania R. Co. v. Braddock Electric R. Co.*, 152 Pa. St. 116, 55 Am. & Eng. R. Cas. 1; *Northern Cent. R. Co.'s Appeal*, 103 Pa. St. 621.

The question whether a grade crossing should be allowed cannot be determined in condemnation proceedings. *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 91 Iowa 16.

Injunction Against Violation of Contract. — Courts of equity having by statute been empowered to decide whether one railroad shall cross another at grade, and having as incident of that power the right to lay down the rules governing the use of the crossing, an agreement between two railroads relative to the use of a grade crossing will be enforced in equity by a bill for equitable relief and for an injunction against the violation of the contract. *Cornwall, etc., R. Co.'s Appeal*, 125 Pa. St. 232, 11 Am. St. Rep. 889, 42 Am. & Eng. R. Cas. 233.

3. Injunction. — *Missouri, etc., R. Co. v. Texas, etc., R. Co.*, 4 Woods (U. S.) 360, 10 Fed. Rep. 497, 6 Am. & Eng. R. Cas. 597;

6. Compensation. — According to a fundamental principle of law, the railroad seeking an intersection must make compensation for all damages and loss that may result therefrom.¹

Humeston, etc., R. Co. v. Chicago, etc., R. Co., 74 Iowa 554, 35 Am. & Eng. R. Cas. 263; *Lynn, etc., R. Co. v. Boston, etc., R. Corp.*, 114 Mass. 88; *Delaware Canal Co. v. Scranton, etc., Traction Co.*, 4 Pa. Dist. Rep. 287; *Baltimore, etc., R. Extension Co.'s Appeal*, 10 W. N. C. (Pa.) 530, 3 Am. & Eng. R. Cas. 242; *Reynoldsville R. Co. v. Buffalo R. Co.*, 134 Pa. St. 541; *Du Bois Traction Pass. R. Co. v. Buffalo, etc., R. Co.*, 149 Pa. St. 1; *Perry County Extension R. Co. v. Newport, etc., R. Co.*, 150 Pa. St. 193.

In a proceeding in equity by one railroad company to restrain another from crossing the tracks of the former at grade, the complainants cannot avail themselves of the fact that the defendants have, by their laches, allowed a third company to build its tracks over that portion of the chartered route of the defendants intended to be occupied by them after making said crossing. *Western Pennsylvania R. Co.'s Appeal*, 104 Pa. St. 399.

The Iowa statute granting the right of one railroad to cross another provides that the crossing shall be so constructed as not unnecessarily to impede the travel or transportation upon the railroad crossed. In the case of *Humeston, etc., R. Co. v. Chicago, etc., R. Co.*, 74 Iowa 554, 35 Am. & Eng. R. Cas. 263, it appeared that the track of the old road at the point at which it was proposed to construct the crossing was upon a heavy grade, so that if loaded trains were stopped within two hundred feet of the crossing, as required by statute, it would be impossible to acquire sufficient momentum to ascend the grade, and that trains going the other way, being on a down grade, would be unable to stop except with great difficulty. It was shown that an under crossing could be constructed at a cost less than \$15,000 in excess of the crossing at grade. The court held that the old road was entitled to an injunction against a crossing at grade, and the fact that the new company, pending the proceedings, had constructed various works at a cost of \$6,000, which would become useless in case the crossing at grade was enjoined, was not sufficient reason for the refusal of the injunction.

Street Railways. — Where two street railway companies are operating their respective roads under a franchise granted by legal authority, their tracks crossing each other at the intersection of two streets, a court of equity will not entertain a bill for injunction by one of them to restrain the other from laying a double track at the crossing, unless a case of irreparable injury is averred and proved, or other special facts showing the inadequacy of legal remedies. *Highland Ave., etc., R. Co. v. Birmingham Union R. Co.*, 93 Ala. 505, 50 Am. & Eng. R. Cas. 422.

1. Compensation. — *United States.* — *Northern Pac. R. Co. v. St. Paul, etc., R. Co.*, 1 McCrary (U. S.) 302.

Alabama. — *Memphis, etc., R. Co. v. Birmingham, etc., R. Co.*, 96 Ala. 571.

Georgia. — *Georgia Midland, etc., R. Co.*

v. Columbus Southern R. Co., 89 Ga. 205, 51 Am. & Eng. R. Cas. 538.

Illinois. — *Chicago, etc., R. Co. v. Springfield, etc., R. Co.*, 67 Ill. 147; *St. Louis, etc., R. Co. v. Springfield, etc., R. Co.*, 96 Ill. 274, 2 Am. & Eng. R. Cas. 487; *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 97 Ill. 506, 2 Am. & Eng. R. Cas. 440; *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 100 Ill. 21; *Chicago, etc., R. Co. v. Illinois Cent. R. Co.*, 113 Ill. 156; *Chicago, etc., R. Co. v. Englewood Connecting R. Co.*, 115 Ill. 375, 56 Am. Rep. 173; *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 15 Ill. App. 587.

Maryland. — *Baltimore, etc., Turnpike Co. v. Union R. Co.*, 35 Md. 224; *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, 60 Md. 263, 14 Am. & Eng. R. Cas. 79.

Massachusetts. — *Grand Junction R., etc., Co. v. Middlesex County*, 14 Gray (Mass.) 553; *Massachusetts Cent. R. Co. v. Boston, etc., R. Co.*, 121 Mass. 124.

Michigan. — *Toledo, etc., R. Co. v. Detroit, etc., R. Co.*, 62 Mich. 564, 4 Am. St. Rep. 875, 28 Am. & Eng. R. Cas. 272.

New York. — *Sixth Ave. R. Co. v. Kerr*, 45 Barb. (N. Y.) 138.

Where one company constructs its track across the track of another the latter is entitled to compensation, although the tracks of the latter are upon piles over tide waters. *Grand Junction R., etc., Co. v. Middlesex County*, 14 Gray (Mass.) 553.

Crossing Projected Route Not Condemned. — Where a company in building its road crossed the line of a projected railway upon a grade twelve or fourteen feet above the grade of the other, no work having been done on the projected line at or near the point of intersection, nor had the right of way been acquired from the owner, nor the proceedings been taken to condemn it, it was held that no injury had been done to the projected road for which damages could be recovered. *St. Louis, etc., R. Co. v. Peach Orchard, etc., R. Co.*, 42 Ark. 249, 20 Am. & Eng. R. Cas. 251.

What Amounts to Total Appropriation. — Where one railroad is in close proximity to the graded right of way and roadbed of another for a distance of thirty-one miles, crossing it a number of times within this distance, and running in one place as much as three miles upon the roadbed of the second railroad, the second railroad is not entitled to recover in damages the value of its entire right of way for thirty-one miles, but is entitled only to the value of the advantage gained by the intersecting railroad crossing its line and appropriating part of its right of way. *Chicago, etc., R. Co. v. Cedar Rapids, etc., R. Co.*, 86 Iowa 500, 51 Am. & Eng. R. Cas. 438.

Distinguished from Damages where Private Lands Are Condemned. — Where the right of one company to cross the track of another is acquired by condemnation proceedings, the exclusive use is not taken, and the damages sustained arise from interference with the exclusive use by the respondent of its track and

Compensation for Necessary Loss from Use of Crossing. — Under this rule the company whose road is crossed should receive not only just compensation for the land taken, but for all loss, inconvenience, and damage which might reasonably be expected to result from the construction and use of the crossing in a legal and proper manner.¹

Illustrations of Rule. — Thus in estimating the damages there should be taken into consideration any fences or structures on the land or changes in its surface absolutely required by law or necessary to be made by the corporation injured in order to accommodate its land to the new conditions.² So the compensation should not be confined to the damage done or the property taken at the very point of intersection. The construction of the new road may constitute such an obstruction to the right of way of the old one as will materially interfere with its capacity to transact business, and where this is the case the damages should include the whole injury sustained.³

right of way for railroad purposes. In such a case the award of damages is governed by different considerations from those applied when a company seeks to condemn the right of way over lands of private persons. *Flint, etc., R. Co. v. Detroit, etc., R. Co.*, 64 Mich. 350.

What Is a Sufficient Payment. — Compensation awarded and paid in money, on the basis that the parties would comply with the terms of the award as to the point and manner of making the crossing, satisfies the provision of the constitution requiring the compensation for the property taken to be paid to the owner or into court for his use. *Chicago, etc., R. Co. v. Kansas City, etc., R. Co.*, 110 Mo. 510.

Crossing of Railroads on Highway. — In *New York, etc., R. Co. v. Bridgeport Traction Co.*, 55 Conn. 410, it was held that the legislature might authorize a street railway to cross a steam railway at grade upon a highway without providing compensation to the steam railway. See also *Elizabethtown, etc., R. Co. v. Ashland, etc., St. R. Co.*, 96 Ky. 347.

And so in *Chicago, etc., R. Co. v. Steel*, 47 Neb. 741, it was held that a railroad holding a permanent easement in a street acquired by ordinance was not entitled to compensation for the crossing of a street railroad. See also *New York, etc., R. Co. v. Forty-second St., etc., R. Co.*, 50 Barb. (N. Y.) 314.

1. Elements to Be Considered in Fixing Compensation. — *Memphis, etc., R. Co. v. Birmingham, etc., R. Co.*, 96 Ala. 571; *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 100 Ill. 21; *Chicago, etc., R. Co. v. Springfield, etc., R. Co.*, 67 Ill. 142; *Chicago, etc., R. Co. v. Englewood Connecting R. Co.*, 115 Ill. 375, 56 Am. Rep. 173; *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 15 Ill. App. 587; *Massachusetts Cent. R. Co. v. Boston, etc., R. Co.*, 121 Mass. 124; *Toledo, etc., R. Co. v. Detroit, etc., R. Co.*, 62 Mich. 564, 4 Am. St. Rep. 875, 28 Am. & Eng. R. Cas. 272; *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 30 Ohio St. 604. See also *Peoria, etc., Union R. Co. v. Peoria, etc., R. Co.*, 105 Ill. 110, 10 Am. & Eng. R. Cas. 129.

In fixing the compensation to be paid a company whose track is crossed, the commissioners, in case the manner of the proposed crossing is unknown, may assess the damages on the basis of either of the three modes which may be adopted in making such crossing (see *supra*, this section, *Manner of Crossing—By*

Bridge, Tunnel, or at Grade); and any additional expense created in the ordinary use of such road, or any other injury or damage to the company's track, right of way, or franchise, occasioned by such crossing, and which may properly be considered as a natural, necessary, and approximate cause thereof, should be allowed. *Toledo, etc., R. Co. v. Detroit, etc., R. Co.*, 62 Mich. 564, 4 Am. St. Rep. 875, 28 Am. & Eng. R. Cas. 272.

Increased Expense of Keeping Track in Repair.

— The intersected road is entitled to be compensated for all damages it may sustain, and for all extra cost in the future in maintaining its road in a safe condition. *St. Louis, etc., R. Co. v. Springfield, etc., R. Co.*, 96 Ill. 274, 2 Am. & Eng. R. Cas. 487.

Where one company acquires the right to run its road through a high embankment of another, and on a grade twenty feet below the track of the other, it is under no legal obligation to erect or maintain a bridge to support the track of such other company, and therefore proof of what it would cost to build such bridge and keep the same in repair is proper in the assessment of damages. The defendant, in such a case, is entitled to have such sum for damages as will enable it to construct and keep in repair all such works as may be necessary to keep its track in a safe and secure condition, and also for all such incidental loss and inconvenience as may be a necessary result. *Chicago, etc., R. Co. v. Springfield, etc., R. Co.*, 67 Ill. 142.

2. Changes in Surface of Land. — *Massachusetts Cent. R. Co. v. Boston, etc., R. Co.*, 121 Mass. 126; *Chicago, etc., R. Co. v. Englewood Connecting R. Co.*, 115 Ill. 375, 56 Am. Rep. 173.

3. Diminished Capacity to Transact Business. — *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 100 Ill. 21; *Peoria, etc., Union R. Co. v. Peoria, etc., R. Co.*, 105 Ill. 110, 10 Am. & Eng. R. Cas. 129.

If the inconvenience or hindrance resulting from the crossing or structures abridges the owner's capacity to transact business, it is an element of damages, even though it does not increase his expense. *Chicago, etc., R. Co. v. Englewood Connecting R. Co.*, 115 Ill. 375, 56 Am. Rep. 173.

Obstruction to Use of Land Not Condemned. — On proceedings to condemn a strip of land across the right of way of a company, a limita-

Remote Damages. — In estimating the compensation due from the intersecting to the intersected road, direct and immediate damages are alone recoverable, and remote or speculative damages should neither be considered nor allowed.¹

Compliance with Police Regulations. — Nor can damages be recovered for expenses involved in a compliance with police regulations as to precautions to be used at such crossings.²

7. Subsequent Duties of Companies — *a. IN GENERAL.* — It is the duty of the two companies to use the crossing in such a manner as not to interfere with each other or endanger the public safety.³

tion of the damages to those for physical injury to the land sought to be condemned for another railroad will be too restricted. The defendant should be allowed to recover for the obstruction to the use of its remaining property and for all damage to it resulting from the operation of the second railroad on the strip so taken. *Lake Shore, etc., R. Co. v. Chicago, etc., R. Co.*, 100 Ill. 21.

Obstruction of Road. — In assessing the damages for the crossing of one road over the tracks and right of way of another, the total obstruction of the road while the tracks are being laid, and the permanent interference, by means of the crossing, with the business transactions over the road, would be proper elements to be considered. *Chicago, etc., R. Co. v. Chicago, etc., R. Co.*, 15 Ill. App. 587.

1. Remote Damages. — *Peoria, etc., Union R. Co. v. Peoria, etc., R. Co.*, 105 Ill. 110, 10 Am. & Eng. R. Cas. 129; *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 30 Ohio St. 604.

Detention of Trains. — In estimating the damages, the jury cannot take into account the detention of trains, loss of future business, nor additional expense incident to the future exercise of corporate powers. *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 30 Ohio St. 604. See also *Boston, etc., R. Corp. v. Old Colony R. Corp.*, 12 Cush. (Mass.) 605.

Increased Danger. — Nor is the increased danger arising from the crossing of the track of one railroad by the trains of another to be considered as an element of damage in such proceedings. Such damages would be merely conjectural or speculative. *Peoria, etc., Union R. Co. v. Peoria, etc., R. Co.*, 105 Ill. 110, 10 Am. & Eng. R. Cas. 130.

Probable Collisions. — The probability of collisions and accidents at such crossing is too remote, indefinite, and uncertain to be admitted as ground for damages. *Kansas City Suburban Belt R. Co. v. Kansas City, etc., R. Co.*, 118 Mo. 599, 57 Am. & Eng. R. Cas. 624.

2. Compliance with Police Regulations. — *Peoria, etc., Union R. Co. v. Peoria, etc., R. Co.*, 105 Ill. 110, 10 Am. & Eng. R. Cas. 130; *Chicago, etc., R. Co. v. Joliet, etc., R. Co.*, 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62; *Flint, etc., R. Co. v. Detroit, etc., R. Co.*, 64 Mich. 350; *Massachusetts Cent. R. Co. v. Boston, etc., R. Co.*, 121 Mass. 124; *Kansas City Suburban Belt R. Co. v. Kansas City, etc., R. Co.*, 118 Mo. 599, 57 Am. & Eng. R. Cas. 624; *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 30 Ohio St. 604.

It is a principle underlying all conduct, that neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation.

Chicago, etc., R. Co. v. Joliet, etc., R. Co., 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62.

Consequently, the intersected road is not entitled to damages for the interruption or inconvenience occasioned to its business, nor for the increased liability to damages from accidents, nor for increased expense in ringing a bell, nor for the risk of being ordered by the county commissioners, when in their judgment the safety of the public may demand it, to provide additional safeguards for travelers crossing its railroad. *Massachusetts Cent. R. Co. v. Boston, etc., R. Co.*, 121 Mass. 124.

Watchmen. — The intersected road has no right to recover as consequential damages the additional expense rendered necessary in operating its road, caused by complying with the provisions of a statute requiring the maintenance of watchmen at crossings. *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 30 Ohio St. 604; *Massachusetts Cent. R. Co. v. Boston, etc., R. Co.*, 121 Mass. 124.

Delay by Stopping. — The law requiring railroad trains to stop before crossing another railroad being a mere police regulation, the damages resulting therefrom cannot be an element in the assessment of damages in favor of the road to be so crossed. *Peoria, etc., Union R. Co. v. Peoria, etc., R. Co.*, 105 Ill. 110, 10 Am. & Eng. R. Cas. 130; *Flint, etc., R. Co. v. Detroit, etc., R. Co.*, 64 Mich. 350; *Kansas City Suburban Belt R. Co. v. Kansas City, etc., R. Co.*, 118 Mo. 599, 57 Am. & Eng. R. Cas. 624; *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 30 Ohio St. 604, 16 Am. Ry. Rep. 291.

Where it was contended on behalf of the intersected railroad that if a crossing were established at the point proposed, the defendant company, in conforming to the requirement of the statute in respect to the stopping of trains on approaching a railroad crossing, at certain distances therefrom, would be compelled to bring its trains to a halt upon an ascending grade, and that thereby the hauling capacity of its engines would be impaired, and that such impairment ought to be considered as an element of damages, it was held that the statute in question was simply a police regulation with which all railroad companies were required to comply, the existence of which was subject to the will of the legislature, and so it was of too uncertain duration to be made the subject of damages as for a perpetual inconvenience and injury. *Chicago, etc., R. Co. v. Joliet, etc., R. Co.*, 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62.

3. Duties of Companies in General. — The maxim *sic ulere tuo ut alienum non laedas* ap-

b. DUTY TO MAINTAIN AND REPAIR CROSSING. — A crossing formed by the intersection of two or more railroads is under the constructive control and management of all, and each is under an obligation to see that the crossing is properly constructed and maintained in a safe condition.¹

By Statute. — The obligations and duties of the respective companies in this regard are in many cases the subject of legislative enactment, and all expenses necessarily accruing from their construction and repair are duly proportioned.²

c. DUTY TO PROVIDE WATCHMEN. — When so required in consideration of the public safety, it is the duty of the respective roads to maintain watchmen at their point of intersection and bear their proportion of such additional expense.³

d. DUTY TO ERECT AND MAINTAIN STATIONS. — The erection and maintenance of stations at the point of intersection are, as a rule, regulated by statute.⁴

plies to a railway company that has a right of passage over the track of another, and binds it so to use its right as not, by negligence, to injure others having like rights. *Patterson v. Wabash, etc., R. Co.*, 54 Mich. 91, 18 Am. & Eng. R. Cas. 130.

1. Duty to Maintain and Repair. — *Chicago, etc., R. Co. v. Joliet, etc., R. Co.*, 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62; *Chicago, etc., R. Co. v. Springfield, etc., R. Co.*, 67 Ill. 142; *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 30 Ohio St. 604.

But in *Chicago, etc., R. Co. v. Springfield, etc., R. Co.*, 67 Ill. 142, the crossing was not at grade, but was an under crossing made by cutting through a high embankment, and it was held that the crossing road was not under any obligation to keep the track above its own in a suitable and safe condition. This case is *distinguished* in *Chicago, etc., R. Co. v. Joliet, etc., R. Co.*, 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62.

Assuming Burden by Stipulation. — A railroad seeking by condemnation proceedings to appropriate a right of way for crossing the tracks of another railroad may, by stipulation tendered, assume the burden of maintaining frogs and crossing apparatus. *Seattle, etc., R. Co. v. State*, 7 Wash. 150, 38 Am. St. Rep. 866. See also *Chicago, etc., R. Co. v. Joliet, etc., R. Co.*, 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62.

Condition Precedent to Contribution. — Where a company seeks to compel another company which has formed a junction with its line to pay the expenses of erecting and maintaining signals and conveniences, as required by statute, it must prove that such expenses have been actually paid; proof of a liability incurred is not enough. *Carmarthen, etc., R. Co. v. Manchester, etc., R. Co.*, L. R. 8 C. P. 685, 42 L. J. C. P. 262.

2. Statutes — Indiana. — Under Indiana Rev. Stat. 1881, §§ 3904, 3905, all companies interested in a crossing of railroads must assist in keeping them in repair, and be responsible for a failure to do so. *Indiana, etc., R. Co. v. Barnhart*, 115 Ind. 399.

Michigan. — The provision in How. Mich. Stat., § 3350, that a railroad corporation whose road is crossed shall bear a proportion of the expense of keeping the crossing in repair, is only justified by the necessities of the case growing out of the connecting of the two

tracks, and should be limited, as near as may be, to what would have been necessary to keep the track of the company whose line is thus crossed, in repair at the crossing if the same had not been made; and this rule should be observed whether the crossing is made on, above, or below grade. *Toledo, etc., R. Co. v. Detroit, etc., R. Co.*, 62 Mich. 564, 4 Am. St. Rep. 875, 28 Am. & Eng. R. Cas. 272.

Ohio — Date of Charter Immaterial. — By the terms of the Ohio Act of 1860, where the tracks of two companies cross each other at a common grade, the crossing shall be made, kept up, and a watchman maintained thereat, at the joint expense of the companies owning the tracks; it was held that the statute imposes upon both companies the expense of making and keeping such crossing as is required under the statute without regard to the date of their respective charters or the location or construction of their respective roads. *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 30 Ohio St. 604; *Cincinnati St. R. Co. v. Cincinnati, etc., R. Co.*, 32 Wkly. L. Bul. (Ohio) 4.

May Compel Contribution. — Where either road performs the whole duty, and pays the entire expense, it may compel contribution by the other to the extent of its equal portion thereof. *Baltimore, etc., R. Co. v. Walker*, 45 Ohio St. 577, 36 Am. & Eng. R. Cas. 492.

3. Duty to Provide Watchmen. — *Baltimore, etc., R. Co. v. Walker*, 45 Ohio St. 577, 36 Am. & Eng. R. Cas. 492; *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 30 Ohio St. 604.

4. See the title STATIONS (RAILROAD).

Statutes as to Stations — Missouri. — The Missouri Act of 1881, relating to railroads crossing other railroads, and providing for the erection of suitable depots and waiting-rooms for the accommodation of passengers at such crossing, is constitutional as being a legitimate exercise of the police power vested in the legislature. *State v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722, following *State v. Wabash, etc., R. Co.*, 83 Mo. 144, 25 Am. & Eng. R. Cas. 133.

Texas. — Article 10, § 1, of the Constitution of Texas, provides: "Every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad; and it shall receive and transport each the other's passengers, tonnage, and cars, loaded or empty, without delay, under such regulations as shall be prescribed by law."

c. DUTY TO STOP BEFORE CROSSING—(1) *In General*.—In the absence of statutes requiring a railroad to stop its trains before crossing the track of another railroad, no stoppage can be required other than that which would arise from the duty of the company to operate its road in such manner as to avoid danger from collision at the crossing.¹

(2) *Agreement Between Companies*.—The obligation to stop may become a matter of agreement between the companies, and in such case the agreement may be enforced by a court of equity.²

The regulations to be prescribed by law for the purpose of carrying out the provisions of this section of the constitution may with propriety extend to just such matters as are embraced in the act imposing forfeitures upon railway companies failing to erect depots at the point of intersection with another road, where the site is practicable and the crossing not within five miles of a town in which is a union depot kept by such roads. *San Antonio, etc., R. Co. v. State*, 79 Tex. 264, 45 Am. & Eng. R. Cas. 586.

The provisions of this article, however, are not self-enacting, and the exercise of the right conferred may be enjoined until, by negotiations or legal proceedings, the right is established with proper limitations. *Missouri, etc., R. Co. v. Texas, etc., R. Co.*, 4 Woods (U. S.) 360, 6 Am. & Eng. R. Cas. 597.

Colorado—Forced Connection.—A railroad company has authority to establish its own stations for receiving and putting down passengers and merchandise, and may regulate the time and manner in which it will carry them, and in the absence of statutory provisions it is not required in Colorado to establish stations for those purposes at a point where another railroad has made a forced connection with a road previously in existence. *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667, 16 Am. & Eng. R. Cas. 57.

Each Company Severally Liable.—Neither company is released from liability by failure of the other to erect and maintain such station, and one may be sued alone without making the other a party defendant to the suit. *State v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722.

Size and Cost of Stations.—The statutes in such cases do not attempt to prescribe the size or expense of these stations; they leave that to the discretion of the railroad companies, simply requiring that they shall be sufficient to comfortably accommodate passengers at that point. *State v. Kansas City, etc., R. Co.*, 32 Fed. Rep. 722.

1. *Flint, etc., R. Co. v. Detroit, etc., R. Co.*, 64 Mich. 350.

Duty to Observe as Well as to Stop.—The duty of an engineer is not fully performed by merely bringing his train to a stop before reaching a railway crossing. It is his duty to observe the track he is about to cross, to ascertain whether there are any trains on it with which he would be liable to collide; and, even if he has the right of way, yet if he sees that a train upon the other road has passed its stopping board or is approaching it at such a rate of speed as to indicate that it will not stop, and hence that there will be danger of a collision if he proceeds, he is not justified in doing so if he can stop his train before reaching the crossing. *Pratt v. Chicago, etc., R. Co.*, 38 Minn. 455.

See also *Chicago, etc., R. Co. v. Rockford, etc., R. Co.*, 72 Ill. 34.

While it is the duty of an engineer on a passenger train approaching a crossing of another railroad to use due care to ascertain whether a train is approaching thereon, it cannot be said, as a matter of law, that he is bound to listen in addition to looking, although the view is limited by obstructions. *Kansas City, etc., R. Co. v. McDonald*, 51 Fed. Rep. 178, 4 U. S. App. 563.

Crossing of Street and Steam Railroads.—Where the tracks of a passenger railway cross those of a steam railway at grade, the driver of the car on the road of the former company is not justified in attempting to cross the track of the latter company without stopping, looking, or listening, no matter what the action of the flagman of the latter company stationed at the crossing may be, if such driver have from other sources information which would lead a prudent man to infer that there was danger to be apprehended from an approaching train. *Philadelphia, etc., R. Co. v. Boyer*, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172.

A municipal ordinance of Philadelphia providing that conductors of passenger railway cars shall stop their cars and cross the tracks of steam railroads in advance of their cars, under a penalty for failure, does not apply to cars on which one man acts as both conductor and driver. *Philadelphia, etc., R. Co. v. Boyer*, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172.

In an application by a steam railroad company for an injunction to restrain an electric railway company from crossing the tracks of the former at grade, if it shall appear practicable for the electric company's cars to be brought to a full stop and to have its conductors go forward to the railroad tracks before attempting to cross, an injunction will be refused if the railway company will undertake the above precautions. *Pennsylvania R. Co. v. Suburban Rapid Transit Co.*, 1 Pa. Dist. Rep. 636.

Mill & V. Tenn. Code, § 1304, requiring trains on intersecting roads to stop before crossing, has been held not to apply to a crossing by a steam railroad over an ordinary horse-car line. *Byrne v. Kansas City, etc., R. Co.*, 61 Fed. Rep. 605.

2. Agreement Between Companies.—Where two companies enter into an agreement that all trains of one shall stop at least two hundred feet from the point of crossing of the other, such contract may be specifically enforced in the sound discretion of a court of chancery, taking into consideration the safety of the public and the convenience of the company crossing the road, by compelling trains to stop at not more than three hundred or four

(3) *Statutory Requirement.* — The duty to stop in such cases, however, is usually regulated by statute.¹ And a failure to observe its statutory duties in this regard will render the company guilty of such violation liable for any injury which may result therefrom, in the absence of contributory negligence on the part of the person injured.²

hundred feet from the crossing. *Cornwall, etc., R. Co.'s Appeal*, 125 Pa. St. 232, 11 Am. St. Rep. 889, 46 Leg. Int. (Pa.) 360, 20 Pittsb. L. J. N. S. 59, 23 W. N. C. (Pa.) 494. And a court of equity has power to grant an injunction to prevent the violation of such contract. *Cornwall, etc., R. Co.'s Appeal*, 125 Pa. St. 232, 11 Am. St. Rep. 889.

Priority of Passage. — Under the provisions of an agreement between two companies that all trains and engines of the plaintiff should have priority over those of the defendant at a crossing of the tracks, the words "all trains and engines" were unambiguous and made no distinction of trains and engines into classes; and there was no warrant to go outside of the agreement to ascertain the rules of priority given to the various classes of trains and engines so as to apply them to the terms of the agreement. *Cornwall, etc., R. Co.'s Appeal*, 125 Pa. St. 232, 11 Am. St. Rep. 889, 23 W. N. C. (Pa.) 494, 46 Leg. Int. (Pa.) 360, 20 Pittsb. L. J. N. S. 59.

1. Statutory Requirement — *United States.* — *Louisville, etc., R. Co. v. East Tennessee, etc., R. Co.*, 22 U. S. App. 102, 60 Fed. Rep. 993; *Byrne v. Kansas City, etc., R. Co.*, 61 Fed. Rep. 605.

Alabama. — *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 187, 49 Am. & Eng. R. Cas. 263; *Ensley R. Co. v. Chewning*, 93 Ala. 24; *Richmond, etc., R. Co. v. Freeman*, 97 Ala. 289; *Richmond, etc., R. Co. v. Greenwood*, 99 Ala. 501.

Illinois. — *Chicago, etc., R. Co. v. Joliet, etc., R. Co.*, 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62; *Chicago, etc., R. Co. v. Snyder*, 117 Ill. 376, 28 Am. & Eng. R. Cas. 611; *Louisville, etc., R. Co. v. Johnson*, 44 Ill. App. 56; *Peoria, etc., Union R. Co. v. Peoria, etc., R. Co.*, 105 Ill. 110, 10 Am. & Eng. R. Cas. 130.

Kentucky. — *Chesapeake, etc., R. Co. v. Com.*, (Ky. 1896) 35 S. W. Rep. 266.

Michigan. — *Flint, etc., R. Co. v. Detroit, etc., R. Co.*, 64 Mich. 350.

Missouri. — *Kansas City Suburban Belt R. Co. v. Kansas City, etc., R. Co.*, 118 Mo. 599, 57 Am. & Eng. R. Cas. 624.

Ohio. — *Lake Shore, etc., R. Co. v. Cincinnati, etc., R. Co.*, 30 Ohio St. 604, 16 Am. Ry. Rep. 291.

Texas. — *San Antonio, etc., R. Co. v. Bowles*, 88 Tex. 634.

Wisconsin. — *Lockwood v. Chicago, etc., R. Co.*, 55 Wis. 50, 6 Am. & Eng. R. Cas. 151.

Canada. — *Great Western R. Co. v. Brown*, 3 Can. Sup. Ct. Rep. 159.

No Discretion as to Performance of Duty. — In *Texas* it has been held that the statute (Rev. Stat., Sayles' ed., art. 4232; late revision, art. 4507) requiring railroads to stop their trains at railway crossings was enacted in order to dispense with any discretion on the part of persons operating trains whether the act required by the statute should be done; that

negligence in such cases was not for the jury; and that upon violation of the statute the railroad company was liable in the absence of contributory negligence on the part of the person injured. *San Antonio, etc., R. Co. v. Bowles*, 88 Tex. 634.

One Company Operator of Both Tracks. — Where the railroad company violated the *Kentucky* statute requiring all trains to be stopped at least fifty feet before getting to a crossing, it was held that the fact that one company was the lessee and operator of all trains on both tracks did not relieve it of liability for non-compliance with the statute. *Chesapeake, etc., R. Co. v. Com.*, (Ky. 1896) 35 S. W. Rep. 266.

Statutory Penalty for Failure to Stop. — The statute in some states has provided a penalty for failure to stop at such crossings. Ill. Railroad Law, §§ 50, 51; *Indianapolis, etc., R. Co. v. People*, 91 Ill. 452.

Where Stop Should Be Made. — Where the statute declares that an engine on approaching a crossing shall "be brought to a full stop," and does not prescribe where the stop shall be made, it is necessary for the court to tell the jury where common prudence would dictate a stop to be made in order to avoid a collision at the crossing; and it is no error to instruct the jury that, if the defendant did not "bring its engine to a full stop before reaching the crossing, at such distance therefrom as, under the circumstances, common prudence would dictate as necessary to avoid colliding," the defendant would be negligent. *Fort Worth, etc., R. Co. v. Mackney*, 83 Tex. 410, 55 Am. & Eng. R. Cas. 308.

Under Wis. Rev. Stat., § 1808, it is the duty of a railway train approaching a railway crossing to come to a stop, not immediately at the four-hundred-foot post, but somewhere between that post and the crossing. *Lockwood v. Chicago, etc., R. Co.*, 55 Wis. 50, 6 Am. & Eng. R. Cas. 151.

The fact that a stoppage within one hundred feet of the crossing as required by the *Alabama* Code, § 1145, will leave the cars in the rear standing on the crossing of another road does not excuse the failure to perform this duty. *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 187, 49 Am. & Eng. R. Cas. 263.

2. Liability for Failure to Stop. — *Richmond, etc., R. Co. v. Freeman*, 97 Ala. 289; *Grand Rapids, etc., R. Co. v. Ellison*, 117 Ind. 234, 39 Am. & Eng. R. Cas. 480; *San Antonio, etc., R. Co. v. Bowles*, 88 Tex. 634.

A Grand Trunk train on which the plaintiff was conductor, before crossing the track of the Great Western Railway, was brought to a stand until the signalman, who was in charge of the crossing and in the employment of the Great Western Railway Co., dropped the semaphore, and thus authorized the Grand Trunk train to proceed. While crossing the track the appellants' train, which had not stopped, owing to the accidental bursting of a tube in the air-

8. Liability for Injuries.—The crossing of two railroads at grade being a place of known danger, both companies should operate their trains at such points with a care and prudence commensurate with the risk involved.¹

One Road Need Not Anticipate Negligence by Other.—The employees of one road have a right to presume that the employees of the other intersecting line will perform every duty imposed upon them by law.² But they cannot indulge such a presumption where the facts reasonably indicate that the other company will not comply with the law.³

Both Companies Sued.—If both companies are sued and it can be shown that the injury was caused solely by the negligence of one, it is within the power of the court to allow a judgment over against the company in default.⁴

brakes, ran into the Grand Trunk train and injured the plaintiff. It was shown that these air-brakes were the best known appliances for stopping trains, and that they had been tested during the day, but that they were not applied at a sufficient distance from the crossing to enable the train to be stopped by the hand-brakes in case of the air-brakes giving way. Section 143 C. S. C., c. 66, enacts that "every locomotive * * * or train of cars on any railway shall, before crossing the track of any other railway on a level, be stopped for at least the space of three minutes." In view of these facts it was held, that the appellants were guilty of negligence in not applying the air-brakes at a sufficient distance from the crossing to enable the train to be stopped by hand-brakes in case of the air-brakes giving way, and that there was no evidence of contributory negligence on the part of the Grand Trunk Railway. *Great Western R. Co. v. Brown*, 3 Can. Sup. Ct. Rep. 159.

Both Engineers Reckless.—In *Kelly v. Duluth, etc., R. Co.*, 92 Mich. 19, it was held that an engineer who was injured by collision with the engine of another company at a crossing could not recover damages, although he had complied with the statutory requirement of stopping and giving crossing signals, where both engineers were reckless in not keeping their engines under control, both knowing that there were no semaphores, flagmen, or gates at the crossing.

1. Care to Be Observed.—A railroad is not required, at a place where its road crosses another railroad, to use such care and skill to avoid inflicting injury as the most prudent in like business are accustomed to exercise, but such as the mass of prudent persons in like business are accustomed to exercise. *Houston, etc., R. Co. v. Brin*, 77 Tex. 174.

Ordinary Care.—In *Chicago, etc., R. Co. v. Chambers*, 32 U. S. App. 253, 68 Fed. Rep. 148, it was held error to refuse to instruct, in the case of a collision, that the engineer had a right to move his train towards the crossing where the accident occurred, if the headlight of the other train was not lighted, when the engineer in question was bound not to proceed if he could discover the other train by the use of ordinary care.

Legitimate Use of Crossing.—In *Albert v. Sweet*, 116 N. Y. 363, 42 Am. & Eng. R. Cas. 216, the plaintiff, an engineer, was injured by his engine colliding with a car left by the defendants at a grade crossing of two railroads. The defendants were engaged in the construction of one of the roads, and left the car in

question projecting over the crossing. The plaintiff's freight train was running ahead of schedule time by special order. The defendants had been notified of the regular time, but not of the special schedule. The defendants had put up no signal, but when the train approached they sent a man along the track who signaled the approaching train. Under such state of facts it was held that the accident was occasioned by the defendants' negligence, and that they were liable to the plaintiff although they had no notice of the time upon which the train was being run, and that negligently leaving their car upon the crossing was not a legitimate use of the same.

Road Not Negligent Not Liable.—Where an injury to a passenger upon a railroad was caused by the negligence of the employees of a private railroad, crossing the former at grade, there being no negligence on the part of the passenger carrier, the latter is not liable. *Bunting v. Pennsylvania R. Co.*, 118 Pa. St. 204, 21 W. N. C. (Pa.) 181.

2. Right to Anticipate Action.—*Birmingham Mineral R. Co. v. Jacobs*, 101 Ala. 149, 55 Am. & Eng. R. Cas. 299.

Until it appears that there is a disregard of the signal by a company attempting to cross the track of another railroad, the employees of the latter company will not be deemed guilty of negligence in failing to anticipate a breach of duty on the part of the employees of the former, for they have a right to assume that the other company will obey the code of signals adopted for the management of trains in such cases. *New York, etc., R. Co. v. Grand Rapids, etc., R. Co.*, 116 Ind. 60, 35 Am. & Eng. R. Cas. 283.

Breach of Agreement.—Where an agreement regulating the use of a crossing has been made, the employees of the train having the right of way are not bound to anticipate any breach of the agreement. *New York, etc., R. Co. v. Grand Rapids, etc., R. Co.*, 116 Ind. 60, 35 Am. & Eng. R. Cas. 283.

3. Birmingham Mineral R. Co. v. Jacobs, 101 Ala. 149, 55 Am. & Eng. R. Cas. 299.

4. Both Companies Sued.—*Gulf, etc., R. Co. v. Hathaway*, 75 Tex. 557, 41 Am. & Eng. R. Cas. 219.

A passenger on the Southern Pacific Railway was injured in a collision with a car upon the track of the Gulf C. & S. F. R. Co., alleged to have been negligently left so as to occasion the collision. The passenger sued both companies. The Southern Pacific alleged that the injury was caused solely by the negligence of the other railway company, and asked judg-

III. RAILROADS CROSSING STREETS AND HIGHWAYS — 1. Right to Cross — *a*.

IN GENERAL — NATURE OF RIGHT. — The general principle is well settled that land already legally appropriated to a public use is not afterwards to be taken for a like use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication.¹ Hence, since a highway or street is property dedicated to a public use, the right of a railroad to cross the same must be derived from one or the other of these sources.²

Nature of Right. — A grant to a railroad company of the right to cross a highway is, in the absence of a clearly expressed intention to the contrary, a grant subject to the existing public right of the use, and is to be exercised in such manner as shall interfere as little as possible with those for whose benefit the way was originally laid out and opened.³

ment over against it in case the plaintiff should recover, and it was held that it was within the power of the court to allow such relief. *Gulf, etc., R. Co. v. Hathaway*, 75 Tex. 557, 41 Am. & Eng. R. Cas. 219.

Street and Steam Railways. — The Supreme Court of *New Jersey* has decided, in the case of *New York, etc., R. Co. v. New Jersey Electric R. Co.*, 60 N. J. L. 52, that when a railroad company fails to give the proper signals of the approach of a train, and a collision ensues with an electric street railway car, the former company cannot recover from the street railway company for losses due to the collision, if its failure to give the signals contributed thereto; that the fact that the two companies have a mutual agreement providing for a derailing switch on the tracks of the electric railway, as a precaution against collisions at that crossing, and also providing that before an electric car shall be permitted to pass over the crossing the conductor of that car who shall be operating the derailing switch shall look in both directions, and listen for the approach of railroad trains, does not excuse the railroad company from giving the statutory signals as a warning of approaching trains; and that when the neglect to give such signals appears to have contributed to the collision, the railroad company cannot recover against the street railway company, although the conductor of the electric car who operated the derailing switch was negligent in failing to look in both directions, and to listen for approaching trains. See 45 Cent. L. J. 253.

Joint Liability. — In *San Antonio, etc., R. Co. v. Bowles*, 88 Tex. 634, which was a joint action against two railroad companies for causing the death of a person by their joint negligence, the jury found ten thousand dollars damages but apportioned the liability equally. The trial court rendered judgment for the entire amount against both, and this was held to be the proper practice.

Action by One Company Against the Other. — An action may be maintained by one company against another to recover damages for a collision where the defendant company was under contract to maintain the crossing and the collision was caused by the latter's servants. *New York, etc., R. Co. v. Grand Rapids, etc., R. Co.*, 116 Ind. 60, 35 Am. & Eng. R. Cas. 283.

1. Right in General. — *Boston, etc., R. Co. v. Lowell, etc., R. Co.*, 124 Mass. 370; *St. Paul*

Union Depot Co. v. St. Paul, 30 Minn. 359; *Little Miami, etc., R. Co. v. Dayton*, 23 Ohio St. 510. See also *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *supra*, this title, *Railroads Crossing Railroads*.

2. Construction Without Lawful Authority. — A railroad company constructing its road across a highway without lawful authority may be enjoined or indicted. *Wellcome v. Leeds*, 51 Me. 313; *Com. v. Vermont, etc., R. Corp.*, 4 Gray (Mass.) 22, *following Com. v. Nashua, etc., R. Corp.*, 2 Gray (Mass.) 54.

Loss of Right. — Where a corporation, by an act of 1849, was granted a public highway for the purpose of constructing and maintaining thereon a plank road, but subsequently forfeited its rights in such highway, railroad companies which, by the same act, were given power to lay their tracks across the plank road without compensation, upon such forfeiture ceased to have any rights under that act, and can assert none as against a gravel road which is afterwards maintained on the same highway by another corporation. *Indianapolis, etc., Gravel Road Co. v. Belt R. Co.*, 110 Ind. 5, 32 Am. & Eng. R. Cas. 173.

3. Nature of Right. — *Jones v. Erie, etc., R. Co.*, 169 Pa. St. 333, 47 Am. St. Rep. 916. See *supra*, this title, *Railroads Crossing Railroads*.

Any authorized use of a highway, in the absence of special authority under the charter of the railroad company, must be presumed to have been granted on the condition that its exercise should be consistent with the establishment of the highway and accordant with its use by the public. *Paducah, etc., R. Co. v. Com.*, 80 Ky. 147, 10 Am. & Eng. R. Cas. 318.

Limited Right. — Where a right to cross or occupy a highway is granted by implication, the corporation can only occupy so much as may be reasonably necessary; and what is reasonably necessary, in case of dispute, must be settled by the courts. *Lehigh Valley R. Co. v. Orange Water Co.*, 42 N. J. Eq. 205.

Overhead Structure. — Where a railroad company has permission to cross the intersection of two streets by an overhead structure, the use of so much space only as is necessary for the purpose of making the passage can be appropriated. In such case the company has no right of way in the streets outside of the terms of the grant. *Jones v. Erie, etc., R. Co.*, 169 Pa. St. 333, 47 Am. St. Rep. 916.

Number of Tracks. — A company which has

Nothing Is Acquired Save a Right of Way, the place of crossing remaining in the common use of the parties for the exercise of their several franchises.¹

b. BY STATUTE. — For the most part such right is derived from legislative enactment, provision being usually made by charter at the time when the road is incorporated.²

By Implication. — A source of such right may also be derived by implication, as has been shown in the case of the crossing of railroads.³

duly located its road across a highway, and acquired a right to construct it there at a certain grade, without any restriction as to the number of tracks or the place where they should be laid, is authorized to lay and maintain as many tracks as are essential to the convenient transaction of its business, and for that purpose may make any necessary alteration in the surface of the highway. *Com. v. Hartford, etc., R. Co., 14 Gray (Mass.) 379; Bangor, etc., R. Co. v. Smith, 47 Me. 34.*

Crossing at Angle or Curve. — Although the railroad is not limited in the number of tracks, and may lay others in the same direction and parallel with the first when the business of the road requires it, it has no right to lay a track in a different direction, or on an angle or curve within the limits of its described location. *Bangor, etc., R. Co. v. Smith, 47 Me. 34.*

1. Right of Way Only Acquired. — *New Jersey Southern R. Co. v. Long Branch Com'rs, 39 N. J. L. 28, 14 Am. Ry. Rep. 211; Illinois Cent. R. Co. v. Chicago, 141 Ill. 586, 51 Am. & Eng. R. Cas. 528.*

Use of Highway Temporarily Suspended During Construction. — The location of a railroad across a public highway, in pursuance of the power conferred by the charter of the railroad company, does not, while the railroad is in process of construction at that point, operate a discontinuance of the highway, but only a temporary suspension of the use. *Willard v. Newbury, 22 Vt. 458.*

2. By Statute — England. — *Reg. v. London, etc., R. Co., 1 Ry. & C. Cas. 317; Reg. v. Birmingham, etc., R. Co., 2 Ry. & C. Cas. 694.*

Illinois. — *Cook County v. Great Western R. Co., 119 Ill. 218.*

Indiana. — *Louisville, etc., R. Co. v. Smith, 91 Ind. 119, 13 Am. & Eng. R. Cas. 608; Clawson v. Chicago, etc., R. Co., 95 Ind. 152, 20 Am. & Eng. R. Cas. 56; Indianapolis, etc., Gravel Road Co. v. Belt R. Co., 110 Ind. 5, 32 Am. & Eng. R. Cas. 173.*

Kentucky. — *Greenup County v. Maysville, etc., R. Co., 88 Ky. 659.*

Massachusetts. — *Cambridge v. Charlestown Branch R. Co., 7 Met. (Mass.) 70; Cooke v. Boston, etc., R. Corp., 133 Mass. 185, 10 Am. & Eng. R. Cas. 328.*

New Hampshire. — *Concord, etc., R. Co. v. Portsmouth, 64 N. H. 219.*

New York. — *Presbyterian Soc. v. Auburn, etc., R. Co., 3 Hill (N. Y.) 567; Seneca, etc., R. Co. v. Auburn, etc., R. Co., 5 Hill (N. Y.) 170; New York Cent., etc., R. Co. v. People, 12 Hun (N. Y.) 195; Hatch v. Syracuse, etc., R. Co., 50 Hun (N. Y.) 64; Ellicottville, etc., Plank Road Co. v. Buffalo, etc., R. Co., 20 Barb. (N. Y.) 644; Fletcher v. Auburn, etc., R. Co., 25 Wend. (N. Y.) 462.*

Ohio. — *State v. Dayton, etc., R. Co., 36 Ohio St. 436, 5 Am. & Eng. R. Cas. 312.*

Pennsylvania. — *Northern Cent. R. Co. v. Com., 90 Pa. St. 300, 5 Am. & Eng. R. Cas. 318; South Waverly's Appeal, (Pa. 1887) 11 Atl. Rep. 245.*

Tennessee. — *Dyer County v. Chesapeake, etc., R. Co., 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676.*

Vermont. — *Mann v. Central Vermont R. Co., 55 Vt. 484, 45 Am. Rep. 628, 14 Am. & Eng. R. Cas. 620; Roxbury v. Central Vermont R. Co., 60 Vt. 121. See also Willard v. Newbury, 22 Vt. 458.*

Wisconsin. — *Buchner v. Chicago, etc., R. Co., 60 Wis. 264, 14 Am. & Eng. R. Cas. 447.*

Consent of Local Authorities. — The fifth paragraph of section 20 of the *Illinois* Railroad Act of 1872 is an absolute grant of power by the state to railway companies to construct their roads across any public highway. It is only where the railroad is to be constructed along or lengthwise of a highway that the consent of the local authorities is necessary. *Cook County v. Great Western R. Co., 119 Ill. 218.*

Private Roads. — Section 3903, *Indiana* Rev. Stat. 1881, conferring upon railroad companies the power to cross highways, without compensation, has reference to ordinary highways, controlled by the public authorities and maintained by taxation, and does not embrace a highway which is used for gravel road purposes by a private corporation under a grant from the board of county commissioners. *Indianapolis, etc., Gravel Road Co. v. Belt R. Co., 110 Ind. 5, 32 Am. & Eng. R. Cas. 173.*

Construction of Statutes — New Hampshire. — Section 3, c. 161, Gen. Laws of New Hampshire, which relates to securing railroad crossings of public highways, is not repealed by § 7, c. 101, Laws of 1883. *Concord, etc., R. Co. v. Portsmouth, 64 N. H. 219.*

Maine. — The *Maine* Act of 1853, c. 41, § 3, relating to the construction of railroads across public highways, is not retroactive in its effect. *Wellcome v. Leeds, 51 Me. 313.*

English Statutes. — Sections 53, 55, and 56 of the *Railways* Clauses Act 1845, relating to the crossing of highways by railway or other interference therewith, do not apply where the object of the special act is to change the nature of the road substantially, but are applicable only to the interference with roads incidentally. *Tanner v. South Wales R. Co., 5 El. & Bl. 618, 85 E. C. L. 618, 1 Jur. N. S. 1215, 25 L. J. Q. B. 7.*

A special railway act making it lawful for a company to carry its line across a street on a level is not obligatory, and does not prevent the company from carrying the line across according to the provisions of the general act. *Dover Harbour v. London, etc., R. Co., 3 De G. F. & J. 559, 30 L. J. Ch. 474.*

3. See *supra*, this title, *Railroads Crossing*

2. Manner of Crossing — *a*. IN GENERAL. — The provisions of the law in regard to the manner of crossing are, as a general rule, the same as govern in the intersection of two railroads.¹ Where a railroad company is authorized to cross highways it is under an obligation to construct its road across them in a reasonable manner, with regard to the double use of the crossing.²

Effect of Crossing. — The crossing should be effected in a manner calculated to injure the highway as little as may be, consistently with the right of intersection.³

Obstruction to Travel on Highway. — The usual and necessary travel on the highway should not be obstructed or impeded.⁴

Usefulness of Highway Not to Be Impaired. — And the crossing should be so constructed as not to defeat the objects and purpose of its original creation by impairing its usefulness as a highway.⁵

Railroads. See also *Hannibal v. Hannibal*, etc., R. Co., 49 Mo. 480.

The right of a company organized under the general railroad law of *New Jersey* (Rev., p. 925), to invade highways between its *termini*, for the purpose of crossing, exists by necessary implication. *Raritan Tp. v. Port Reading R. Co.*, 49 N. J. Eq. 11, 50 Am. & Eng. R. Cas. 169.

1. See *supra*, this title, *Railroads Crossing Railroads*.

2. Manner of Crossing. — *Roxbury v. Central Vermont R. Co.*, 60 Vt. 121.

The right of crossing is subject to the maxim *sic utere tuo ut alienum non laedas*. *Roxbury v. Central Vermont R. Co.*, 60 Vt. 121.

In *Johnson v. St. Paul, etc.*, R. Co., 31 Minn. 283, 15 Am. & Eng. R. Cas. 467, the court said: "A railroad company laying its track in a public highway is under obligation to lay it in a proper manner, having regard to the general public use to which the highway is devoted."

Question for Jury. — Whether a railroad company has properly constructed its crossing, so as to render it as convenient and as safe as possible for the public, is a question for the jury. *Roberts v. Chicago, etc.*, R. Co., 35 Wis. 679.

No Exclusive Use. — Neither the railroad company nor the public has the exclusive right of a clear passage. Both are restricted by public necessity and convenience. *Pittsburg, etc.*, R. Co. *v. Dunn*, 56 Pa. St. 280.

3. Effect of Crossing. — *Kansas City v. Kansas City, etc.*, R. Co., 102 Mo. 633, 47 Am. & Eng. R. Cas. 157; *Kyne v. Wilmington, etc.*, R. Co., 8 Houst. (Del.) 185; *Northern Cent. R. Co. v. Baltimore*, 46 Md. 425; *Palatka, etc.*, R. Co. *v. State*, 23 Fla. 546, 11 Am. St. Rep. 395, 32 Am. & Eng. R. Cas. 191; *Dyer County v. Chesapeake, etc.*, R. Co., 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676.

Construction of Right. — A grant to a railroad company of the right to construct its road along, upon, or across, or to use an existing highway, is not to be construed as a power to destroy the highway. This is the rule of construction unless the language of the grant is such as to show unmistakably an intention to grant such power. *Palatka, etc.*, R. Co. *v. State*, 23 Fla. 546, 11 Am. St. Rep. 395, 32 Am. & Eng. R. Cas. 191.

Flooding Roadway. — A railway company au-

thorized to divert a road crossing its line on a level, and to carry it under the line by a bridge, may be enjoined at the suit of the attorney general from making or maintaining a bridge which by reason of the road thereunder being too low might cause such road to be flooded. *Atty.-Gen. v. Furness R. Co.*, 47 L. J. Ch. 776, 38 L. T. 555, 26 W. R. 650.

Construction of Approaches. — A railroad company must, if possible, construct its road without any inconvenience to the public; but if this cannot be done, it must be constructed with the least possible inconvenience. If a bridge or substitute road be necessary to prevent the obstruction, the company must build it in a reasonable time, and cannot delay it until its road is completed. *Louisville, etc.*, R. Co. *v. State*, 3 Head (Tenn.) 523.

4. Travel Should Not Be Obstructed — *Delaware, etc.* — *Kyne v. Wilmington, etc.*, R. Co., 8 Houst. (Del.) 185.

Massachusetts. — *Com. v. Hartford, etc.*, R. Co., 14 Gray (Mass.) 379.

Minnesota. — *Johnson v. St. Paul, etc.*, R. Co., 31 Minn. 283, 15 Am. & Eng. R. Cas. 467.

Missouri. — *State v. Hannibal, etc.*, R. Co., 86 Mo. 13, 29 Am. & Eng. R. Cas. 604.

New Jersey. — *Warren R. Co. v. State*, 29 N. J. L. 353; *Newark v. Delaware, etc.*, R. Co., 42 N. J. Eq. 196. See also *Central R. Co. v. State*, 32 N. J. L. 220.

Pennsylvania. — *Northern Cent. R. Co. v. Com.*, 90 Pa. St. 300, 5 Am. & Eng. R. Cas. 318; *Pittsburgh, etc.*, R. Co. *v. Com.*, 101 Pa. St. 192, 10 Am. & Eng. R. Cas. 321; *Chester v. Baltimore, etc.*, R. Co., 140 Pa. St. 275; *North Manheim Township's Appeal*. (Pa. 1888) 14 Atl. Rep. 137, 22 W. N. C. (Pa.) 149, 36 Am. & Eng. R. Cas. 194.

Rhode Island. — *Hughes v. Providence, etc.*, R. Co., 2 R. I. 493.

Texas. — *Galveston City R. Co. v. Nolan*, 53 Tex. 139, 3 Am. & Eng. R. Cas. 387.

Wisconsin. — *Oshkosh v. Milwaukee, etc.*, R. Co., 74 Wis. 534, 17 Am. St. Rep. 175, 39 Am. & Eng. R. Cas. 681, *following Jamestown v. Chicago, etc.*, R. Co., 69 Wis. 648, 32 Am. & Eng. R. Cas. 263.

See also *Baltimore, etc.*, R. Co. *v. Ritchie*, 31 Md. 191; *Willard v. Newbury*, 22 Vt. 458.

5. Usefulness as a Highway Should Remain Unimpaired — *Illinois.* — *Peoria, etc.*, R. Co. *v. Lyons*, 9 Ill. App. 350.

Kentucky. — *Paducah, etc.*, R. Co. *v. Com.*, 80 Ky. 147, 10 Am. & Eng. R. Cas. 318.

b. GOING OVER OR UNDER HIGHWAY — (1) *In General*. — In considering the right of a railroad to cross above or below a highway, regard must be had to the rules already laid down.¹

(2) *Election*. — It is usually within the election of the railroad company to carry the highway over or under its tracks as may seem most expedient,² and the election, when exercised by the railroad company in good faith, is not reviewable.³

Other Sources of Determination. — The determination of the crossing is not in all instances left to the railroad, however, but has been conferred by statute upon others.⁴

New York. — Fletcher v. Auburn, etc., R. Co., 25 Wend. (N. Y.) 462; Osborne v. Jersey City, etc., R. Co., 27 Hun (N. Y.) 589; Master-son v. New York Cent., etc., R. Co., 84 N. Y. 247, 38 Am. Rep. 510; Schermerhorn v. Mount McGregor R. Co., 69 Hun (N. Y.) 512.

Ohio. — State v. Dayton, etc., R. Co., 36 Ohio St. 436, 5 Am. & Eng. R. Cas. 312.

Texas. — Gulf, etc., R. Co. v. Greenlee, 62 Tex. 344; Missouri, etc., R. Co. v. Connelly, (Tex. Civ. App. 1896) 39 S. W. Rep. 145.

Vermont. — Roxbury v. Central Vermont R. Co., 60 Vt. 121.

See also Patterson v. South, etc., Alabama R. Co., 89 Ala. 318; Burritt v. New Haven, 42 Conn. 174; Hamden v. New Haven, etc., Co., 27 Conn. 158; Conklin v. New York, etc., R. Co., 102 N. Y. 107.

Usefulness of Highway Destroyed. — The construction of a railroad across a highway should not be permitted where the usefulness of the highway is virtually destroyed. Osborne v. Jersey City, etc., R. Co., 27 Hun (N. Y.) 589.

Raised Rails. — It cannot be permitted to destroy the usefulness of a public road by raising the rails so high at a crossing that it is dangerous to persons and animals to pass over the tracks. Paducah, etc., R. Co. v. Com., 80 Ky. 147, 10 Am. & Eng. R. Cas. 318. See also Johnson v. St. Paul, etc., R. Co., 31 Minn. 283; Indianapolis, etc., R. Co. v. State, 37 Ind. 489.

Prima Facie Negligence. — Leaving the highway in such a condition as to require the wheels of vehicles passing over the railroad track to be raised nine inches perpendicularly from the surface of the highway, in order to pass over the surface of the rails, is *prima facie* a negligent interference with the free use of the highway. Evansville, etc., R. Co. v. Carver, 113 Ind. 51, 32 Am. & Eng. R. Cas. 134.

1. See the preceding subdivision.

2. *Election*. — People v. New York Cent., etc., R. Co., 74 N. Y. 302; New York Cent., etc., R. Co. v. People, 12 Hun (N. Y.) 195; Conklin v. New York, etc., R. Co., 102 N. Y. 107; Jamaica v. Long Island R. Co., (Supreme Ct.) 49 N. Y. St. Rep. 365, 66 Hun (N. Y.) 631; Illinois Cent. R. Co. v. Bentley, 64 Ill. 438; Buchner v. Chicago, etc., R. Co., 60 Wis. 264, 14 Am. & Eng. R. Cas. 447; Newton v. Chicago, etc., R. Co., 66 Iowa 422, 23 Am. & Eng. R. Cas. 298.

Meaning of Term "Road." — The word "road" means the whole road, including footpaths, and the company does not reform the road as required by the act, in lowering the surface of the carriageway and leaving the

footways at their original level. Manchester, etc., R. Co. v. Reg., 3 Ry. Cas. 633, 3 G. & D. 269, 3 Q. B. 528, 43 E. C. L. 851; Reg. v. Manchester, etc., R. Co., 2 Ry. & C. Cas. 711.

The Words "Bed of the Turnpike Road," in an act authorizing a railway company in carrying its tracks across a turnpike to lower the bed of such road, mean that the carriage road only shall be lowered; and the full breadth of the former carriage road is not intended to be preserved under the bridge, but to be preserved only as to the part of the road lowered as it descends to the bridge on one side and ascends from it on the other. Manchester, etc., R. Co. v. Reg., 3 Ry. Cas. 633, 3 G. & D. 269, 3 Q. B. 528, 43 E. C. L. 851.

3. **Election Not Reviewable.** — People v. New York Cent., etc., R. Co., 74 N. Y. 302; Illinois Cent. R. Co. v. Bentley, 64 Ill. 438; Jamaica v. Long Island, etc., R. Co., (Supreme Ct.) 49 N. Y. St. Rep. 365, 66 Hun (N. Y.) 631.

Mandamus Will Not Lie. — Mandamus will not lie to compel a railway company which has the option to carry a turnpike road over the railway or the railway over the turnpike, where the crossing is effected, to do one of these two things, unless it is shown that it is impossible for the company to exercise an option. Reg. v. Southeastern R. Co., 4 H. L. Cas. 471, 17 Jur. 901, affirmed in 17 Q. B. 485, 79 E. C. L. 485, 15 Jur. 871, 20 L. J. Q. B. 428.

Restoration Impracticable. — It seems, however, that where it would be impracticable to restore the highway to any reasonable degree of usefulness by a particular mode of crossing, that mode should not be permitted. People v. New York Cent., etc., R. Co., 74 N. Y. 302.

4. **Commissioners.** — Under Massachusetts Rev. Stat., c. 24, § 13, county commissioners have final jurisdiction of the question whether a highway which crosses a railroad shall be laid over, under, or on a level with it. Boston, etc., R. Co. v. Middlesex County, 1 Allen (Mass.) 324.

Incorporated City. — An incorporated city being invested by the statute with the power to extend its streets either over or across the tracks of railroads, either above the tracks by means of viaducts or on the same grade or level with the tracks, it has a discretion which mode to adopt, which cannot be controlled or interfered with by the courts. Illinois Cent. R. Co. v. Chicago, 141 Ill. 586, 51 Am. & Eng. R. Cas. 528.

Railroad Crossing Board. — In Michigan where a railroad company desires to cross a street at a point occupied by another railroad, the state railroad crossing board may, under How. Stat. Mich., § 3301, require such company to carry

3. Right to Change Location of Highway—*a.* IN GENERAL. — A railroad company has no inherent right to change the existing location of a highway; ¹ in some cases, however, such right is granted out of regard to public convenience. ²

b. BY STATUTE. — Provisions of such a nature are not infrequently the subject of legislative enactment, and considerable latitude in this direction has been vested in the railroad companies by the terms and construction of the same. ³ As will be seen, however, from a review of such statutes, the right of

its tracks above those of the other company by means of a bridge, and to provide a passageway upon such bridge for teams and pedestrians, the cost of such passageway to be borne by the two companies equally. *Fort-street Union Depot Co. v. State R. Crossing Board*, 81 Mich. 248, 45 Am. & Eng. R. Cas. 113.

1. See *infra*, this title, *Streets or Highways Crossing Railroads—Grade Crossings*.

Right to Change Location of Highway. — Where a railroad charter gives the company power to alter and grade the public and other roads crossing its railroad, so as not to impede the travel on such roads, the company has no right to change the route of any public or other road. *Warren R. Co. v. State*, 29 N. J. L. 353. See also *Hughes v. Providence, etc., R. Co.*, 2 R. I. 493.

Nor has it a right, under the *New Jersey* Act of March 28, 1862, to alter the grade of a public highway which crosses its tracks. *Central R. Co. v. State*, 32 N. J. L. 220.

2. **Right Recognized in Some Cases.** — *Schermerhorn v. Mount McGregor R. Co.*, 69 Hun (N. Y.) 512; *Palatka, etc., R. Co. v. State*, 23 Fla. 546, 11 Am. St. Rep. 395, 32 Am. & Eng. R. Cas. 197; *North Manheim Tp. v. Reading, etc., R. Co.*, 18 Phila. (Pa.) 650; *Abington Tp. v. North Pennsylvania R. Co.*, 2 Pa. Dist. Rep. 68; *Davis v. Hampshire County*, 153 Mass. 218; *Clawson v. Chicago, etc., R. Co.*, 95 Ind. 152, 20 Am. & Eng. R. Cas. 56; *Illinois Cent. R. Co. v. Bentley*, 64 Ill. 438. See *infra*, this title, *Streets or Highways Crossing Railroads—Grade Crossings*.

3. **Statutes—Connecticut.** — By statute in Connecticut it is provided that the railroad may, "under the direction of the railroad commissioners, raise or lower [any] turnpike, highway, or street at the said crossing, or change the location thereof," etc. This statute was passed in 1849 and appears in all the revisions since that time; it was reenacted with slight amendment in 1883, and now constitutes § 3480 of the Gen. Stat. 1888. *Middletown v. New York, etc., R. Co.*, 62 Conn. 492.

Florida. — Under the Florida statute a railroad may make a change in the line of a highway where an embankment or cutting calls for it, or it is desirable with a view to a more easy ascent or descent. Where the conditions are such as not to permit of grading the highway to the level of the railroad cut or embankment, a detour or change in the route of the highway may be made. This new line or detour, after being established on land acquired by the railroad company, is to be maintained as other public highways, and not as the private road of the company. *Palatka, etc., R. Co. v. State*, 23 Fla. 546, 11 Am. St. Rep. 395, 32 Am. & Eng. R. Cas. 197.

Indiana. — Under the provisions of the *Indiana* Rev. Stat. of 1881, § 3915, to the effect that whenever a railroad shall cross a public highway, such highway may be carried under or over the track as may be most expedient and convenient, it has been held that the old highway may be filled up and the new one established where a change in the road is desirable, and additional land may be taken for this purpose. *Clawson v. Chicago, etc., R. Co.*, 95 Ind. 152, 20 Am. & Eng. R. Cas. 56.

Massachusetts. — Under the *Massachusetts* Pub. Stat., c. 112, §§ 120, 129, 130, county commissioners, in ordering the separation at a crossing of the grades of a railroad and a highway, may change the highway to a place different from that of the existing crossing, if the change is not greater than is reasonably necessary in order to do away with the crossing at grade. *Davis v. Hampshire County*, 153 Mass. 218, followed in *Hammond v. Worcester County*, 154 Mass. 509.

Ohio. — Section 16 of the *Ohio* Corporation Act of 1852, under which the *Dayton and Southeastern Railroad Company* was incorporated, provides as follows: "It shall be lawful for such corporation, whenever it may be necessary in the construction of such road to cross any road or stream of water, to divert the same from its present location or bed; but said corporation shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness." *State v. Dayton, etc., R. Co.*, 36 Ohio St. 436, 5 Am. & Eng. R. Cas. 312.

Pennsylvania. — A railroad company, organized under the general railroad laws of *Pennsylvania*, has power to change the site of a township road, as well when it crosses the road diagonally as when it occupies it longitudinally. *North Manheim Tp. v. Reading, etc., R. Co.*, 18 Phila. (Pa.) 650.

By a supplement passed in 1852 to the Act of April 3, 1837, which constituted the charter of the *Sunbury and Erie Railroad Company* (now the *Philadelphia and Erie Railroad Company*), it was provided that if said "railroad company shall find it necessary to change the site of any portion of any turnpike or public road, they shall cause the same to be reconstructed forthwith, at their own proper expense, on the most favorable location and in as perfect a manner as the original road." *Pittsburgh, etc., R. Co. v. Com.*, 101 Pa. St. 192, 10 Am. & Eng. R. Cas. 321.

This same statute has been made to apply to the *Pennsylvania Railroad*, and the question whether a change of the public road is necessary is to be determined by the railroad company, and after it has supplied a new and safe crossing in place of an old one, and this has been used by the public for several years, the

the railroad company in this regard is a grant for the purpose of public convenience, and the duties of the company as to the new road are the same, and can be enforced in like measure, as in the case of the original highway.

4. Construction of Crossings — *a. DUTY TO CONSTRUCT* — (1) *In General.* — It is the duty of every railroad company properly to construct and maintain crossings over all public highways on the line of its road in such manner that the same shall be safe and convenient to travelers, so far as it can do so without interfering with the safe operation of the road.¹

Unfrequented Ways. — The duty of the railroad company in this regard will not be enforced to an unreasonable degree, however, and such obligation does not apply to unfrequented roads or ways.²

(2) *By Statute.* — The duty of the railroad company to construct and maintain crossings over public highways is a matter usually regulated by stat-

supervisors of the township have no authority to restore the old one. *Pennsylvania R. Co.'s Appeal*, 128 Pa. St. 509, 39 Am. & Eng. R. Cas. 685.

Wisconsin. — By § 1836, Wis. Rev. Stat., it is provided that a railroad company may change the course or direction of any highway when made necessary or desirable to secure more easy ascent or descent by reason of any embankment or cut made in the construction of the railroad and land taken necessary therefor; provided such highway or road be not so changed from its original course more than six rods, nor its distance thereby lengthened more than five rods. *Buchner v. Chicago*, etc., R. Co., 60 Wis. 264, 14 Am. & Eng. R. Cas. 447.

1. Duty to Construct and Maintain Safe and Convenient Crossings — *Alabama.* — *Patterson v. South*, etc., Alabama R. Co., 89 Ala. 318.

Connecticut. — *Middletown v. New York*, etc., R. Co., 62 Conn. 492.

Illinois. — *Chicago*, etc., R. Co. *v. Chicago*, 140 Ill. 309; *Illinois Cent. R. Co. v. Highway Com'rs*, 61 Ill. App. 203. See also *Bloomington v. Illinois Cent. R. Co.*, 49 Ill. App. 129.

Indiana. — *Pennsylvania Co. v. Frund*, 4 Ind. App. 469; *Terre Haute*, etc., R. Co. *v. Clem*, 123 Ind. 15, 18 Am. St. Rep. 303, 42 Am. & Eng. R. Cas. 229; *Louisville*, etc., R. Co. *v. Smith*, 91 Ind. 119, 13 Am. & Eng. R. Cas. 608.

Iowa. — *Farley v. Chicago*, etc., R. Co., 42 Iowa 234.

Kansas. — *State v. Missouri Pac. R. Co.*, 33 Kan. 176; *Missouri*, etc., R. Co. *v. Long*, 27 Kan. 684, 6 Am. & Eng. R. Cas. 254.

Michigan. — *People v. Lake Shore*, etc., R. Co., 52 Mich. 277, 13 Am. & Eng. R. Cas. 611. See also *Chicago*, etc., R. Co. *v. Hough*, 61 Mich. 507.

Nebraska. — *State v. Chicago*, etc., R. Co., 29 Neb. 412, 42 Am. & Eng. R. Cas. 248; *Burlington*, etc., R. Co. *v. Koonce*, 34 Neb. 479. See also *Chicago*, etc., R. Co. *v. State*, 47 Neb. 549.

New Jersey. — *Newark v. Delaware*, etc., R. Co., 42 N. J. Eq. 196.

Tennessee. — *Dyer County v. Chesapeake*, etc., R. Co., 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676.

Vermont. — *Roxbury v. Central Vermont R. Co.*, 60 Vt. 121.

See also *People v. Union Pac. R. Co.*, 20

Colo. 186; *State v. Shardlow*, 43 Minn. 524, 45 Am. & Eng. R. Cas. 106.

Reasonably Safe. — An instruction that "it is not sufficient that the crossing is so constructed that it is possible to safely pass over it, but it should be so constructed and maintained in such condition as to be reasonably safe and convenient for public travel by persons exercising ordinary care," was held to correctly state the law, and was not open to the objection of argumentativeness. *Brown v. Hannibal*, etc., R. Co., 99 Mo. 310, 42 Am. & Eng. R. Cas. 87.

Expert Opinion. — Where a statute provides that all railroad companies must make such highway crossings "as the circumstances of the case and the public safety may require," the nature of the crossing is not governed by the public safety alone, but by what is practicable in the judgment of a competent engineer to be done for the purpose of carrying out the objects of the railroad company. *Kyne v. Wilmington*, etc., R. Co., 8 Houst. (Del.) 185.

Question for Jury. — Where the evidence tended to show that the two approaches to the crossing were not in line, that travel was necessarily diverted to the south by reason of a telegraph pole upon one of the approaches, that the signboard which would be a guide to one not familiar with the crossing extended over the south edge of the embankment eighteen or twenty inches, and that the traveled track was about a foot from the brink, it was held proper to submit the question whether the crossing was defective to the jury. *Brown v. Hannibal*, etc., R. Co., 99 Mo. 310, 42 Am. & Eng. R. Cas. 87.

2. Unfrequented Ways. — *Berry v. Northeastern R. Co.*, 72 Ga. 137, 28 Am. & Eng. R. Cas. 575. See also *Gulf*, etc., R. Co. *v. Rowland*, 70 Tex. 298, 35 Am. & Eng. R. Cas. 286; *Gulf*, etc., R. Co. *v. Ellis*, 70 Tex. 307, 35 Am. & Eng. R. Cas. 292. See *infra*, this section, *Liability for Defective Crossings*.

What a Sufficient Dedication. — Testimony that a road had been traveled by the public for twenty years is not sufficient to show a dedication, in a country where one feels himself at liberty to pass at will over all unclosed lands. Such a crossing a railway company is not bound to maintain. *Gulf*, etc., R. Co. *v. Montgomery*, 85 Tex. 64. See generally the title **DEDICATION**.

utory enactment.¹ And a failure to regard such statutory requirements will render the railroad company liable for all injuries from such neglect of duty.²

Property in Hands of Receiver. — The railroad company will not be relieved of its duty by the fact that the road has gone into the hands of a receiver.³

Highways Laid Out over Existing Railroads. — The duty to construct railroad crossings at highways and the approaches thereto, as to highways laid out over railroads already constructed, is not imposed by the common law. It is simply a duty of statutory enactment as a police regulation.⁴ And such stat-

1. **By Statute** — *Connecticut*. — *Middletown v. New York*, etc., R. Co., 62 Conn. 492.

Illinois. — *Chicago*, etc., R. Co. *v. Chicago*, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150.

Iowa. — *Farley v. Chicago*, etc., R. Co., 42 Iowa 234.

Kansas. — *Missouri*, etc., R. Co. *v. Long*, 27 Kan. 684, 6 Am. & Eng. R. Cas. 254.

Maine. — *Portland*, etc., R. Co. *v. Deering*, 78 Me. 61, 57 Am. Rep. 784, 23 Am. & Eng. R. Cas. 51; *Boston*, etc., R. Co. *v. York County*, 79 Me. 386, 32 Am. & Eng. R. Cas. 271.

Michigan. — *Thayer v. Flint*, etc., R. Co., 93 Mich. 150. See also *People v. Detroit*, etc., R. Co., 79 Mich. 471, 42 Am. & Eng. R. Cas. 257.

Missouri. — *Lincoln v. St. Louis*, etc., R. Co., 75 Mo. 27; *Moberly v. Kansas City*, etc., R. Co., 98 Mo. 183, 17 Mo. App. 518; *Ellis v. Wabash*, etc., R. Co., 17 Mo. App. 126.

Nebraska. — *State v. Chicago*, etc., R. Co., 29 Neb. 412, 42 Am. & Eng. R. Cas. 248.

New York. — *Haynes v. Buffalo*, etc., R. Co., 38 Hun (N. Y.) 17.

Pennsylvania. — *North Manheim Township's Appeal*, (Pa. 1888) 14 Atl. Rep. 137, 36 Am. & Eng. R. Cas. 194.

Texas. — *Gulf*, etc., R. Co. *v. Ellis*, 70 Tex. 307, 35 Am. & Eng. R. Cas. 292. See also *Gulf*, etc., R. Co. *v. Rowland*, 70 Tex. 298.

Construction of Statutes — *Connecticut*. — It was provided by Conn. Gen. Stat., § 3480, that every railroad company which should locate its road across any highway should make and maintain such bridges as the convenience and safety of the public should require. A subsequent act of 1889, c. 220, § 7, provided that "it shall be the duty of the railroad companies to maintain and keep in repair all structures erected over their tracks at any highway crossing; but it shall be the duty of the municipality in which the structure is situated to keep in repair the surface of the highway, including planking or other surface material of the highway upon such structure." In construing these statutes it was held that the latter act did not repeal by implication the former, which still remained in force. *Middletown v. New York*, etc., R. Co., 62 Conn. 492.

The *Illinois* statute in this regard includes streets thereafter laid out or extended as well as existing streets. *Chicago*, etc., R. Co. *v. Chicago*, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150.

See also *State v. Chicago*, etc., R. Co., 29 Neb. 412, 42 Am. & Eng. R. Cas. 248, under the *Nebraska* Act of March 31, 1887.

Exemption — Burden of Proof. — Any company claiming to be exempt from the provisions of statutes imposing this duty has the burden to establish by affirmative proof the facts upon

which the exemption is based. *Farley v. Chicago*, etc., R. Co., 42 Iowa 234.

Performance of Work by Another. — The performance of work by a township on the roadway of an approach to a railroad crossing, in an endeavor to make it passable, will not relieve the road company from its statutory obligation to construct suitable crossings for the passage of teams. *Thayer v. Flint*, etc., R. Co., 93 Mich. 150.

2. **Liability for Defective Crossings.** — *Terre Haute*, etc., R. Co. *v. Clem*, 123 Ind. 15, 18 Am. St. Rep. 303, 42 Am. & Eng. R. Cas. 229; *Moberly v. Kansas City*, etc., R. Co., 98 Mo. 183, 17 Mo. App. 518; *Farley v. Chicago*, etc., R. Co., 42 Iowa 234; *Moggy v. Canadian Pac. R. Co.*, 3 Manitoba L. Rep. 209; *Evansville*, etc., R. Co. *v. Carver*, 113 Ind. 51, 32 Am. & Eng. R. Cas. 134; *Indianapolis*, etc., R. Co. *v. Stout*, 53 Ind. 143.

There must, however, be a direct connection between the negligent act and the injury. *Moberly v. Kansas City*, etc., R. Co., 98 Mo. 183, 17 Mo. App. 518.

3. **Receivership.** — Where a city had obtained a peremptory writ of mandamus to compel a receiver appointed in foreclosure proceedings to construct a crossing over the tracks, a motion filed by the receiver asking a continuation of the case until the foreclosure should be terminated was properly overruled, as was also a motion that the cause be continued until the deposition of the receiver could be taken and until certain creditors could intervene, where the fact which the receiver claimed his deposition would show was that he had no funds with which to make the crossing, and the allegation in regard to the creditors was to the effect that the receiver had been notified of their intention to resist the expenditure which the crossing would make necessary. *Fort Dodge v. Minneapolis*, etc., R. Co., 87 Iowa 389, 55 Am. & Eng. R. Cas. 58.

Objection of Creditors. — It is within the power of the court to order the receiver to construct the crossing required, notwithstanding the objection of mortgage creditors, since liens acquired by creditors on railway property must be subject to the burden of constructing and maintaining proper crossings. *Fort Dodge v. Minneapolis*, etc., R. Co., 87 Iowa 389, 55 Am. & Eng. R. Cas. 58.

4. **Highways Laid Out over Existing Railroads.** — *O'Fallon v. Ohio*, etc., R. Co., 45 Ill. App. 579; *Chicago*, etc., R. Co. *v. Chicago*, 140 Ill. 309; *Louisville*, etc., R. Co. *v. Smith*, 91 Ind. 119, 13 Am. & Eng. R. Cas. 608; *Boston*, etc., R. Co. *v. York County*, 79 Me. 386, 32 Am. & Eng. R. Cas. 271; *State v. Chicago*, etc., R. Co., 29 Neb. 412, 42 Am. & Eng. R. Cas. 248; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345, *overruling Miller v. New York*, etc., R.

utes, when brought up for the consideration of the courts, have, as a rule, been held constitutional and valid.¹

6. PROCEEDINGS TO COMPEL CONSTRUCTION. — If the railroad company refuse or neglect to construct crossings, as required by law, it may be compelled to do so.² The procedure in such cases must differ according to the jurisdiction in which the remedy is sought to be enforced,³ but the most usual remedy in such cases is by mandamus.⁴

Co., 21 Barb. (N. Y.) 513. But see *Rock Creek Tp. v. St. Joseph, etc., R. Co.*, 43 Kan. 543, 42 Am. & Eng. R. Cas. 255.

1. **Constitutionality of Statutes** — *Illinois*. — In *Illinois Cent. R. Co. v. Bloomington*, 76 Ill. 447, long after the construction of a railroad a street was extended so as to cross the same, and the city passed an ordinance requiring the railroad to make a safe and proper crossing by grading the approaches of the street at the crossing, there being nothing in the charter of the company imposing such duty, nor any such duty imposed by general law in force at the time the company was created. In passing upon the question the court held that the company was not liable to this new burden any further than might have been required of an individual, and as the whole burden was sought to be placed upon the company without regard to benefits, the ordinance was in violation of the constitution, and the legislature itself could not impose such burden without making provision for compensation.

Maine. — In Maine such a statute is constitutional, and applies to a railroad built before the enactment of the statute, when the charter of the company made it subject to the general laws then in existence, and to such as should thereafter be passed. *Portland, etc., R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784, 23 Am. & Eng. R. Cas. 51. See also *Boston, etc., R. Co. v. York County*, 79 Me. 386, 32 Am. & Eng. R. Cas. 271.

Michigan. — Under the Michigan statute (Laws of 1873, Act 198, art. 4, § 15, as amended by the Laws of 1889, Act 165), railroad companies cannot be compelled to erect and maintain residence crossings at their own expense for the use of individuals, when no statute requiring them existed at the time of the construction of the road, and a statute requiring such crossings is not within the power of police regulation. *People v. Detroit, etc., R. Co.*, 79 Mich. 471, 42 Am. & Eng. R. Cas. 257.

Minnesota. — The Minnesota statutes (c. 15, Laws 1887, and c. 222, Laws 1889), are not, as to highways laid out after their passage, unconstitutional because they make no provision for compensation; for such provision is made by the statute regulating the laying out of highways. *State v. Shardlow*, 43 Minn. 524, 45 Am. & Eng. R. Cas. 106.

Nebraska. — The Nebraska Act of March 31, 1887, requiring railroad corporations to construct and keep in repair suitable crossings where railroads cross public highways, has been held constitutional. *State v. Chicago, etc., R. Co.*, 29 Neb. 412, 42 Am. & Eng. R. Cas. 248.

Texas. — The Texas statute of March 23, 1887, however, which requires railroad companies to make, at their own expense, crossings outside of any inclosure, on the demand of any

two citizens "who either live or own lands within five miles of the place" designated for the crossing, is unconstitutional by reason that it is not necessarily for a public benefit, such citizens being authorized to require the establishment of a crossing, although actuated by selfish or malicious motives, and notwithstanding the fact that such crossing has no connection with any other way over which the public has a right to pass. *Gulf, etc., R. Co. v. Ellis*, 70 Tex. 307, 35 Am. & Eng. R. Cas. 292.

2. For procedure in such cases, see ENCYC. OF PL. AND PR., title RAILROADS.

Notice. — The service of the notice of the necessity for the construction and maintenance of crossings, which the statute requires the overseer to give to the railway company, is sufficient if the notice is actually delivered to the agent of the railway company most convenient to the crossing; the service need not be made by any particular officer or person. The fact that the notice served on a railroad demands the construction of a crossing within sixty days, when the statute requires the crossing to be constructed within thirty days after the service of the notice, does not affect the sufficiency of the notice if the overseer does not proceed to make any repairs until after the expiration of the sixty days; nor need the notice set forth the statute in all its details. *Henry v. Wabash Western R. Co.*, 44 Mo. App. 100.

Under the *Missouri* Act of 1875, railroads must construct crossings without being notified, and the act is not intended for the protection of travelers only. *Lincoln v. St. Louis, etc., R. Co.*, 75 Mo. 27.

3. **Complaint**. — It seems that such action on the part of the railroad can be compelled by the proper parties joining in a complaint. See *Haynes v. Buffalo, etc., R. Co.*, 38 Hun (N. Y.) 17.

Fine. — By the *Illinois* Act of 1874, § 11, if the railroad company fails to construct and maintain the street crossings and their approaches after being notified so to do, it shall not only be liable for the expenses of the municipal authorities in that behalf, but it shall be subject to a fine. *Chicago, etc., R. Co. v. Chicago*, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150.

4. **Mandamus**. — In Nebraska the board of transportation has jurisdiction to hear complaints and make orders in regard to the construction and repairing of crossings, and its orders in that regard may be enforced by mandamus. *State v. Chicago, etc., R. Co.*, 29 Neb. 412, 42 Am. & Eng. R. Cas. 248. See also *People v. Union Pac. R. Co.*, 20 Colo. 186.

Burden of Proof on Relator. — In an action to compel a railroad company by writ of mandamus to construct a crossing at the intersec-

c. MODE OF CONSTRUCTION — (1) *In General*. — No fixed mode of construction is prescribed, but the crossing should in all cases meet the necessities of the public and the requirements of the statute.¹

(2) *Width of Crossing*. — The width of the crossing and approaches thereto is to be determined by what is reasonable under the circumstances of each case, and according to the requirements of the statute or authority by virtue of which the crossing was established.²

(3) *Approaches — Embankments*. — An embankment constructed as a necessary approach to a railroad track is in legal contemplation a part of the crossing,³ and should comply with the provisions regulating crossings in general.⁴

tion of the railroad with an alleged street, the municipality has the burden to establish that the alleged street was a public highway, and the fact of its being a highway is not established by the introduction of a duly acknowledged and recorded plat of the town, without showing further that the person laying out the road had title to the land. *Edenville v. Chicago, etc., R. Co.*, 77 Iowa 69.

Vague and Indefinite Ordinance. — Where a city by ordinance ordered three railroad companies jointly to construct a viaduct, and the ordinance was vague and indefinite in regard to the materials to be used and the dimensions of the viaduct itself, and its construction as ordered would require a change of grade of certain streets in violation of certain provisions of the statutes, it was held that mandamus would not lie to enforce the construction of such viaduct. *State v. Missouri Pac. R. Co.*, 33 Kan. 176.

See generally the title **MANDAMUS**.

1. Mode of Construction. — See *St. Louis, etc., R. Co. v. Aven*, 61 Ark. 149.

Where the approaches to a crossing are graded, and planks are laid between the rails to make an even surface for the passage of persons and teams, and gates are erected to delay such passage until trains pass, there is no part of the track or right of way or land to be restored to its former state, nor is the usefulness of the railroad in any way impaired. *Chicago, etc., R. Co. v. Chicago*, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150.

Under Pennsylvania Statute. — A crossing so constructed as not to endanger the reasonable passage of persons and transportation of property, or as not to unnecessarily interfere with the public highway, is a substantial compliance with § 12 of the Pa. Act of 1849 (P. L. p. 84). *North Manheim Township's Appeal*, (Pa. 1888) 14 Atl. Rep. 137, 36 Am. & Eng. R. Cas. 194.

2. Width of Crossing. — *Bloomington v. Illinois Cent. R. Co.*, 154 Ill. 539.

By § 807 of the *Missouri Rev. Stat.* 1879 a railroad company is required to construct and maintain good and sufficient crossings where the road crosses the public highways. But it is not meant by this statute that the crossing shall be constructed the whole width of the public highway (streets of a crowded town or city would doubtless be an exception to this rule); and ordinarily a crossing the full width of the highway is not constructed. *Ellis v. Wabash, etc., R. Co.*, 17 Mo. App. 126.

For other cases involving similar questions, see *North Manheim Township's Appeal*, (Pa. 1888) 14 Atl. Rep. 137, 36 Am. & Eng. R. Cas.

194; *Reg. v. Rigby*, 6 Ry. Cas. 479, 14 Q. B. 687, 68 E. C. L. 687, 19 L. J. Q. B. 153, 14 Jur. 329; *Reg. v. Birmingham, etc., R. Co.*, 1 G. & D. 324, 4 Jur. 966.

3. Approaches — Embankments. — *Farley v. Chicago, etc., R. Co.*, 42 Iowa 234; *O'Fallon v. Ohio, etc., R. Co.*, 45 Ill. App. 572; *Illinois Cent. R. Co. v. Highway Com'rs*, 61 Ill. App. 208; *Moberly v. Kansas City, etc., R. Co.*, 93 Mo. 183, 17 Mo. App. 518; *Roxbury v. Central Vermont R. Co.*, 60 Vt. 121; *Burrill v. New Haven*, 42 Conn. 174.

Meaning of Term. — In *Illinois Cent. R. Co. v. Highway Com'rs*, 61 Ill. App. 208, the court said: "We understand an approach, within the meaning of the statute, to be an embankment, grade bridge, or structure which the construction of the road has made necessary to be erected or constructed within the right of way to enable persons passing along the highway with teams and vehicles to reach the crossing of the railroad." See also *Bloomington v. Illinois Cent. R. Co.*, 154 Ill. 539.

The phrases "railroad crossings of highways and streets," and "the approaches thereto within their respective rights of way," as laid down in par. 71, § 8, c. 114, *Illinois Rev. Stat.* 1889, describe different portions of the space within the right of way of the railroad company. Railroad "crossing" means that portion comprising the track or roadbed; the "approaches thereto," that portion extending from the track, on each side thereof, back "so far as may be necessary, so that at all times the crossing shall be safe." The words do not necessarily include the entire width of the railroad's right of way. *O'Fallon v. Ohio, etc., R. Co.*, 45 Ill. App. 572.

4. Provisions Regulating Crossings Apply. — *O'Fallon v. Ohio, etc., R. Co.*, 45 Ill. App. 572; *Illinois Cent. R. Co. v. Highway Com'rs*, 61 Ill. App. 203; *Farley v. Chicago, etc., R. Co.*, 42 Iowa 237, 56 Iowa 337, 2 Am. & Eng. R. Cas. 108; *Newton v. Chicago, etc., R. Co.*, 66 Iowa 422, 23 Am. & Eng. R. Cas. 298; *Maltby v. Chicago, etc., R. Co.*, 52 Mich. 108, 13 Am. & Eng. R. Cas. 606; *Hayes v. New York Cent., etc., R. Co.*, 9 Hun (N. Y.) 63.

In the construction of a railway which crosses a public highway, it is not only the duty of the company to leave the highway in such condition that its usefulness will not be impaired, but when its approaches have been materially interfered with by the construction work, these also must be left in as good condition as they were before the railway was built. *Gulf, etc., R. Co. v. Greenlee*, 62 Tex. 344, 23 Am. & Eng. R. Cas. 322.

(4) *Cattle-guards*. — It is the duty of the railroad company to erect suitable cattle-guards where its right of way crosses a public highway.¹ And when so erected, they should be placed near enough to the crossing to accomplish the purpose for which they were intended.²

(5) *Bridges*. — So, when necessary for the convenience and safe passage of the public, it is the duty of the railroad to erect and maintain bridges at

Liable for Injury. — Where a railway company has crossed a highway, the duty of the company is not merely to provide a crossing upon which the rails do not rise more than one inch above or sink one inch below the level; but it is also the company's duty to construct and maintain such approaches as may be necessary to enable persons using the highway to avail themselves of the crossing. Therefore, where a railway company laid a plank fourteen feet long outside the rail, and did not grade the road up to the plank at one end of it, but left the ends of the ties exposed, the company was liable for an accident occurring to the plaintiff's mule by reason of the whiffletree catching upon one of these ties. *Moggy v. Canadian Pac. R. Co.*, 3 Manitoba L. Rep. 209.

Level Crossing. — Where the railroad crosses the highway nearly on a level with it, there is no necessity for an embankment twenty rods long in order to reach the actual crossing. *Beatty v. Central Iowa R. Co.*, 58 Iowa 242, 8 Am. & Eng. R. Cas. 210.

Sidewalks. — The duty of a railroad company in *Illinois* to maintain a sidewalk is predicated upon par. 71, c. 114, S. & C. Stat., p. 1937, which provides that hereafter at all railroad crossings of highways and streets in this state the several railroad corporations in this state shall construct and maintain said crossings and the approaches thereto within their respective rights of way, so that at all times they shall be safe to persons and property. It is not necessary for the railroad to maintain a sidewalk unless this is necessary in order to make a suitable approach to the crossing. *Bloomington v. Illinois Cent. R. Co.*, 49 Ill. App. 129.

1. Duty to Erect Cattle-guards — *Illinois*. — *Peoria*, etc., R. Co. *v. Barton*, 80 Ill. 72.

Indiana. — *Fort Wayne*, etc., R. Co. *v. Herbold*, 99 Ind. 91, 23 Am. & Eng. R. Cas. 221; *Welty v. Indianapolis*, etc., R. Co., 105 Ind. 55, 24 Am. & Eng. R. Cas. 371; *Pittsburgh*, etc., R. Co. *v. Eby*, 55 Ind. 567; *New Albany*, etc., R. Co. *v. Pace*, 13 Ind. 411; *Wabash*, etc., R. Co. *v. Tretts*, 96 Ind. 450, 19 Am. & Eng. R. Cas. 601.

Kansas. — *Atchison*, etc., R. Co. *v. Shaft*, 33 Kan. 521, 19 Am. & Eng. R. Cas. 529; *Union Pac. R. Co. v. Harris*, 28 Kan. 206, 11 Am. & Eng. R. Cas. 431; *St. Louis*, etc., R. Co. *v. Curl*, 28 Kan. 622, 11 Am. & Eng. R. Cas. 458.

Minnesota. — *Greeley v. St. Paul*, etc., R. Co., 33 Minn. 136, 53 Am. Rep. 16, 19 Am. & Eng. R. Cas. 559.

New York. — *Tracy v. Troy*, etc., R. Co., 38 N. Y. 433, 98 Am. Dec. 54; *Bradley v. Buffalo*, etc., R. Co., 34 N. Y. 427.

Ohio. — *Cleveland*, etc., R. Co. *v. Newbrander*, 40 Ohio St. 15, 11 Am. & Eng. R. Cas. 480.

See also *Jeffersonville*, etc., R. Co. *v. Avery*, 31 Ind. 277; *Jeffersonville*, etc., R. Co. *v. Morgan*, 38 Ind. 190; *Indianapolis*, etc., R. Co. *v. Bonnell*, 42 Ind. 539.

Wagon Crossings. — Under the *Minnesota* statute (Minn. Gen. Stat. 1878, c. 34, § 54), it is bound to make cattle-guards at wagon crossings in towns and cities as well as in the country. *Greeley v. St. Paul*, etc., R. Co., 33 Minn. 136, 53 Am. Rep. 16, 19 Am. & Eng. R. Cas. 559.

Inconvenience No Excuse. — The fact that a railroad crossing is at or near a depot, and that to construct a crossing there would inconvenience the company, will not excuse them from complying with the positive requirement of the statute requiring such protection to be provided. *Tracy v. Troy*, etc., R. Co., 38 N. Y. 433, 98 Am. Dec. 54; *Bradley v. Buffalo*, etc., R. Co., 34 N. Y. 427; *Atchison*, etc., R. Co. *v. Shaft*, 33 Kan. 521, 19 Am. & Eng. R. Cas. 529.

The *Ohio* Act, April 18, 1874 (71 Ohio L. 85), imposes upon railroad companies the duty of maintaining cattle-guards whenever their road crosses a highway.

It has been held, however, that such statute may be construed as allowing exceptions required by public convenience and necessity and a proper use of a station yard by the company. *Cleveland*, etc., R. Co. *v. Newbrander*, 40 Ohio St. 15, 11 Am. & Eng. R. Cas. 480.

When the company is relieved from its duty in this regard for the reasons mentioned, it is its duty to construct cattle-guards at the first points from the highway which will not interfere with the necessities and convenience of the public and the company. *Cleveland*, etc., R. Co. *v. Newbrander*, 40 Ohio St. 15, 11 Am. & Eng. R. Cas. 480.

Ordinance Against Stray Cattle. — In *New York* a city ordinance prohibiting animals running at large within city limits does not relieve a railroad company from constructing cattle-guards at street crossings. *Crawford v. New York Cent.*, etc., R. Co., 18 Hun (N. Y.) 108.

Penalty for Failure to Construct. — In *Case v. New York Cent.*, etc., R. Co., 75 Hun (N. Y.) 527, it was held that under a statute which required the construction of cattle-guards at a railroad crossing and declared a penalty for a failure to comply with its requirements, such penalty did not include damages for injury to personal property.

2. Location. — *Evansville*, etc., R. Co. *v. Barbee*, 74 Ind. 169; *Indianapolis*, etc., R. Co. *v. Bonnell*, 42 Ind. 539; *Indianapolis*, etc., R. Co. *v. Irish*, 26 Ind. 268.

Leaving Open Space. — In *Indianapolis*, etc., R. Co. *v. Bonnell*, 42 Ind. 539, the court said: "We do not think a railroad can be regarded as securely fenced where the cattle-guards are placed so far apart as to leave an open space on both sides."

crossings¹ and the approaches thereto.²

(6) *Precautions to Be Observed.* — A railroad company should erect whatever structures are necessary to the convenience and safety of the crossing, and such duty is a continuing one without any express statutory requirement.³ The duty of the railroad in this regard, however, is usually defined by statute or ordinance.⁴

1. Duty to Maintain Bridges. — *Berry v. Northeastern R. Co.*, 72 Ga. 137, 28 Am. & Eng. R. Cas. 575; *Middletown v. New York, etc., R. Co.*, 62 Conn. 492; *People v. Boston, etc., R. Co.*, 70 N. Y. 569; *People v. Union Pac. R. Co.*, 20 Colo. 186; *Illinois Cent. R. Co. v. Highway Com'rs*, 61 Ill. App. 203.

In *People v. Boston, etc., R. Co.*, 70 N. Y. 569, the railroad company was required to construct a bridge over a turnpike road on the ground that the state may, under the powers reserved to the legislature, impose upon railroad corporations such additional burdens as are essential to the public welfare. See also *Chicago, etc., R. Co. v. State*, 47 Neb. 549.

Where a railroad company, for purposes of its own, raised an embankment in the natural bed of a watercourse, and obstructed the flow of the stream and diverted its waters into a ditch which was dug for that purpose, it was held that the company could be compelled to build a bridge across the ditch as an approach to the railroad crossing. *Illinois Cent. R. Co. v. Highway Com'rs*, 61 Ill. App. 203.

Police Power. — The provision of the charter of the city of Omaha (§ 48, c. 12a, Comp. Stat.), authorizing said city by ordinance to require railroad companies to construct and keep in repair viaducts over streets crossed by their tracks, has been held to be a valid exercise of the police power of the state. *Chicago, etc., R. Co. v. State*, 47 Neb. 549.

And so it was held in *State v. Missouri Pac. R. Co.*, 33 Kan. 176, that the same act might be ordered by a city of the first class.

2. The Approaches to a Bridge are part thereof, and they must be maintained and repaired. Such duty exists towards the surface of such approaches as well as towards the foundation and structure. *Hayes v. New York Cent., etc., R. Co.*, 9 Hun (N. Y.) 63. See also *Bury v. Lancashire, etc., R. Co.*, 20 Q. B. Div. 485, L. R. 14 App. 417, 42 Am. & Eng. R. Cas. 56.

Width of Approaches. — A company erecting a bridge to carry a turnpike over its track was bound (under its special act) to make the approaches to such bridge as wide as the turnpike road had been. In such case it was no excuse that the approaches, though of less width, were as convenient to the public as they could be made in execution of the powers of the act, and as convenient to the public as the original road had been; nor that the company could not widen the approaches without taking more land, and had exhausted the compulsory powers of purchasing. *Reg. v. Birmingham, etc., R. Co.*, 2 Q. B. 47, 42 E. C. L. 565, 2 Ry. Cas. 694.

Where the defendant was bound to keep in repair a bridge and its approaches over its railroad, and both the bridge and the highway were subsequently widened, the former by the railroad and the latter by the town authorities, in an action to recover damages alleged to

have been caused by a defect in the approach to the bridge, but (as claimed by the railroad) outside of the approach as it was when the bridge was originally built, it was held that whatever constituted at any time the approaches to the bridge the defendant was bound to keep in repair. *Carter v. Boston, etc., R. Corp.*, 139 Mass. 525.

3. Precautions to Be Observed. — *Kansas City v. Kansas City, etc., R. Co.*, 102 Mo. 633, 47 Am. & Eng. R. Cas. 157; *Dyer County v. Chesapeake, etc., R. Co.*, 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676.

4. Bell Towers. — Proof showing that a person at a crossing could see a train coming in one direction, but a short distance, except at one particular place where a train might be seen between buildings, and that in the summer time the view there was obstructed by the foliage, is sufficient to justify an order directing the company to maintain an electric signal bell. *Matter of Highway Com'rs*, 74 Hun (N. Y.) 44.

An ordinance requiring the stationing of flagmen and erection of bell towers at street crossings of railroads has reference to the duty required of the owners or lessees of the railroad tracks, and a failure to comply with this ordinance cannot be made the basis of a liability against a railroad company not owning or leasing the track nor having any control over the same, but having only a license from the owner of the track to run its cars thereon under certain regulations. *Lake Shore, etc., R. Co. v. Kaste*, 11 Ill. App. 536.

Sign Boards. — An open and traveled street in a city, though not so laid out and established by the municipal authorities as to make the city responsible for damages occasioned by defects therein, is a "traveled place," within the meaning of the *Massachusetts Act of 1849*, c. 222, § 2; and a railroad corporation is bound to maintain a signboard, and the other precautions required by statute at railroad crossings, at the place where such a street crosses its road. *Whittaker v. Boston, etc., R. Co.*, 7 Gray (Mass.) 98.

The failure of the company to provide a signboard at a public crossing did not, under the provision of the *Iowa Code*, § 1288, render the company liable for injuries received at the crossing, simply upon proof of this neglect. This statute must not be construed to act retrospectively, and it did not enlarge the liability of the company for an accident occurring before it took effect. *Payne v. Chicago, etc., R. Co.*, 44 Iowa 236.

Gates. — A request of the authorities of a municipality that a railroad corporation shall erect gates at a crossing imposes no duty upon it to do so, and it is not chargeable with negligence for omitting to comply with the request, until an order of the Supreme Court requiring it has been obtained as authorized by

5. Duty to Keep Crossings in Repair — *a. IN GENERAL.* — As a general rule, the duty of keeping a public crossing in repair is the same as the duty of construction, it being the duty of the railroad company to keep its track and approaches thereto in a condition fit to meet the demands of public travel.¹

the *New York* Act of 1884 (§ 3, c. 439, Laws of 1884). *Daniels v. Staten Island Rapid Transit Co*, 125 N. Y. 407, *reversing* 55 Hun (N. Y.) 606, 28 N. Y. St. Rep. 87.

When gates have been erected, however, they must be tended or they become false signals. *Hooper v. Boston*, etc., R. Co., 81 Me. 260.

When a private railway not constructed under parliamentary powers is used for the conveyance of passengers, its owner is not bound by the provisions of 5 & 6 Vict., c. 55, § 9, as to making and maintaining gates at grade crossings. *Matson v. Baird*, L. R. 3 App. 1082, 26 W. R. 835, 39 L. T. 304.

Signals — Flagmen. — Under the General Railroad Act of *New York* of 1890, § 33, which authorizes a county court to make an order for a company to station flagmen at points where railroads pass over highways at grade, or that gates be erected and maintained, or to make such other order respecting the same as may be deemed proper, a court has authority to order the erection of an electric bell signal at such crossing. *Matter of Highway Com'rs*, 74 Hun (N. Y.) 46.

The commissioners of highways of a town are "local authorities" within Laws of *New York*, 1892, c. 676, § 33, which provides that the court may, on the application of the "local authorities," compel a railroad company to station a flagman or place gates at any point where a highway crosses the railroad at grade. *Matter of Highway Com'rs*, 72 Hun (N. Y.) 575.

An application under such statute need not state facts which show that the crossing is dangerous, as the only requirement of the statute as to the character of the crossing is that it shall be one at grade. *Matter of Highway Com'rs*, 72 Hun (N. Y.) 575.

Barriers — Guard-rail. — Where a railroad company has occupied a part of a public road, and made a cut across it, and a new road has been constructed, it is the duty of the company to erect and maintain for a reasonable time a proper barrier to prevent travelers from falling into the cut. *Pittsburg*, etc., R. Co. *v.* *Moses*, (Pa. 1886) 2 Atl. Rep. 188, 24 Am. & Eng. R. Cas. 295.

Evidence that a guard-rail at a crossing was three and a quarter inches from the track rail, while two and three-fourths inches would amply accommodate the passage of the defendant's engines, does not establish negligent construction rendering the defendant liable for damages, in the absence of proof of a different condition at other crossings and of proof as to whether the deceased caught his foot between the guard and the main rail. *McPhillips v. New York*, etc., R. Co., 12 Daly (N. Y.) 365.

1. Duty to Keep Crossing in Repair — England. — *Bury v. Lancashire*, etc., R. Co., 20 Q. B. Div. 485, L. R. 14 App. 417, 42 Am. & Eng. R. Cas. 56.

Alabama. — *South*, etc., *Alabama R. Co. v. McLendon*, 63 Ala. 266; *Pratt Coal*, etc., Co.

v. Davis, 79 Ala. 308; *Patterson v. South*, etc., *Alabama R. Co.*, 89 Ala. 318.

Connecticut. — *Burritt v. New Haven*, 42 Conn. 174; *Middletown v. New York*, etc., R. Co., 62 Conn. 492.

Georgia. — *Western*, etc., R. Co. *v. Atlanta*, 74 Ga. 774, 19 Am. & Eng. R. Cas. 233.

Illinois. — *People v. Chicago*, etc., R. Co., 67 Ill. 120; *Peoria*, etc., R. Co. *v. Lyons*, 9 Ill. App. 350.

Indiana. — *Louisville*, etc., R. Co. *v. Smith*, 91 Ind. 119, 13 Am. & Eng. R. Cas. 608.

Iowa. — *Farley v. Chicago*, etc., R. Co., 42 Iowa 234; *Newton v. Chicago*, etc., R. Co., 66 Iowa 422, 23 Am. & Eng. R. Cas. 298.

Kansas. — *State v. Missouri Pac. R. Co.*, 33 Kan. 176.

Kentucky. — *Paducah*, etc., R. Co. *v. Com.*, 80 Ky. 147, 10 Am. & Eng. R. Cas. 318.

Massachusetts. — *Cambridge v. Charlestown Branch R. Co.*, 7 Met. (Mass.) 70; *Gillett v. Western R. Corp.* 8 Allen (Mass.) 560.

Michigan. — *Maltby v. Chicago*, etc., R. Co., 52 Mich. 108, 13 Am. & Eng. R. Cas. 606.

Nebraska. — *State v. Chicago*, etc., R. Co., 29 Neb. 412, 42 Am. & Eng. R. Cas. 248.

Nevada. — *Ferguson v. Virginia*, etc., R. Co., 13 Nev. 184.

New Jersey. — *Newark v. Delaware*, etc., R. Co., 42 N. J. Eq. 196; *New York*, etc., R. Co. *v. State*, 50 N. J. L. 303, 32 Am. & Eng. R. Cas. 186.

New York. — *Worster v. Forty-second St.*, etc., *Ferry R. Co.*, 50 N. Y. 203; *Gale v. New York Cent.*, etc., R. Co., 76 N. Y. 594; *Master-son v. New York Cent.*, etc., R. Co., 84 N. Y. 247, 38 Am. Rep. 510; *Lowell v. Central*, etc., R. Co., 15 N. Y. App. Div. 218; *Fash v. Third Ave. R. Co.*, 1 Daly (N. Y.) 148; *Hayes v. New York Cent.*, etc., R. Co., 9 Hun (N. Y.) 63; *Cuddeback v. Jewett*, 20 Hun (N. Y.) 187; *Rockwell v. Third Ave. R. Co.*, 64 Barb. (N. Y.) 438; *Pakalinsky v. New York Cent.*, etc., R. Co., 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251.

Pennsylvania. — *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *Pittsburg*, etc., R. Co. *v. Dunn*, 56 Pa. St. 280.

Tennessee. — *Dyer County v. Chesapeake*, etc., R. Co., 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676.

Texas. — *Missouri*, etc., R. Co. *v. Connelly*, (Tex. Civ. App. 1896) 39 S. W. Rep. 145.

Vermont. — *Mann v. Central Vermont R. Co.*, 55 Vt. 484, 45 Am. Rep. 628, 14 Am. & Eng. R. Cas. 620; *Roxbury v. Central Vermont R. Co.*, 60 Vt. 121.

Wisconsin. — *Buchner v. Chicago*, etc., R. Co., 60 Wis. 264, 14 Am. & Eng. R. Cas. 447; *Jamestown v. Chicago*, etc., R. Co., 69 Wis. 648, 32 Am. & Eng. R. Cas. 263; *Oshkosh v. Milwaukee*, etc., R. Co., 74 Wis. 534, 17 Am. St. Rep. 175, 39 Am. & Eng. R. Cas. 681.

Reasonably Safe. — This duty will be sufficiently discharged if they are maintained in a reasonably safe and convenient condition, so as not to materially impair the usefulness of

Obligation Inseparable from Enjoyment of Franchise. — The obligation to keep up the crossing, imposed as a condition of the right to cross, necessarily attaches to whatever person or corporation may become the owner of the road, so long as the right is exercised. It is a continuing condition or obligation inseparable from the enjoyment of the franchise.¹

b. PROCEEDINGS TO COMPEL REPAIRS. — As in the case of construction, the railroad company, upon neglect or refusal to repair, may be compelled to do so.² There is no uniform method of enforcing the duty of the railroad company in this regard. The remedy in such cases must necessarily vary, according to the approved method of procedure in the jurisdiction in which the right is sought to be enforced.³

the highway or interfere with its safe enjoyment by travelers who exercise ordinary care and prudence. *Patterson v. South, etc., Alabama R. Co.*, 89 Ala. 318.

Repair of Substituted Crossing. — Where the municipal authorities discontinue a crossing with the assent of the railroad company, and substitute another a short distance from the old one, such change does not exonerate the railroad company from keeping up such new crossing. *People v. Chicago, etc., R. Co.*, 67 Ill. 118, 2 Am. Ry. Rep. 66.

Duty Imposed by Charter. — Where the charter of a railroad company gives the corporation the right to cross highways, but makes it the duty of the corporation to construct and keep in repair good and sufficient bridges or passages over or under the railroad, an obligation is thereby imposed which requires the corporation to keep the highway, at all times and under all circumstances, in a condition fit for safe and convenient use. *Newark v. Delaware, etc., R. Co.*, 42 N. J. Eq. 196. See also *Henry v. Wabash Western R. Co.*, 44 Mo. App. 100.

Crossing under Bridge. — The *Connecticut* statutes (Rev. Stat. 323, 324, §§ 28, 30) do not require a railroad company to maintain the highway under its bridge so as to prevent the bridge from interfering with public travel. It was so held where the roadway beneath the bridge had been allowed to fill up until the space was too small to meet the requirements of common convenience and necessity. *Gray v. Danbury*, 54 Conn. 574, 29 Am. & Eng. R. Cas. 486.

1. Obligation Inseparable from Enjoyment of Franchise. — *People v. Chicago, etc., R. Co.*, 67 Ill. 120; *Little Miami R. Co. v. Greene County*, 31 Ohio St. 338.

Purchaser at Foreclosure Sale. — The duty of building crossings and keeping them in repair, which is imposed by the charter of a railroad company, devolves upon a new corporation which purchases the property and franchises of the old at a sale made under a decree of foreclosure, and which has organized itself under section 56 of the *New Jersey* Railroad and Canal Act. *New York, etc., R. Co. v. State*, 50 N. J. L. 303, 32 Am. & Eng. R. Cas. 186.

A railroad corporation cannot escape the performance of any duty imposed upon it by law or by its charter by reason of its having leased its road without the consent of the state. And where such lease was made without consent to another railroad corporation, which entered upon and ran the road, the former cor-

poration will be liable for any injuries caused by defects in a railroad crossing. *Freeman v. Minneapolis, etc., R. Co.*, 28 Minn. 443, 7 Am. & Eng. R. Cas. 410.

2. Proceedings to Compel Repairs. — *Indianapolis, etc., R. Co. v. State*, 37 Ind. 489; *Chicago, etc., R. Co. v. State*, 47 Neb. 549; *State v. Chicago, etc., R. Co.*, 29 Neb. 412; *State v. Missouri Pac. R. Co.*, 33 Kan. 176; *Cambridge v. Charlestown Branch R. Co.*, 7 Met. (Mass.) 70; *Dyer County v. Chesapeake, etc., R. Co.*, 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676; *Henry v. Wabash Western R. Co.*, 44 Mo. App. 100. See also *Reg. v. London, etc., R. Co.*, 1 Ry. & C. Cas. 317; *Reg. v. Birmingham, etc., R. Co.*, 2 Ry. & C. Cas. 694.

What Deemed a Failure to Keep in Repair. — Crossings of public roads upon railway tracks, not placed and kept in such condition that persons with vehicles or otherwise may cross them without delay, danger, or injury, are not kept in condition in which their usefulness as crossings is not impaired. *Galveston, etc., R. Co. v. Matula*, 79 Tex. 577.

3. For procedure in such cases, see ENCYC. OF PL. AND PR., title RAILROADS.

Mandamus. — A common remedy is by mandamus. *Indianapolis, etc., R. Co. v. State*, 37 Ind. 489; *State v. Missouri Pac. R. Co.*, 33 Kan. 176; *Cambridge v. Charlestown Branch R. Co.*, 7 Met. (Mass.) 70; *Chicago, etc., R. Co. v. State*, 47 Neb. 549. See also *Reg. v. London, etc., R. Co.*, 1 Ry. & C. Cas. 317; *Reg. v. Birmingham, etc., R. Co.*, 2 Ry. & C. Cas. 694.

Jurisdiction of Board of Transportation. — In *Nebraska* the board of transportation has jurisdiction to hear complaints and make orders in regard to the construction and repair of highway crossings, and its orders may be enforced by mandamus. *State v. Chicago, etc., R. Co.* 29 Neb. 412.

Mandatory Injunction. — A judgment dismissing an indictment against a railroad company for failing to keep in repair a bridge over its track is not a bar to a civil action brought by the county to recover expenses for repairing the same bridge and for a mandatory injunction to maintain it in future. *Dyer County v. Chesapeake, etc., R. Co.*, 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676.

When the crossing is in good condition, and there is nothing to indicate that the railroad company will refuse to discharge its duty in the future, the court will not grant a mandatory injunction to compel the company to make future repairs. *Dyer County v. Chesapeake, etc., R. Co.*, 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676.

Right of Action Against Company. — Whenever in such cases the city or county authorities are obliged to respond in damages on account of a defect in a street or highway under the control of a railroad company,¹ or are forced to make necessary repairs at their own expense, they have a right of action over, to recover from the railroad company the amount of money so paid out.²

6. Duty to Restore Highway — *a.* IN GENERAL. — After crossing a street or highway it is the duty of the railroad company to restore the same to its former condition.³

1. Right of Action Against Company. — *West.* *ern*, etc., R. Co. *v.* Atlanta, 74 Ga. 774, 19 Am. & Eng. R. Cas. 233.

2. When the railroad company fails or refuses to perform its duty touching structures and repairs at its intersection with a public road, the county having the work done can recover the reasonable cost thereof. *Dyer County v. Chesapeake*, etc., R. Co., 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676.

And so where the company, in violation of its duty, allows a bridge to fall into disrepair, and it is reconstructed by the county, an action may be maintained by the county to recover the expense. *Dyer County v. Chesapeake*, etc., R. Co., 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676.

Where a railway act (incorporating the English Railways Clauses Act 1845, so far as it was not expressly varied) provides that if after notice the company does not repair a bridge over a turnpike road to the satisfaction of the surveyor of the trustees, the latter may repair and recover the costs, upon the cessation of the turnpike trust, the Railways Clauses Act 1845, § 65, revives, and an order to repair the bridge may be made under it. *London*, etc., R. Co. *v.* Board of Works, 42 L. J. M. C. 70, L. R. 8 C. P. 185.

Liability of Public Officials. — The failure of a company to perform its duties as to crossing or otherwise using an established public road does not relieve the public officials from liability. *State v. Putnam County*, 23 Fla. 632, 28 Am. & Eng. Corp. Cas. 164.

3. Duty to Restore Highway — *England.* — *Reg. v. Manchester*, etc., R. Co., 2 Ry. & C. Cas. 711.

Connecticut. — *Hamden v. New Haven*, etc., Co., 27 Conn. 158; *English v. New Haven*, etc., Co., 32 Conn. 241; *Burritt v. New Haven*, 42 Conn. 198. See also *Middletown v. New York*, etc., R. Co., 62 Conn. 492.

Florida. — *Palatka*, etc., R. Co. *v.* State, 23 Fla. 546, 11 Am. St. Rep. 395.

Illinois. — *Chicago*, etc., R. Co. *v.* Payne, 59 Ill. 534, 11 Am. Ry. Rep. 157; *People v. Chicago*, etc., R. Co., 67 Ill. 118, 2 Am. Ry. Rep. 66; *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 586, 51 Am. & Eng. R. Cas. 528; *Peoria*, etc., R. Co. *v.* Lyons, 9 Ill. App. 350; *O'Fallon v. Ohio*, etc., R. Co., 45 Ill. App. 572.

Indiana. — *Louisville*, etc., Consol. R. Co. *v.* Pritchard, 131 Ind. 564, 31 Am. St. Rep. 451; *Evansville*, etc., R. Co. *v.* Carver, 113 Ind. 51, 32 Am. & Eng. R. Cas. 131; *Indianapolis*, etc., R. Co. *v.* State, 37 Ind. 489; *Lake Shore*, etc., R. Co. *v.* McIntosh, 140 Ind. 261.

Iowa. — *Farley v. Chicago*, etc., R. Co., 42 Iowa 234; *Gear v. Chicago*, etc., R. Co., 43 Iowa 83; *Newton v. Chicago*, etc., R. Co., 66 Iowa 422, 23 Am. & Eng. R. Cas. 298.

Kansas. — *State v. Missouri Pac. R. Co.*, 33 Kan. 176; *Missouri*, etc., R. Co. *v.* Long, 27 Kan. 684, 6 Am. & Eng. R. Cas. 254.

Kentucky. — *Greenup County v. Maysville*, etc., R. Co., 88 Ky. 659; *Paducah*, etc., R. Co. *v.* Com., 80 Ky. 147, 10 Am. & Eng. R. Cas. 318.

Michigan. — *Chicago*, etc., R. Co. *v.* Hough, 61 Mich. 507; *Tobias v. Detroit*, etc., R. Co., 103 Mich. 330.

Minnesota. — *State v. St. Paul*, etc., R. Co., 35 Minn. 131, 59 Am. Rep. 313.

New York. — *People v. Dutchess*, etc., R. Co., 58 N. Y. 152; *People v. New York Cent.*, etc., R. Co., 74 N. Y. 302; *Masterson v. New York Cent.*, etc., R. Co., 84 N. Y. 247, 38 Am. Rep. 510; *People v. New York*, etc., R. Co., 89 N. Y. 266, 10 Am. & Eng. R. Cas. 230; *Conklin v. New York*, etc., R. Co., 102 N. Y. 107; *Fletcher v. Auburn*, etc., R. Co., 25 Wend. (N. Y.) 462; *Ottenot v. New York*, etc., R. Co., (Ct. App.) 28 N. Y. St. Rep. 483; *Rauenstein v. New York*, etc., R. Co., (Ct. App.) 31 N. Y. St. Rep. 911; *People v. Troy*, etc., R. Co., 37 How. Pr. (N. Y. Supreme Ct.) 427; *Roe v. Elmendorf*, 52 How. Pr. (N. Y. Supreme Ct.) 232; *New York Cent.*, etc., R. Co. *v.* People, 12 Hun (N. Y.) 195; *Hatch v. Syracuse*, etc., R. Co., 50 Hun (N. Y.) 64; *Windsor v. Delaware*, etc., Canal Co., 92 Hun (N. Y.) 127. See also *Presbyterian Soc. v. Auburn*, etc., R. Co., 3 Hill (N. Y.) 567; *Ellicottville*, etc., Plank Road Co. *v.* Buffalo, etc., R. Co., 20 Barb. (N. Y.) 644.

Ohio. — *Little Miami R. Co. v. Greene County*, 31 Ohio St. 338; *State v. Dayton*, etc., R. Co., 36 Ohio St. 434, 5 Am. & Eng. R. Cas. 312.

Pennsylvania. — *North Manheim Township's Appeal*, (Pa. 1888) 14 Atl. Rep. 137; *Com. v. Pennsylvania*, etc., R. Co., 117 Pa. St. 637; *Pittsburgh*, etc., R. Co. *v.* Com., 101 Pa. St. 192.

Tennessee. — *Dyer County v. Chesapeake*, etc., R. Co., 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676.

Texas. — *Gulf*, etc., R. Co. *v.* Greenlee, 62 Tex. 344, 23 Am. & Eng. R. Cas. 322; *Dallas*, etc., R. Co. *v.* Able, 72 Tex. 150, 37 Am. & Eng. R. Cas. 453.

Vermont. — *Roxbury v. Central Vermont R. Co.*, 60 Vt. 121.

Wisconsin. — *Roberts v. Chicago*, etc., R. Co., 35 Wis. 679; *Buchner v. Chicago*, etc., R. Co., 60 Wis. 264, 14 Am. & Eng. R. Cas. 447; *Jamestown v. Chicago*, etc., R. Co., 69 Wis. 648, 32 Am. & Eng. R. Cas. 263; *Oshkosh v. Milwaukee*, etc., R. Co., 74 Wis. 534, 17 Am. St. Rep. 175, 39 Am. & Eng. R. Cas. 681; *Leitch v. Chicago*, etc., R. Co., 93 Wis. 79; *Racine v. Chicago*, etc., R. Co., 92 Wis. 118.

b. BY CHARTER. — The duty of restoring the highway is in some instances provided for by the original charter.¹

c. BY STATUTE. — In other cases the duty of the railroad company in this regard has been provided for by statute.² There is usually to be found in the statutes a requirement that the railroad companies shall restore the highway "to its former state," or put it in such condition and state of repair as not to "impair or interfere with its free and proper use," or as "not unnecessarily to have impaired its usefulness," or other equivalent expressions.³ Where

1. *By Charter.* — In the absence of express provision in its charter to the contrary, a railway is under obligation to leave every highway that it crosses in a safe condition; and where this duty was imposed by the original charter under which a road was built, the same duty will rest upon any company which may afterwards own the road. *People v. Chicago, etc., R. Co.*, 67 Ill. 118, 2 Am. Ry. Rep. 66.

Construction of Bridge. — A railroad charter providing that the company shall construct its track across roads, highways, etc., "so as not to interfere with the free use of the same, and in such manner as to afford and leave in good repair and well constructed for public use all such roads, highways, etc., and shall restore the road or highway, etc., thus intersected to its former good condition, or in a sufficient manner not to have unnecessarily impaired its usefulness," does not exempt the company from its common-law obligation to maintain perpetually a bridge over the road, made necessary by the crossing, but rather declares and enforces that obligation. *Dyer County v. Chesapeake, etc., R. Co.*, 87 Tenn. 712, 38 Am. & Eng. R. Cas. 676.

The duty of restoration of the highway, imposed by its charter (§ 5, c. 195, N. Y. L. 1846), upon the New York, New Haven, and Hartford Railroad Company, does not require it to construct a bridge of the full width of the highway, the requirement being complied with by constructing a bridge which, in view of the circumstances, will not unnecessarily impair the usefulness of the highway. *People v. New York, etc., R. Co.*, 89 N. Y. 266, 10 Am. & Eng. R. Cas. 230.

2. *By Statute* — *England.* — *Reg. v. Manchester, etc., R. Co.*, 2 Ry. & C. Cas. 711.

Illinois. — *Chicago, etc., R. Co. v. Payne*, 59 Ill. 534, 11 Am. Ry. Rep. 157.

New York. — *People v. Dutchess, etc., R. Co.*, 58 N. Y. 152; *Conklin v. New York, etc., R. Co.*, 102 N. Y. 107; *Ottenot v. New York, etc., R. Co.*, (Ct. App.) 28 N. Y. St. Rep. 483; *Rauenstein v. New York, etc., R. Co.*, (Ct. App.) 31 N. Y. St. Rep. 911; *New York Cent., etc., R. Co. v. People*, 12 Hun (N. Y.) 195; *People v. Troy, etc., R. Co.*, 37 How. Pr. (N. Y. Supreme Ct.) 427; *Schermerhorn v. Mount McGregor R. Co.*, 69 Hun (N. Y.) 512.

Pennsylvania. — *North Manheim Township's Appeal*, (Pa. 1888) 14 Atl. Rep. 137.

Ohio. — *State v. Dayton, etc., R. Co.*, 36 Ohio St. 434.

Texas. — *Dallas, etc., R. Co. v. Able*, 72 Tex. 150, 37 Am. & Eng. R. Cas. 453; *Gulf, etc., R. Co. v. Montgomery*, 85 Tex. 67.

Wisconsin. — *Roberts v. Chicago, etc., R. Co.*, 35 Wis. 679; *Racine v. Chicago, etc., R. Co.*, 92 Wis. 118.

Construction of Statutes — *New York.* — Under the New York law requiring a restoration of a highway when a company has constructed its track across the same, the company will not be compelled to restore a highway, in an action brought by the highway commissioners for that purpose, where it appears that the company had crossed the highway with the permission of the Supreme Court and changed its location; that the old highway had not been used nor worked for more than six years, but that the new highway was so used and worked, and its location acquiesced in by the proper authorities, for that length of time. *Schermerhorn v. Mount McGregor R. Co.*, 69 Hun (N. Y.) 512.

Texas. — A charge that it was the duty of a company, under Texas Rev. Stat., art. 4170, to restore a road crossed by its tracks to such a state as not to *necessarily* impair its usefulness as a public highway, is misleading and erroneous, if it affects a material issue in the case, when the statute requires that the company shall restore the road to such state as not *unnecessarily* to impair its usefulness. *Dallas, etc., R. Co. v. Able*, 72 Tex. 150, 37 Am. & Eng. R. Cas. 453.

Wisconsin. — Under the statute (Wisconsin Rev. Stat., c. 79, § 11), which requires a highway over which a railway is constructed to be restored "to its former usefulness," the company must so restore it that its use by the public shall not be materially interfered with, nor the highway be rendered less safe and convenient to persons and teams passing over it, except so far as diminished safety and convenience are inseparable from any crossing of a highway by a railroad. *Roberts v. Chicago, etc., R. Co.*, 35 Wis. 679.

3. *Palatka, etc., R. Co. v. State*, 23 Fla. 546, 11 Am. St. Rep. 395, 32 Am. & Eng. R. Cas. 196.

Church, C. J., in *People v. New York Cent., etc., R. Co.*, 74 N. Y. 305, said: "The statute implies that the usefulness of a highway intersected may be to some extent impaired, and I think it fairly implies also that the crossing must be such as that the usefulness of the highway shall not be destroyed. The duty thus imposed is an important one for the public, and it should be enforced not oppressively, but reasonably and fairly, for the public benefit." *Quoted in Palatka, etc., R. Co. v. State*, 23 Fla. 546, 11 Am. St. Rep. 395, 32 Am. & Eng. R. Cas. 196.

In *New York*, where the provision obtains that the highway shall be restored to such a state as "not unnecessarily to have impaired its usefulness," it has been stated to be true that bringing in the word "unnecessarily" does imply that the usefulness of the highway

the statute is silent, the common law applies, and a statute that expresses specifically no further exaction than a restoration of the highway to its former condition is not to be construed as abridging the common-law duty of maintaining the crossing in such a plight as to make it reasonably safe.¹

What Constitutes Restoration. — The question as to what constitutes a sufficient restoration is one which can only be determined by the circumstances of the particular case; but the highway should in all cases be left in a condition of safety to the public, and if the restoration is prescribed by statute, the provisions of the statute should be complied with in all particulars.²

may have been somewhat impaired, either in the process of the construction or in the maintenance of the railway; that it is quite certain, however, that the section does not mean that the highway should be rendered useless, but that it does mean that the highway shall be preserved for the use of the public travel and to permit the adoption of it at the same time for the laying of its track upon it. *People v. Dutchess*, etc., R. Co., 58 N. Y. 165, *quoted in* *Palatka*, etc., R. Co. v. State, 23 Fla. 546, 11 Am. St. Rep. 395, 32 Am. & Eng. R. Cas. 190.

Restoration Subject to Additional Use. — While a highway cannot be restored in all respects to its former condition, it must be so far restored as not to impair its usefulness more than the additional use of it for railroad purposes renders absolutely necessary. *Evansville*, etc., R. Co. v. *Carver*, 113 Ind. 51, 32 Am. & Eng. R. Cas. 134; *Roberts v. Chicago*, etc., R. Co., 35 Wis. 679.

1. Common-law Duty. — *Maltby v. Chicago*, etc., R. Co., 52 Mich. 108, 13 Am. & Eng. R. Cas. 606; *Palatka*, etc., R. Co. v. State, 23 Fla. 546, 11 Am. St. Rep. 395, 32 Am. & Eng. R. Cas. 196.

The last clause of paragraph 89 of section 1, article 5, chapter 24 of the Revised Statutes of *Illinois*, relating to extending streets across railroads, means that such track, right of way, or land shall be restored so as not to impair its usefulness more than is necessary, in view of its use for the purposes of a street, subject to its use by the railroad. It is not expected that the crossing can be so restored as to obviate all danger, delay, or inconvenience. It is only necessary that there shall be no unreasonable impairment of the usefulness of the railroad's right of way. *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 586.

Restoration to Original Condition. — The duty of restoration need not be to the original condition of the highway, but may be to one different which does not impair its usefulness. *Conklin v. New York*, etc., R. Co., 102 N. Y. 110.

The company must restore the whole of the road, however wide; it is not enough for it to put in order the part usually traveled. *Lake Shore*, etc., R. Co. v. *McIntosh*, 140 Ind. 262.

2. What Constitutes Restoration. — Under a statute which provides that if a railroad company change the site of any public road it shall restore the same "in as perfect a manner as the original road," upon such change the railroad will be required to fence the new road, if it appears that a fence is necessary from the situation, that is, by reason of an embankment. *North Manheim Township's Appeal*, (Pa. 1888) 14 Atl. Rep. 137. See also *Roxbury v. Central Vermont R. Co.*, 60 Vt. 121, where

it was held that the railroad company must fence the approaches to the crossing when such was necessary to restore the road to the sufficiency required by statute.

Erection of Guard Rails. — The *Delaware* statute provides that no approaches to a railroad crossing shall be of a heavier grade than five degrees, and that such approaches shall be protected by sufficient railings or guards: and it was held, in an action against the company for an injury resulting from failure to observe the regulations of the statute in the latter regard, that the question of negligence in failure to erect such guards after having made the approach by filling was a question for the jury. *Kyne v. Wilmington*, etc., R. Co., 8 Houst. (Del.) 185.

Restoration of Footpaths. — By the Railway Act (6 & 7 Will. IV., c. 140, § 94), a company was empowered generally to raise, sink, or deepen any roads in order to carry them over or under or by the side of the railway, subject to the provisions and restrictions of said act. By another act (7 Will. IV., c. 24, § 38, enabling them to vary their line), they were authorized to carry the line of railway across a certain turnpike road by means of a bridge of the width of thirty feet at least, and for that purpose were empowered to lower the bed of the road, leaving a certain inclination on each side of the bridge, and to restore the road. The company under such act made a bridge thirty feet wide over a road forty-two feet wide, lowering the carriageway of the road, but leaving two footways, each six feet wide, at their original level. Upon this state of facts it was held that the word "road" meant the whole road, including footpaths, and therefore the company had not restored the road as required by the act. *Reg. v. Manchester*, etc., R. Co., 2 Ry. & C. Cas. 711.

Embankments. — In *Roxbury v. Central Vermont R. Co.*, 60 Vt. 138, the court said: "It is plain that the company's duty did not end at the line of its land, if the highway could not be made good and sufficient without extending the fill of the crossing further. A crossing that could not be used in ordinary travel on the highway without the embankment or fill constituting the approaches being extended beyond the railroad land, would not be, without such extension, such a crossing as the law required. With such a defective crossing the highway would not be *restored* to its former state and usefulness. It would not be good and sufficient."

Power to Acquire New Land. — The duty of restoration carries with it the necessary powers for that purpose, and among them the power to take land compulsorily where removal or change of the highway is necessary. *People*

Continuing Duty. — The duty of the railroad company to repair and restore a highway is a continuing one, and commensurate with the increasing necessity of the public, and so, where the enlargement of a city or increased travel upon streets has rendered the crossing as originally restored inconvenient or dangerous, it is the duty of the company to adapt it to the public needs.¹

New Devices. — In carrying out the obligation thus imposed, it becomes the duty of the company to adopt such new devices as changing circumstances and growth of population may suggest.²

d. PROCEEDINGS TO COMPEL RESTORATION. — Where the railroad company fails or refuses to restore the highway to its former condition, or to such a condition as not unnecessarily to impair its usefulness, it may be compelled to do so by mandamus,³ mandatory injunction,⁴ or by suit in equity.⁵

v. Dutchess, etc., R. Co., 58 N. Y. 152. See also Valley R. Co. v. Bohm, 34 Ohio St. 120.

1. Continuing Duty. — *Burritt v. New Haven, etc., Co., 32 Conn. 241; Burritt v. New Haven, 42 Conn. 198; Cooke v. Boston, etc., R. Corp., 133 Mass. 185, 10 Am. & Eng. R. Cas. 328; Manley v. St. Helens Canal, etc., Co., 2 H. & N. 840; Hatch v. Syracuse, etc., R. Co., 50 Hun (N. Y.) 64. See also People v. New York, etc., R. Co., 89 N. Y. 266.*

In *Roxbury v. Central Vermont R. Co., 60 Vt. 130*, the court said: "The obligation to restore was constant until performed. The negligence in the primary duty was continuing. The liability is like that in the ordinary case where a person puts an obstruction in the highway, creating a defect and causing special damage to a traveler."

In speaking of the usual requirement that the railroad company shall restore the highway which it crosses to its former state so as not to impair its usefulness, Mr. Mills says: "The word 'usefulness' implies capabilities for use, and appertains to the future as well as the present." Mills Em. Dom., § 198, quoted in *Dyer County v. Chesapeake, etc., R. Co., 87 Tenn. 712, 38 Am. & Eng. R. Cas. 679.*

Enlargement of Bridge. — In *English v. New Haven, etc., Co., 32 Conn. 241*, a bridge of a railroad crossing was constructed of suitable capacity to accommodate the public when the road was first built; by the increase of travel incident to the growth of the city the public convenience afterwards required a material enlargement of the bridge, and it was held that, notwithstanding the fact that the original duty had been discharged, a new and additional duty was created by the change of circumstances, and its performance was required not because it would be beneficial to the company to perform it, but because the convenience, necessity, and safety of the public demanded it. See also *Burritt v. New Haven, 42 Conn. 198.*

Alteration of Bridges. — So an alteration of a bridge may be ordered upon a petition by the proper authorities showing a public necessity for the proposed change. *Boston, etc., R. Co. v. Hampden County, 164 Mass. 551.*

Widening of Crossing. — So where, by the growth of business and the widening of the vehicles used upon the highway, the crossing became inadequate, it was held to be the duty of the company to widen its crossing. *Atchison, etc., R. Co. v. Henry, 57 Kan. 154.*

No Statutory Limitation. — The company cannot protect itself from liability caused by its

failure to restore the highway, on the ground that the statute of limitations would bar the original action. *Roxbury v. Central Vermont R. Co., 60 Vt. 121; Hamden v. New Haven, etc., Co., 27 Conn. 168; Burritt v. New Haven, 42 Conn. 174; English v. New Haven, etc., Co., 32 Conn. 241; Little Miami R. Co. v. Greene County, 31 Ohio St. 338; Windsor v. Delaware, etc., Canal Co., 92 Hun (N. Y.) 127.*

2. New Devices. — *Cooke v. Boston, etc., R. Corp., 133 Mass. 185, 10 Am. & Eng. R. Cas. 328.*

3. Proceedings to Compel Restoration. — *New York Cent., etc., R. Co. v. People, 12 Hun (N. Y.) 195; People v. Dutchess, etc., R. Co., 58 N. Y. 152; People v. New York Cent., etc., R. Co., 74 N. Y. 306; Indianapolis, etc., R. Co. v. State, 37 Ind. 489. See also State v. Dayton, etc., R. Co., 36 Ohio St. 441; Reg. v. Manchester, etc., R. Co., 2 Ry. & C. Cas. 711.*

Where in mandamus proceedings to compel a company to restore a street crossing to a suitable condition the court finds that the plan proposed by the party complaining was suitable, appropriate, and adequate for such purposes, and the return to the Supreme Court fails to disclose the evidence upon which such finding is based, it will be presumed that the evidence was sufficient to justify the determination of the court below. Where the plan includes a bridge over the contiguous tracks of two railway companies, it must necessarily have reference to the rights of each in accomplishing the general purpose of the public accommodation and convenience, and neither can be compelled to surrender its property or change its route further than is reasonably necessary for such purpose. *State v. St. Paul, etc., R. Co., 38 Minn. 246, 34 Am. & Eng. R. Cas. 168.*

On proceedings by mandamus to compel a railway company to reform a road crossed by its track and to lower the whole width thereof, it is not a good return that the carriage road and footpaths as they exist are more commodious and convenient to the public than if lowered as required by the writ. *Manchester, etc., R. Co. v. Reg., 3 Ry. Cas. 633, 3 G. & D. 269, 3 Q. B. 528, 43 E. C. L. 851.*

4. Mandatory Injunction. — *State v. Dayton, etc., R. Co., 36 Ohio St. 434; Oshkosh v. Milwaukee, etc., R. Co., 74 Wis. 534, 17 Am. St. Rep. 175, 39 Am. & Eng. R. Cas. 681; Jamestown v. Chicago, etc., R. Co., 69 Wis. 648, 32 Am. & Eng. R. Cas. 263.*

5. Suit in Equity. — *Greenup County v. Maysville, etc., R. Co., 88 Ky. 659.*

7. Liability for Defective Crossings — *a.* IN GENERAL. — The railroad company is liable for any injury resulting to a traveler from its failure to repair, restore, or keep in safe condition a public highway where the same intersects its right of way.¹

Illustrations of Rule. — Thus the company will be liable for injuries resulting from leaving obstructions in the street at night with no light to mark the same;² for negligence in not erecting proper barriers to guard the public

1. Liability for Defective Crossings — *United States.* — *Hogue v. Chicago, etc., R. Co.,* 32 Fed. Rep. 365.

Connecticut. — *Allen v. New Haven, etc., Co.,* 50 Conn. 215, 14 Am. & Eng. R. Cas. 615.

Delaware. — *Kyne v. Wilmington, etc., R. Co.,* 8 Houst. (Del.) 185.

Georgia. — *Central, etc., R. Co. v. Robertson,* 95 Ga. 430.

Illinois. — *Terre Haute, etc., R. Co. v. Granfield,* 58 Ill. App. 136.

Indiana. — *Louisville, etc., Consol. R. Co. v. Pritchard,* 131 Ind. 564, 31 Am. St. Rep. 451; *Litchville, etc., R. Co. v. Smith,* 91 Ind. 119, 13 Am. & Eng. R. Cas. 608; *Terre Haute, etc., R. Co. v. Clem,* 123 Ind. 15, 18 Am. St. Rep. 303, 42 Am. & Eng. R. Cas. 229; *Lake Shore, etc., R. Co. v. McIntosh,* 140 Ind. 261; *Evansville, etc., R. Co. v. Carverner,* 113 Ind. 51, 32 Am. & Eng. R. Cas. 134.

Iowa. — *McKelvy v. Burlington, etc., R. Co.,* 84 Iowa 455.

Kentucky. — *Paducah, etc., R. Co. v. Com.,* 80 Ky. 147, 10 Am. & Eng. R. Cas. 318.

Maine. — *Webb v. Portland, etc., R. Co.,* 57 Me. 117.

Massachusetts. — *Gillett v. Western R. Corp.,* 8 Allen (Mass.) 560; *Lowell v. Boston, etc., R. Corp.,* 23 Pick. (Mass.) 24.

Michigan. — *Maltby v. Chicago, etc., R. Co.,* 52 Mich. 108, 13 Am. & Eng. R. Cas. 606; *Jeffreys v. Detroit, etc., R. Co.,* (Mich. 1896) 65 N. W. Rep. 755.

Minnesota. — *Kelly v. Southern Minnesota R. Co.,* 28 Minn. 98, 6 Am. & Eng. R. Cas. 264; *Freeman v. Minneapolis, etc., R. Co.,* 28 Minn. 443, 7 Am. & Eng. R. Cas. 410.

Missouri. — *Lyon v. St. Louis, etc., R. Co.,* 6 Mo. App. 516; *Tetherow v. St. Joseph, etc., R. Co.,* 98 Mo. 74.

New York. — *Gale v. New York Cent., etc., R. Co.,* 76 N. Y. 594, affirming 53 How. Pr. (N. Y. Supreme Ct.) 385, 13 Hun (N. Y.) 1; *Worster v. Forty-second St., etc., Ferry R. Co.,* 50 N. Y. 203; *Masterson v. New York Cent., etc., R. Co.,* 84 N. Y. 247, 38 Am. Rep. 510; *Fash v. Third Ave. R. Co.,* 1 Daly (N. Y.) 148; *Cuddeback v. Jewett,* 20 Hun (N. Y.) 187; *Rockwell v. Third Ave. R. Co.,* 64 Barb. (N. Y.) 438; *Pakalinsky v. New York Cent., etc., R. Co.,* 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251.

Ohio. — *Pittsburgh, etc., R. Co. v. Maurer,* 21 Ohio St. 421; *Potter v. Bunnell,* 20 Ohio St. 150.

Pennsylvania. — *Oakland R. Co. v. Fielding,* 48 Pa. St. 320; *Pittsburgh, etc., R. Co. v. Dunn,* 56 Pa. St. 280.

South Carolina. — *Hill v. Port Royal, etc., R. Co.,* 31 S. Car. 393, 39 Am. & Eng. R. Cas. 607.

Texas. — *Dallas, etc., R. Co. v. Able,* 72

Tex. 150, 37 Am. & Eng. R. Cas. 453; *Missouri Pac. R. Co. v. Bridges,* 74 Tex. 520, 15 Am. St. Rep. 856, 39 Am. & Eng. R. Cas. 604; *Gulf, etc., R. Co. v. Montgomery,* 85 Tex. 67; *Taylor, etc., R. Co. v. Warner,* 88 Tex. 642; *Galveston, etc., R. Co. v. White,* (Tex. Civ. App. 1895) 32 S. W. Rep. 186.

Vermont. — *Mann v. Central Vermont R. Co.,* 55 Vt. 484, 45 Am. Rep. 628, 14 Am. & Eng. R. Cas. 620.

Wisconsin. — *Milwaukee, etc., R. Co. v. Hunter,* 11 Wis. 160, 78 Am. Dec. 699.

Canada. — *Oliver v. North Eastern R. Co.,* L. R. 9 Q. B. 409; *Whitmarsh v. Grand Trunk R. Co.,* 7 U. C. C. P. 373.

Injury from Two Causes. — If the plaintiff be injured by reason of the negligent construction and maintenance of a public highway crossing by the defendant railroad, taken in connection with the negligent running and management of its trains at such crossing, then there may be a recovery, the plaintiff being without fault, although neither the defective crossing nor the negligent running and management of the train, taken by itself, would have brought the same or like result. *Lake Shore, etc., R. Co. v. McIntosh,* 140 Ind. 261.

Knowledge on Part of Traveler. — A railroad company crossing a public highway is liable for an injury occasioned to a traveler by a want of repair in the approaches to the crossing. And it makes no difference that the traveler knew of the want of repair; he had a right, notwithstanding, to use the highway. *Maltby v. Chicago, etc., R. Co.,* 52 Mich. 108, 13 Am. & Eng. R. Cas. 606.

Defect Not an Act of Company. — Though the defect in a roadbed was not caused by any act of the company, yet if they knew of its existence, and that the street was made dangerous thereby, it was their duty to have it repaired; and neglecting to repair, they were liable for the consequences of their negligence. *Oakland R. Co. v. Fielding,* 48 Pa. St. 320.

Construction by Former Owner. — The fact that the former owners of a railroad constructed a defective crossing does not authorize or justify its maintenance and use in such defective condition by the succeeding owners, and the fact that the crossing was constructed many years before the time of the injury occasioned by its defective construction cannot lessen the liability of the railroad company, but, on the contrary, increases such liability. *Lake Shore, etc., R. Co. v. McIntosh,* 140 Ind. 262.

Notice of Defect. — A railroad is not liable for an injury resulting from its crossing being out of repair, unless it had notice of such fact or the defect existed a sufficient length of time to justify the presumption of notice. *Mann v. Chicago, etc., R. Co.,* 86 Mo. 347.

2. Obstructions in Street. — *Lyon v. St. Louis, etc., R. Co.,* 6 Mo. App. 516.

from cuts and excavations made in the highway;¹ or for improperly spacing or planking the crossing.²

b. BY STATUTE. — The duty of the railroad company as to the construction, maintenance, and repair of the crossing is provided for by statute in many cases.³ And in such cases a failure to comply with the provisions of the statute is sufficient ground upon which to base an action.⁴

c. LIMITED LIABILITY. — Although the liability of the railroad as a general rule is limited to neglect of duty at public highways,⁵ yet it may become liable for a defectively constructed crossing at a road not made public by law, if it maintains a crossing there, knowing that such road is in common use by the public.⁶

1. **Erection of Barriers.** — *Potter v. Bunnell*, 20 Ohio St. 150; *Pittsburg, etc., R. Co. v. Moses*, (Pa. 1886) 2 Atl. Rep. 188, 24 Am. & Eng. R. Cas. 295. See also *Veazie v. Penobscot, etc., R. Co.*, 49 Me. 119.

2. **Improper Spacing or Planking.** — *Elgin, etc., R. Co. v. Raymond*, 148 Ill. 241; *Spooner v. Delaware, etc., R. Co.*, 115 N. Y. 22, 39 Am. & Eng. R. Cas. 599, *affirming* 41 Hun (N. Y.) 643, 1 N. Y. St. Rep. 558; *Payne v. Troy, etc., R. Co.*, 83 N. Y. 572, 6 Am. & Eng. R. Cas. 54.

In *Missouri, etc., R. Co. v. Connelly*, (Tex. Civ. App. 1896) 39 S. W. Rep. 145, it was held that the company should construct the crossing and approaches in such a manner that a vehicle might be driven over the same without a severe jolt.

Question for Jury. — Where a railroad corporation, with a view to preventing the accumulation of ice and snow along its rails and the derailling of its cars, takes out, at a diagonal railroad crossing, a plank ten inches widely next to the rail, and the runner of a cutter slips into this space and glides along the projecting rail, and the cutter is upset, a question is presented for the jury to determine whether in the presence of two duties one was negligently sacrificed by the railroad company for the sake of the other. *Lowell v. Central Vermont R. Co.*, 15 N. Y. App. Div. 218.

3. See *supra*, this section, *Duty to Construct; Duty to Keep Crossings in Repair; Duty to Restore Highway.*

4. Under the provisions of *Iowa Code*, § 1288, making railway companies liable to persons injured through the neglect of the former to properly construct and maintain good and sufficient and safe crossings and cattle-guards at all points where a railway track crosses a public highway, and providing that "in order for the injured party to recover it shall only be necessary for him to prove such neglect," a railroad company is not liable for injuries sustained at such crossing from causes other than its neglect to comply with the provisions of the statute. *McKelvy v. Burlington, etc., R. Co.*, 84 Iowa 455.

The *Massachusetts Pub. Stat.*, c. 112, § 124, makes it the duty of a company to "so guard or protect its rails by plank, timber, or otherwise, as to secure a safe and easy passage across its road;" and where a person was injured by reason of defects in the planking between the tracks, it was held that the provision applied to highways laid out after the location of the railroad as well as to those laid out before. *Scanlan v. Boston*, 140 Mass. 84.

5. **Limited Liability.** — *Taylor, etc., R. Co. v.*

Warner, 88 Tex. 642; *Gulf, etc., R. Co. v. Montgomery*, 85 Tex. 64; *Coon v. North Carolina R. Co.*, 65 N. Car. 507; *Berry v. North-eastern R. Co.*, 72 Ga. 137, 28 Am. & Eng. R. Cas. 575.

In *Flint, etc., R. Co. v. Willey*, 47 Mich. 88, 5 Am. & Eng. R. Cas. 305, it was held that a road which had never been laid out as a public highway, and which, being unfit for travel, had been closed against the public, was not a highway within the provisions of the railroad law, which makes a company liable for injury at places where its track is crossed by a highway, and that this was so even though the owners of land along the road had moved their fences back so as to open it as a highway, and had been paid for their land by the township, and a bridge had been built upon it by the public authorities.

Public Highway Prior to Construction of Railroad. — In *Ferguson v. Virginia, etc., R. Co.*, 13 Nev. 184, it was held that the railroad company could only be held responsible for injuries received by a plaintiff on account of a defective crossing, on the theory that the street where the accident occurred was a public highway prior to the construction of the railroad, and that in such event it would be the duty of the company to keep the crossing in repair.

Highways by Virtue of Public Use. — The company is not bound to keep in repair the crossings of highways which are such through public use only. *Flint, etc., R. Co. v. Willey*, 47 Mich. 88, 5 Am. & Eng. R. Cas. 305; *Missouri, etc., R. Co. v. Long*, 27 Kan. 684, 6 Am. & Eng. R. Cas. 254. Compare *Kelly v. Southern Minnesota R. Co.*, 28 Minn. 98, 6 Am. & Eng. R. Cas. 264, where it was held that where a road is used openly and notoriously by the public as a highway, and a railroad company recognizes it as such by permitting the public to cross its track, and by assuming to maintain a public crossing at that place, it is immaterial whether the road be a public highway or not.

Footway. — The public use of a footway as a crossing over a railroad track, with the acquiescence of the company, does not convert it into a public crossing within the meaning of *Missouri Rev. Stat.* 1889, § 2608. Nor do such use and acquiescence devolve upon the company the duty of maintaining the footway as a public crossing and of keeping it open and unobstructed, subject to the statutory penalties for failure to do so. *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211.

6. **Assumption of Duty.** — *Missouri Pac. R. Co. v. Bridges*, 74 Tex. 520, 15 Am. St. Rep.

Extraordinary Care. — The law does not, as a rule, require any one to exercise extraordinary care or vigilance, and this rule applies as to the amount of care that railroad companies shall exercise as to the safety of their crossings.¹

Presumption of Negligence. — For a negligent breach of its duty the railroad company must answer in damages to one who sustains an injury while in the exercise of ordinary care; but the presumption of negligence which prevails in cases where passengers are injured while on the trains of the carrier does not obtain where injury is received at a crossing.²

IV. STREETS OR HIGHWAYS CROSSING RAILROADS — 1. Right to Cross — a. IN GENERAL. — According to the rule already laid down³ a railroad company holds its right of way subject to the right of the state to cross such tracks when the public necessity demands that new roads and streets shall be opened.⁴

856, 39 Am. & Eng. R. Cas. 604; Gulf, etc., R. Co. v. Montgomery, 85 Tex. 67; Taylor, etc., R. Co. v. Warner, 88 Tex. 642; Kelly v. Southern Minnesota R. Co., 28 Minn. 98, 6 Am. & Eng. R. Cas. 264; Webb v. Portland, etc., R. Co., 57 Me. 117; Central, etc., R. Co. v. Robertson, 95 Ga. 430.

In Missouri Pac. R. Co. v. Bridges, 74 Tex. 520, 15 Am. St. Rep. 856, 39 Am. & Eng. R. Cas. 604, in passing upon this question, the court said: "The company may be under no obligation to maintain the crossing of a road, not made public by law, which its track intersects; but if it voluntarily assumes to do so, knowing that it is a road in common use by the public, it in effect invites the use of it and proclaims it safe, and should be held liable for any injuries resulting to passengers over the crossing by reason of its negligent construction."

1. Extraordinary Care. — Terre Haute, etc., R. Co. v. Clem, 123 Ind. 15, 18 Am. St. Rep. 303, 42 Am. & Eng. R. Cas. 229.

Extraordinary Accident. — In Taylor v. Long Island R. Co., 16 N. Y. App. Div. 1, it was held that a charge of negligence could not be based upon the fact that the plank that formed the approach to the crossing was raised above the ground about the thickness of the plank itself, the soil at the place being composed of loose sand, since no vigilance could foresee that an accident would happen from such a cause.

Remote Consequence. — Where a company builds its track on a trestle over a highway, and afterwards the county officials open a new road under the same trestle, if the new road be laid out because the company has negligently permitted the old road to get in bad condition, an injury received by a traveler on the new road is too remote a consequence of the company's negligence to sustain an action. Hill v. Port Royal, etc., R. Co., 31 S. Car. 393, 39 Am. & Eng. R. Cas. 607.

2. Presumption of Negligence. — Terre Haute, etc., R. Co. v. Clem, 123 Ind. 15, 18 Am. St. Rep. 303, 42 Am. & Eng. R. Cas. 229.

3. See *supra*, this title, *Railroads Crossing Railroads*.

4. Right to Cross — Connecticut. — Bridgeport v. New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63.

Illinois. — Chicago, etc., R. Co. v. Lake, 71 Ill. 333; Illinois Cent. R. Co. v. Chicago, 138 Ill. 453; Chicago, etc., R. Co. v. Chicago, 140

Ill. 309, 50 Am. & Eng. R. Cas. 150; Illinois Cent. R. Co. v. Chicago, 141 Ill. 594, 51 Am. & Eng. R. Cas. 528.

Indiana. — Fort Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558, 32 Am. St. Rep. 277.

Massachusetts. — Boston, etc., R. Co. v. Boston, 140 Mass. 87; Old Colony, etc., R. Co. v. Plymouth County, 14 Gray (Mass.) 155.

Michigan. — Matter of Opening First St., 66 Mich. 42; Parks, etc., Com'rs v. Michigan Cent. R. Co., 90 Mich. 385.

Missouri. — Hannibal v. Hannibal, etc., R. Co., 49 Mo. 480.

Pennsylvania. — Philadelphia, etc., R. Co. v. Philadelphia, 9 Phila. (Pa.) 563.

Street Crossing Railroad — Only Right of Way Acquired. — Under the condemnation of a right to lay streets across a railroad track, nothing is acquired but a right of way; the place of crossing will remain in common use of the parties for the exercise of their several franchises. A right affecting so slightly the exercise of the franchises of the corporation whose track is crossed may be deduced from a mere grant of the power of condemnation. New Jersey Southern R. Co. v. Long Branch Com'rs, 39 N. J. L. 28, 14 Am. Ry. Rep. 211.

Right Exists from Necessity. — In New York, etc., R. Co. v. Drummond, 46 N. J. L. 644, 20 Am. & Eng. R. Cas. 13, the court said: "The right of railroads and common highways to cross each other exists from necessity, and is indisputably established. Morris, etc., R. Co. v. Central R. Co., 31 N. J. L. 205. And the claim cannot be yielded so that every unimportant erection on the roadway of a railroad, because useful or convenient to the company, shall suffice to bar off the important right of the people of the state to multiply and extend their common highways as necessity or public convenience may require."

Limitation of Right. — Streets and public highways cannot be constructed across railroad tracks when as a result the company would be unable to use its track at the point of crossing for the purpose for which it was constructed. Fort Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558, 32 Am. St. Rep. 277.

A railroad company cannot be required to take a street across its tracks where such tracks are in constant use. People v. New York Cent., etc., R. Co., 69 Hun (N. Y.) 166.

Not an Inconsistent Use. — The appropriation of land to the public use of a railroad is not so inconsistent with its public use as a highway

6. BY STATUTE. — The right of streets and highways to be laid out or extended across the tracks of existing railroads is frequently regulated by statute.¹

Power of Public Corporations. — Public and municipal corporations, under their general authority to lay out streets and highways, may extend the same across the roadway of a railroad at convenient and suitable places;² such power being necessarily implied in the general authority conferred on cities and towns for such purposes, without express provision on the subject.³

2. Nature of Right. — The right of a street or highway to cross a railroad is in its nature the same as that of a railroad to cross a street or highway, which has been discussed in this article.⁴

crossing as to prohibit its subsequent appropriation for that purpose. *Boston, etc., R. Co. v. Boston*, 140 Mass. 87.

Lands Crossing Railway Dedicated for Street. — The dedication of land by the owners of it for the purpose of a public avenue, across which a railroad has already been built, cannot impair or interfere in any way with the rights of the railroad company within the lines of its road under its charter, whether to the soil or to the right of way, to hold, occupy, and enjoy the same. *Ogle v. Philadelphia, etc., R. Co.*, 3 *Houst. (Del.)* 302, *affirming* 3 *Houst. (Del.)* 267.

Prescription — Long User. — A public crossing over a railway may be established by sufficiently long use. *Easley v. Missouri Pac. R. Co.*, 113 Mo. 236.

1. By Statute. — *Chicago, etc., R. Co. v. Chicago*, 140 Ill. 309; *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 586, 51 Am. & Eng. R. Cas. 528; *Lake Erie, etc., R. Co. v. Kokomo*, 130 Ind. 224; *Portland, etc., R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784, 23 Am. & Eng. R. Cas. 51; *In re Railroad Com'rs*, 87 Me. 247; *Old Colony, etc., R. Co. v. Plymouth County*, 11 *Gray (Mass.)* 512; *Parks, etc., Com'rs v. Michigan Cent. R. Co.*, 90 Mich. 385, 50 Am. & Eng. R. Cas. 144; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *Boston, etc., R. Co. v. Greenbush*, 52 N. Y. 510, *affirming* 5 *Lans. (N. Y.)* 461; *Delaware, etc., Canal Co. v. Whitehall*, 90 N. Y. 21, 10 Am. & Eng. R. Cas. 227; *Little Miami, etc., R. Co. v. Dayton*, 23 Ohio St. 510.

Construction of Statutes. — The meaning of par. 89, § 1, art. 5, c. 24, of the *Illinois* statute is broad enough not only to confer power upon the cities to make a street crossing over railroad rights of way at the same level or grade with the railroad tracks, but also to confer the power of extending streets above and over the track or right of way by means of a viaduct or bridge. The word "across" in such paragraph was intended to designate a crossing at grade. *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 586, 51 Am. & Eng. R. Cas. 528.

Under the *New Jersey* Act of March 19, 1874 (Rev., p. 944), municipal authorities may also construct bridges as parts of streets, to carry the public way above intersecting railroads. *Read v. Camden*, 54 N. J. L. 347.

2. Power of Public and Municipal Corporations. — *St. Paul, etc., R. Co. v. Minneapolis*, 35 *Minn.* 141, 24 Am. & Eng. R. Cas. 309; *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 586, 51 Am. & Eng. R. Cas. 528; *Illinois Cent. R. Co. v. Chicago*, 138 Ill. 453; *Lake Erie, etc., R. Co. v. Kokomo*, 130 Ind. 224.

City Council Judge of Public Necessity. — Power to appropriate the property of a railroad in such a manner as to destroy or greatly injure its franchise, or render it impossible or very difficult to prosecute the object of its organization, cannot be inferred from the general grant of power to establish a road across its track; but such general grant is sufficient to warrant the laying of a road across its track whenever public necessity demands it; and as to whether that public necessity exists a city council may be judge. *Hannibal v. Hannibal, etc., R. Co.*, 49 Mo. 480, 1 Am. Ry. Rep. 40.

Longitudinal Taking. — The right to take longitudinally is quite a different thing from the right to cross, and is governed by different rules. A municipal corporation, in the absence of legislation expressly or by necessary implication authorizing it, cannot take a part of the right of a railroad company by constructing a public highway longitudinally to the right of way. *Fort Wayne v. Lake Shore, etc., R. Co.*, 132 Ind. 558, 32 Am. St. Rep. 277.

Parallel Highway. — Public and municipal corporations, under their general authority to lay out highways, cannot take land for a parallel highway previously taken and occupied by a railroad under and pursuant to their grant. Presumptively there is no necessity so urgent as to require it. *Bridgeport v. New York, etc., R. Co.*, 36 Conn. 255, 4 Am. Rep. 63.

Grade Crossing Unauthorized. — A town has no authority under the *Vermont* statutes (R. L., § 388r) to lay out and build a highway across a railroad at grade. *Central Vermont R. Co. v. Royalton*, 58 Vt. 234.

3. Power Implied. — *St. Paul Union Depot Co. v. St. Paul*, 30 *Minn.* 362. In this case it was said: "In like manner, railroads necessarily cross streets and highways on their routes. An adjustment of the two public uses is thus demanded by public convenience and necessity wherever practicable, and may well be presumed to be contemplated in the legislation authorizing such improvements and by corporations in accepting or acting under such legislation."

Public and municipal corporations may lay out highways across a railroad, because such lay-out does not dispossess the railroad company, and, being a more urgent and constantly occurring necessity, must be presumed to have been contemplated by the parties to the grant. *Bridgeport v. New York, etc., R. Co.*, 36 Conn. 255, 4 Am. Rep. 63.

4. See *supra*, this title, *Railroads Crossing Streets and Highways — Nature of Right*.

Only Right of Way Acquired.— Nothing is acquired save a right of way, the place of crossing remaining in the common use of the parties for the exercise of their several franchises.¹

3. Manner of Crossing.— The crossing should be made so as to cause the least possible inconvenience or injury to the railroad company.²

Land Necessary for Operation of Franchise.— Where a railroad company has acquired title to land as a site for building purposes or for the necessary operation of its franchise and business, a highway cannot as a general rule be laid out across the grounds so purchased and used.³

Inconvenience No Bar to Right.— Where the opening of the street or highway amounts only to an inconvenience, and does not seriously impair or destroy any franchise, the right will not be denied.⁴

1. Nothing Acquired Save a Right of Way.— Illinois Cent. R. Co. *v.* Chicago, 138 Ill. 453; New Jersey Southern R. Co. *v.* Long Branch Com'rs, 39 N. J. L. 28, 14 Am. Ry. Rep. 211.

In a proceeding by a city against a railway company to condemn a part of its track for the extension of a public street over or across such track, a judgment of condemnation, no matter in what language couched, will not take the land itself, or the exclusive use thereof, but the city will acquire only a joint right with the railway company to the use of the land condemned. The use by the public will be, as a matter of fact, subject and subordinate. Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586, 51 Am. & Eng. R. Cas. 528.

2. Manner of Crossing.— Northern Cent. R. Co. *v.* Baltimore, 46 Md. 425; Milwaukee, etc., R. Co. *v.* Faribault, 23 Minn. 167.

Power to appropriate the property of a railroad in such a manner as to destroy or greatly injure its franchise, or render it impossible or very difficult to prosecute the objects of its organization, cannot be inferred from the general grant of power to establish a road across its track; but such general grant is sufficient to warrant the laying of such road whenever public necessity demands it. Hannibal *v.* Hannibal, etc., R. Co., 49 Mo. 480, 1 Am. Ry. Rep. 40.

Total Interference with Use.— A highway cannot be constructed across a railroad track when by so doing the company would be unable to use its track at the point of crossing for the purpose for which it was constructed. Fort Wayne *v.* Lake Shore, etc., R. Co., 132 Ind. 558, 32 Am. St. Rep. 277.

Crossing by Bridge or Viaduct.— When it appears that the only way in which a highway can be laid out across the track without serious interference with the railroad company is by means of a viaduct or bridge, the same must be constructed. Northern Cent. R. Co. *v.* Baltimore, 46 Md. 425.

New Jersey Statutes.— A public road cannot be laid across a railroad within five hundred feet of an existing public road, since the passage of the Act of 1881, Rep. Sup. N. J., p. 874, § 10. New York, etc., R. Co. *v.* Capner, 49 N. J. L. 555. And in order to determine whether a proposed new road is within five hundred feet of an old one, the width of the highways where they cross the railroad bed and tracks, and not the width elsewhere, must be regarded. New York, etc., R. Co. *v.*

Drummond, 45 N. J. L. 511, 17 Am. & Eng. R. Cas. 149, *affirmed* in 46 N. J. L. 644.

3. Land Necessary for Operation of Franchise.— Parks, etc., Com'rs *v.* Detroit, etc., R. Co., 93 Mich. 58; St. Paul Union Depot Co. *v.* St. Paul, 30 Minn. 359; Prospect Park, etc., R. Co. *v.* Williamson, 91 N. Y. 552, 14 Am. & Eng. R. Cas. 34. See also Delaware, etc., Canal Co. *v.* Whitehall, 90 N. Y. 21, 10 Am. & Eng. R. Cas. 227.

Land Intended for Station.— An injunction will lie to restrain commissioners of highways from laying out a highway across the grounds belonging to a railroad company, purchased and intended to be used as a station house, engine house, etc. Albany Northern R. Co. *v.* Brownell, 24 N. Y. 345.

Inclined Plane for Elevation of Cars.— Neither a public nor a private highway can, under the provisions of the N. Y. Rev. Stat., be laid out across the fixtures and erections upon the inclined plane of a railroad which are used for the drawing up or letting down of cars for the conveyance of merchandise or passengers. Mohawk, etc., R. Co. *v.* Artcher, 6 Paige (N. Y.) 83.

Meaning of Term "Track."— Where a statute authorized the construction of streets and highways across a railroad track without compensation to the owners of the track, it was held that the term "track" as there used did not include grounds upon which tracks are laid for storing or exclusively for making up trains. Boston, etc., R. Co. *v.* Greenbush, 52 N. Y. 510, 4 Am. Ry. Rep. 386, *affirming* 5 Lans. (N. Y.) 461. See also Delaware, etc., Canal Co. *v.* Whitehall, 90 N. Y. 21.

Depot Grounds.— In Milwaukee, etc., R. Co. *v.* Faribault, 23 Minn. 167, it was held that a city would not be allowed to lay out and open a street through the depot grounds of a railroad company, in such a manner as to destroy or impair to a great extent an easement acquired therein by the railroad company by virtue of a prior grant from the legislature.

4. Inconvenience No Bar to Right.— Philadelphia, etc., R. Co. *v.* Philadelphia, 9 Phila. (Pa.) 563.

A railroad company cannot convert its right of way into a store-room for its cars, calling it a "yard," and thus prevent a street from crossing its right of way. Parks, etc., Com'rs *v.* Detroit, etc., R. Co., 93 Mich. 58.

Where the ground of a railroad company, called a yard, is nothing more than a collec-

4. Compensation — *a.* IN GENERAL. — The right of railroad companies to compensation for the additional duties and obligations imposed upon them by the construction of a highway over their right of way, is a question concerning which different rules exist in different jurisdictions.

No Compensation Allowed Railroad. — The courts of some states have laid down the doctrine, that it being the duty of the railroad in the first instance to provide and construct crossings, and maintain them in a safe condition, they are entitled to no compensation in such cases.¹

Railroad Entitled to Compensation. — On the other hand, it may be laid down as a general rule that the railroad company is entitled to compensation in such cases.²

tion of tracks, a street may be extended over or across the same under paragraph 89 of § 1, art. 5, c. 24 of the *Illinois* Statutes. *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 586, 51 Am. & Eng. R. Cas. 528.

Burden of Proof. — Under the *Michigan* statute (How. Stat., c. 29, §§ 1298, 1322), the commissioners have power to lay out highways across the depot grounds of a village except where such action would be attended by inconvenience to the railroad amounting to an inability to use them, and the burden is upon the railroad company to show that the two uses will be incompatible. *Battle Creek, etc., R. Co. v. Tiffany*, 99 Mich. 471.

1. New York. — In New York it has been held that where a highway is laid out by proper authority across a railroad company's right of way, it is not such a taking of property as entitles the company to damages. *Delaware, etc., Canal Co. v. Whitehall*, 90 N. Y. 24; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *Boston, etc., R. Co. v. Greenbush*, 52 N. Y. 510, *affirming* 5 Lans. (N. Y.) 461. See also *Sixth Ave. R. Co. v. Kerr*, 45 Barb. (N. Y.) 139. In *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345, it was held that the laying out of a highway over a railroad without compensation was valid, and not a violation of the constitution; Denio, J., saying: "Upon this my opinion is that the railroad companies under the general act do not acquire the same unqualified title and right of disposition to the real estate taken for the road and paid for according to the act, which individuals have in their lands." *Quoted* in *Sixth Ave. R. Co. v. Kerr*, 45 Barb. (N. Y.) 139.

Maine. — In *Boston, etc., R. Co. v. York County*, 79 Me. 386, it was held, under a statute (R. S., c. 18, § 27) providing that the railroad company shall, at its own expense, build and maintain so much of a county road as is within the limits of the railroad, that the statute duty of the railroad company did not entitle it to any extra compensation for the taking of its land, and that the expense thus put upon the railroad company was not to be considered in appraising their damages.

Missouri. — In *Hannibal v. Hannibal, etc., R. Co.*, 49 Mo. 480, without deciding whether a railroad was entitled to compensation, the court held that while the fact of laying a highway across a railroad might impose some additional burden upon the road, yet such streets were necessary and the franchise of the railroad company was taken subject to any inconvenience that might arise from it, and the general authority given the proper authorities to open

streets was a sufficient warrant to lay them across the track of a railroad whenever called for by public necessity. *Compare* the *Missouri* case in the succeeding note.

2. Railroad Held Entitled to Compensation — *Illinois.* — *Illinois Cent. R. Co. v. Bloomington*, 76 Ill. 447; *Chicago, etc., R. Co. v. Chicago*, 140 Ill. 309; *Chicago, etc., R. Co. v. Chicago*, 149 Ill. 457; *Lake Shore, etc., R. Co. v. Chicago*, 151 Ill. 359; *Chicago, etc., R. Co. v. Cicero*, 154 Ill. 656; *Illinois Cent. R. Co. v. Chicago*, 156 Ill. 98; *Illinois Cent. R. Co. v. Highway Com'rs*, 161 Ill. 247; *Illinois Cent. R. Co. v. Highway Com'rs*, 61 Ill. App. 203.

Kansas. — *Kansas Cent. R. Co. v. Jackson County*, 45 Kan. 716, 46 Am. & Eng. R. Cas. 26; *Greenwood County v. Kansas City, etc., R. Co.*, 46 Kan. 104; *Atchison, etc., R. Co. v. Osage County*, 48 Kan. 576; *Chicago, etc., R. Co. v. Chautauqua County*, 49 Kan. 763.

Maryland. — *Northern Cent. R. Co. v. Baltimore*, 46 Md. 425, 18 Am. Ry. Rep. 461.

Massachusetts. — *Massachusetts, etc., R. Co. v. Boston, etc., R. Co.*, 121 Mass. 124; *Boston, etc., R. Co. v. Middlesex County*, 1 Allen (Mass.) 324; *Old Colony, etc., R. Co. v. Plymouth County*, 14 Gray (Mass.) 155.

Michigan. — *Detroit, etc., R. Co. v. Detroit*, 49 Mich. 47; *Matter of Opening First St.*, 58 Mich. 641, 66 Mich. 42; *Chicago, etc., R. Co. v. Hough*, 61 Mich. 507; *People v. Detroit, etc., R. Co.*, 79 Mich. 471, 42 Am. & Eng. R. Cas. 257; *Parke, etc., Com'rs v. Michigan Cent. R. Co.*, 90 Mich. 385.

Missouri. — *Kansas City v. Kansas City, etc., R. Co.*, 102 Mo. 633. *Compare* the *Missouri* case in the preceding note.

New Jersey. — *New York, etc., R. Co. v. Capner*, 49 N. J. L. 555; *Central R. Co. v. Bayonne*, 51 N. J. L. 428.

Ohio. — *Little Miami, etc., R. Co. v. Dayton*, 23 Ohio St. 510.

No Set-off for Benefits from Increased Travel. — The supposed benefit to the company from an increase of travel on its railroad cannot be set off against the compensation payable to it. *Boston, etc., R. Co. v. Middlesex County*, 1 Allen (Mass.) 324; *Old Colony, etc., R. Co. v. Plymouth County*, 14 Gray (Mass.) 155; *St. Paul, etc., R. Co. v. Minneapolis*, 35 Minn. 141, 24 Am. & Eng. R. Cas. 309.

Benefits by increase in its traffic or business arising from the increased facility for travel which the highway affords are not to be taken into account. *State v. Shardlow*, 43 Minn. 524, 45 Am. & Eng. R. Cas. 106.

Nominal Damages. — In *Illinois Cent. R. Co. v. Highway Com'rs*, 161 Ill. 247, it was held

b. ELEMENTS TO BE CONSIDERED. — The railroad company is entitled to compensation for land taken,¹ for the construction and repair of the crossing and maintaining the same in safe condition for the traveling public,² for planking the roadbed where it crosses the track,³ and for the construction of cattle-guards⁴

that an order of highway commissioners laying out a public highway without any agreement as to compensation or damages, or a release of the same or an ascertainment of the amount by a verdict of a jury as prescribed by the statute, was void although the damages may have been merely nominal.

No Damages. — An instruction in a proceeding to condemn across the right of way of a railroad company for a street, that "the issue in this case is as to the compensation, if any, which the petitioner should pay," etc., is erroneous, as leaving the jury free to allow the railroad company no compensation at all. *Chicago, etc., R. Co. v. Cicero*, 154 Ill. 656.

1. Compensation for Land Taken. — *Chicago, etc., R. Co. v. Cicero*, 154 Ill. 656; *Illinois Cent. R. Co. v. Chicago*, 156 Ill. 98; *Illinois Cent. R. Co. v. Highway Com'rs*, 161 Ill. 251; *Chicago, etc., R. Co. v. Chautauqua County*, 49 Kan. 763; *Portland, etc., R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784, 23 Am. & Eng. R. Cas. 51; *Boston, etc., R. Co. v. Cambridge*, 159 Mass. 283, 55 Am. & Eng. R. Cas. 23; *Old Colony, etc., R. Co. v. Plymouth County*, 14 Gray (Mass.) 155; *Matter of Opening First St.*, 66 Mich. 42; *New York, etc., R. Co. v. Capner*, 49 N. J. L. 555.

The compensation to be paid to a railroad for crossing its right of way for street purposes not only includes the use of the land occupied by the street for such crossing, but any extra expense created by the use of the right of way for the street, in the ordinary use of the company's road, and such other damage as may be sustained by injury to its track, right of way, and franchise, occasioned by the crossing, and which may be properly considered as a natural and proximate cause thereof. *Matter of Opening First St.*, 66 Mich. 42.

Future Use of Land. — In *Portland, etc., R. Co. v. Deering*, 78 Me. 61, 57 Am. Rep. 784, it was held that the jury, in order to decide what the damages were, should have been allowed to take into consideration not only the use which the railroad was then making of its land, but the use which, in all probability, it would thereafter make of it; that a distinction was to be observed between what land might be worth in the future and what it was then worth in view of the future, it being allowable to base calculations to some extent on the reasonable probabilities of the future.

Lands of No Market Value. — The fact that lands within a railroad's right of way have no market value because devoted to railroad uses does not preclude the recovery of such compensation as may be just.

Measure of Compensation. — In *Chicago, etc., R. Co. v. Chicago*, 149 Ill. 457, it was said: "The measure of compensation is the amount of decrease in the value of the use for railroad purposes, caused by the use for the purposes of a street, such use for the purposes of a street being exercised jointly with the use of the companies for railroad purposes." See also

Illinois Cent. R. Co. v. Highway Com'rs, 161 Ill. 252.

Land Rendered Unavailable for Purposes Designed. — The fact that by the opening of the proposed street across the right of way and other premises of a railroad company the property will be rendered unavailable for the purpose of a freight depot, to which it is peculiarly adapted, and that there is no other property obtainable and suitable for that purpose, may be taken into consideration in determining the amount of compensation to be awarded. *Chicago, etc., R. Co. v. Cicero*, 154 Ill. 656.

Land Used as Station. — When the lands of a company are crossed by the laying out of a public highway which intersects the tracks and station grounds of the railway at right angles, the railroad company is entitled to an assessment of damages by reason of laying out the highway. *New York, etc., R. Co. v. Capner*, 49 N. J. L. 555.

Warehouse. — Where, by reason of the condemnation of a highway crossing over a company's tracks, an adjacent warehouse, and the land on which it stands, are rendered less available and less valuable for warehouse purposes, the company is entitled to be compensated for such damage. *Parks, etc., Com'rs v. Chicago, etc., R. Co.*, 91 Mich. 291.

2. Construction and Repair of Crossing. — *Matter of Opening First St.*, 58 Mich. 641; *Boston, etc., R. Co. v. Cambridge*, 159 Mass. 283, 55 Am. & Eng. R. Cas. 23; *Old Colony, etc., R. Co. v. Plymouth*, 14 Gray (Mass.) 155.

The damage to a railroad from opening a street across it includes the expense entailed by the crossing, and in a city where there is much travel may involve outlays for making it safe. *Matter of Opening First St.*, 58 Mich. 641; *Chicago, etc., R. Co. v. Hough*, 61 Mich. 507.

Neither the legislature nor a municipal corporation has the right to impose upon a railroad, without making any provision for compensation to it, the expense of making a safe and proper crossing by grading the approaches at a point where a street is to be extended across the railroad, where no general law and nothing in its charter imposed the duty on the railroad company. *Illinois Cent. R. Co. v. Bloomington*, 76 Ill. 447.

3. Planking Roadbed. — *Central R. Co. v. Bayonne*, 51 N. J. L. 428; *State v. District Ct.*, 42 Minn. 247, 42 Am. & Eng. R. Cas. 241; *State v. Shardlow*, 43 Minn. 524, 45 Am. & Eng. R. Cas. 106.

4. Cattle-guards. — *Kansas Cent. R. Co. v. Jackson County*, 45 Kan. 716, 46 Am. & Eng. R. Cas. 26, followed in *Greenwood County v. Kansas City, etc., R. Co.*, 46 Kan. 104, followed in *Atchison, etc., R. Co. v. Osage County*, 48 Kan. 576; *Union Pac. R. Co. v. Harris*, 28 Kan. 206, 11 Am. & Eng. R. Cas. 431; *Chicago, etc., R. Co. v. Hough*, 61 Mich. 507; *Kansas City v. Kansas City, etc., R. Co.*, 102 Mo. 633; *People v. Detroit, etc., R. Co.*, 79 Mich. 471, 42 Am. & Eng. R. Cas. 257.

and culverts.¹

Structures Necessary for Safety of Crossing. — The erection and maintenance of signs, gates, and such appliances for the convenience and safety of the public have been held to entitle the company to compensation;² while some courts have laid down the doctrine that the cost of constructing and operating such appliances is properly included in the ordinary operating expenses of the road.³

Remote Damages. — The company is not entitled to compensation for inconvenience,⁴ increased danger⁵ or delay,⁶ or for observing police regulations in regard to the crossing.⁷

5. Right of Abutting Owners. — It is a general principle that where a railroad company has, in compliance with the requirement concerning the construction and repair of its crossings, injured the land of an abutting owner or imposed an additional burden thereon, such owner may maintain an action for damages,⁸ whether such injury has been caused either by raising⁹ or

Contra, State *v.* District Ct., 42 Minn. 247, 42 Am. & Eng. R. Cas. 241; State *v.* Shardlow, 43 Minn. 524, 45 Am. & Eng. R. Cas. 106; Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150.

Constitutionality of Statute Imposing Whole Burden on Railroad. — It has been held that a statute which imposes the whole expense of cattle-guards, fences, etc., upon the railroad company, is in conflict with the constitutional provision forbidding the taking of private property without just compensation. Chicago, etc., R. Co. *v.* Hough, 61 Mich. 507; Matter of Opening First St., 58 Mich. 641.

1. Culverts. — Central R. Co. *v.* Bayonne, 51 N. J. L. 428.

Sewers — Illinois Statute. — Paragraph 89 in the Illinois City Act implies that there may be cases where the company is entitled to compensation, and cases where it is entitled to no compensation. In the extension of streets over railroad lands other than tracks or rights of way, and in the construction of sewers under or through rights of way, serious damage may be done, which may require compensation or restoration. Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150.

2. Structures Necessary for Safety of Crossing Entitle Railroad to Compensation. — Central R. Co. *v.* Bayonne, 51 N. J. L. 428; Parks, etc., Com'rs *v.* Michigan Cent. R. Co., 90 Mich. 385, 50 Am. & Eng. R. Cas. 144; Parks, etc., Com'rs *v.* Chicago, etc., R. Co., 91 Mich. 291; Parks, etc., Com'rs *v.* Detroit, etc., R. Co., 93 Mich. 58. See also Matter of Opening First St., 58 Mich. 641.

3. Included in Road's Operating Expenses. — Boston, etc., R. Co. *v.* Cambridge, 159 Mass. 283, 55 Am. & Eng. R. Cas. 23, *following* Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray (Mass.) 155; State *v.* District Ct., 42 Minn. 247, 42 Am. & Eng. R. Cas. 241; State *v.* Shardlow, 43 Minn. 524, 45 Am. & Eng. R. Cas. 106.

4. Inconvenience. — Portland, etc., R. Co. *v.* Deering, 78 Me. 61, 57 Am. Rep. 784, 23 Am. & Eng. R. Cas. 51; Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150.

5. Increased Danger. — Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150; Portland, etc., R. Co. *v.* Deering, 78 Me. 61, 57 Am. Rep. 784, 23 Am. & Eng. R.

Cas. 51; Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray (Mass.) 155.

Defending Suits for Injuries. — In estimating the damages of a railroad company for land taken in laying out a highway across its track, damages are not to be taken into account for expenses in defending itself against claims for accidents. Boston, etc., R. Co. *v.* York County, 79 Me. 386, 32 Am. & Eng. R. Cas. 271.

6. Delay. — Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150.

7. Observing Police Regulations. — Matter of Opening First St., 66 Mich. 42; Chicago, etc., R. Co. *v.* Chicago, 140 Ill. 309, 50 Am. & Eng. R. Cas. 150. But see the preceding notes.

Compensation cannot be had for the increased expense of ringing a bell or for the liability of the company to be ordered by the county commissioners to build a bridge for the highway over its track. Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray (Mass.) 155.

8. Right of Abutting Owners. — Burritt *v.* New Haven, 42 Conn. 195; Bradley *v.* New York, etc., R. Co., 21 Conn. 294; Nicks *v.* Chicago, etc., R. Co., 84 Iowa 27; Brewer *v.* Boston, etc., R. Co., 113 Mass. 52; Autenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 254; Wead *v.* St. Johnsbury, etc., R. Co., 64 Vt. 52; Buchner *v.* Chicago, etc., R. Co., 60 Wis. 264, 14 Am. & Eng. R. Cas. 447.

It is no answer to an action for injury accruing to the plaintiffs by the building of the defendant's road, that the best possible crossing was made, considering the topography and physical surroundings present. The abutting owner has no pecuniary interest in the betterments of the company. If the crossing made by the company left the abutting owner in a still worse condition than before, and largely depreciated his lands, his right of action is unquestionable. Autenrieth *v.* St. Louis, etc., R. Co., 36 Mo. App. 254.

9. Raising Highway. — It is the duty of a company to construct and maintain sufficient crossings at points where its railroad intersects a public highway. If in so doing it is necessary to raise the bed of the highway, an additional burden is thereby imposed upon the land, for which the owner of the fee may recover damages. Wead *v.* St. Johnsbury, etc., R. Co., 64 Vt. 52.

New York. — But in New York it has been

lowering¹ the bed of the highway or the construction of the necessary approaches and embankments thereto.²

Relief from Liability. — The company will not be relieved from liability on account of such damage, by reason of the crossing having been constructed by virtue of a statute³ under the sanction and direction of a city,⁴ or by reason of the fact that its charter provides for the taking of land for such purposes.⁵

Erection of Gates and Barriers. — The erection and maintenance of gates or barriers in a street at a railroad crossing, pursuant to a municipal ordinance, is not such a taking of land as will entitle the owners of abutting lots to compensation.⁶

Inconvenience or Delay. — Nor should a recovery be allowed for mere inconvenience or delay which falls upon the abutting owner, but which is incident to the lawful operation of the crossing.⁷

held that where a railroad company, in restoring a crossing as required by statute, raises the street in front of the abutting owner's land, without changing its line as originally laid out, the latter is not entitled to compensation, since his fee in the street is not subject to any new or different use. *Conklin v. New York, etc., R. Co.*, 102 N. Y. 107; *Ottenot v. New York, etc., R. Co.*, (Ct. App.) 28 N. Y. St. Rep. 483, *followed* in *Rauenstein v. New York, etc., R. Co.*, (Ct. App.) 31 N. Y. St. Rep. 911; *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 98, 53 Am. Rep. 123, note.

1. Lowering Highway. — The lowering by a railroad company of the grade of a highway in order to adjust such grade to that of its track laid across such highway, is the taking of the property of the owner of a lot abutting on that part of the highway so lowered, for which, and for the consequent injury to the lot, the railroad company must make compensation, although the track itself does not encroach upon that part of the highway of which the fee is in such lot owner. *Buchner v. Chicago, etc., R. Co.*, 60 Wis. 264, 14 Am. & Eng. R. Cas. 447.

2. Approaches and Embankments. — *Burritt v. New Haven*, 42 Conn. 174; *Nicks v. Chicago, etc., R. Co.*, 84 Iowa 27.

3. Statutory Authority for Construction No Defense. — *Nicks v. Chicago, etc., R. Co.*, 84 Iowa 27. But see *Whittier v. Portland, etc., R. Co.*, 38 Me. 26.

4. Nicks v. Chicago, etc., R. Co., 84 Iowa 27.

The charter of a company required it, upon crossing any highway, to restore this to its former state, or in a sufficient manner not to impair its usefulness, and also provided that it should "construct and use that part of its road within the city of N., subject to such regulations as the common council of the city should prescribe." The charter of the city provided that the common council of the city should "have supervision over all bridges crossing railroads within the city, and might from time to time order the widening and repairing of the same in such manner as in their judgment the public convenience might require." The company had in the year 1848 constructed its road, crossing the highway in the outer part of the city of N., and had restored the highway by making a crossing at the grade of the road.

In 1869 the city had so extended and the travel over this highway so much increased as to make it necessary to the public convenience that a bridge should be built over the railroad at the crossing, and the common council of the city made an order that one should be built by the railroad company. The company failing to build it, the common council authorized the road commissioners of the city to make a contract with the railroad company that if the company would build the bridge the city would construct the necessary embankments for approaching it; and under this agreement the railroad company built the bridge, and the city made the embankments. These embankments raised the street so much in front of the house and lot of the plaintiff as to damage the property seriously. Under the state of facts it was held that the city was not liable in damages, and that the company was, for the reason that the only duty resting upon the city with regard to highways was imposed by the legislature and was limited to the making of highways and maintaining them in a condition safe and convenient for the public use, while here the structure was made necessary only by the fact of the railroad crossing the highway. The necessity grew properly out of the existence of the railroad, and not out of the demands of public travel. *Burritt v. New Haven*, 42 Conn. 174.

5. Under Charter Provisions. — *Bradley v. New York, etc., R. Co.*, 21 Conn. 294; *Burritt v. New Haven*, 42 Conn. 195; *Fletcher v. Auburn, etc., R. Co.*, 25 Wend. (N. Y.) 462.

6. Erection of Gates and Barriers. — *First Cong. Church, etc., v. Milwaukee, etc., R. Co.*, 77 Wis. 158, 43 Am. & Eng. R. Cas. 182.

7. Inconvenience or Delay. — *Wood v. Stourbridge R. Co.*, 16 C. B. N. S. 222, 111 E. C. L. 222; *Caledonian R. Co. v. Ogilvy*, 2 Macq. H. L. Cas. 229.

An owner of property abutting on a street of which the city has the fee, cannot recover damages of a railroad for raising the grade of the centre of the street, compelling him to drive back some distance in order to cross the track by means of such changed grade. *Rauenstein v. New York, etc., R. Co.*, (Ct. App.) 31 N. Y. St. Rep. 911, *following* *Ottenot v. New York, etc., R. Co.*, (Ct. App.) 28 N. Y. St. Rep. 483.

6. **Grade Crossings** — *a.* IN GENERAL. — The matter of grade crossings is to some extent regulated by statute.¹

Grade Crossings Allowed. — In some states such crossings are allowable, there being no provision of law prohibiting their existence.²

Grade Crossings Not Favored. — On the other hand the continuance of such crossings has in many instances been regarded with disfavor,³ and statutory provision has been made for their alteration or removal.⁴

b. **CONSTITUTIONALITY OF STATUTES.** — The object of such statutes is to remove certain conditions which, though lawful in themselves, have become a source of danger to life and property, and as such they are the legitimate exercise of the police power of the state and are constitutional.⁵

1. See *supra*, this title, *Railroads Crossing Railroads*.

2. **Grade Crossings Not Prohibited — Iowa.** — Under the laws of Iowa there is nothing to prevent a railroad track being laid on an even level with a highway. *Morris v. Chicago*, etc., R. Co., 26 Fed. Rep. 22.

Minnesota Laws 1887, c. 15, relating to highway crossings by railroads, provides how grade crossings shall be constructed, but does not authorize all crossings to be at grade. *State v. Minneapolis*, etc., R. Co., 39 Minn. 219, 35 Am. & Eng. R. Cas. 250.

New York. — The crossing of highways at grade by a railway is not unlawful. It is therefore neither a nuisance nor a trespass at law; nor does such crossing require the commissioners' consent thereto. *Baxter v. Spuyten Duyvil*, etc., R. Co., 61 Barb. (N. Y.) 428.

Rhode Island. — A railway crossing a highway on the same level is not *prima facie* a nuisance; and unless it shall be shown that such railway did unreasonably impede or obstruct the safe and convenient use of the highway, no injunction will be granted to restrain it from maintaining such crossing. *Johnston v. Providence*, etc., R. Co., 10 R. I. 365, 6 Am. Ry. Rep. 139.

England. — Where a highway is crossed by a railway without diverting the road, a bridge must be made to carry the highway over or under the railway, but the highway may be diverted to a place where there is a level crossing, if such diversion will be more convenient than a bridge. *Atty.-Gen. v. Ely*, etc., R. Co., L. R. 4 Ch. 194, 38 L. J. Ch. 258, 20 L. T. N. S. 1, 17 W. R. 356. Where a railway company is wholly without funds, and has not the means to raise the necessary money, it will not be compelled by mandamus to construct a bridge in lieu of a level crossing, pursuant to an order of the board of trade. *In re Bristol*, etc., R. Co., 3 Q. B. Div. 10, 47 L. J. Q. B. 48, 26 W. R. 236, 3 Ry. & C. T. Cas. xviii.

3. See *supra*, this title, *Railroads Crossing Railroads*.

Gen. Stat. Conn., § 3481, provides that when a new highway shall be constructed across a railroad "such highway shall pass over or under the railroad, as the railroad commissioners shall direct," and it has been held that the commissioners could direct whether the highway should pass over or under the railroad before the laying out of the highway had been completed by the acceptance of the committee's report. *Smith v. New Haven*, 59 Conn. 203; *New York*, etc., R. Co. *v. Waterbury*, 60 Conn. 1, 49 Am. & Eng. R. Cas. 367.

The language, "when a new highway shall be constructed," does not refer to the laying out of the highway, but to the building of the crossing over or under the railroad. *Smith v. New Haven*, 59 Conn. 203.

4. **Alteration or Removal of Grade Crossings.** — *New York*, etc., R. Co. *v. Bristol*, 151 U. S. 556, *affirming* *New York*, etc., R. Co.'s Appeal, 62 Conn. 527, 55 Am. & Eng. R. Cas. 38; *Westbrook's Appeal*, 57 Conn. 95, 37 Am. & Eng. R. Cas. 446; *New York*, etc., R. Co.'s Appeal, 58 Conn. 532, 45 Am. & Eng. R. Cas. 109; *New York*, etc., R. Co. *v. Waterbury*, 55 Conn. 19; *Fairfield's Appeal*, 57 Conn. 167, 39 Am. & Eng. R. Cas. 689; *Doolittle v. Branford*, 59 Conn. 402, 49 Am. & Eng. R. Cas. 279; *Lancaster v. Worcester County*, 113 Mass. 100; *Boston*, etc., R. Co. *v. Newton*, 148 Mass. 474; *Boston*, etc., R. Corp. *v. Winchester*, 156 Mass. 217, 55 Am. & Eng. R. Cas. 49; *Boston*, etc., R. Co. *v. Cambridge*, 159 Mass. 283, 55 Am. & Eng. R. Cas. 23.

A statute which simply authorizes a railroad corporation to cross a street at grade, abridges, but does not take away, the power of the county commissioners to prescribe what alterations may be made in the way, the time and manner of making them, etc. *Brewer v. Boston*, etc., R. Co., 113 Mass. 52.

Interpretation of Statutes — Connecticut. — The Conn. Act of 1883 (Session Laws of 1883, c. 107, § 2) provides that "no new highway or portion of a highway shall be constructed across a railroad at grade." Under such statute it was held that when a street had been laid out across a railroad at grade before the passage of the act, and partially constructed, but had not been actually completed for public use at the time the act took effect, such crossing could not thereafter be made; and that it was of no moment that the company had given permission to construct the crossing at grade. Private contracts cannot put limitations upon legislative power to protect life. *New York*, etc., R. Co. *v. Waterbury*, 55 Conn. 19.

Road Operated by Lessee. — When a railroad is operated by a company under a perpetual lease, it is the road of the lessee, within the meaning of the Connecticut statute for the alteration of grade crossings. *Westbrook's Appeal*, 57 Conn. 95, 37 Am. & Eng. R. Cas. 446.

5. **Constitutionality of Statutes.** — *Westbrook's Appeal*, 57 Conn. 95, 37 Am. & Eng. R. Cas. 446; *New York*, etc., R. Co.'s Appeal, 58 Conn. 532, 45 Am. & Eng. R. Cas. 109; *New York*, etc., R. Co. *v. Bristol*, 151 U. S. 556, *affirming* 62 Conn. 527, 55 Am. & Eng. R. Cas. 38.

c. **POWER OF COMMISSIONERS.** — In some states by statute railroad commissioners or other officials are authorized to determine proceedings in regard to grade crossings, their duty and extent of authority in such matters being regulated by the statute creating their authority.¹ In the discharge of their duty they are empowered to make alterations in highways, where necessary to the removal of grade crossings,² and apportion the expense between the

Grade Crossings in the Nature of Nuisances. — The *Connecticut* Act of 1889, relating to grade crossings (Session Laws of 1889, c. 220), provides in effect that the directors of every company which operates a railroad in this state shall apply for the removal of at least one grade crossing each year for every sixty miles of road; and that if the directors of any company shall fail so to do, the commissioners shall order such crossing or crossings removed. Under such statute it was held that as grade crossings are in the nature of nuisances, the legislature has a right to cause them to be abated, and to require either party to pay the whole or any portion of the expense. *New York, etc., R. Co.'s Appeal*, 62 Conn. 527, 55 Am. & Eng. R. Cas. 38, affirmed in 151 U. S. 556.

Apportionment of Expense. — The *Connecticut* Act of 1889 (Session Laws, c. 220), which provides for an order by the railroad commissioners for the change of a highway where crossed at grade by a railroad laid out since the highway was made, and authorizes the commissioners to apportion the expense of the alteration between the town and the railroad company, but limits the amount to be set to the town to one quarter of the expense, and requires that the rest be paid by the railroad company, is not unconstitutional as conflicting with the provisions for "due course of law" in taking property, in the Fourteenth Amendment of the Constitution of the United States, and in art. 1, §§ 9 and 12 of the constitution of this state. *New York, etc., R. Co.'s Appeal*, 58 Conn. 532, 45 Am. & Eng. R. Cas. 109.

Massachusetts Statute Applicable to Proceedings Pending for Removing Crossing. — Since the whole subject of the crossing of highways by railroads can be regulated by the legislature, the legislature may, at any time before a final decree has been rendered, amend the statutes under which a proceeding has been commenced; and if the amended act is made applicable to the pending proceeding and is valid, the court, in rendering a final decree, must proceed in accordance with the statutes as amended. *In re Northampton*, 158 Mass. 299, 55 Am. & Eng. R. Cas. 31.

1. **Connecticut.** — While the railroad commissioners cannot interfere with the general power of towns and selectmen to lay out new highways, yet they have, under the statute, power to deal with existing highways where a change becomes necessary to the removal of a grade crossing, and where the construction of short portions of new highway becomes necessary they may order such new highway made. *Doolittle v. Branford*, 59 Conn. 402, 49 Am. & Eng. R. Cas. 279. See also *Fairfield's Appeal*, 57 Conn. 167, 39 Am. & Eng. R. Cas. 689.

Massachusetts. — Under the statutes of Massachusetts the county commissioners have the power, in order to do away with grade cross-

ings, to cause any deviation to be made from the existing highway which is reasonably necessary for a safe and convenient crossing over or under a railroad. *Davis v. Hampshire County*, 153 Mass. 218, 55 Am. & Eng. R. Cas. 52.

Under Mass. Rev. Stat., c. 24, § 13, county commissioners have final jurisdiction of the question whether a highway which crosses a railroad shall be laid out over, under, or on a level with it. *Boston, etc., R. Co. v. Middlesex County*, 1 Allen (Mass.) 324.

But they have no power, under the Mass. Stat. of 1872, to change the grade of a railroad where it crosses a highway. *Boston, etc., R. Co. v. Hampden County*, 116 Mass. 73.

Michigan. — In Michigan a state railroad crossing board has been provided, who may require the railroad company to carry its tracks over the highway in a manner specified by their decision. *Fort St. Union Depot Co. v. State Railroad Crossing Board*, 81 Mich. 248, 45 Am. & Eng. R. Cas. 113.

2. **Power of Commissioners to Make Alterations in Highway.** — *Doolittle v. Branford*, 59 Conn. 402, 49 Am. & Eng. R. Cas. 279; *Fairfield's Appeal*, 57 Conn. 167, 39 Am. & Eng. R. Cas. 689. See also *Com. v. Vermont, etc., R. Corp.*, 4 Gray (Mass.) 22; *Parker v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 107, 50 Am. Dec. 709; *Boston, etc., R. Co. v. Hampden County*, 116 Mass. 73.

Enforcement of Commissioners' Order. — The usual proceeding to enforce an order of commissioners is a bill in equity. See *Roxbury v. Boston, etc., R. Corp.*, 6 Cush. (Mass.) 424; *Brainard v. Connecticut River R. Co.*, 7 Cush. (Mass.) 506.

Indefinite Order. — An order of the county commissioners, passed on the petition of the mayor and aldermen, or selectmen, under the Massachusetts Stat. 1842, c. 22, which determines that the raising of a highway at a place named where it is crossed by a railroad on a level, so as to pass over the railroad, is necessary for the security of the public, without defining the height above the railroad to which the highway shall be raised, the grade of the ascent, the mode and material of the structure, or the time within which it shall be made, is too indefinite to be specifically enforced by a court of equity under the Massachusetts Stat. 1849, c. 222, § 5. *Roxbury v. Boston, etc., R. Corp.*, 2 Gray (Mass.) 460.

Penalty for Failure to Comply with Order of Commissioners. — If a railroad company unreasonably neglects to comply with the order of county commissioners allowing the company upon its petition, in pursuance of the Mass. Act of 1846, c. 271, to cross a highway upon a level, the only remedy is for the penalty given by section 4, or by a proceeding in equity under the Act of 1849, c. 222, § 5. The commissioners cannot assess damages or issue a

parties as justice may require.¹

V. INJURIES AT CROSSINGS — 1. Mutuality of Obligation Between Railroad Company and Traveler — a. IN GENERAL. — Travelers upon a highway and the railroad company have mutual and reciprocal duties and obligations.² The railroad in running its trains and the traveler in using the highway are each engaged in the exercise of a lawful right,³ and one must avoid being

warrant for a jury in such a case. *Vermont*, etc., *R. Co. v. Franklin County*, 10 Cush. (Mass.) 12.

1. Apportionment of Expense. — Section 3483 of the *Connecticut* Gen. Stat., authorizing the railroad commissioners to make alterations in highways where necessary to the removal of grade crossings, provides that the commissioners shall determine the expense and by whom it shall be paid, with the right to apportion it between the company and the town, and under such statute it was held that an order, made before the work was done, that a town should, on its completion, pay a gross sum toward the cost of a bridge over the railroad track, to be constructed by the railroad company, was not invalid, since with full means of ascertaining beforehand the entire expense to be incurred in building such a bridge, it is not to be presumed that the commissioners ordered the town to pay a greater sum than one half the entire cost, to which the assessment upon the town was limited by the statute. *Doolittle v. Branford*, 59 Conn. 402, 49 Am. & Eng. R. Cas. 279.

The commissioners or the superior court, when an appeal is taken to it, may, in their discretion, either apportion the expense or impose the whole burden upon the railroad company. *Fairfield's Appeal*, 57 Conn. 167, 39 Am. & Eng. R. Cas. 689. But the discretion allowed in apportioning the expenses of altering the crossing is exhausted when exercised by the superior court on appeal. *Fairfield's Appeal*, 57 Conn. 167, 39 Am. & Eng. R. Cas. 689.

2. Mutuality of Obligations — United States. — *Continental Imp. Co. v. Stead*, 95 U. S. 161; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 49 Am. & Eng. R. Cas. 323; *Thomas v. Delaware, etc., R. Co.*, 8 Fed. Rep. 731, 19 Blatchf. (U. S.) 533; *Morris v. Chicago, etc., R. Co.*, 26 Fed. Rep. 22; *Atchison, etc., R. Co. v. McClurg*, 59 Fed. Rep. 860; *Texas, etc., R. Co. v. Cody*, 166 U. S. 606; *Schofield v. Chicago, etc., R. Co.*, 2 McCrary (U. S.) 268.

Illinois. — *Galena, etc., Union R. Co. v. Dill*, 22 Ill. 265; *Chicago, etc., R. Co. v. Still*, 19 Ill. 499, 71 Am. Dec. 236; *Chicago, etc., R. Co. v. Cauffman*, 38 Ill. 424; *Chicago, etc., R. Co. v. Gretzner*, 46 Ill. 74; *St. Louis, etc., R. Co. v. Manly*, 58 Ill. 300.

Indiana. — *Toledo, etc., R. Co. v. Goddard*, 25 Ind. 185; *Pennsylvania Co. v. Krick*, 47 Ind. 368; *Indianapolis, etc., R. Co. v. McLin*, 82 Ind. 435, 8 Am. & Eng. R. Cas. 237.

Florida. — *Florida Cent., etc., R. Co. v. Williams*, 37 Fla. 406.

Iowa. — *Willoughby v. Chicago, etc., R. Co.*, 37 Iowa 432.

Kansas. — *Leavenworth, etc., R. Co. v. Rice*, 10 Kan. 426; *Chicago, etc., R. Co. v. Williams*, 56 Kan. 333.

Kentucky. — *Louisville, etc., R. Co. v. Goetz*,

79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627.

Louisiana. — *White v. Vicksburg, etc., R. Co.*, 42 La. Ann. 990.

Maine. — *Whitney v. Maine Cent. R. Co.*, 69 Me. 208.

Maryland. — *Baltimore, etc., R. Co. v. Owings*, 65 Md. 502, 28 Am. & Eng. R. Cas. 639; *Philadelphia, etc., R. Co. v. Hogeland*, 66 Md. 149, 59 Am. Rep. 159.

Massachusetts. — *Shaw v. Boston, etc., R. Corp.*, 8 Gray (Mass.) 45; *Favor v. Boston, etc., R. Corp.*, 114 Mass. 350, 19 Am. Rep. 364.

Michigan. — *Kelly v. Michigan Cent. R. Co.*, 65 Mich. 186, 8 Am. St. Rep. 876, 28 Am. & Eng. R. Cas. 633.

Missouri. — *Welsch v. Hannibal, etc., R. Co.*, 72 Mo. 451, 37 Am. Rep. 440, 6 Am. & Eng. R. Cas. 75.

Minnesota. — *Klotz v. Winona, etc., R. Co.*, (Minn. 1897) 71 N. W. Rep. 257.

New Hampshire. — *Hall v. Brown*, 54 N. H. 495.

Nevada. — *Cohen v. Eureka, etc., R. Co.*, 14 Nev. 376.

New York. — *McGrath v. New York Cent., etc., R. Co.*, 59 N. Y. 471, 17 Am. Rep. 359, reversing 1 Hun (N. Y.) 437.

North Carolina. — *Rigler v. Charlotte, etc., R. Co.*, 94 N. Car. 604, 26 Am. & Eng. R. Cas. 386; *Randall v. Richmond, etc., R. Co.*, 104 N. Car. 410, 42 Am. & Eng. R. Cas. 603.

Ohio. — *Pittsburgh, etc., R. Co. v. Maurer*, 21 Ohio St. 421.

Oregon. — *McBride v. Northern Pac. R. Co.*, 19 Oregon 64, 42 Am. & Eng. R. Cas. 146.

Pennsylvania. — *North Pennsylvania R. Co. v. Heileman*, 49 Pa. St. 64, 88 Am. Dec. 482; *Lehigh Valley R. Co. v. Brandtmaier*, 113 Pa. St. 610.

South Carolina. — *Zeigler v. Northeastern R. Co.*, 5 S. Car. 221.

West Virginia. — *Beyel v. Newport News, etc., R. Co.*, 34 W. Va. 538, 45 Am. & Eng. R. Cas. 188.

3. Each in the Exercise of a Lawful Right. — See *Glass v. Memphis, etc., R. Co.*, 94 Ala. 581; *Jennings v. St. Louis, etc., R. Co.*, 112 Mo. 268; *Henry v. Grand Ave. R. Co.*, 113 Mo. 525; *Brand v. Schenectady, etc., R. Co.*, 8 Barb. (N. Y.) 368; *McGrath v. New York Cent., etc., R. Co.*, 59 N. Y. 471, 17 Am. Rep. 359, reversing 1 Hun (N. Y.) 437; *Brand v. Schenectady, etc., R. Co.*, 8 Barb. (N. Y.) 368.

Both Have Common Right of Way. — *Toledo, etc., R. Co. v. Goddard*, 25 Ind. 185; *Indianapolis, etc., R. Co. v. McLin*, 82 Ind. 435, 8 Am. & Eng. R. Cas. 237; *Herlich v. Louisville, etc., R. Co.*, 44 La. Ann. 280; *Baltimore, etc., R. Co. v. Owings*, 65 Md. 502, 28 Am. & Eng. R. Cas. 639; *Shaw v. Boston, etc., R. Corp.*, 8 Gray (Mass.) 45; *Hall v. Brown*, 54 N. H. 495; *McGrath v. New York Cent., etc., R. Co.*, 59 N. Y. 471, 17 Am. Rep. 359, reversing

injured and the other avoid inflicting injury.¹

b. DEGREE OF CARE REQUIRED OF EACH. — As a general rule the same degree of care is required of each,² such care being commensurate with the danger or risk involved.³ The question as to what will constitute due care in

1 Hun (N. Y.) 437; Pennsylvania R. Co. v. Heileman, 49 Pa. St. 64, 88 Am. Dec. 482.

Point of Crossing. — In Brunswick, etc., R. Co. v. Gibson, 97 Ga. 489, it was contended that the injured party had not crossed the street at the place generally used by the public. In passing upon the question, the court said: "It is true that in most cities streets are usually crossed at certain points, generally at the intersection of other streets, but there is no law which requires people to cross only at such places. If the street is a public one, people have a right to cross it at any place along its line, and the law will protect them from being run over, either by ordinary vehicles or railroad trains. The only difference in the duty of a railroad company towards persons crossing at the usual places of crossing and towards those crossing at other places in the street, is in the greater degree of care required in the one case than in the other. On the other hand, there is a corresponding duty on the part of persons who cross the street elsewhere than at the usual crossings, to exercise a greater degree of care for their own protection than would be required of them at such crossings."

In *Henry v. Grand Ave. R. Co.*, 113 Mo. 525, it was held that pedestrians might walk along and across streets at any point they saw fit, provided they were in the exercise of due care and caution.

1. Cohen v. Eureka, etc., R. Co., 14 Nev. 376; *Zeigler v. Northeastern R. Co.*, 5 S. Car. 221; *Hanlon v. Missouri Pac. R. Co.*, 104 Mo. 381; *Leavenworth, etc., R. Co. v. Rice*, 10 Kan. 426; *Chicago, etc., R. Co. v. Williams*, 56 Kan. 333. See also *Galena, etc., Union R. Co. v. Dill*, 22 Ill. 265.

One must look for the approach of trains, and the other must give signals and warning of approach. *Chicago, etc., R. Co. v. Hatch*, 79 Ill. 137.

Blind Persons. — The blind have as much right to frequent railroad depots, public crossings, and other places of danger, as any other of the general public; but, when they do so, due care dictates that they must provide themselves with such surroundings while there, as are reasonably necessary to avoid upon their part all the known dangers that encompass the place. *Florida Cent., etc., R. Co. v. Williams*, 37 Fla. 406.

2. The Same Degree of Care Required of Each — *United States.* — *Schofield v. Chicago, etc., R. Co.*, 2 McCrary (U. S.) 268; *Thomas v. Delaware, etc., R. Co.*, 8 Fed. Rep. 731, 19 Blatchf. (U. S.) 533; *Texas, etc., R. Co. v. Cody*, 166 U. S. 606; *Continental Imp. Co. v. Stead*, 95 U. S. 161; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 49 Am. & Eng. R. Cas. 323.

Illinois. — *Chicago, etc., R. Co. v. Still*, 19 Ill. 499, 71 Am. Dec. 236.

Indiana. — *Leavitt v. Terre Haute, etc., R. Co.*, 5 Ind. App. 513; *Indianapolis, etc., R. Co.*

v. McLin, 82 Ind. 435, 8 Am. & Eng. R. Cas. 237; *Louisville, etc., R. Co. v. Stommel*, 126 Ind. 35.

Kansas. — *Leavenworth, etc., R. Co. v. Rice*, 10 Kan. 426.

Kentucky. — *Louisville, etc., R. Co. v. Goetz*, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627.

Maine. — *Whitney v. Maine Cent., R. Co.*, 69 Me. 208.

Maryland. — *Philadelphia, etc., R. Co. v. Hogeland*, 66 Md. 149, 59 Am. Rep. 159.

Massachusetts. — *Shaw v. Boston, etc., R. Corp.*, 8 Gray (Mass.) 45; *Bailey v. New Haven, etc., Co.*, 107 Mass. 497; *Favor v. Boston, etc., R. Corp.*, 114 Mass. 350, 19 Am. Rep. 364. See also *Bradley v. Boston, etc., R. Co.*, 2 Cush. (Mass.) 539.

Missouri. — *Eswin v. St. Louis, etc., R. Co.*, 96 Mo. 290.

Nevada. — *Cohen v. Eureka, etc., R. Co.*, 14 Nev. 376.

New Hampshire. — *Hall v. Brown*, 54 N. H. 495.

North Carolina. — *Randall v. Richmond, etc., R. Co.*, 104 N. Car. 410.

Pennsylvania. — *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259, 98 Am. Dec. 346.

West Virginia. — *Beyel v. Newport News, etc., R. Co.*, 34 W. Va. 538, 45 Am. & Eng. R. Cas. 188.

See also *Reed v. Chicago, etc., R. Co.*, 74 Iowa 188.

Electric Cars. — In *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551, it was held that at a street crossing, as high a degree of care was required of those in charge of an electric street car as of those driving other vehicles.

3. Care Commensurate with Danger. — *Haas v. Grand Rapids, etc., R. Co.*, 47 Mich. 401, 8 Am. & Eng. R. Cas. 268, following *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274; *Louisville, etc., R. Co. v. Stommel*, 126 Ind. 35; *Leavitt v. Terre Haute, etc., R. Co.*, 5 Ind. App. 513; *Florida Cent., etc., R. Co. v. Williams*, 37 Fla. 406; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 49 Am. & Eng. R. Cas. 323; *Texas, etc., R. Co. v. Cody*, 166 U. S. 606. See *infra*, this section, *Duty of Railroad Company*.

Crowded Streets. — While railroads are held to strict observance of all precautions necessary for the protection of the public in crossing the crowded streets of cities, there is also an obligation on the part of the public to be vigilant and attentive when passing such crossings. *White v. Vicksburg, etc., R. Co.*, 42 La. Ann. 990 [quoted in *Herlich v. Louisville, etc., R. Co.*, 44 La. Ann. 280]; *Florida Cent., etc., R. Co. v. Williams*, 37 Fla. 406.

The obligation resting upon each to use proper care and diligence increases as the highway becomes more crowded. *Chicago, etc., R. Co. v. Gretzner*, 46 Ill. 74.

Place Unusually Hazardous. — Where it is well known to the servants of a railroad company and a person injured at a road crossing, that

a particular case must necessarily depend upon the existing state of circumstances at the time of the injury.¹

c. SUPERIOR RIGHT OF PASSAGE. — While in a sense the rights of travelers and a railroad company upon a highway crossing are equal, yet in respect to the priority of passage the right of the latter is superior,² such right being derived from the consideration due to public convenience and the difficulties and delay which would otherwise result.³

2. Duty of Railroad Company — *a. IN GENERAL.* — It is the duty of the railroad company in running its trains to use ordinary care and prudence to guard against injury to the person or property of those who may travel on the public highway, and have occasion to cross its tracks;⁴ ordinary care being

such place is unusually hazardous, it is the duty of both parties to use more care than at ordinary crossings where the danger is not so great. *Wabash, etc., R. Co. v. Wallace*, 110 Ill. 114, 19 Am. & Eng. R. Cas. 359.

Dark Crossing. — Where a person was injured on a dark night at a crossing not lighted, it was held that the danger being increased by the darkness a greater degree of care was required both of the company and of one crossing the tracks. *Texas, etc., R. Co. v. Cody*, 166 U. S. 606.

1. See *infra*, *Duty of Railroad Company*.

2. Superior Right of Passage — *United States.* — *Continental Imp. Co. v. Stead*, 95 U. S. 161; *Thomas v. Delaware, etc., R. Co.*, 8 Fed. Rep. 731; *Morris v. Chicago, etc., R. Co.*, 26 Fed. Rep. 22.

Illinois. — *Chicago, etc., R. Co. v. Lee*, 87 Ill. 454.

Indiana. — *Indianapolis, etc., R. Co. v. McLin*, 82 Ind. 435, 8 Am. & Eng. R. Cas. 237; *Louisville, etc., R. Co. v. Phillips*, 112 Ind. 59, 2 Am. St. Rep. 155, 31 Am. & Eng. R. Cas. 432; *Ohio, etc., R. Co. v. Walker*, 113 Ind. 196, 32 Am. & Eng. R. Cas. 121.

Iowa. — *Black v. Burlington, etc., R. Co.*, 38 Iowa 515.

Kentucky. — *Louisville, etc., R. Co. v. Goetz*, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627.

Maryland. — *Philadelphia, etc., R. Co. v. Hogeland*, 66 Md. 149, 59 Am. Rep. 159.

Missouri. — *Eswin v. St. Louis, etc., R. Co.*, 96 Mo. 290.

Pennsylvania. — *Newhard v. Pennsylvania R. Co.*, 153 Pa. St. 417, 55 Am. & Eng. R. Cas. 258.

Utah. — *Wilson v. Southern Pac. Co.*, 13 Utah 352.

Conditional Right. — The company is entitled to the right of precedence on condition that it give reasonable and timely warning of the approach of its trains, and a failure to give such warning is negligence. *Indianapolis, etc., R. Co. v. McLin*, 82 Ind. 435, 8 Am. & Eng. R. Cas. 237; *Olsen v. Oregon Short Line, etc., R. Co.*, 9 Utah 129; *Continental Imp. Co. v. Stead*, 95 U. S. 161.

An instruction that asserts an absolute right of way in a railroad company over its track as against all foot passengers and vehicles at crossings, without regard to the circumstances, is properly refused. Such right of way is not absolute. *Chicago West Div. R. Co. v. Ingraham*, 33 Ill. App. 351.

Regular Trains. — The rule of law that trains have an absolute right of way as against per-

sons crossing the track only applies to regular trains running on schedule time, and does not apply to a switch-train that is liable to move back and forth at any time. *Northern Pac. R. Co. v. Holmes*, 3 Wash. Ter. 543.

How Far Company's Right Exclusive. — The right of the public in a highway crossing a railroad is simply a right of passage across the railroad, and no individual has the right to commit a trespass upon the company's property within the limits of the highway crossing, which is for the purpose of passage from one side of the railroad to the other; and any other use thereof, whether between the tracks or rails, is unwarranted. The right of way and of use, when not used or required for such passage, belongs to the railroad company, and may be used by it in the same manner as if no street crossing was there. *Kelly v. Michigan Cent. R. Co.*, 65 Mich. 186, 8 Am. St. Rep. 876, 28 Am. & Eng. R. Cas. 633.

3. Derivation of Right. — *Chicago, etc., R. Co. v. Lee*, 87 Ill. 454; *Continental Imp. Co. v. Stead*, 95 U. S. 161; *Eswin v. St. Louis, etc., R. Co.*, 96 Mo. 290.

Where a railroad crosses a highway at grade, trains upon the one and teams upon the other have each a legal right to cross, and each has the right to require the exercise of due care on the part of the other; but from the greater speed of the trains, the greater difficulty of stopping them, and the requirements of public travel thereon, the trains have precedence. *Morris v. Chicago, etc., R. Co.*, 26 Fed. Rep. 22. See also *Eswin v. St. Louis, etc., R. Co.*, 96 Mo. 290, 35 Am. & Eng. R. Cas. 390.

4. Ordinary Care on Part of Company — *England.* — *Stubley v. London, etc., R. Co.*, L. R. 1 Exch. 13.

United States. — *Thomas v. Delaware, etc., R. Co.*, 8 Fed. Rep. 729, 19 Blatchf. (U. S.) 533; *Continental Imp. Co. v. Stead*, 95 U. S. 161; *Texas, etc., R. Co. v. Cody*, 166 U. S. 606.

Illinois. — *Chicago, etc., R. Co. v. Hatch*, 79 Ill. 137; *Chicago, etc., R. Co. v. Gretzner*, 46 Ill. 75; *Galena, etc., Union R. Co. v. Dill*, 22 Ill. 265; *St. Louis, etc., R. Co. v. Manly*, 58 Ill. 300; *Toledo, etc., R. Co. v. Jones*, 76 Ill. 311; *Chicago, etc., R. Co. v. Perkins*, 125 Ill. 127; *Peoria, etc., Union R. Co. v. Herman*, 39 Ill. App. 287.

Iowa. — *Willoughby v. Chicago, etc., R. Co.*, 37 Iowa 432.

Kentucky. — *Louisville, etc., R. Co. v. Com.*, 13 Bush (Ky.) 390, 26 Am. Rep. 205; *Louisville, etc., R. Co. v. Goetz*, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627.

that degree of care which a person of ordinary prudence is presumed to use, under the particular circumstances, to avoid injury, and should be in proportion to the danger to be avoided and the consequences involved in its neglect.¹

Extraordinary Care. — A railroad company is not required to use extraordinary care in running its trains, except under circumstances of peculiar danger,² and is not bound to guard against accidents extraordinary in their nature, the occurrence of which could not have been reasonably anticipated.³

Maryland. — *State v. Philadelphia, etc., R. Co.*, 47 Md. 76.

Massachusetts. — *Shaw v. Boston, etc., R. Corp.*, 8 Gray (Mass.) 45; *Bailey v. New Haven, etc., Co.*, 107 Mass. 497; *Com. v. Boston, etc., R. Corp.*, 101 Mass. 201; *Bradley v. Boston, etc., R. Co.*, 2 Cush. (Mass.) 539.

New Jersey. — *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Morris, etc., R. Co. v. Haslan*, 33 N. J. L. 147.

New York. — *Harty v. New York Cent. R. Co.*, 42 N. Y. 468; *Wilds v. Hudson River Co.*, 24 N. Y. 430; *Fero v. Buffalo, etc., R. Co.*, 22 N. Y. 209, 78 Am. Dec. 178; *Beisiegel v. New York Cent. R. Co.*, 34 N. Y. 622, 90 Am. Dec. 741; *McGrath v. New York Cent., etc., R. Co.*, 59 N. Y. 471, 17 Am. Rep. 359, *reversing* 1 Hun (N. Y.) 437.

Ohio. — *Harriman v. Pittsburgh, etc., R. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507.

Texas. — *Texas, etc., R. Co. v. Curlin*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1003; *Texas, etc., R. Co. v. Warren*, (Tex. Civ. App. 1895) 32 S. W. Rep. 578.

Using Track of Another Company. — When one railroad company is by permission using the track and easement of another, the former is held to observe such precautions for the safety of the public at a crossing as shall be fully equivalent to those required by reasonable care and prudence of the latter. *Webb v. Portland, etc., R. Co.*, 57 Me. 117.

Responsibility Cannot Be Avoided. — The company cannot avoid responsibility in this regard by putting up a sign at the crossing that it will not be responsible for injuries. *Chicago, etc., R. Co. v. Reith*, 65 Ill. App. 461.

1. Ordinary Care — What Constitutes. — *Chicago, etc., R. Co. v. Adler*, 129 Ill. 335, 39 Am. & Eng. R. Cas. 666, *affirming* 28 Ill. App. 102; *Toledo, etc., R. Co. v. Goddard*, 25 Ind. 185; *Tetherow v. St. Joseph, etc., R. Co.*, 98 Mo. 74, 14 Am. St. Rep. 617; *Stanley v. Union Depot R. Co.*, 114 Mo. 606; *State v. Manchester, etc. R. Co.*, 52 N. H. 528; *Lamline v. Houston, etc., R. Co.*, 14 Daly (N. Y.) 144; *Houston, etc., R. Co. v. Oram*, 49 Tex. 341; *Houston, etc., R. Co. v. Parker*, 50 Tex. 330; *Norfolk, etc., R. Co. v. Ormsby*, 27 Gratt. (Va.) 455, 17 Am. Ry. Rep. 321.

It is going too far to require that degree of care which any of such persons would take of "his family" placed under like circumstances. *Louisville, etc., R. Co. v. McCoy*, 81 Ky. 403, 15 Am. & Eng. R. Cas. 277.

Care Which Ordinary Prudence Suggests. — In *Hendrickson v. Great Northern R. Co.*, 49 Minn. 245, 32 Am. St. Rep. 540, it was held that a railway company must be exonerated where a collision occurs at the crossing of a public highway, between a traveler on the way and one of its trains, when the company has

used such reasonable care to avoid the collision as ordinary prudence would suggest.

In *International, etc., R. Co. v. Sein*, 11 Tex. Civ. App. 386, it was held error to charge that the railroad company must use "great" care in approaching the crossing.

2. Extraordinary Care. — *Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 1; *Willoughby v. Chicago, etc., R. Co.*, 37 Iowa 432; *Western, etc., R. Co. v. King*, 70 Ga. 261; *Weber v. New York Cent., etc., R. Co.*, 58 N. Y. 451; *Grip-pen v. New York Cent. R. Co.*, 40 N. Y. 34; *Baltimore, etc., R. Co. v. Breinig*, 25 Md. 378, 90 Am. Dec. 49; *Smith v. Maine Cent. R. Co.*, 87 Me. 339.

Full Measure of Care. — Where after charging that the railroad company should exercise all ordinary and reasonable care, the court added, "a full measure of care and diligence — all that could be expected," it was held that such charge was error, the effect of it being to require extraordinary care of the company. *Western, etc., R. Co. v. King*, 70 Ga. 261.

Utmost Care. — So where the court charged "that considering the nature of the business in which the defendant was engaged, and the hazard attending the running of cars in the streets of a city, and particularly on a dark night, the defendant was bound to exercise the utmost care and diligence, and to use all the means and measures of precaution which the highest prudence could suggest, and which it was in its power to employ," it was held error. *Weber v. New York Cent., etc., R. Co.*, 58 N. Y. 451, *distinguishing* *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 75 Am. Dec. 375. See also *Baltimore, etc., R. Co. v. Breinig*, 25 Md. 378, 90 Am. Dec. 49.

High Degree of Care. — In *Ohio, etc., R. Co. v. Buck*, 130 Ind. 300, which was an action against a railway company to recover damages received at a crossing, it appeared that the lower court instructed the jury that it was the defendant's duty to exercise a "high degree of care" in approaching the crossing. The court then explained to the jury what amount of care was required. It was held that it could not be said that the jury were misled by the instruction.

The Alabama Law exacts of railroad companies and other common carriers in their use of steam power extraordinary diligence or "that degree of diligence which very careful and prudent men take of their own affairs." *Alabama G. S. R. Co. v. McAlpine*, 71 Ala. 545, 15 Am. & Eng. R. Cas. 544. See also *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621; *Mobile, etc., R. Co. v. Blakely*, 59 Ala. 471.

3. Extraordinary Accidents. — *Shaw v. Boston, etc., R. Corp.*, 8 Gray (Mass.) 45. See also *Taylor v. Long Island R. Co.*, 16 N. Y. App. Div. 1.

Effect upon Duty to Passengers. — In compliance with this duty, however, under no circumstances should the railroad company permit the same to interfere with the higher duty which it owes to its passengers.¹

b. CARE COMMENSURATE WITH DANGER — (1) *Generally.* — While, as a general rule, the railroad company is bound to exercise only ordinary care, yet in cases where unusual peril and risk may result to persons and property, the company must use care and caution commensurate with such existing dangers.²

(2) *In Populous Places.* — Thus a greater degree of care and caution is required in running its trains through towns and cities, over public crossings, or in the vicinity of railroad stations, on account of the risk of accidents at such places.³

It is not negligent to omit a precaution which, if taken, would have prevented the injury, when the injury could not reasonably have been anticipated, and would not, unless under exceptional circumstances, have happened from the omission. *Sutton v. New York Cent., etc., R. Co.*, 66 N. Y. 243.

1. **Not in Conflict with Duty to Passengers.** — *Bailey v. Hartford, etc., Valley R. Co.*, 56 Conn. 444, 37 Am. & Eng. R. Cas. 483. See also *Chicago, etc., R. Co. v. Dunn*, 61 Ill. 385, 12 Am. Ry. Rep. 427. And see generally the title CARRIERS OF PASSENGERS, vol. 5, p. 474.

2. **Care Commensurate with Danger** — *United States*. — *Continental Imp. Co. v. Stead*, 95 U. S. 161; *Thomas v. Delaware, etc., R. Co.*, 8 Fed. Rep. 729, 19 Blatchf. (U. S.) 533.

Alabama. — *Louisville, etc., R. Co. v. Webb*, 97 Ala. 308; *East Tennessee, etc., R. Co. v. Deaver*, 79 Ala. 221; *Memphis, etc., R. Co. v. Womack*, 84 Ala. 149; *Frazer v. South, etc., Alabama R. Co.*, 81 Ala. 185, 60 Am. Rep. 145; *Ensley R. Co. v. Chewing*, 93 Ala. 29; *Highland Ave., etc., R. Co. v. Sampson*, 91 Ala. 564; *Georgia Pac. R. Co. v. Lee*, 92 Ala. 271; *Savannah, etc., R. Co. v. Meadors*, 95 Ala. 137.

California. — *Strong v. Sacramento, etc., R. Co.*, 61 Cal. 326, 8 Am. & Eng. R. Cas. 273; *Nehrbas v. Central Pac. R. Co.*, 62 Cal. 320, 14 Am. & Eng. R. Cas. 670.

Connecticut. — *Andrews v. New York, etc., R. Co.*, 60 Conn. 293.

Illinois. — *Galena, etc., Union R. Co. v. Dill*, 22 Ill. 265; *Chicago, etc., R. Co. v. Stumps*, 69 Ill. 409; *Wabash, etc., R. Co. v. Wallace*, 110 Ill. 114, 19 Am. & Eng. R. Cas. 359.

Indiana. — *Lake Shore, etc., R. Co. v. McIntosh*, 140 Ind. 261.

Kansas. — *Leavenworth, etc., R. Co. v. Rice*, 10 Kan. 426.

Maryland. — *Philadelphia, etc., R. Co. v. Hogeland*, 66 Md. 149, 59 Am. Rep. 159.

Michigan. — *Guggenheim v. Lake Shore, etc., R. Co.*, 66 Mich. 150.

Missouri. — *Karle v. Kansas City, etc., R. Co.*, 55 Mo. 476; *Hicks v. Pacific R. Co.*, 64 Mo. 430, 17 Am. Ry. Rep. 273; *Harlan v. St. Louis, etc., R. Co.*, 65 Mo. 22; *Welsch v. Hannibal, etc., R. Co.*, 72 Mo. 451, 37 Am. Rep. 440, 6 Am. & Eng. R. Cas. 75; *Frick v. St. Louis, etc., R. Co.*, 75 Mo. 595, 8 Am. & Eng. R. Cas. 280.

New Jersey. — *New York, etc., R. Co. v. Randel*, 47 N. J. L. 144, 23 Am. & Eng. R. Cas. 308; *Telfer v. Northern R. Co.*, 30 N. J. L. 193.

New York. — *Beisiegel v. New York Cent. R. Co.*, 34 N. Y. 622, 90 Am. Dec. 741; *MacKay v. New York Cent. R. Co.*, 35 N. Y. 75; *Grippen v. New York Cent. R. Co.*, 40 N. Y. 34; *Cordell v. New York Cent., etc., R. Co.*, 75 N. Y. 330.

Pennsylvania. — *Philadelphia, etc., R. Co. v. Hagan*, 47 Pa. St. 244, 86 Am. Dec. 541.

Virginia. — *Norfolk, etc., R. Co. v. Ormsby*, 27 Gratt. (Va.) 455.

Number of Tracks. — In *Lake Shore, etc., R. Co. v. Johnsen*, 135 Ill. 641, it was said that railroad companies must observe unusual care and take extra precautions to avoid injury to persons passing along the streets or sidewalks, when they cover a public street with a large number of tracks. See also *Kentucky Cent. R. Co. v. Smith*, 93 Ky. 449.

Climbing Over Cars at Crossing. — Where a railroad company is in the habit of obstructing a crossing with its trains, and knows that it is the custom of travelers to crawl under, climb over, or go around the same, it is the duty of the company to move its trains with due regard to this custom. *Atchison, etc., R. Co. v. Cross*, 58 Kan. 424.

In *Carmer v. Chicago, etc., R. Co.*, 95 Wis. 513, it was held that under like circumstances it was for the jury to say whether the company ought to have anticipated that a person was on the track, and whether greater precautions should have been taken.

Care to Be Observed Towards Children. — In *Norfolk, etc., R. Co. v. Ormsby*, 27 Gratt. (Va.) 455, it was held that where a company ran its trains through the streets of a city where many children lived, the greatest care should be used by the company and its agents to prevent injury to the children on the streets.

3. **In Populous Places** — *United States*. — *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 49 Am. & Eng. R. Cas. 323.

Alabama. — *Louisville, etc., R. Co. v. Webb*, 97 Ala. 308; *East Tennessee, etc., R. Co. v. Deaver*, 79 Ala. 221; *Memphis, etc., R. Co. v. Womack*, 84 Ala. 149; *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 168, 5 Am. St. Rep. 354; *Frazer v. South, etc., Alabama R. Co.*, 81 Ala. 185, 60 Am. Rep. 145; *Savannah, etc., R. Co. v. Meadors*, 95 Ala. 137; *Georgia Pac. R. Co. v. Lee*, 92 Ala. 271.

California. — *Wilson v. Cunningham*, 3 Cal. 241, 58 Am. Dec. 407.

Illinois. — *Chicago, etc., R. Co. v. Stumps*, 69 Ill. 409; *Illinois Cent. R. Co. v. Ebert*, 74 Ill. 399; *Lake Shore, etc., R. Co. v. Johnsen*,

(3) *Where View Is Obstructed*—**Extra Danger.**—Where a railroad company has created an extra danger it is bound to use extra precautions; and if the track is put in a position where the trains, when close to their transit over a public street or highway, cannot be seen, this is an extra danger calling for more than ordinary caution.¹

135 Ill. 641, *affirming* 35 Ill. App. 430; Cleveland, etc., R. Co. v. Doerr, 41 Ill. App. 530.

Kentucky.—Louisville, etc., R. Co. v. Goetz, 79 Ky. 442, 42 Am. Rep. 227; Central Pass. R. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. Rep. 309, 32 Am. & Eng. R. Cas. 16; Paducah, etc., R. Co. v. Hoehl, 12 Bush (Ky.) 41; Illinois Cent., R. Co. v. Dick, 91 Ky. 434.

Louisiana.—Curley v. Illinois Cent. R. Co., 40 La. Ann. 810.

Missouri.—Harlan v. St. Louis, etc., R. Co., 65 Mo. 22; Frick v. St. Louis, etc., R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280; Werner v. Citizens' R. Co., 81 Mo. 368; Hicks v. Pacific R. Co., 64 Mo. 430, 17 Am. Ry. Rep. 273; Harlan v. St. Louis, etc., R. Co., 65 Mo. 22.

New York.—Costello v. Syracuse, etc., R. Co., 65 Barb. (N. Y.) 103; Johnson v. Hudson River R. Co., 6 Duer (N. Y.) 641, *affirmed* 20 N. Y. 65, 75 Am. Dec. 375; Zimmer v. New York Cent., etc., R. Co., 7 Hun (N. Y.) 552, *affirmed* 67 N. Y. 601; Fero v. Buffalo, etc., R. Co., 22 N. Y. 209, 78 Am. Dec. 178; Beisiegel v. New York Cent. R. Co., 34 N. Y. 622, 90 Am. Dec. 741; Bleyle v. New York Cent., etc., R. Co., (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675; Grippen v. New York Cent. R. Co., 40 N. Y. 34.

North Carolina.—Troy v. Cape Fear, etc., R. Co., 99 N. Car. 298, 6 Am. St. Rep. 521.

Ohio.—Cleveland, etc., R. Co. v. Schneider, 45 Ohio St. 678, 35 Am. & Eng. R. Cas. 334.

Pennsylvania.—Philadelphia, etc., R. Co. v. Hagan, 47 Pa. St. 244, 86 Am. Dec. 541; Philadelphia, etc., R. Co. v. Long, 75 Pa. St. 257.

Tennessee.—Little Rock, etc., R. Co. v. Wilson, 90 Tenn. 271.

Virginia.—Norfolk, etc., R. Co. v. Ormsby, 27 Gratt. (Va.) 455.

Wisconsin.—Kinney v. Crocker, 18 Wis. 80; Butler v. Milwaukee, etc., R. Co., 28 Wis. 487; Ferguson v. Wisconsin Cent. R. Co., 63 Wis. 148.

Precautions Necessarily Limited.—In an action to recover damages for injuries received by the plaintiff at a crossing on the defendant's road, an instruction "that considering the nature of the business in which the defendant was engaged, and the hazard attending the running of cars in the streets of a city, and particularly on a dark night, the defendant was bound to exercise the utmost care and diligence, and to use all the means and measures of precaution which the highest prudence could suggest and which it was in its power to employ," was held error on the ground that such precautions would absolutely prevent all injuries except those occasioned by the wilful act of the party injured. Weber v. New York Cent., etc., R. Co., 58 N. Y. 451.

Prescribing Certain Precautions Does Not Exclude Others.—The general duties and liabilities of railroad companies at public and private crossings, provided for in *Maine* Rev. Stat., c. 51, §§ 15, 19, do not express all the precautions

necessary to avoid injuries on city thoroughfares. The legislature does not undertake to define or point out all the precautions which reasonable and ordinary care may require at such places. Webb v. Portland, etc., R. Co., 57 Me. 117.

And so municipal ordinances prescribing certain precautions to be observed by railroads in using the city's street crossings do not absolve them from the exercise of ordinary care in other particulars not mentioned in the ordinances, but required by the general law of the land. Wilkins v. St. Louis, etc., R. Co., 101 Mo. 93; Peoria, etc., Union R. Co. v. Herman, 39 Ill. App. 287; Chicago, etc., R. Co. v. Perkins, 125 Ill. 127; Grand Trunk R. Co. v. Ives, 144 U. S. 408.

1. Where View Is Obstructed—*United States.*—Continental Imp. Co. v. Stead, 95 U. S. 161.

California.—Nehrbas v. Central Pac. R. Co., 62 Cal. 320, 14 Am. & Eng. R. Cas. 670.

Illinois.—Chicago, etc., R. Co. v. McGaha, 19 Ill. App. 342; Peoria, etc., R. Co. v. Siltman, 88 Ill. 529; Chicago, etc., R. Co. v. Dillon, 123 Ill. 570, 5 Am. St. Rep. 559, 32 Am. & Eng. R. Cas. 1.

Iowa.—Funston v. Chicago, etc., R. Co., 61 Iowa 452, 14 Am. & Eng. R. Cas. 640.

Michigan.—Haas v. Grand Rapids, etc., R. Co., 47 Mich. 401, 8 Am. & Eng. R. Cas. 268.

Minnesota.—Loucks v. Chicago, etc., R. Co., 31 Minn. 526, 19 Am. & Eng. R. Cas. 305.

New Jersey.—Pennsylvania R. Co. v. Matthews, 36 N. J. L. 531; New York, etc., R. Co. v. Randel, 47 N. J. L. 144, 23 Am. & Eng. R. Cas. 308.

New York.—Mackay v. New York Cent. R. Co., 35 N. Y. 75; Richardson v. New York Cent. R. Co., 45 N. Y. 846; Cordell v. New York Cent., etc., R. Co., 70 N. Y. 119, 26 Am. Rep. 550.

Texas.—Missouri, etc., R. Co. v. Rogers, (Tex. 1897) 40 S. W. Rep. 956.

See also Illinois Cent. R. Co. v. Benton, 69 Ill. 174; Rockford, etc., R. Co. v. Hillmer, 72 Ill. 235; Ohio, etc., R. Co. v. Clutter, 82 Ill. 123; Prescott v. Eastern R. Co., 113 Mass. 370; Craig v. New York, etc., R. Co., 118 Mass. 431; Kelly v. St. Paul, etc., R. Co., 29 Minn. 1, 6 Am. & Eng. R. Cas. 93; Pennsylvania R. Co. v. Matthews, 36 N. J. L. 531. See *infra*, this section, *Duty to Give Signals*.

Decreased Speed.—Where the view was obstructed so that parties crossing the railroad could not see an approaching train, it was held that the latter should have approached the crossing at a less rate of speed, and used increased diligence to give warning of its approach. Continental Imp. Co. v. Stead, 95 U. S. 161.

Signals at Farm Crossings.—So in Thomas v. Delaware, etc., R. Co., 8 Fed. Rep. 729, it was held that although there is no statutory requirement to ring a bell or sound a whistle at a farm crossing, it does not follow that the omission to do so when the crossing is ob-

Company Chargeable with Notice. — In such cases the railroad company is chargeable with notice of all the perilous circumstances of a crossing, occasioned by its own act, and due care and caution should attend all its actions in thus dealing with a known danger.¹

Illustrations. — Thus where the view is obstructed by curves or cuts,² standing cars,³ buildings,⁴ or underbrush,⁵ a greater degree of care and caution is required on the part of the railroad company.

Question of Fact. — And whether such acts will in themselves constitute negligence is a question for the jury.⁶

Signals — Speed of Train. — In all such cases it is the duty of the railroad company to use all precautions to avoid accidents, not only by complying with the requirements as to signals,⁷ but to approach the crossing at a rate of speed

structed is not a circumstance to be considered in determining the question of negligence.

1. Company Chargeable with Notice of Condition of Crossing. — *Chicago, etc., R. Co. v. Payne*, 59 Ill. 541; *Rockford, etc., R. Co. v. Hillmer*, 72 Ill. 235; *Atchison, etc., R. Co. v. Parsons*, 42 Ill. App. 93.

A traveler has a right to assume that the railroad company will use more care, in view of the obstructed condition of the crossing, than ordinary. *Thomas v. Delaware, etc., R. Co.*, 8 Fed. Rep. 729, 19 Blatchf. (U. S.) 533.

2. View Obstructed by Curves or Cuts. — *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313, 7 Am. Ry. Rep. 365; *Chicago, etc., R. Co. v. Triplett*, 38 Ill. 482; *Richmond, etc., R. Co. v. Johnston*, 89 Ga. 560.

Warning Ineffectual. — If the bell and whistle on trains approaching a crossing can give no warning to persons on the highway, because of a high intervening bank, then the company is bound to employ some other means of giving warning. *Roberts v. Chicago, etc., R. Co.*, 35 Wis. 679.

3. View Obstructed by Standing Cars. — *Thomas v. Delaware, etc., R. Co.*, 8 Fed. Rep. 729, 19 Blatchf. (U. S.) 533; *Anderson v. New York, etc., R. Co.*, (Supreme Ct.) 25 N. Y. St. Rep. 158, 53 Hun (N. Y.) 633, 2 Silv. (N. Y.) 9, *affirmed* in 125 N. Y. 701, 34 N. Y. St. Rep. 1012; *Blayle v. New York Cent., etc., R. Co.*, (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675, *affirmed* in 113 N. Y. 626, 22 N. Y. St. Rep. 993; *Houston, etc., R. Co. v. Wilson*, 60 Tex. 142.

Accumulation of Cars at Crossing. — Where there is no statute which provides that a railroad company shall not permit an accumulation of cars upon its side tracks at a crossing, so as to obstruct the hearing or view of an approaching train, it is error to instruct the jury that such an act constitutes negligence. It is for the jury to say, under proper instructions, whether the acts of a railroad company in leaving cars at a crossing are negligent or not. *Dillingham v. Parker*, 80 Tex. 572; *Missouri, etc., R. Co. v. Rogers*, (Tex. 1897) 40 S. W. Rep. 956.

A finding by the trial court that such an act is negligence under the circumstances will be affirmed on appeal when supported by the evidence. *Houston, etc., R. Co. v. Stewart*, (Tex. 1891) 17 S. W. Rep. 33.

In *Chicago, etc., R. Co. v. Nelson*, 59 Ill. App. 308, it was held that it was not negli-

gence for the company to maintain telegraph poles on the right of way or permit cars to stand on its track so as to obstruct the view. See also *Chicago, etc., R. Co. v. Johnson*, 61 Ill. App. 464.

4. View Obstructed by Building. — *Richardson v. New York Cent. R. Co.*, 45 N. Y. 846; *Mackey v. New York Cent. R. Co.*, 35 N. Y. 75.

Negligence in Erecting Watch-house. — The erection of a flagman's watch-house near a railroad track at a crossing so as to prevent a view of approaching trains is not negligence *per se*. *Central R. Co. v. Feller*, 84 Pa. St. 226, 18 Am. Ry. Rep. 369.

5. View Obstructed by Underbrush. — *Rockford, etc., R. Co. v. Hillmer*, 72 Ill. 235; *Indianapolis, etc., R. Co. v. Smith*, 78 Ill. 112; *Ohio, etc., R. Co. v. Clutter*, 82 Ill. 123. See also *Dimick v. Chicago, etc., R. Co.*, 80 Ill. 338.

Negligence. — It is negligence for a company to permit weeds, etc., to grow upon its right of way to such a height as materially to obstruct the view at a highway crossing and for an injury that might have been avoided but for such obstruction the company will be liable. *Indianapolis, etc., R. Co. v. Smith*, 78 Ill. 112; *Chicago, etc., R. Co. v. Tilton*, 29 Ill. App. 95; *Terre Haute, etc., R. Co. v. Barr*, 31 Ill. App. 57; *Chicago, etc., R. Co. v. Lee*, 87 Ill. 454; *Ohio, etc., R. Co. v. Clutter*, 82 Ill. 123.

6. Negligence Question for Jury. — *Atchison, etc., R. Co. v. Willey*, 57 Kan. 764; *Galveston, etc., R. Co. v. Michalke*, 90 Tex. 276; *Klotz v. Winona, etc., R. Co.*, (Minn. 1897) 71 N. W. Rep. 257.

7. Duty to Give Signals — Georgia. — *Richmond, etc., R. Co. v. Johnston*, 89 Ga. 560.

Illinois. — *Chicago, etc., R. Co. v. Triplett*, 38 Ill. 482; *Chicago, etc., R. Co. v. Dillon*, 123 Ill. 570, 5 Am. St. Rep. 559, 32 Am. & Eng. R. Cas. 1, *affirming* 24 Ill. App. 203.

Minnesota. — *Loucks v. Chicago, etc., R. Co.*, 31 Minn. 526, 19 Am. & Eng. R. Cas. 305.

Missouri. — *Frick v. St. Louis, etc., R. Co.*, 75 Mo. 595, 8 Am. & Eng. R. Cas. 280.

New York. — *Blayle v. New York Cent., etc., R. Co.*, (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675, *affirmed* in 113 N. Y. 626, 22 N. Y. St. Rep. 993; *Hermans v. New York Cent., etc., R. Co.*, (Supreme Ct.) 17 N. Y. Supp. 319, 63 Hun (N. Y.) 625, 43 N. Y. St. Rep. 900, *affirmed* in 137 N. Y. 558, 50 N. Y. St. Rep. 932.

that the enhanced danger would seem to warrant.¹

c. **LOOKOUTS.** — It is the duty of the engineer when his train is in motion to keep a constant lookout for obstructions, and when one is discerned, no matter when or where, he should promptly resort to all means within his power to avert the threatened danger.² Especially does this duty exist at public crossings, where, by virtue of the double user of the public and the railroad company, accidents are much more liable to occur.³

Must Exercise Ordinary Care. — The lookout must exercise ordinary care, and if he fails to discover the peril of persons at the crossing when reasonable attention would have enabled him to do so in time to have prevented the injury, the company will be held liable.⁴

North Carolina. — Hinkle v. Richmond, etc., R. Co., 109 N. Car. 472, 26 Am. St. Rep. 581.

Texas. — Houston, etc., R. Co. v. Wilson, 60 Tex. 142.

See *infra*, this section, *Duty to Give Signals*.

1. **Decreased Speed.** — Chicago, etc., R. Co. v. Dillon, 123 Ill. 570, 5 Am. St. Rep. 559, 32 Am. & Eng. R. Cas. 1, *affirming* 24 Ill. App. 203; Indianapolis, etc., R. Co. v. Stables, 62 Ill. 313, 7 Am. Ry. Rep. 365; Chicago, etc., R. Co. v. Triplett, 38 Ill. 482. See *infra*, this section, *Rate of Speed*.

Where a train is made up of flat cars which are being pushed in front of the engine through a cut, and which cannot be discovered by a person on a highway until the crossing is reached, it is the duty of the company to use every precaution to avoid accidents. The statutory signals should not only be given, but the train run at a low rate of speed. Chicago, etc., R. Co. v. Triplett, 38 Ill. 482.

A verdict is warranted by evidence showing that a person was killed by a train at a crossing near the city limits, where, by reason of the curve in the track, the approaching train could not be easily seen, and such train was running at the rate of from eighteen to thirty miles an hour, with the tender of the engine turned towards the crossing, no signal having been given, except a whistle blown about four hundred yards from the crossing. Richmond, etc., R. Co. v. Johnston, 89 Ga. 560.

The speed of the train may be considered in connection with the location of the roads and the other surrounding circumstances on the question of negligence. Indianapolis, etc., R. Co. v. Stables, 62 Ill. 313, 7 Am. Ry. Rep. 365. See also *Blayle v. New York Cent., etc., R. Co.*, (Supreme Ct.) 11 N. Y. St. Rep. 585.

2. **Lookouts.** — Hilz v. Missouri Pac. R. Co., 101 Mo. 36; Bullock v. Wilmington, etc., R. Co., 105 N. Car. 180, 42 Am. & Eng. R. Cas. 93; East Tennessee, etc., R. Co. v. White, 5 Lea (Tenn.) 540; Railroad Co. v. Walker, 11 Heisk. (Tenn.) 383; Galveston City R. Co. v. Hewitt, 67 Tex. 473, 60 Am. Rep. 32. See also Chicago, etc., R. Co. v. Gomes, 46 Ill. App. 255; St. Louis, etc., R. Co. v. Lewis, 60 Ark. 409; St. Louis, etc., R. Co. v. Roberts, 56 Ark. 387; St. Louis Southwestern R. Co. v. Russell, 62 Ark. 182; Townley v. Chicago, etc., R. Co., 53 Wis. 626; Whalen v. Chicago, etc., R. Co., 75 Wis. 654; Memphis, etc., R. Co. v. Womack, 84 Ala. 149. See *infra*, this section, *Backing Cars*.

Efficiency of Lookout. — The lookout must be as efficient as the circumstances require, and especially so where the chances of access to

the track are greater than usual. Marcott v. Marquette, etc., R. Co., 47 Mich. 1, 4 Am. & Eng. R. Cas. 548.

3. **Special Duty at Crossings** — Alabama, — Frazer v. South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145; Memphis, etc., R. Co. v. Womack, 84 Ala. 149; Ensley R. Co. v. Chewing, 93 Ala. 29; Savannah, etc., R. Co. v. Meadors, 95 Ala. 137; Louisville, etc., R. Co. v. Webb, 97 Ala. 308.

Arkansas. — St. Louis, etc., R. Co. v. Denty, 63 Ark. 177.

California. — Robinson v. Western Pac. R. Co., 48 Cal. 409.

Iowa. — Clampt v. Chicago, etc., R. Co., 84 Iowa 71, 49 Am. & Eng. R. Cas. 468.

Kansas. — Kansas Pac. R. Co. v. Pointer, 14 Kan. 37.

Maine. — Purinton v. Maine Cent. R. Co., 78 Me. 569.

Michigan. — Cooper v. Lake Shore, etc., R. Co., 66 Mich. 261, 11 Am. St. Rep. 482; Marcott v. Marquette, etc., R. Co., 47 Mich. 1, 4 Am. & Eng. R. Cas. 548; Battishill v. Humphreys, 64 Mich. 494, 28 Am. & Eng. R. Cas. 597; Kelly v. Duluth, etc., R. Co., 92 Mich. 19.

Minnesota. — Johnson v. St. Paul, etc., R. Co., 31 Minn. 283, 15 Am. & Eng. R. Cas. 467.

Missouri. — Frick v. St. Louis, etc., R. Co., 75 Mo. 595, 8 Am. & Eng. R. Cas. 280; Halferty v. Wabash, etc., R. Co., 82 Mo. 90.

New York. — Cheney v. New York Cent., etc., R. Co., 16 Hun (N. Y.) 415.

Texas. — Texas, etc., R. Co. v. Lowry, 61 Tex. 149.

Wisconsin. — Heddles v. Chicago, etc., R. Co., 74 Wis. 239, 39 Am. & Eng. R. Cas. 645.

Canada. — Hollinger v. Canadian Pac. R. Co., 21 Ont. Rep. 705.

4. **Must Exercise Ordinary Care.** — East Tennessee, etc., R. Co. v. White, 5 Lea (Tenn.) 540, 8 Am. & Eng. R. Cas. 65; Gulf, etc., R. Co. v. Pendery, (Tex. Civ. App. 1896) 36 S. W. Rep. 793.

Leaving Duty to One Not an Employee. — So where the employees of the company paid no attention to the track ahead, or their duty to give signals, but left such duties to a boy who was riding and ringing the bell for amusement, the company is chargeable with negligence. Chicago, etc., R. Co. v. Ryan, 70 Ill. 211.

The Tennessee Statute (§§ 1166-1168) has been construed to mean that some person shall be so situated on the lookout that he can see ahead. If the engineer cannot see, the fireman must, and if the fireman cannot, the

Precautions as to Persons Seen At or Near Crossing. — The engineer in charge of the train will not be required to stop his train whenever any one is seen on or near the track, for he has a right to presume that such person will not remain in a dangerous position or advance in the face of an approaching train.¹

Limitation. — While this is so as a general rule, yet if the circumstances of the situation are such as to lead a reasonable man to apprehend that injury will result unless the train is stopped, then it is his duty to use all reasonable diligence to avoid such injury.²

d. APPLIANCES FOR PUBLIC SAFETY AT CROSSINGS — (1) *In General.* — As a general rule a railroad company is not bound to provide appliances for the safety of travelers at the crossing unless they shall be so required by statute or ordinance.³ "Courts and juries cannot, whatever may be thought by them of the convenience or necessity of such or other like precautions, at particular crossings, hold the company to provide them under the penalty of being charged with negligence for the omission."⁴

(2) *Gates* — (a) **Duty to Maintain.** — Unless so required by statute or ordinance a railroad company is not required to maintain gates at all highways or streets crossing its line.⁵ And in order to hold the company culpable on the ground

engineer must. *Nashville, etc., R. Co. v. Nowlin*, 1 Lea (Tenn.) 523.

Burden of Proof. — The same statute provides that every railroad which fails to observe the precautions therein mentioned (failure to provide a lookout being the point in issue) shall be responsible for all damages, etc., and "no railroad company that observes or causes these precautions to be observed shall be responsible for any damages done to persons or property on its road." The burden of proof that it has observed the required precautions is on the company. *Railroad Co. v. Walker*, 11 Heisk. (Tenn.) 384.

The Arkansas Statute (Sand. & H. Dig., § 6207) also places the burden, in cases of this kind, on the railroad company. *St. Louis, etc., R. Co. v. Denty*, 63 Ark. 177.

1. **Right to Anticipate Action.** — *Birmingham R., etc., Co. v. Bowers*, 110 Ala. 328; *Burson v. Louisville, etc., R. Co.*, (Ala. 1897) 22 So. Rep. 457; *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576; *Leavitt v. Terre Haute, etc., R. Co.*, 5 Ind. App. 513; *Terre Haute, etc., R. Co. v. Graham*, 46 Ind. 239, 6 Am. Ry. Rep. 358; *Boyd v. Wabash Western R. Co.*, 105 Mo. 371; *Maryland Cent. R. Co. v. Neubeur*, 62 Md. 391, 19 Am. & Eng. R. Cas. 261; *Johnson v. Louisville, etc., R. Co.*, 91 Ky. 651, 13 Am. & Eng. R. Cas. 623; *Spooner v. Delaware, etc., R. Co.*, 115 N. Y. 22, 39 Am. & Eng. R. Cas. 599; *Schmolze v. Chicago, etc., R. Co.*, 83 Wis. 659.

After Due Warning. — Where a railroad train has given a proper warning signal as it approaches an ordinary grade crossing in the open country, it is not required to slow up or stop until a traveler, who has had an opportunity to hear and see the train, has passed the crossing. *Newhard v. Pennsylvania R. Co.*, 153 Pa. St. 417, 55 Am. & Eng. R. Cas. 258.

2. *Leavitt v. Terre Haute, etc., R. Co.*, 5 Ind. App. 513; *Texas, etc., R. Co. v. Roberts*, (Tex. Civ. App. 1896) 37 S. W. Rep. 870; *Louisville, etc., R. Co. v. Howard*, 90 Tenn. 144. See also *International, etc., R. Co. v. Sein*, 11 Tex. Civ. App. 386; *Chicago, etc., R. Co. v. Goebel*, 119 Ill. 515, *affirming* 20 Ill. App. 103.

In Cities and Towns. — While a railroad company has the right to use its own track, and while its engineer ordinarily, when his train is in motion, seeing persons near the track ahead of him, has the right to presume that they will keep out of his way, yet, when the train is moving in a town, great watchfulness on the part of the company's servants is required. It is then the duty of the engineer, before starting his engine across a street, not only to give timely warning of his intention to start, but to look ahead and see that his train is not likely to hurt persons. *Texas, etc., R. Co. v. Lowry*, 61 Tex. 149.

He is bound to use reasonable diligence before he discovers peril as well as afterwards, and the company is responsible for his negligent errors of judgment. *Georgia Midland, etc., R. Co. v. Evans*, 87 Ga. 673.

3. **Appliances for Public Safety.** — *Stubley v. London, etc., R. Co.*, L. R. 1 Exch. 13; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *State v. Philadelphia, etc., R. Co.*, 47 Md. 76, 18 Am. Ry. Rep. 253; *Com. v. Boston, etc., R. Corp.*, 101 Mass. 203; *Case v. New York Cent., etc., R. Co.*, 75 Hun (N. Y.) 527; *Weber v. New York Cent., etc., R. Co.*, 58 N. Y. 459; *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9.

4. *Weber v. New York Cent., etc., R. Co.*, 58 N. Y. 459; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531. See also *Welsch v. Hannibal, etc., R. Co.*, 72 Mo. 451, 6 Am. & Eng. R. Cas. 75, 37 Am. Rep. 443, and note.

Duty to Maintain, a Question of Law. — In an action for an injury at a crossing it was a misdirection for the judge to leave to the jury, as evidence of negligence on the part of the company, its omission to keep a gatekeeper. *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 258, 18 W. R. 456, 22 L. T. 382.

5. *Gates.* — *Stubley v. London, etc., R. Co.*, L. R. 1 Exch. 13; *Bilbee v. London, etc., R. Co.*, 18 C. B. N. S. 584, 114 E. C. L. 584; *Vallance v. Boston, etc., R. Co.*, 55 Fed. Rep. 364; *Grand Trunk, etc., R. Co. v. Ives*, 144 U. S. 408; *Cohn v. New York Cent., etc., R. Co.*, 6 N. Y. App. Div. 196; *Case v. New York Cent., etc., R. Co.*, 75 Hun (N. Y.) 527; *Martin v. New York Cent., etc., R. Co.*, 20

of negligence in this regard, the evidence must be sufficient to warrant a finding that there was peculiar hazard at the particular crossing.¹

(b) **Operation of Gate.** — Where, however, a company has set up a gate at a crossing it becomes the duty of the company to operate the same in a reasonable and prudent manner, and it is liable for injury resulting from a failure to perform its duty in this regard.² Acts of a gateman which tend to mislead a traveler into the belief that he may cross in safety are to be taken into account in determining whether an attempt to cross is negligent.³

(c) **Duty of Gatemen.** — It is the duty of a gateman to observe the track and know when, on account of trains or engines thereon, it becomes dangerous for persons to cross, and when it is so to close the gates, and keep them closed to prevent persons from going on the track so long as the danger continues;⁴ and when the tracks are clear or persons may cross without danger

Misc. Rep. (N. Y. Supreme Ct.) 363; *McCallum v. Long Island R. Co.*, 38 Hun (N. Y.) 569; *Com. v. Boston, etc., R. Corp.*, 101 Mass. 203; *C. C. & I. R. Co. v. Reiss*, 13 Ohio Cir. Ct. Rep. 405.

Request of Municipal Authorities. — A request of the authorities of a municipality that a railroad corporation shall erect gates at a crossing imposes no duty upon it to do so, and it is not chargeable with negligence for omitting to comply with the request until an order of the Supreme Court requiring it has been obtained as authorized by the *New York Act of 1884* (§ 3, c. 439, Laws of 1884). *Daniels v. Staten Island Rapid Transit Co.*, 125 N. Y. 407, reversing 55 Hun (N. Y.) 606, 28 N. Y. St. Rep. 87, 7 N. Y. Supp. 725.

Third-class Road — Texas Statute. — A company is not required to place gates at a crossing where its track is crossed by a third-class road in an inclosure, under Tex. Rev. Stat., art. 4389, providing that any person through whose land a third-class road may run may, if necessary, erect gates across the road; and art. 4245, making railroad companies liable for stock killed or injured by reason of a failure to fence their roads. *Galveston, etc., R. Co. v. O'Neal*, 4 Tex. App. Civ. Cas., § 86.

Private Road — English Statute. — The owner of a private railway, not constructed under parliamentary powers, nor used for the conveyance of passengers, is not bound by the provisions of 5 and 6 Vict., c. 55, § 9, as to making and maintaining gates at grade crossings. *Matson v. Baird*, L. R. 3 App. 1082, 26 W. R. 835, 39 L. T. 304.

Violation of City Ordinance. — A person cannot recover damages against a railroad company for personal injuries because of its failure to maintain gates at a street crossing, in compliance with the requirements of an ordinance, where the absence of the gates has no causal connection with the injury. *Jennings v. St. Louis, etc., R. Co.*, 99 Mo. 394.

A city ordinance required a company to maintain gates at its grade crossings and to attend them at all times when trains were passing. The company was sued for killing the plaintiff's intestate between eight and nine o'clock in the evening, and the proof showed that the gates were attended from seven o'clock in the morning until seven o'clock in the evening, but not from that time until the next morning. It was held that proof of the violation of the ordinance did not establish the cause of action

against the company, but was evidence bearing on the question of negligence. *Rainey v. New York Cent., etc., R. Co.*, 68 Hun (N. Y.) 495.

1. **Dangerous Crossings.** — *Vallance v. Boston, etc., R. Co.*, 55 Fed. Rep. 364; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Com. v. Boston, etc., R. Corp.*, 101 Mass. 201; *Stubley v. London, etc., R. Co.*, L. R. 1 Exch. 13. See also *Louisville, etc., R. Co. v. Goetz*, 79 Ky. 442, 42 Am. Rep. 227.

2. **Operation of Gates.** — *Bayley v. Eastern R. Co.*, 125 Mass. 62; *Lunt v. London, etc., R. Co.*, L. R. 1 Q. B. 277; *Hughes v. Delaware, etc., Canal Co.*, 1 Lack. Leg. N. (Pa.) 215; *Phillips v. New York Cent., etc., R. Co.*, 127 N. Y. 657, 38 N. Y. St. Rep. 675.

Rights of Person on Private Way Covered by Gate. — When a public highway and a private road both cross a railway track diagonally, converging at such track, where a gate is placed by the company, serving both roads, a traveler on the private road, only available by means of such gate, is placed in the same position with respect to the gatekeeper as if he were using the public road. *Lunt v. London, etc., R. Co.*, L. R. 1 Q. B. 277, 12 Jur. N. S. 409, 35 L. J. Q. B. 105, 14 W. R. 497, 14 L. T. N. S. 225.

Sufficiency of Gate for Jury. — Whether or not a gate provided by a railway company at a crossing is reasonably sufficient is a question for the jury, and it is error for the court to instruct them that the plaintiff cannot recover in an action for damages growing out of the company's negligence in the construction and maintenance of a gate. Nor would the instruction be justified even if it appeared that the plaintiff himself supposed the gate to be sufficient, and this were embodied in the instruction. *McKenly v. Chicago, etc., R. Co.*, 43 Iowa 641, 14 Am. Ry. Rep. 495.

3. **Acts of Gateman Tending to Mislead.** — *Conaty v. New York, etc., R. Co.*, 164 Mass. 572; *Sweeney v. Old Colony, etc., R. Co.*, 10 Allen (Mass.) 368, 87 Am. Dec. 644; *Bayley v. Eastern R. Co.*, 125 Mass. 62; *Merrigan v. Boston, etc., R. Co.*, 154 Mass. 193. See also *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.) 227, 85 Am. Dec. 700; *Johanson v. Boston, etc., R. Co.*, 153 Mass. 57.

4. **Duty of Gateman.** — *Cleveland, etc., R. Co. v. Schneider*, 45 Ohio St. 678, 35 Am. & Eng. R. Cas. 334; *Whelan v. New York, etc., R. Co.*, 38 Fed. Rep. 15; *Lunt v. London, etc., R. Co.*, L. R. 1 Q. B. 277.

from passing cars, then to open the gates and keep them open to enable persons to cross so long as it is safe for them to do so, but no longer.¹

Negligence of Gateman Is Negligence of Company. — The gateman being a servant of the railroad company, negligence on his part in the performance of his duty is the negligence of the railroad company.²

(3) *Flagmen — Watchmen* — (a) **Duty to Maintain.** — In the absence of statutory provisions there is no general rule of law by which a railroad company is bound to place a flagman or watchman at a particular crossing.³

Under 5 & 6 Vict., c. 55, § 9, a railway company must keep the gates at the ends of grade crossings closed against all persons or cattle upon the highway. If it fails to perform this duty and injury arises, it is liable to an action for damages. *Fawcett v. York, etc., R. Co.*, 16 Q. B. 610, 71 E. C. L. 610, 15 Jur. 173, 20 L. J. Q. B. 222.

Permitting Stranger to Open. — It may be as negligent in a company to permit strangers to open its gates after they are closed as to fail to close them. *Haywood v. New York Cent., etc., R. Co.*, (Supreme Ct.) 35 N. Y. St. Rep. 748, 59 Hun (N. Y.) 617, *affirmed* 128 N. Y. 590, 38 N. Y. St. Rep. 1011.

1. Duty to Open Gates when Track Is Clear. — *Cleveland, etc., R. Co. v. Schneider*, 45 Ohio St. 678, 35 Am. & Eng. R. Cas. 334.

Gateman Should Exercise Care and Discretion. — It is the duty of the gatekeeper at a level crossing not merely to open the gate when required for the passage of horses and vehicles, but to exercise reasonable caution and discretion in doing so, so as to protect travelers from passing trains. *Lunt v. London, etc., R. Co.*, L. R. 1 Q. B. 277, 12 Jur. N. S. 409, 35 L. J. Q. B. 105, 14 W. R. 497, 14 L. T. N. S. 225.

2. Company Liable for Negligence of Gateman. — *Bayley v. Eastern R. Co.*, 125 Mass. 62; *Feeney v. Long Island R. Co.*, 116 N. Y. 375, 39 Am. & Eng. R. Cas. 639, *affirming* 42 Hun (N. Y.) 657, 5 N. Y. St. Rep. 63.

A railroad company which, in operating the road with the company owning the same, under an agreement to pay the latter a specified sum yearly, in excess of the amount to which it is entitled out of the joint earnings, for the use of its tracks and the cost of switching, uses the tracks at a crossing, where gates and gatemen are maintained, is bound to the same care in the use thereof as the company owning the road, and should anticipate the reasonable effect of the gates, and the gateman's conduct in their management, on persons approaching the crossing or about to cross, and operate the road at that place with due regard to such probable effect, and exercise care proportioned to the probable danger to persons using such crossing under these circumstances. And if, while so using the tracks of the road, it accepts the services of the gatemen employed by the company owning the road, instead of employing gatemen of its own, they become, for the time being, its servants, for whose negligence it is responsible; and if it does not accept their services, its duty is to place competent gatemen at such crossing, and it is responsible for its omission to do so. *Cleveland, etc., R. Co. v. Schneider*, 45 Ohio St. 678, 35 Am. & Eng. R. Cas. 334. See also *Brow v. Boston, etc., R. Co.*, 157 Mass. 399.

3. Duty to Maintain Watchmen or Flagmen — *England.* — *Stubley v. London, etc., R. Co.*, L. R. 1 Exch. 13; *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 258; *Bilbee v. London, etc., R. Co.*, 18 C. B. N. S. 584, 114 E. C. L. 584.

California. — *Carragher v. San Francisco Bridge Co.*, 81 Cal. 98.

Illinois. — *Chicago, etc., R. Co. v. Lane*, 130 Ill. 116; *Peoria, etc., Union R. Co. v. Herman*, 39 Ill. App. 287.

Maryland. — *State v. Philadelphia, etc., R. Co.*, 47 Md. 76, 18 Am. Ry. Rep. 253; *Maryland Cent. R. Co. v. Neubeur*, 62 Md. 391; *State v. Philadelphia, etc., R. Co.*, 47 Md. 85; *Northern Cent. R. Co. v. Medairy*, (Md. 1897) 37 Atl. Rep. 796.

Massachusetts. — *Bailey v. New Haven, etc., Co.*, 107 Mass. 496. See also *Com. v. Boston, etc., R. Corp.*, 101 Mass. 201; *Shaw v. Boston, etc., R. Corp.*, 8 Gray (Mass.) 45.

Michigan. — *Haas v. Grand Rapids, etc., R. Co.*, 47 Mich. 401, 8 Am. & Eng. R. Cas. 268; *Cooper v. Lake Shore, etc., R. Co.*, 66 Mich. 261, 11 Am. St. Rep. 482.

Missouri. — *Welsch v. Hannibal, etc., R. Co.*, 72 Mo. 451, 37 Am. Rep. 440, 6 Am. & Eng. R. Cas. 75.

New Jersey. — *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Delaware, etc., R. Co. v. Toffey*, 38 N. J. L. 525, 13 Am. Ry. Rep. 75; *Delaware, etc., R. Co. v. East Orange*, 41 N. J. L. 127; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531.

New York. — *Ernst v. Hudson River R. Co.*, 39 N. Y. 61; *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9; *Grippen v. New York Cent. R. Co.*, 40 N. Y. 34; *Kissenger v. New York, etc., R. Co.*, 56 N. Y. 538, 6 Am. Ry. Rep. 154; *Weber v. New York Cent., etc., R. Co.*, 58 N. Y. 451; *McGrath v. New York Cent., etc., R. Co.*, 59 N. Y. 468, 17 Am. Rep. 359; *Culhane v. New York Cent., etc., R. Co.*, 60 N. Y. 133; *McGrath v. New York Cent., etc., R. Co.*, 63 N. Y. 522; *McGovern v. New York Cent., etc., R. Co.*, 67 N. Y. 423; *Dolan v. Delaware, etc., Canal Co.*, 71 N. Y. 285; *Pakalinsky v. New York Cent., etc., R. Co.*, 82 N. Y. 424; *Houghkirk v. Delaware, etc., Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370, *reversing* 28 Hun (N. Y.) 407; *Martin v. New York Cent., etc., R. Co.*, 20 Misc. Rep. (N. Y. Supreme Ct.) 363; *Cohn v. New York Cent., etc., R. Co.*, 6 N. Y. App. Div. 196; *Finklestein v. New York Cent., etc., R. Co.*, 41 Hun (N. Y.) 34; *Reid v. New York, etc., R. Co.*, (Supreme Ct.) 44 N. Y. St. Rep. 688, 63 Hun (N. Y.) 630; *McCallum v. Long Island R. Co.*, 38 Hun (N. Y.) 569.

Pennsylvania. — *Philadelphia, etc., R. Co. v. Killips*, 88 Pa. St. 405.

Country Roads. — There is no duty to station flagmen at country roads. *State v. Philadelphia, etc., R. Co.*, 47 Md. 76, 18 Am. Ry. Rep.

Dangerous Crossings. — It seems, however, that where the circumstances of the crossing are such that common prudence would dictate that some precautionary measures should be taken for the protection of the public, the failure of the company to provide a flagman, watchman, or the like may be deemed negligence, even though there is no statutory requirement.¹ But before negligence can be imputed to the company for failure to do so, it must appear that the danger at the crossing was exceptional — something rendering ordinary care on the part of persons crossing the track insufficient protection against injury, and therefore rendering the assumption of this burden on the part of the railway company a matter of common duty for the safety of others.²

Established Practice. — So the company may bind itself to maintain a flagman or watchman where for its own convenience it elects to place them at certain crossings, and by establishing a practice of that kind leads the public to rely upon the performance of such duties.³

253; Maryland Cent. R. Co. v. Neubeur, 62 Md. 391, 19 Am. & Eng. R. Cas. 261; Haas v. Grand Rapids, etc., R. Co., 47 Mich. 401, 8 Am. & Eng. R. Cas. 268; Telfer v. Northern R. Co., 30 N. J. L. 188.

1. Flagmen Required under Certain Circumstances — *Kentucky.* — Central Pass. R. Co. v. Kuhn, 86 Ky. 578, 9 Am. St. Rep. 309; Newport News, etc., Co. v. Stewart, (Ky. 1896) 36 S. W. Rep. 528.

Massachusetts. — Com. v. Boston, etc., R. Corp., 101 Mass. 201; Eaton v. Fitchburg R. Co., 129 Mass. 364, 2 Am. & Eng. R. Cas. 183.

Michigan. — Freeman v. Duluth, etc., R. Co., 74 Mich. 86.

Missouri. — Welsch v. Hannibal, etc., R. Co., 72 Mo. 451, 37 Am. Rep. 440, 6 Am. & Eng. R. Cas. 75.

New Jersey. — New Jersey R., etc., Co. v. West, 32 N. J. L. 91; Pennsylvania R. Co. v. Matthews, 36 N. J. L. 531.

Ohio. — Cleveland, etc., R. Co. v. Schneider, 45 Ohio St. 678, 35 Am. & Eng. R. Cas. 334.

Pennsylvania. — Philadelphia, etc., R. Co. v. Killips, 88 Pa. St. 405.

Wisconsin. — Kinney v. Crocker, 18 Wis. 74. See also Cliff v. Midland R. Co., L. R. 5 Q. B. 253; Illinois Cent. R. Co. v. Ebert, 74 Ill. 399; Welsch v. Hannibal, etc., R. Co., 72 Mo. 451, 37 Am. Rep. 440, 6 Am. & Eng. R. Cas. 75; Delaware, etc., R. Co. v. Toffey, 38 N. J. L. 525.

Where a company was charged with negligence in not stationing a flagman at a crossing where the injury occurred, it was held that it was not error to refuse to instruct the jury that the fact that it did not appear that an accident had occurred at the precise place at any previous time must be taken as conclusive proof of the sufficiency of the precaution provided by the company. Quill v. New York Cent., etc., R. Co., 16 Daly (N. Y.) 313, affirmed 126 N. Y. 620, 36 N. Y. St. Rep. 1012.

An Illinois Statute requires railroad companies, upon receiving notice from the public authorities that a flagman is necessary at a crossing, to place and retain a flagman there. But the mere fact that the duty is imposed upon the company to keep a flagman upon the crossing, upon so receiving notice, does not relieve it from the duty of placing one there of its own motion, if the necessities of the crossing require it; and evidence that no flagman had been stationed at the crossing is ad-

missible, notwithstanding the provisions of the statute, for the purpose of proving negligence. Chicago, etc., R. Co. v. Perkins, 125 Ill. 127.

Absence of Flagman Known to Traveler. — The knowledge of a traveler over a railroad at a street crossing that no flagman is stationed there at the time, and his dependence for that reason upon his own sight and hearing to discover the approach of trains, will not excuse the railroad company for its negligence in not keeping a flagman stationed at the crossing at that hour. Annaker v. Chicago, etc., R. Co., 81 Iowa 267.

2. Danger Exceptional. — Grand Trunk R. Co. v. Ives, 144 U. S. 408; Freeman v. Duluth, etc., R. Co., 74 Mich. 86, 37 Am. & Eng. R. Cas. 501; Haas v. Grand Rapids, etc., R. Co., 47 Mich. 401, 8 Am. & Eng. R. Cas. 268; Guggenheim v. Lake Shore, etc., R. Co., 66 Mich. 150, 32 Am. & Eng. R. Cas. 89; Battishall v. Humphreys, 64 Mich. 494, 28 Am. & Eng. R. Cas. 597.

Duty Dependent upon Circumstances. — In the absence of a statute requiring flagmen or gates, the question whether a company should provide them will depend upon circumstances, such as the amount of business, the amount of travel over the street or highway, and the obstructions that may surround the intersection of the street or highway with the track, and where ringing a bell or sounding a whistle may not be sufficient. Lapsley v. Union Pac. R. Co., 50 Fed. Rep. 172, affirmed 51 Fed. Rep. 174; Annaker v. Chicago, etc., R. Co., 81 Iowa 267.

Reasonable Precaution. — It is not negligence in a company to omit to station a flagman at a crossing unless such precaution is necessary; and it is therefore error to instruct the jury that they may find such failure to be negligence if they believe it was a reasonable precaution to have such flagman. Peoria, etc., Union R. Co. v. Herman, 39 Ill. App. 287.

Custom of Prudent Railroads. — In the absence of a custom of prudent railroads to station flagmen at crossings, a company is not bound to do so, however dangerous the crossing may be. Welsch v. Hannibal, etc., R. Co., 72 Mo. 451, 37 Am. Rep. 440, 6 Am. & Eng. R. Cas. 75.

3. Established Practice. — Ernst v. Hudson River R. Co., 39 N. Y. 61, 36 How. Pr. (N. Y.) 84.

Withdrawal of Flagman. — Where by voluntary and continued practice it has become notoriously public that a flagman has been placed at a crossing to give notice of the approach of trains, the withdrawal of such flagman without notice may become an act of negligence on the part of the company for which it will be held liable.¹

Whether Question for Court or Jury. — In some jurisdictions, whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is especially dangerous is a question of fact for a jury to determine, under all the circumstances of the case,² although in some cases it has been held that it is a question of law for the court.³

Presence or Absence as Bearing on Question of Negligence. — Aside from the question of the authority of the jury to determine the necessity of a flagman or to predicate negligence upon his absence, the presence or absence of a flagman may be proved as an item of evidence to be considered by the jury, in connection with all the other facts and circumstances in the case, upon the question of the prudence or negligence of the railroad company in moving its train at the time and place in question.⁴

1. Withdrawal of Flagman. — *Burns v. North Chicago Rolling Mill Co.*, 65 Wis. 312; *St. Louis, etc., R. Co. v. Dunn*, 78 Ill. 197; *Pittsburgh, etc., R. Co. v. Yundt*, 78 Ind. 373, 41 Am. Rep. 580, 3 Am. & Eng. R. Cas. 502; *Ernst v. Hudson River R. Co.*, 39 N. Y. 61, 36 How. Pr. (N. Y.) 84; *Dolan v. Delaware, etc., Canal Co.*, 71 N. Y. 285.

The Absence of Such Flagman from His Post may excuse one cognizant of his duty from gross negligence in failing to stop before attempting to cross and look both ways to see if a train is approaching. *Chicago, etc., R. Co. v. Hutchinson*, 120 Ill. 587, 32 Am. & Eng. R. Cas. 82.

But Where a Person Sees the Train Approaching the Crossing the company is not chargeable with negligence because of the absence of a flagman usually stationed there. *Pakalinsky v. New York Cent., etc., R. Co.*, 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251.

Flagman's Voluntary Withdrawal. — So where a flagman voluntarily withdraws from his post his negligence is imputable to the company. *Waldele v. New York Cent., etc., R. Co.*, 4 N. Y. App. Div. 549.

2. Question for Jury — *United States*. — *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Lapsley v. Union Pac. R. Co.*, 50 Fed. Rep. 172.

Iowa. — *Annaker v. Chicago, etc., R. Co.*, 81 Iowa 267; *Tierney v. Chicago, etc., R. Co.*, 84 Iowa 641.

Maine. — *Webb v. Portland, etc., R. Co.*, 57 Me. 117; *Lesan v. Maine Cent. R. Co.*, 77 Me. 85, 23 Am. & Eng. R. Cas. 245.

Massachusetts. — *Eaton v. Fitchburg R. Co.*, 129 Mass. 364.

Minnesota. — *Bolinger v. St. Paul, etc., R. Co.*, 36 Minn. 418, 1 Am. St. Rep. 680.

In *Lesan v. Maine Cent. R. Co.*, 77 Me. 85, 23 Am. & Eng. R. Cas. 245, it was held that there might be extreme cases where a judge is justified in giving an absolute direction upon the question of negligence in failing to station a flagman at a crossing, but generally it is a question for the jury. Even though the facts are undisputed, if they are of such a nature or pertain to such a matter that different intelligent and honest minds might differ in judgment upon them, the question should be left to the jury.

3. Submission of Question to Jury Erroneous — *New York*. — *Coyle v. Long Island R. Co.*, 33 Hun (N. Y.) 37; *Crawford v. Delaware, etc., R. Co.*, 53 N. Y. Super. Ct. 150; *Pakalinsky v. New York Cent. R. Co.*, 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251; *Grippen v. New York Cent. R. Co.*, 40 N. Y. 41; *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9; *Weber v. New York Cent., etc., R. Co.*, 58 N. Y. 451; *McCallum v. Long Island R. Co.*, 38 Hun (N. Y.) 569.

Wisconsin. — *Heddles v. Chicago, etc., R. Co.*, 74 Wis. 239, *distinguishing Burns v. North Chicago Rolling Mill Co.*, 65 Wis. 315; *Winchell v. Abbot*, 77 Wis. 371.

Compare McGrath v. New York Cent., etc., R. Co., 63 N. Y. 522; *Houghkirk v. Delaware, etc., Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370, *reversing* 28 Hun (N. Y.) 407; *Winstanley v. Chicago, etc., R. Co.*, 72 Wis. 375, 35 Am. & Eng. R. Cas. 370.

4. Presence or Absence as Bearing on Question of Negligence — *Illinois*. — *Chicago, etc., R. Co. v. Lane*, 130 Ill. 116, *affirming* 30 Ill. App. 437. See also *Peoria, etc., Union R. Co. v. Herman*, 39 Ill. App. 287.

Indiana. — *Pittsburgh, etc., R. Co. v. Yundt*, 78 Ind. 373, 3 Am. & Eng. R. Cas. 502, 41 Am. Rep. 580.

Iowa. — *Hart v. Chicago, etc., R. Co.*, 56 Iowa 166, 41 Am. Rep. 93.

Kansas. — *Kansas Pac. R. Co. v. Richardson*, 25 Kan. 391, 6 Am. & Eng. R. Cas. 96.

New York. — *Reid v. New York, etc., R. Co.*, (Supreme Ct.) 44 N. Y. St. Rep. 688, 63 Hun (N. Y.) 630; *Coyle v. Long Island R. Co.*, 33 Hun (N. Y.) 37; *Crawford v. Delaware, etc., R. Co.*, 55 N. Y. Super. Ct. 50; *Houghkirk v. Delaware, etc., Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370, *reversing* 28 Hun (N. Y.) 407; *Brown v. Rome, etc., R. Co.*, (Supreme Ct.) 16 N. Y. St. Rep. 456, *affirmed* 121 N. Y. 669; *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9; *Grippen v. New York Cent. R. Co.*, 40 N. Y. 41; *Weber v. New York Cent., etc., R. Co.*, 58 N. Y. 451; *McGrath v. New York Cent., etc., R. Co.*, 63 N. Y. 522; *Casey v. New York Cent., etc., R. Co.*, 78 N. Y. 518; *Ernst v. Hudson River R. Co.*, 39 N. Y. 61.

Wisconsin. — *Hoye v. Chicago, etc., R. Co.*, 67 Wis. 14; *Heddles v. Chicago, etc., R. Co.*,

(b) **By Statute or Ordinance.** — Although, as has been stated, a railroad company is not, as a general rule, bound to station flagmen, and negligence cannot be predicated of the omission,¹ yet such duty may exist by virtue of a statute or ordinance.² Such statutes or ordinances are a valid exercise of the legislative power, as a police regulation for the safety of the public and passengers upon the train.³

Failure to Comply with Requirement. — A failure to comply with the terms of such statute or ordinance, when imposed by the proper authorities, is negligence *per se*, provided the neglect was the proximate cause of the injury.⁴

74 Wis. 239; *Abbot v. Dwinell*, 74 Wis. 514; *Burns v. North Chicago Rolling Mill Co.*, 65 Wis. 312.

1. *Carraher v. San Francisco Bridge Co.*, 81 Cal. 98; *Houghkirk v. Delaware, etc., Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370; *Peoria, etc., Union R. Co. v. Herman*, 39 Ill. App. 287; *Chicago, etc., R. Co. v. Lane*, 130 Ill. 116. See the subdivision immediately preceding.

Company Estopped. — Where the railroad company asks, and the court gives at its request, instructions based upon the duty to have a flagman stationed at the place where an injury is inflicted, the company will be estopped from denying that it was its duty to have such flagman at such place, and the concession thus made will justify an instruction on the subject. *Lake Shore, etc., R. Co. v. Johnsen*, 135 Ill. 641, affirming 35 Ill. App. 430.

2. **Statutes** — *Colorado.* — In *Denver, etc., R. Co. v. Ryan*, 17 Colo. 98, it was held that a municipal ordinance requiring the presence of a flagman at important crossings was a reasonable and proper regulation.

Maryland. — The Maryland Code, art. 23, § 194, provides that where the crossing is dangerous it shall be the duty of the commissioners of the county in which the crossing is located to notify the company to place a flagman there or give some notice to the public by the erection of gates, safety bells, etc. *Northern Cent. R. Co. v. Medairy*, (Md. 1897) 37 Atl. Rep. 796.

Massachusetts. — Where the action is for negligently injuring a person at a grade crossing, the jury may consider the failure of the company to station a flagman or to have a gate at the crossing as tending to show negligence, although it has never been requested to do so by the town selectmen nor by the county commissioners, under Mass. Act of 1874, c. 372, § 126. *Eaton v. Fitchburg R. Co.*, 129 Mass. 364, 2 Am. & Eng. R. Cas. 183.

Michigan. — It is not the law of Michigan that a railroad company is bound to place a flagman at every road or street crossing in a village or city. *Freeman v. Duluth, etc., R. Co.*, 74 Mich. 86, 37 Am. & Eng. R. Cas. 501.

But where it appears that a crossing is more than ordinarily hazardous the railroad commissioners may order a flagman or watchman posted at that crossing. *Freeman v. Duluth, etc., R. Co.*, 74 Mich. 86, 37 Am. & Eng. R. Cas. 501; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *Guggenheim v. Lake Shore, etc., R. Co.*, 66 Mich. 150, 32 Am. & Eng. R. Cas. 89.

New York. — The New York Act of 1892, c. 676, § 33, provides that the supreme court or county court may compel a railroad company to erect gates or station a flagman at crossings

"upon the application of the local authorities," and it has been held that the commissioners of highways are local authorities within the meaning of the statute. *Matter of Highway Com'rs*, 72 Hun (N. Y.) 575; *People v. Long Island R. Co.*, 134 N. Y. 506.

The above statute only provides that a crossing where such gate is to be erected or flagman stationed shall be one at grade, and therefore it is not necessary that an application under it shall show that the crossing is dangerous. *Matter of Highway Com'rs*, 72 Hun (N. Y.) 575. See also General Railroad Act of 1890, § 33; *Matter of Highway Com'rs*, 74 Hun (N. Y.) 46.

3. **Police Regulation.** — *Denver, etc., R. Co. v. Ryan*, 17 Colo. 98; *Delaware, etc., R. Co. v. East Orange*, 41 N. J. L. 127; *Kentucky Cent. R. Co. v. Com.*, (Ky. 1892) 49 Am. & Eng. R. Cas. 312.

Such ordinance, when passed, is a judicial act imposing pecuniary burden and loss on the railroad company, and is subject to review in the supreme court, which will determine whether the power conferred has been exercised in a legal and reasonable manner. *Delaware, etc., R. Co. v. East Orange*, 41 N. J. L. 127.

The *New York* statute authorizing the supreme court or county judge, on application of the local authorities, to order a flagman to be stationed, or gates erected, at railway crossings, is not unconstitutional as a delegation of legislative power to the judges. *People v. Long Island R. Co.*, 134 N. Y. 506.

Penalty for Disobedience of Ordinance. — Though the statute authorizing the supreme court or county judge to order a flagman to be stationed or gates erected at street and highway crossings, by a railroad, prescribes no penalty for disobedience of such order, an indictment may be maintained against a railroad company which is a common carrier for neglecting to comply therewith, under the Penal Code, declaring every wilful omission to perform a duty enjoined by law on any public officer, or on "any person holding a public trust or employment," punishable as a misdemeanor, where no special provision is made for the punishment of such delinquency. *People v. Long Island R. Co.*, 134 N. Y. 506.

Unauthorized Ordinance. — In *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, it was held that a municipal corporation has no power by ordinance to compel a company to station a watchman at a crossing, when there is no statute granting it such authority, either expressly or by implication.

4. **Failure to Comply with Ordinance.** — *Pennsylvania Co. v. Hensil*, 70 Ind. 569, 36 Am.

(c) **Duty of Flagmen or Watchmen.** — The duty of a flagman or watchman stationed at a crossing is in its nature somewhat similar to that of a gateman, hereinbefore treated. He should protect the traveling public by signaling the approach of trains, and in the absence of signals may, it has been held, give the public the right to presume that the tracks are clear.¹

Liability for Negligence of Flagman. — Although it is not negligent for a company to fail to keep a flagman at a crossing, yet if one is employed his failure to perform the usual and ordinary functions of his position may be sufficient to charge the company.²

Rep. 188, 6 Am. & Eng. R. Cas. 79; *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236, 20 Am. St. Rep. 601.

Action Not Based on Ordinance. — Though an action for negligence is not based on a city ordinance requiring the stationing of a watchman at a certain crossing and prescribing his duties, and said ordinance furnished no cause of action, still the existence of such ordinance was a fact bearing upon the conduct of the managers of the train, and is proper evidence tending to support the general allegation of negligence. *Fusili v. Missouri Pac. R. Co.*, 45 Mo. App. 535.

Exclusion of Ordinance in Evidence. — Where one injured at a crossing of a steam and a horse railroad sues both companies, the horse-car company cannot complain of the exclusion from the jury of an ordinance of the city requiring steam companies to have a flagman at the crossing. Even if the company had notice of the ordinance, or was required to take notice, its negligence would not excuse the negligence of the horse-car company. *Central Pass. R. Co. v. Kuhn*, 86 Ky. 578, 9 Am. St. Rep. 309, 32 Am. & Eng. R. Cas. 16.

1. **Presumption in Absence of Signals.** — Chicago, etc., R. Co. v. *Wilson*, 133 Ill. 55, 42 Am. & Eng. R. Cas. 153, *affirming* 35 Ill. App. 346; Chicago, etc., R. Co. v. *Clough*, 134 Ill. 586, *affirming* 33 Ill. App. 129; Chicago, etc., R. Co. v. *Hutchinson*, 120 Ill. 587, 32 Am. & Eng. R. Cas. 82; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 10 Am. St. Rep. 136. But see *Smith v. Wabash R. Co.*, 141 Ind. 92. See also *St. Louis, etc., R. Co. v. Dunn*, 78 Ill. 197; *Wilkins v. St. Louis, etc., R. Co.*, 101 Mo. 93.

Traveler Signaled to Cross. — Though one about to cross a railroad crossing where a flagman is stationed sees, or could see, the train on the track moving towards him, yet if he is signaled by the flagman to cross, he has a right to presume from the request of the flagman to come on that the train will not move over the crossing while he is in the act of diligently complying with the request. *Fusili v. Missouri Pac. R. Co.*, 45 Mo. App. 535.

Warning Too Late to Avoid Danger. — The object of a city ordinance requiring railroads to station a watchman at street crossings used by them is to prevent travelers from going on the crossing when trains are approaching, and not to give warning of danger when it is too late to avoid it. *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491.

2. **Liability for Negligence of Flagman** — *United States*. — *Woodley v. Baltimore, etc., R. Co.*, 19 D. C. 542.

Alabama. — *Louisville, etc., R. Co. v. Webb*,

90 Ala. 185, 49 Am. & Eng. R. Cas. 427; *Alabama G. S. R. Co. v. Anderson*, 109 Ala. 299.

Illinois. — *St. Louis, etc., R. Co. v. Dunn*, 78 Ill. 197; *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 8 Am. St. Rep. 337, 35 Am. & Eng. R. Cas. 440, *affirming* 24 Ill. App. 48; *Chicago, etc., R. Co. v. Clough*, 134 Ill. 586, *affirming* 33 Ill. App. 129.

Massachusetts. — *Sweeny v. Old Colony, etc., R. Co.*, 10 Allen (Mass.) 368, 87 Am. Dec. 644.

New York. — *Kissenger v. New York, etc., R. Co.*, 56 N. Y. 538, 6 Am. Ry. Rep. 154, *affirming* 36 N. Y. Super. Ct. 572; *Dolan v. Delaware, etc., Canal Co.*, 71 N. Y. 285; *Waldele v. New York Cent., etc., R. Co.*, 4 N. Y. App. Div. 549; *Finklestein v. New York Cent., etc., R. Co.*, 41 Hun (N. Y.) 34.

Whether the conduct of the flagman was proper or not is a question depending on the circumstances of each case. *Delaware, etc., R. Co. v. Toffey*, 38 N. J. L. 525, 13 Am. Ry. Rep. 75.

Negligence of Flagman Proximate Cause of Injury. — In order to hold the railroad company liable, it must be shown that the negligence or absence of the flagman was the proximate cause of the injury. *Pakalinsky v. New York Cent., etc., R. Co.*, 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251; *Pennsylvania Co. v. Hensie*, 70 Ind. 569, 36 Am. Rep. 188, 6 Am. & Eng. R. Cas. 79.

Carelessness in Giving Signal. — Where a company places a flagman at a crossing to warn persons of danger, it is liable to one who is induced to cross by a safety signal given by the flagman, and is injured in attempting to do so by reason of the signal being carelessly given when there was real danger. *Sweeny v. Old Colony, etc., R. Co.*, 10 Allen (Mass.) 368, 87 Am. Dec. 644; *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 8 Am. St. Rep. 337, 35 Am. & Eng. R. Cas. 440, *affirming* 24 Ill. App. 48; *Chicago, etc., R. Co. v. Clough*, 134 Ill. 586, *affirming* 33 Ill. App. 129.

Flagman Assuming Duty. — Where a flagman in the employment of a railroad company has for several years been in the habit of warning persons about to cross the main line of the railroad of the approach of trains, but was not employed by the railroad company to watch such main track, the company will nevertheless be liable if he so negligently discharges his assumed duty as to the main track that a party attempting to cross is led into a place of danger and injured without any want of care on his own part concurring to produce such injury. *Peck v. Michigan Cent. R. Co.*, 57 Mich. 3, 19 Am. & Eng. R. Cas. 257.

Omission to Give Warning. — Where a party is approaching the crossing and fails to hear the

(4) *Signs* — (a) **Failure to Erect Not Necessarily Negligence.** — The failure to erect a caution board or sign at a crossing does not necessarily make the railroad company responsible for damages occasioned by collision with one of its trains.¹

(b) **Object and Purpose.** — The caution board is for the purpose of a notification to those passing along the road,² and where a person might have known of a crossing by the exercise of ordinary care,³ or where he is familiar with the crossing from frequent use, it cannot be said that the injury was the result of an omission to maintain a sign.⁴

(c) **Statutory Requirements.** — Where provision for the erection and maintenance of signs is made by statute,⁵ the intention of such statutes is not to create an absolute liability on the part of the company, but to make a failure to provide signboards at such places evidence of negligence.⁶

bell, the failure of the flagman to give warning is sufficient to charge the company, if such failure solely produced the injury. *Kissenger v. New York, etc., R. Co.*, 56 N. Y. 538, 6 Am. Ry. Rep. 154, *affirming* 36 N. Y. Super. Ct. 572; *Dolan v. Delaware, etc., Canal Co.*, 71 N. Y. 285; *Finklestein v. New York Cent., etc., R. Co.*, 41 Hun (N. Y.) 34.

Where One Company Runs over Another Track. — It has been held that so far as the question of liability for negligence in this connection is concerned, a company running its trains over the road of another is bound by the same laws and ordinances that bind the owner. *McGrath v. New York Cent., etc., R. Co.*, 63 N. Y. 523, *reversing* 1 *Thomp. & C.* (N. Y.) 243.

1. **Failure to Erect Signs Not Necessarily Negligence.** — *Haas v. Grand Rapids, etc., R. Co.*, 47 Mich. 401, 8 Am. & Eng. R. Cas. 268; *Payne v. Chicago, etc., R. Co.*, 39 Iowa 523; *Lang v. Holiday Creek R., etc., Co.*, 49 Iowa 469; *Field v. Chicago, etc., R. Co.*, 4 McCrary (U. S.) 573, 14 Fed. Rep. 332, 8 Am. & Eng. R. Cas. 425.

The failure to erect a sign at a crossing renders railway companies liable only for damages sustained by the neglect or refusal to erect the signs, and does not release a party seeking to recover from the necessity of establishing due care on his part. *Lang v. Holiday Creek R., etc. Co.*, 49 Iowa 469; *Payne v. Chicago, etc., R. Co.*, 39 Iowa 523; *Baltimore, etc., R. Co. v. Whitacre*, 35 Ohio St. 627; *Field v. Chicago, etc., R. Co.*, 4 McCrary (U. S.) 573, 14 Fed. Rep. 332, 8 Am. & Eng. R. Cas. 425.

2. **Object and Purpose.** — *Gulf, etc., R. Co. v. Greenlee*, 62 Tex. 344, 23 Am. & Eng. R. Cas. 322; *Baltimore, etc., R. Co. v. Whitacre*, 35 Ohio St. 627.

Private Action for Failure to Maintain. — The duty to erect signboards is a duty to the public, and no private action can be grounded upon the neglect unless individual injury is traced to it. *Haas v. Grand Rapids, etc., R. Co.*, 47 Mich. 401, 8 Am. & Eng. R. Cas. 268.

Person Not Intending to Use Crossing. — Failure to provide the statutory signboard does not confer a right of action upon a traveler in the neighborhood of the crossing, but not intending to use the same. *East Tennessee, etc., R. Co. v. Feathers*, 10 Lea (Tenn.) 103, 15 Am. & Eng. R. Cas. 446.

3. **One Who Might Have Known of Crossing.** — *Gulf, etc., R. Co. v. Greenlee*, 62 Tex. 344, 23 Am. & Eng. R. Cas. 322.

4. **One Familiar with Crossing.** — *Haas v. Grand Rapids, etc., R. Co.*, 47 Mich. 401, 8 Am. & Eng. R. Cas. 268.

A company erected a pole with a bell on it at the side of a crossing, and on either side, and one thousand seven hundred feet away, on the track, it placed annunciators connected with the bell by wires, causing the bell to ring when trains passed; but the apparatus proved a failure and for nearly two years had been abandoned, though the post and bell remained. The party who was killed at the crossing passed it daily and knew that the apparatus was out of order. It was held that allowing the pole and bell to remain was not evidence of negligence as to him, neither was it negligence in failing to keep it in order as to him; and it was therefore error to submit such questions to the jury. *Wellenhoffer v. New York, etc., R. Co.*, (Supreme Ct.) 50 N. Y. St. Rep. 111, 21 N. Y. Supp. 866, 66 Hun (N. Y.) 634.

5. **Statutory Requirements.** — *Ewen v. Chicago, etc., R. Co.*, 38 Wis. 613; *East Tennessee, etc., R. Co. v. Feathers*, 10 Lea (Tenn.) 103, 15 Am. & Eng. R. Cas. 446. See also the statutes of the various states.

Not an Established Public Road. — The *Texas* statute requiring railroads to erect warning signs at all points where their roads shall cross public roads applies to all roads that are traveled on horseback and in vehicles, and which were so used at the time of the construction of a railroad. A road, however, which is opened across a railroad track after the construction of the railroad, and without being established as a public road under the law, would impose upon the railroad company no obligation to perform the requirements of the statute. *International, etc., R. Co. v. Jordan*, 1 Tex. App. Civ. Cas., § 859.

Penalty for Failure to Erect. — Section 2424 of the *Mississippi* Code of 1871, requiring railroad companies to erect signboards where they cross highways, and imposing a penalty for failure to do so, is unconstitutional in so far as it gives to the county the fine collected. The suit permitted by it is a civil suit, and the state has no interest in it. The fine, when collected, belongs to the school fund, and the state board of education are the proper parties to bring the suit for a violation of its provisions. *Mobile, etc., R. Co. v. State*, 51 Miss. 137.

6. **Intention of Statutes.** — *Field v. Chicago, etc., R. Co.*, 4 McCrary (U. S.) 573, 14 Fed. Rep. 332, 8 Am. & Eng. R. Cas. 425; *Payne v. Chicago, etc., R. Co.*, 44 Iowa 236; *Dodge*

Question for Jury. — It is for the jury to say whether the omission to have such a sign is negligence, and whether a failure to provide one contributed to the injury.¹

c. RATE OF SPEED — (1) *In General.* — In the absence of statute regulating the rate of speed the common-law rule prevails, which is that the railroad company is under the duty and obligation at all times to use ordinary care and prudence in the running of its trains, so that no unnecessary risk or hazard shall be cast upon the public.²

(2) *Right of Railroad Company to Regulate Speed.* — While it is the right of the company to choose and regulate its own speed, the right is not wholly unaffected by surrounding or attendant conditions, and may be negligently as well as rightfully exercised.³ And it is generally a question of fact in each case whether the actual rate was excessive or dangerous,⁴ the rule of law being

v. Burlington, etc., R. Co., 34 Iowa 276, 5 Am. Ry. Rep. 507. See also Correll v. Burlington, etc., R. Co., 38 Iowa 120, 18 Am. Rep. 22.

In *Dodge v. Burlington, etc., R. Co., 34 Iowa 276*, it was held that the omission of a company to have a signboard as provided by § 1331 of the Revision (*Iowa Stat.*), was negligence on the part of the company. See also *Correll v. Burlington, etc., R. Co., 38 Iowa 122, 18 Am. Rep. 22.*

1. Question for Jury. — *Shaber v. St. Paul, etc., R. Co., 28 Minn. 103, 2 Am. & Eng. R. Cas. 185; Baltimore, etc., R. Co. v. Whitacre, 35 Ohio St. 627; Heddles v. Chicago, etc., R. Co., 77 Wis. 228.*

Failure to Erect Admissible in Evidence. — Evidence that there was no signboard at the crossing at the time of the accident is admissible on the issue of due care on the part of the plaintiff. *Elkins v. Boston, etc., R. Co., 115 Mass. 190.*

And it is competent for him to show that there was no signboard up, as required by law, as reflecting on the question of his care, although the want of such signboard is not alleged as a ground of recovery. *Baltimore, etc., R. Co. v. Whitacre, 35 Ohio St. 627.*

2. Rate of Speed Dictated by Ordinary Care and Prudence. — *Lapsley v. Union Pac. R. Co., 50 Fed. Rep. 172, affirmed 51 Fed. Rep. 174; East Tennessee, etc., R. Co. v. Deaver, 79 Ala. 216; Western R. Co. v. Sistrunk, 85 Ala. 352; Chicago, etc., R. Co. v. Florens, 32 Ill. App. 365; Moore v. Central R. Co., 47 Iowa 688; Guggenheim v. Lake Shore, etc., R. Co., 66 Mich. 150, 32 Am. & Eng. R. Cas. 89; Telfer v. Northern R. Co., 30 N. J. L. 188. See also Central Ohio R. Co. v. Lawrence, 13 Ohio St. 66, 82 Am. Dec. 434.*

Rate of Speed where Gates Are Provided. — So long as a railroad company makes it safe for the public to cross its road on the public highway by providing gates, watchmen, or other means, it may run its trains at any rate of speed over such crossings; but if it neglects to use every precaution necessary for the safety of the public, no moderation or slowness of speed will excuse its neglect. *Pennsylvania R. Co. v. Coon, 111 Pa. St. 430.*

Less Speed than Required by Ordinance. — If ordinary care and prudence require engines and trains to be run at a less rate of speed than that required by a city ordinance, the company must observe such care and prudence. *Shaber v. St. Paul, etc., R. Co., 28 Minn. 103, 2 Am. & Eng. R. Cas. 185.*

Handcar. — Ordinary care requires those running a handcar to check its speed if it threatens danger to a person, even though he is not at the time on the track, but only approaching it. *Moore v. Central R. Co., 47 Iowa 688.*

3. Right to Regulate Speed. — *Salter v. Utica, etc., R. Co., 88 N. Y. 42; Thomas v. Delaware, etc., R. Co., 8 Fed. Rep. 729, 19 Blatchf. (U. S.) 533.*

Unless otherwise prescribed by statute or ordinance, a train may run at such rate of speed as the exigencies of the railroad company may require, and preserve this speed at the usual crossings notwithstanding the approach of vehicles upon the highway; and under ordinary circumstances it will not be considered either gross or ordinary negligence, or what is called want of ordinary care. *Telfer v. Northern R. Co., 30 N. J. L. 192; Chicago, etc., R. Co. v. Lee, 68 Ill. 576.*

"While a railway is not restricted by law to any rate of speed, unusual speed at crossings, or at other places where men or brutes may be exposed to danger from passing trains, may be considered in connection with other matters, as the failure to give signals of the approach of the train, and the like, to determine the want of care on the part of those operating it." *Artz v. Chicago, etc., R. Co., 44 Iowa 285.*

Power by Charter — Ordinance. — The fact that the charter of a railroad company gives it the power to regulate the speed of its trains does not exempt it from the restriction imposed by an ordinance limiting the speed of trains. The exercise of the police power by the state cannot be restricted by such charter grants. *Cleveland, etc., R. Co. v. Harrington, 131 Ind. 426, 49 Am. & Eng. R. Cas. 359.*

4. Question of Fact. — *Wilds v. Hudson River R. Co., 29 N. Y. 326; De Loge v. New York Cent., etc., R. Co., 92 Hun (N. Y.) 149; Waldele v. New York Cent., etc., R. Co., 4 N. Y. App. Div. 549; Huntress v. Boston, etc., R. Co., 66 N. H. 185; Pratt v. Chicago, etc., R. Co., 98 Iowa 563.*

While, in the absence of municipal regulations, no rate of speed is negligence *per se*, still it does not follow that a company may at all times and places run its trains at any rate of speed. A high rate of speed at a country crossing may be considered by the jury as tending to show negligence. *Stepp v. Chicago, etc., R. Co., 85 Mo. 229.*

Where the evidence introduced by the plaintiff showed that although the defendant was

now well settled that no rate of speed will, in the absence of statute or ordinance, be considered negligence *per se*.¹

(3) *Rate of Speed Must Vary According to Locality* — (a) *In General*. — The rate of speed must necessarily vary according to the locality in which the train is being run and the particular circumstances of the case.²

(b) *Country Crossings*. — No obligation rests upon a railroad to slacken the ordinary speed of its trains before reaching a highway crossing in the open country.³

running its trains at a negligent rate of speed, still there was no connection between the rate of speed and the accident, but the injury was caused by the forgetful and neglectful state of the deceased at the time, it is the duty of the trial court to direct a verdict for the defendant. *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80, 8 Am. & Eng. R. Cas. 467.

1. *No Rate of Speed Negligence Per Se* — *Alabama*. — *Western R. Co. v. Sistrunk*, 85 Ala. 352.

Connecticut. — *Dyson v. New York, etc., R. Co.*, 57 Conn. 9, 14 Am. St. Rep. 82.

Illinois. — *Toledo, etc., R. Co. v. Barlow*, 71 Ill. 640.

Iowa. — *Flattes v. Chicago, etc., R. Co.*, 35 Iowa 101; *Plaster v. Illinois Cent. R. Co.*, 35 Iowa 449; *McKonkey v. Chicago, etc., R. Co.*, 40 Iowa 205; *Artz v. Chicago, etc., R. Co.*, 44 Iowa 254.

Maine. — *Grows v. Maine Cent. R. Co.*, 67 Me. 100.

Michigan. — *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.

Missouri. — *Maher v. Atlantic, etc., R. Co.*, 64 Mo. 267; *Wallace v. St. Louis, etc., R. Co.*, 74 Mo. 594; *Goodwin v. Chicago, etc., R. Co.*, 75 Mo. 73, 11 Am. & Eng. R. Cas. 460; *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80, 8 Am. & Eng. R. Cas. 467.

Nebraska. — *Burlington, etc., R. Co. v. Wendt*, 12 Neb. 76.

New Jersey. — *Telfer v. Northern R. Co.*, 30 N. J. L. 188.

New York. — *Wilds v. Hudson River R. Co.*, 29 N. Y. 315; *Warner v. New York Cent. R. Co.*, 44 N. Y. 465; *Salter v. Utica, etc., R. Co.*, 88 N. Y. 42.

Pennsylvania. — *Reading, etc., R. Co. v. Ritchie*, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267.

2. *Rate of Speed Must Vary*. — *Louisville, etc., R. Co. v. Webb*, 97 Ala. 308; *Alabama G. S. R. Co. v. Anderson*, 109 Ala. 299; *East Tennessee, etc., R. Co. v. Deaver*, 79 Ala. 221; *Dyson v. New York, etc., R. Co.*, 57 Conn. 9, 14 Am. St. Rep. 82; *Pacific, etc., R. Co. v. Houts*, 12 Kan. 328; *Hicks v. New York, etc., R. Co.*, 164 Mass. 424; *Wilds v. Hudson River R. Co.*, 29 N. Y. 315; *Salter v. Utica, etc., R. Co.*, 88 N. Y. 42; *Wilds v. Hudson River R. Co.*, 29 N. Y. 315; *Massoth v. Delaware, etc., Canal Co.*, 64 N. Y. 531; *Cordell v. New York Cent., etc., R. Co.*, 70 N. Y. 124, 26 Am. Rep. 550.

The rate of speed at which trains can be run is relative to the danger attending such running. *Pacific R. Co. v. Houts*, 12 Kan. 328.

There must be a reasonable and fair regard on the part of railroads for persons and property in running their trains through villages and over frequented public crossings, and the rate of speed must be made to conform reason-

ably with the surroundings. *Stepp v. Chicago, etc., R. Co.*, 85 Mo. 220.

Sounds Preventing Signals Being Heard. — There may be special circumstances which impose the duty of slackening speed at a particular time; as where the engineer sees that a person is crossing the track or there are sounds which might prevent the signals from being noticed. In such a case the company would be liable for his negligence. *Dyson v. New York, etc., R. Co.*, 57 Conn. 9, 14 Am. St. Rep. 82.

Proximity of Another Railroad. — The deceased and two companions, one of whom owned and drove the team, approached very slowly, in an open wagon, a level crossing of the defendant's railroad. It was about ten o'clock on a starlight night. When about three hundred and fifty feet from the crossing a locomotive whistle was heard, but no bell was heard by them at any time. Another railroad passed in the immediate neighborhood; and the deceased and his companions could not tell, from the sound of the whistle, upon which road the train was. The team moved on without stopping, and almost immediately upon reaching the crossing a collision took place, by which two of the three men were instantly killed. The approach to the crossing was upon a slightly descending grade, and the view of the track was almost entirely obstructed by houses and other structures. Gates had been constructed at the crossing; but they had been left open and the flagman had left them for the night. It was held that the jury might have inferred that the travelers looked and listened after hearing the whistle; that there was evidence of negligence on the part of the company in running the train at a rate greater than the statutory rate, and in leaving the gates open, thus inviting persons to cross; and that the plaintiff was entitled to recover. *State v. Boston, etc., R. Co.*, 80 Me. 430, 35 Am. & Eng. R. Cas. 356.

3. *In Open Country*. — *Farve v. Louisville, etc., R. Co.*, 42 Fed. Rep. 441; *Chicago, etc., R. Co. v. Harwood*, 80 Ill. 88; *Toledo, etc., R. Co. v. Jones*, 76 Ill. 311; *Louisville, etc., R. Co. v. Pirschbacher*, 63 Ill. App 144; *Omaha, etc., Valley R. Co. v. Talbot*, 48 Neb. 627; *Missouri Pac. R. Co. v. Hansen*, 48 Neb. 232; *Chicago, etc., R. Co. v. Grablin*, 38 Neb. 90; *Omaha, etc., Valley R. Co. v. Talbot*, 48 Neb. 627; *Cohen v. Eureka, etc., R. Co.*, 14 Nev. 276; *Warner v. New York Cent. R. Co.*, 44 N. Y. 465; *Zeigler v. Northeastern Co.*, 5 S. Car. 221.

But the greater the speed the greater the degree of care required in giving warning when approaching the crossing. *Childs v. Pennsylvania R. Co.*, 150 Pa. St. 73.

Illustrations. — It is not negligence *per se* to

(c) **In Cities and Towns.** — On the other hand, it is negligent for the company to run its trains at a high rate of speed over the streets of a populous city or town, unless some precaution has been taken in regard to gates or flagmen to warn the public.¹

(d) **Dangerous Places.** — So, also, where the crossing is known to be dangerous, the company should approach the same with care and appropriate signals.²

Rate of Speed Question for Jury. — Whether a given rate of speed, under the existing circumstances, is or is not negligence, is a question frequently submitted to the jury.³

run a train at the rate of twenty-five or thirty miles an hour across a public road in the country. *Goodwin v. Chicago, etc., R. Co.*, 75 Mo. 73, 11 Am. & Eng. R. Cas. 460; *Reading, etc., R. Co. v. Ritchie*, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267.

Where a train is running in the country, with signals which can be heard a mile, a speed of forty to forty-five miles an hour at a crossing is not excessive. *Griffith v. Baltimore, etc., R. Co.*, 44 Fed. Rep. 574.

It is not negligence for a railroad company to run a train over a public crossing in the open country at the rate of thirty miles an hour. It is only the force of special circumstances that requires a less rate of speed. *Reading, etc., R. Co. v. Ritchie*, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267.

1. **In Cities and Towns.** — *Louisville, etc., R. Co. v. Webb*, 97 Ala. 308; *Alabama G. S. R. Co. v. Anderson*, 109 Ala. 299; *East Tennessee, etc., R. Co. v. Deaver*, 79 Ala. 221; *Chicago, etc., R. Co. v. Engle*, 84 Ill. 397; *Lafayette, etc., R. Co. v. Adams*, 26 Ind. 76; *Cleveland, etc., R. Co. v. Harrington*, 131 Ind. 426; *Pacific R. Co. v. Houts*, 12 Kan. 328; *Loucks v. Chicago, etc., R. Co.*, 31 Minn. 526, 19 Am. & Eng. R. Cas. 305; *Cohen v. Eureka, etc., R. Co.*, 14 Nev. 376; *Philadelphia, etc., R. Co. v. Long*, 75 Pa. St. 257; *Piper v. Chicago, etc., R. Co.*, 77 Wis. 247.

The rate of speed in crossing the streets of a city must depend upon the particular circumstances of the case. *Wilds v. Hudson River R. Co.*, 29 N. Y. 315.

A railroad company may be liable for an injury at a street crossing in a thickly settled district, where the train was running at an unlawful speed, if it appears that the accident would not have happened had it been running at proper speed. *Duffy v. Missouri Pac. R. Co.*, 19 Mo. App. 380.

A rate of speed over twenty-five miles an hour in a populous neighborhood of a city is too great and rebuts any presumption of negligence on the part of a party run over and killed by the train while attempting to cross the street. *Hagan v. Philadelphia, etc., R. Co.*, 5 Phila. (Pa.) 179.

Prima Facie Wilful Negligence. — To run a train at a rapid rate of speed across a public street in a city or town is *prima facie* wilful negligence. *Eskridge v. Cincinnati, etc., R. Co.*, 89 Ky. 367, 42 Am. & Eng. R. Cas. 176.

Gross Negligence. — Where the plaintiff was injured at a dangerous crossing near a populous city, and it appeared that the train was run at a rapid rate on a down grade, without steam, rendering it comparatively noiseless, and without ringing a bell or sounding a whistle, this was held sufficient to warrant the

jury in finding the company guilty of gross negligence. *Chicago, etc., R. Co. v. Payne*, 59 Ill. 534, 11 Am. Ry. Rep. 157.

2. **Dangerous Places.** — *Ellis v. Lake Shore, etc., R. Co.*, 138 Pa. St. 506, 21 Am. St. Rep. 914; *South, etc., Alabama R. Co. v. Thompson*, 62 Ala. 494.

In *Beanstrom v. Northern Pac. R. Co.*, 46 Minn. 193, evidence that a railroad train crossed the principal thoroughfare of a village at the rate of twenty-five or thirty miles an hour, without giving any signal of its approach except a whistle three-fourths of a mile away, and that the opportunities of seeing or hearing a train were greatly obstructed, was held sufficient to justify a finding of negligence on the part of the company.

3. **Rate of Speed Question for Jury** — *Alabama.* — *Alabama G. S. R. Co. v. Anderson*, 109 Ala. 299; *Louisville, etc., R. Co. v. Webb*, 90 Ala. 185, 97 Ala. 308.

Delaware. — *Burton v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 252.

Georgia. — *Western, etc., R. Co. v. King*, 70 Ga. 261, 19 Am. & Eng. R. Cas. 255.

Indiana. — *Terre Haute, etc., R. Co. v. Clark*, 73 Ind. 168.

Iowa. — *Pratt v. Chicago, etc., R. Co.*, 98 Iowa 563.

Kansas. — *Pacific R. Co. v. Houts*, 12 Kan. 328.

Minnesota. — *Howard v. St. Paul, etc., R. Co.*, 32 Minn. 214, 19 Am. & Eng. R. Cas. 283.

Mississippi. — *Alabama, etc., R. Co. v. Phillips*, 70 Miss. 14.

Missouri. — *Gratiot v. Missouri Pac. R. Co.*, 116 Mo. 450, 55 Am. & Eng. R. Cas. 108.

Nebraska. — *Chicago, etc., R. Co. v. Grablin*, 38 Neb. 90; *Missouri Pac. R. Co. v. Hansen*, 48 Neb. 232.

New Hampshire. — *Clark v. Boston, etc., R. Co.*, 64 N. H. 324, 31 Am. & Eng. R. Cas. 548.

New York. — *Martin v. New York Cent., etc., R. Co.*, 27 Hun (N. Y.) 532, affirmed in 97 N. Y. 628; *Jetter v. New York, etc., R. Co.*, 2 Keyes (N. Y.) 154; *De Loge v. New York Cent., etc., R. Co.*, 92 Hun (N. Y.) 149; *Thompson v. New York Cent., etc., R. Co.*, 110 N. Y. 636; *Waldele v. New York Cent., etc., R. Co.*, 4 N. Y. App. Div. 549; *Cordell v. New York Cent., etc., R. Co.*, 70 N. Y. 124, 26 Am. Rep. 550; *Beisegel v. New York Cent. R. Co.*, 14 Abb. Pr. N. S. (N. Y. Ct. App.) 29; *Massoth v. Delaware, etc., Canal Co.*, 64 N. Y. 524; *Salter v. Utica, etc., R. Co.*, 88 N. Y. 42.

Pennsylvania. — *Childs v. Pennsylvania R. Co.*, 150 Pa. St. 73; *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33.

South Carolina. — *Zeigler v. Northeastern R. Co.*, 5 S. Car. 221.

Usual Rate of Speed Without Signals. — It is negligent for the train to maintain its usual rate of speed when approaching a crossing, without observing the usual precautions and giving the required danger signals to warn the public.¹ Nor should the speed of a train at crossings be so great as to render unavailing the warning of its whistle or bell when given.²

(4) *By Statute or Ordinance* — (a) **In General.** — The rate of speed at which trains should be run is in many instances regulated by statute or ordinance.³

Constitutionality. — Such statutes or ordinances are not in conflict with either the state or federal constitutions,⁴ and are no violation of the original charter granted the railroad.⁵ They are a valid exercise of the police power of the

Texas. — *International, etc., R. Co. v. Graves*, 59 Tex. 330.

Vermont. — *Morse v. Rutland, etc., R. Co.*, 27 Vt. 49.

Wisconsin. — *Hoppe v. Chicago, etc., R. Co.*, 61 Wis. 357, 19 Am. & Eng. R. Cas. 74.

A charge of the court instructing the jury that it was the duty of a railway company to reduce the speed of the engine when crossing any of the streets of a city was error in the absence of legislation regulating that matter. In a given case a failure to reduce speed might, as a matter of fact, be negligence; but this must be ascertained and determined by the jury. *International, etc., R. Co. v. Graves*, 59 Tex. 330.

Not Question for Jury in All Cases. — It is not correct to say that in every case where excessive speed is alleged the question must be submitted to the jury. If it be clearly shown that on the occasion in question the velocity was not greater than that which had been usually practiced for a considerable time with the tacit consent of the community, and without accident, it should not be considered an open question whether running at that rate was negligent and lawful. *Wilds v. Hudson River R. Co.*, 29 N. Y. 326.

1. **Signals.** — *Thayer v. Flint, etc., R. Co.*, 93 Mich. 150. See *infra*, this section, *Duty to Give Signals*.

2. **Speed Rendering Signals Unavailing.** — *Baltimore, etc., R. Co. v. Owings*, 65 Md. 502, 28 Am. & Eng. R. Cas. 639; *Childs v. Pennsylvania R. Co.*, 150 Pa. St. 73; *Beanstrom v. Northern Pac. R. Co.*, 46 Minn. 193; *Martin v. New York Cent., etc., R. Co.*, 27 Hun (N. Y.) 532, *affirmed* 97 N. Y. 628.

3. **Statutory Regulations** — *Alabama.* — *Western R. Co. v. Sistrunk*, 85 Ala. 352.

Illinois. — *Toledo, etc., R. Co. v. Deacon*, 63 Ill. 91.

Indiana. — *Cleveland, etc., R. Co. v. Harrington*, 131 Ind. 426, 49 Am. & Eng. R. Cas. 358.

Minnesota. — *Evison v. Chicago, etc., R. Co.*, 45 Minn. 370.

Missouri. — *Liddy v. St. Louis R. Co.*, 40 Mo. 507; *Merz v. Missouri Pac. R. Co.*, 88 Mo. 672; *Schlereth v. Missouri Pac. R. Co.*, 96 Mo. 509; *Grube v. Missouri Pac. R. Co.*, 98 Mo. 330, 14 Am. St. Rep. 645.

Nebraska. — *Union Pac. R. Co. v. Rassmusen*, 25 Neb. 810, 13 Am. St. Rep. 527.

New Hampshire. — *Clark v. Boston, etc., R. Co.*, 64 N. H. 323, 31 Am. & Eng. R. Cas. 548.

New York. — *Massoth v. Delaware, etc., Canal Co.*, 64 N. Y. 524.

Virginia. — *Virginia Midland R. Co. v. White*, 84 Va. 498, 10 Am. St. Rep. 874.

Wisconsin. — *Horn v. Chicago, etc., R. Co.*, 38 Wis. 463; *Ewen v. Chicago, etc., R. Co.*, 38 Wis. 613; *Hooker v. Chicago, etc., R. Co.*, 76 Wis. 542.

Railroads Extending into an Adjoining State. — A statute regulating speed across highways in the compact part of a town applies to railroads extending into an adjoining state. *Clark v. Boston, etc., R. Co.*, 64 N. H. 323, 31 Am. & Eng. R. Cas. 548.

Repeated Violation of Ordinance. — The fact that a railroad company has not been prosecuted for repeated violations of a city ordinance limiting the speed of trains does not tend to prove that such ordinance has been abandoned and has become obsolete, and constitutes no defense to an action against such company for injuries caused by its negligence in running its trains at excessive speed. *Cleveland, etc., R. Co. v. Harrington*, 131 Ind. 426, 49 Am. & Eng. R. Cas. 359.

Limitations of Franchise. — Under sections 37 and 43 of the *Wisconsin* General Railway Law of 1872, the restraints placed upon railway companies as to their rate of speed at crossings and within incorporated cities are limitations of the franchise, and violations of them are expressly made criminal by statute. *Horn v. Chicago, etc., R. Co.*, 38 Wis. 463.

4. **Not Unconstitutional.** — *Merz v. Missouri Pac. R. Co.*, 88 Mo. 672; *Ohio, etc., R. Co. v. McClelland*, 25 Ill. 140.

Ordinance Unreasonable and Void. — To justify the courts in declaring a city ordinance, limiting the rate of speed of railroad trains and engines within the city, void, as in restraint of trade, its unreasonableness or want of necessity as a police regulation must be clear, manifest, undoubted, so as to be an abuse of discretion on the part of the council. *Knobloch v. Chicago, etc., R. Co.*, 31 Minn. 402, 14 Am. & Eng. R. Cas. 625.

An ordinance of the city of St. Paul limiting the speed of trains within the city limits to four miles an hour was held unreasonable and void as to certain parts of the road in the suburbs of the city. *Evison v. Chicago, etc., R. Co.*, 45 Minn. 370. Compare *Cleveland, etc., R. Co. v. Harrington*, 131 Ind. 426, 49 Am. & Eng. R. Cas. 358.

5. **Not Violative of Original Charter.** — *Mobile, etc., R. Co. v. State*, 51 Miss. 137; *Cleveland, etc., R. Co. v. Harrington*, 131 Ind. 426, 49 Am. & Eng. R. Cas. 359.

By charters, unlimited discretion in the regulation of the speed of trains is not conferred.

state, for the welfare and safety of its inhabitants.¹

Delegation of Power to Municipalities. — The power to enact such regulations may be delegated to cities and towns.²

(b) **Speed in Violation of Ordinance.** — In some cases it has been held that the running of a railroad train within the limits of a city at a rate of speed greater than is allowed by an ordinance of such city is negligence.³ But perhaps the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as a circumstance

Among the rights reserved is the power to regulate the approaches to and the crossing of public highways, and the passage through cities and villages, where life and property are constantly in imminent danger from the rapid speed of railway trains. Toledo, etc., R. Co. v. Deacon, 63 Ill. 91, 7 Am. Ry. Rep. 150.

1. **Exercise of Police Power.** — Clark v. Boston, etc., R. Co., 64 N. H. 323, 31 Am. & Eng. R. Cas. 548; Grube v. Missouri Pac. R. Co., 98 Mo. 336, 14 Am. St. Rep. 645; Toledo, etc., R. Co. v. Deacon, 63 Ill. 91; Mobile, etc., R. Co. v. State, 51 Miss. 137; Cleveland, etc., R. Co. v. Harrington, 131 Ind. 426, 49 Am. & Eng. R. Cas. 359.

2. **Power Delegated to Cities and Towns.** — Merz v. Missouri Pac. R. Co., 88 Mo. 672; Grube v. Missouri Pac. R. Co., 98 Mo. 336, 14 Am. St. Rep. 645; Evison v. Chicago, etc., R. Co., 45 Minn. 370; Cleveland, etc., R. Co. v. Harrington, 131 Ind. 426, 49 Am. & Eng. R. Cas. 359.

In Merz v. Missouri Pac. R. Co., 88 Mo. 672, it was held that a city, in the absence of any express authority in its charter, would have the right to pass such an ordinance by virtue of its general supervision over the police of the city.

Where a city had power under its charter, as a police regulation, to limit the speed of trains to a certain number of miles per hour within its corporate limits, the courts of the state will support an ordinance limiting the rate of speed to six miles per hour or to any other reasonable rate. Gratiot v. Missouri Pac. R. Co., 116 Mo. 450, 55 Am. & Eng. R. Cas. 108.

3. **Speed in Violation of Ordinance** — *Indiana*. — Shirk v. Wabash R. Co., 14 Ind. App. 126; Pennsylvania Co. v. Horton, 132 Ind. 189.

Missouri. — Liddy v. St. Louis R. Co., 40 Mo. 507; Karle v. Kansas City, etc., R. Co., 55 Mo. 476; Keim v. Union R., etc., Co., 90 Mo. 314; Eswin v. St. Louis, etc., R. Co., 96 Mo. 290; Schlereth v. Missouri Pac. R. Co., 96 Mo. 509; Kellny v. Missouri Pac. R. Co., 101 Mo. 67; Dahlstrom v. St. Louis, etc., R. Co., 108 Mo. 525; Gratiot v. Missouri Pac. R. Co., (Mo. 1891) 16 S. W. Rep. 384, 49 Am. & Eng. R. Cas. 398.

Texas. — Texas, etc., R. Co. v. Brown, 11 Tex. Civ. App. 503; Gulf, etc., R. Co. v. Pender, (Tex. Civ. App. 1896) 36 S. W. Rep. 793.

Wisconsin. — Piper v. Chicago, etc., R. Co., 77 Wis. 247.

See also Chicago, etc., R. Co. v. Gregory, 58 Ill. 226; Toledo, etc., R. Co. v. Deacon, 63 Ill. 91; St. Louis, etc., R. Co. v. Dunn, 78 Ill. 197; Chicago, etc., R. Co. v. Becker, 84 Ill. 483; St. Louis, etc., R. Co. v. Mathias, 50 Ind. 65; Chicago, etc., R. Co. v. Spilker, 134 Ind. 380;

Dodge v. Burlington, etc., R. Co., 34 Iowa 276; Correll v. Burlington, etc., R. Co., 38 Iowa 120, 18 Am. Rep. 22; Murray v. Missouri Pac. R. Co., 101 Mo. 236, 20 Am. St. Rep. 601; Virginia Midland R. Co. v. White, 84 Va. 498, 10 Am. St. Rep. 874.

Proximate Cause. — Where it appears that a person was killed at a crossing by a train running at a prohibited rate of speed, and that he would have had time to cross in safety had the train been running only at lawful speed, the unlawful speed may be considered the proximate cause of the accident. Winstanley v. Chicago, etc., R. Co., 72 Wis. 375, 35 Am. & Eng. R. Cas. 370.

Negligence as Matter of Law. — In Western, etc., R. Co. v. Young, 81 Ga. 397, 12 Am. St. Rep. 320, 37 Am. & Eng. R. Cas. 489, it was held that it is negligence, as matter of law, for railway companies not to use the precautions for safety at public crossings definitely prescribed by statute or valid municipal ordinances.

In Atchison, etc., R. Co. v. Feehan, 47 Ill. App. 66, it was held that proof that a train was running at a prohibited rate of speed at a crossing when an accident occurred raises a presumption of negligence, in the absence of anything to show that the accident was due to some other cause.

Backing Train. — A municipal ordinance prohibiting, under penalty, the backing of a railroad engine at a greater speed than four miles an hour is a reasonable police regulation, the violation of which is negligence and renders the railroad company liable for damages at the suit of a person injured. Louisville, etc., R. Co. v. Webb, 90 Ala. 185, 49 Am. & Eng. R. Cas. 427.

And so, in Texas, etc., R. Co. v. Brown, (Tex. Civ. App. 1896) 39 S. W. Rep. 140, it was held that running a train backwards over a crossing at the rate of fifteen miles an hour and in violation of a city ordinance was gross negligence.

Trespassers. — If an engineer, knowing that persons are accustomed to cross the track between the streets of a large and crowded city, drives his engine forward recklessly, or with indifference as to whether such persons are injured or not, and at a rate of speed greatly in excess of that limited by ordinance, an injury thereby inflicted upon one of such persons, even though he be a trespasser, will be regarded as the result of "such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness or wantonness." Lake Shore, etc., R. Co. v. Bodemer, 139 Ill. 596, 32 Am. St. Rep. 218, 54 Am. & Eng. R. Cas. 177, affirming 33 Ill. App. 479.

from which negligence may be inferred.¹

f. DUTY TO GIVE SIGNALS—(1) *In General*.—It is the duty of a railroad company to give reasonable and proper warnings, for the protection of travelers on the highway, when its trains are approaching a highway crossing,² and a traveler has a right to presume that this duty will be per-

1. Circumstance from Which Negligence Can Be Inferred—*United States*.—Grand Trunk R. Co. *v. Ives*, 144 U. S. 408.

Iowa.—*Artz v. Chicago, etc.*, R. Co., 44 Iowa 284.

Maryland.—*Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534; *Philadelphia, etc., R. Co. v. Stebbing*, 62 Md. 504, 19 Am. & Eng. R. Cas. 36.

Minnesota.—*Faber v. St. Paul, etc., R. Co.*, 29 Minn. 465, 8 Am. & Eng. R. Cas. 277.

Nebraska.—*Burlington, etc., R. Co. v. Wendt*, 12 Neb. 76.

New Hampshire.—*Nutter v. Boston, etc., R. Co.*, 60 N. H. 483; *Clark v. Boston, etc., R. Co.*, 64 N. H. 323.

Ohio.—*Meek v. Pennsylvania Co.*, 38 Ohio St. 632, 13 Am. & Eng. R. Cas. 643.

See also *Blanchard v. Lake Shore, etc., R. Co.*, 126 Ill. 416; *Lane v. Atlantic Works*, 111 Mass. 136; *Wright v. Malden, etc., R. Co.*, 4 Allen (Mass.) 283; *Union Pac. R. Co. v. Rassmussen*, 25 Neb. 810, 13 Am. St. Rep. 527; *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 66, 52 Am. Dec. 434.

The rate of speed, in connection with other circumstances, may be considered in determining the question of negligence; but the rate of speed at which a train can be run with safety to the passengers cannot, in itself, be deemed negligence as against one who is injured thereby at the crossing. *Terre Haute, etc., R. Co. v. Clark*, 73 Ind. 168, 6 Am. & Eng. R. Cas. 84. But see the cases from this jurisdiction in the preceding note.

Proximate Cause.—The fact that a train was violating a city ordinance as to speed at the time of an accident does not of itself constitute negligence, unless the plaintiff shows that the injury would not otherwise have occurred. *Philadelphia, etc., R. Co. v. Stebbing*, 62 Md. 504, 19 Am. & Eng. R. Cas. 36; *Chicago, etc., R. Co. v. Kennedy*, 2 Kan. App. 693.

But it is competent evidence as tending to show negligence. *Meek v. Pennsylvania Co.*, 38 Ohio St. 632, 13 Am. & Eng. R. Cas. 643.

New York Cases.—Whether a violation of an ordinance is necessarily an act of negligence, or such a wrongful act in violation of law as legally to charge the defendant with any injuries resulting from such act, may be regarded as an open question in New York state. The decision in *Brown v. Buffalo, etc., R. Co.*, 22 N. Y. 191, that running trains at a greater rate of speed than permitted by ordinance was not evidence of negligence in fact, and involved no consequence except liability for the penalty to the municipality, was dissented from by three judges, and has been overruled in *Jetter v. New York, etc., R. Co.*, 2 Abb. App. Dec. (N. Y.) 458, 2 Keyes (N. Y.) 154, and *Beisegel v. New York Cent. R. Co.*, 14 Abb. Pr. N. S. (N. Y. Ct. App.) 29. The actual decisions have, however, only gone to the extent of holding that city ordinances of

this character are competent evidence upon the question of negligence of railroad corporations, and, with proof of a greater rate of speed than that prescribed, proper, with all the other evidence in the case, to be submitted to the jury for their consideration. It has not been necessary in any case in which the question has arisen for the courts to go farther. *Masboth v. Delaware, etc., Canal Co.*, 64 N. Y. 524.

In *Jetter v. New York, etc., R. Co.*, 2 Keyes (N. Y.) 154, there is a plain intimation that a municipal ordinance, passed by authority of the legislature, has the force of an express statute, and that every violator of it is a wrongdoer and *ex necessitate* negligent in the eye of the law, and that every innocent party injured by such violation is entitled to his civil remedy for such injury. This would make railroad corporations liable to the same extent for a disregard of a city ordinance regulating the speed of trains as for an omission of the statutory signals of sounding the whistle or ringing the bell at highway crossings.

Judge Grover, in *Beisegel v. New York Cent. R. Co.*, 14 Abb. Pr. N. S. (N. Y. Ct. App.) 29, in an opinion concurred in by all the members of the court, took the same view of the legal effect of a city ordinance upon the civil rights of the parties. See also *McGrath v. New York Cent., etc., R. Co.*, 63 N. Y. 522; *Warner v. New York Cent. R. Co.*, 44 N. Y. 465.

2. Train Must Give Reasonable Warning of Approach—*England*.—*Gray v. North Eastern R. Co.*, 48 L. T. 904, 4 Ry. & C. T. Cas. xv.

United States.—*Morris v. Chicago, etc., R. Co.*, 26 Fed. Rep. 22.

Illinois.—*Galena, etc., Union R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471; *Chicago, etc., R. Co. v. Still*, 19 Ill. 499, 71 Am. Dec. 236; *Chicago, etc., R. Co. v. Cauffman*, 38 Ill. 428; *Chicago, etc., R. Co. v. Gretzner*, 46 Ill. 84; *Illinois Cent. R. Co. v. Gillis*, 68 Ill. 317; *Rockford, etc., R. Co. v. Hillmer*, 72 Ill. 235; *Peoria, etc., Union R. Co. v. Clayberg*, 107 Ill. 644, 15 Am. & Eng. R. Cas. 356.

Indiana.—*Indianapolis, etc., R. Co. v. McLin*, 82 Ind. 435, 8 Am. & Eng. R. Cas. 237.

Kentucky.—*Louisville, etc., R. Co. v. Com.*, 13 Bush (Ky.) 388, 26 Am. Rep. 205; *Louisville, etc., R. Co. v. Goetz*, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627.

Maryland.—*State v. Union R. Co.*, 70 Md. 69, 42 Am. & Eng. R. Cas. 167.

Massachusetts.—*Favor v. Boston, etc., R. Corp.*, 114 Mass. 350, 19 Am. Rep. 364; *Linfield v. Old Colony R. Corp.*, 10 Cush. (Mass.) 562, 57 Am. Dec. 124.

Michigan.—*Klanowski v. Grand Trunk R. Co.*, 57 Mich. 525.

Minnesota.—*Kelly v. St. Paul, etc., R. Co.*, 29 Minn. 1; *Loucks v. Chicago, etc., R. Co.*, 31 Minn. 526, 19 Am. & Eng. R. Cas. 305. See also *Shaber v. St. Paul, etc., R. Co.*, 28 Minn. 103.

formed and reasonable warning given.¹

(2) *By Statute* — (a) *In General*. — The duty to give signals at crossings is usually provided for by statute.²

Missouri. — Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229.

New York. — Cordell *v.* New York Cent., etc., R. Co., 64 N. Y. 535; Dyer *v.* Erie R. Co., 71 N. Y. 228.

Pennsylvania. — Philadelphia, etc., R. Co. *v.* Hagan, 47 Pa. St. 244, 86 Am. Dec. 541; Philadelphia, etc., R. Co. *v.* Stinger, 78 Pa. St. 219; Philadelphia, etc., R. Co. *v.* Killips, 88 Pa. St. 405.

South Carolina. — Strother *v.* South Carolina, etc., R. Co., 47 S. Car. 375.

Texas. — International, etc., R. Co. *v.* Jordan, 1 Tex. App. Civ. Cas., § 859, 10 Am. & Eng. R. Cas. 301.

Wisconsin. — Roberts *v.* Chicago, etc., R. Co., 35 Wis. 679.

At Common Law. — In the absence of any statutory provision upon the subject no legal obligation rests upon a railroad corporation to blow its whistle in approaching a public crossing with one of its trains. Brown *v.* Milwaukee, etc., R. Co., 22 Minn. 165, 19 Am. Ry. Rep. 298; Spencer *v.* Illinois Cent. R. Co., 29 Iowa 55.

Where a statute prescribes certain signals to be given by trains, the common law does not require others that may be more effective, under the maxim that every one must use his own property so as not to injure that of another. Beisiegel *v.* New York Cent. R. Co., 49 N. Y. 9.

Other Means of Information Open to Traveler Not Excuse for Omission. — The railroad company cannot excuse a failure to give the required signals on approaching the highway, on the ground that the traveler has other means of informing himself of the time that trains will pass. Chicago, etc., R. Co. *v.* Triplett, 38 Ill. 482.

1. Right to Presume that Warning Will Be Given — *United States*. — Texas, etc., R. Co. *v.* Cody, 166 U. S. 606.

California. — Robinson *v.* Western Pac. R. Co., 48 Cal. 409.

Illinois. — Lake Shore, etc., R. Co. *v.* Johnson, 135 Ill. 641, *affirming* 35 Ill. App. 430.

Michigan. — Klanowski *v.* Grand Trunk R. Co., 57 Mich. 525.

Minnesota. — Kelly *v.* St. Paul, etc., R. Co., 29 Minn. 1; Loucks *v.* Chicago, etc., R. Co., 31 Minn. 526, 19 Am. & Eng. R. Cas. 305.

Missouri. — Stepp *v.* Chicago, etc., R. Co., 85 Mo. 229; Petty *v.* Hannibal, etc., R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 181.

New York. — Beisiegel *v.* New York Cent. R. Co., 34 N. Y. 622, 90 Am. Dec. 741, 31 How. Pr. (N. Y.) 181, *reversing* 33 Barb. (N. Y.) 429; Ernst *v.* Hudson River R. Co., 35 N. Y. 9, 90 Am. Dec. 761; Rodrian *v.* New York, etc., R. Co., (Supreme Ct.) 28 N. Y. St. Rep. 625.

Pennsylvania. — Philadelphia, etc., R. Co. *v.* Hagan, 47 Pa. St. 244, 86 Am. Dec. 541.

Wisconsin. — Roberts *v.* Chicago, etc., R. Co., 35 Wis. 679.

Where a Person Is Familiar with a Crossing and with the custom of the company to give signals when trains approach it, the court may

assume that a failure to signal at the time of the accident wherein he was killed may have lulled him into security and induced him to advance after looking and listening for trains. Vandewater *v.* New York, etc., R. Co., 74 Hun (N. Y.) 32. See also Hinkle *v.* Richmond, etc., R. Co., 109 N. Car. 472, 26 Am. St. Rep. 581.

Even though no law requires signals at private crossings, yet if the company is accustomed to give such signals, and the custom is notorious, travelers may rely on the company's doing so, and a failure to signal is a proper fact for the jury to consider in passing upon the question of the defendant's negligence. Nash *v.* New York Cent., etc., R. Co., (Supreme Ct.) 15 N. Y. St. Rep. 879, 48 Hun (N. Y.) 618.

2. Statutes Providing for Signals at Crossings — *United States*. — Saldana *v.* Galveston, etc., R. Co., 43 Fed. Rep. 862.

Alabama. — Cook *v.* Central R., etc., Co., 67 Ala. 533; Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 24 Am. St. Rep. 863, 48 Am. & Eng. R. Cas. 170; Alabama G. S. R. Co. *v.* Linn, 103 Ala. 134; Georgia Pac. R. Co. *v.* Lee, 92 Ala. 262.

Arkansas. — St. Louis, etc., R. Co. *v.* State, 56 Ark. 166; St. Louis, etc., R. Co. *v.* Hendricks, 53 Ark. 201; State *v.* Kansas City, etc., R. Co., 54 Ark. 546.

California. — Strong *v.* Sacramento, etc., R. Co., 61 Cal. 326, 8 Am. & Eng. R. Cas. 273.

Georgia. — Georgia R., etc., Co. *v.* Wynn, 42 Ga. 331; Western, etc., R. Co. *v.* Atlanta, 74 Ga. 774, 19 Am. & Eng. R. Cas. 233.

Illinois. — Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416, *affirming* 27 Ill. App. 22; Mobile, etc., R. Co. *v.* Davis, 130 Ill. 146, *affirming* 31 Ill. App. 490, 42 Am. & Eng. R. Cas. 70; Chicago, etc., R. Co. *v.* Dillon, 123 Ill. 570, 5 Am. St. Rep. 559, 32 Am. & Eng. R. Cas. 1; Lake Shore, etc., R. Co. *v.* Johnson, 135 Ill. 641, *affirming* 35 Ill. App. 430; Williams *v.* Chicago, etc., R. Co., 135 Ill. 491; Illinois Cent. R. Co. *v.* Slater, 129 Ill. 91, 16 Am. St. Rep. 242, *affirming* 28 Ill. App. 73; Western Union R. Co. *v.* Fulton, 64 Ill. 271; Galena, etc., Union R. Co. *v.* Loomis, 13 Ill. 548, 56 Am. Dec. 471; Chicago, etc., R. Co. *v.* Dougherty, 110 Ill. 521, 19 Am. & Eng. R. Cas. 292.

Indiana. — Ohio, etc., R. Co. *v.* McDanel, 5 Ind. App. 108; Pittsburgh, etc., R. Co. *v.* Brown, 67 Ind. 45, 33 Am. Rep. 73; Pittsburgh, etc., R. Co. *v.* Shaw, 15 Ind. App. 173.

Kansas. — Atchison, etc., R. Co. *v.* State, 22 Kan. 1; Leavenworth, etc., R. Co. *v.* Rice, 10 Kan. 437.

Massachusetts. — Linfield *v.* Old Colony R. Corp., 10 Cush. (Mass.) 562, 57 Am. Dec. 124; Favor *v.* Boston, etc., R. Corp., 114 Mass. 350, 19 Am. Rep. 364; Norton *v.* Eastern R. Co., 113 Mass. 366.

Michigan. — Sanborn *v.* Detroit, etc., R. Co., 91 Mich. 538, 50 Am. & Eng. R. Cas. 114.

Minnesota. — Kelly *v.* St. Paul, etc., R. Co., 29 Minn. 1.

The Effect of Such Statutes is to superadd a duty upon the railroad company, the disregard of which, however, would impose no greater or other liability than would follow from the disregard of a common-law duty in respect to care in running a train.¹

(b) **Object and Purpose of Statutes — Protection of Travelers on Highway.** — The object and purpose of such statutes is not only to give notice that a railroad track crosses the highway, but is intended for the protection of life, and to give warning to travelers on the highway of the approach of trains.²

Missouri. — *State v. St. Joseph, etc., R. Co.*, 46 Mo. App. 466; *Burger v. Missouri Pac. R. Co.*, 112 Mo. 238, 34 Am. St. Rep. 379; *Bell v. Hannibal, etc., R. Co.*, 72 Mo. 50, 4 Am. & Eng. R. Cas. 580; *Hanlon v. Missouri Pac. R. Co.*, 104 Mo. 381.

New York. — *Mayer v. New York Cent., etc., R. Co.*, (Supreme Ct.) 29 N. Y. St. Rep. 183, 55 Hun (N. Y.) 608, *affirmed* in 132 N. Y. 579, 43 N. Y. St. Rep. 965; *Matter of Highway Com'rs*, 74 Hun (N. Y.) 48; *Lewis v. New York, etc., R. Co.*, 123 N. Y. 496, *affirming* 52 Hun (N. Y.) 614, 24 N. Y. St. Rep. 435, 1 *Silv.* (N. Y.) 393; *Byrne v. New York Cent., etc., R. Co.*, 94 N. Y. 12, *reversing* 28 Hun (N. Y.) 438; *Cordell v. New York Cent., etc., R. Co.*, 64 N. Y. 535, *reversing* 6 Hun (N. Y.) 461; *Harty v. Central R. Co.*, 42 N. Y. 468; *Voak v. Northern Cent. R. Co.*, 75 N. Y. 320; *Steves v. Oswego, etc., R. Co.*, 18 N. Y. 422; *Chrystal v. Troy, etc., R. Co.*, 124 N. Y. 519; *Vandewater v. New York, etc., R. Co.*, 135 N. Y. 583; *Rodrian v. New York, etc., R. Co.*, (Supreme Ct.) 28 N. Y. St. Rep. 625.

South Carolina. — *Hale v. Columbia, etc., R. Co.*, 34 S. Car. 292; *Neely v. Charlotte, etc., R. Co.*, 33 S. Car. 136; *Kaminitsky v. Northeastern R. Co.*, 25 S. Car. 53; *Strother v. South Carolina, etc., R. Co.*, 47 S. Car. 375.

Tennessee. — *Katzenberger v. Lawo*, 90 Tenn. 235, 25 Am. St. Rep. 681, 50 Am. & Eng. R. Cas. 443. See also *Little Rock, etc., R. Co. v. Wilson*, 90 Tenn. 271.

Texas. — *International, etc., R. Co. v. Jordan*, 1 Tex. App. Civ. Cas., § 859, 10 Am. & Eng. R. Cas. 301; *Brown v. Griffin*, 71 Tex. 654; *Houston, etc., R. Co. v. Nixon*, 52 Tex. 19; *International, etc., R. Co. v. Gray*, 65 Tex. 32, 27 Am. & Eng. R. Cas. 318; *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, 35 Am. & Eng. R. Cas. 364; *Galveston, etc., R. Co. v. Cook*, (Tex. 1891) 16 S. W. Rep. 1038; *Houston, etc., R. Co. v. Brin*, 77 Tex. 174.

Vermont. — *Wakefield v. Connecticut, etc., R. Co.*, 37 Vt. 330, 86 Am. Dec. 711.

West Virginia. — *Toudy v. Norfolk, etc., R. Co.*, 38 W. Va. 694.

Wisconsin. — *Ewen v. Chicago, etc., R. Co.*, 38 Wis. 613; *Cahoon v. Chicago, etc., R. Co.*, 85 Wis. 570; *Ransom v. Chicago, etc., R. Co.*, 62 Wis. 178, 51 Am. Rep. 718, 19 Am. & Eng. R. Cas. 16.

Canada. — *Grand Trunk R. Co. v. Rosenberger*, 9 Can. Sup. Ct. Rep. 311, *affirming* 8 Ont. App. 482, 19 Am. & Eng. R. Cas. 8.

Distance from Crossing. — A statute requiring the checking of trains and ringing of bells in approaching public crossings is applicable, without reference to the distance from the crossing to the point at which the train started. *East Tennessee, etc., R. Co. v. Markens*, 88 Ga. 60.

Highway Over or Under Track. — Even where the crossing is over or under the railroad track, it has been held that a statute requiring a signal before crossing "any traveled public road or street" is applicable, and the railroad liable to the statutory penalty for omitting signals before crossing at such points. *People v. New York Cent. R. Co.*, 13 N. Y. 78, *affirming* 25 Barb. (N. Y.) 199. And if danger is likely to result to persons or property from a failure to signal, the company must signal at crossings above or below grade. *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259, 98 Am. Dec. 346.

But in *Illinois* it has been held that a statute requiring a bell to be rung at street crossings has no application to a street where no travel passes over the track except upon a viaduct above the tracks. *Blanchard v. Lake Shore, etc., R. Co.*, 126 Ill. 416, *affirming* 27 Ill. App. 22.

The right of a court to regulate signals where highways cross railroads, as given by the General Railroad Act of 1890, § 33, extends to a crossing where the railroad track is two feet below grade, though the statute uses the expression "where a railroad crosses a * * * highway * * * at grade." *Matter of Highway Com'rs*, 74 Hun (N. Y.) 48.

1. Effect of Statutes. — *Houston, etc., R. Co. v. Nixon*, 52 Tex. 19; *International, etc., R. Co. v. Jordan*, 1 Tex. App. Civ. Cas., § 859, 10 Am. & Eng. R. Cas. 301; *Artz v. Chicago, etc., R. Co.*, 34 Iowa 153; *Steves v. Oswego, etc., R. Co.*, 18 N. Y. 422. See *infra*, this section, *Effect on Liability of Failure to Give Signals*.

Qui Tam Actions under Illinois Statute. — An action may be maintained for the penalty prescribed by the Illinois statutes for failure to ring a bell or sound a whistle in approaching a crossing. See *Chicago, etc., R. Co. v. Howard*, 38 Ill. 414; *Toledo, etc., R. Co. v. Foster*, 43 Ill. 480; *Chicago, etc., R. Co. v. Adler*, 56 Ill. 344, 3 Am. Ry. Rep. 278; *Illinois Cent. R. Co. v. Herr*, 54 Ill. 356; *Illinois Cent. R. Co. v. Tait*, 50 Ill. 48; *Wilson v. Ohio, etc., R. Co.*, 64 Ill. 542, 16 Am. Rep. 565, 3 Am. Ry. Rep. 285.

2. Object and Purpose of Statutes. — *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478; *Louisville, etc., R. Co. v. Hall*, 91 Ala. 112, 24 Am. St. Rep. 863, 48 Am. & Eng. R. Cas. 170; *Williams v. Chicago, etc., R. Co.*, 135 Ill. 491, *affirming* 32 Ill. App. 339; *Chicago, etc., R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761, 23 Am. & Eng. R. Cas. 282; *Missouri Pac. R. Co. v. Pierce*, 33 Kan. 61; *Burger v. Missouri Pac. R. Co.*, 112 Mo. 238, 34 Am. St. Rep. 379; *Pakalinsky v. New York Cent., etc., R. Co.*, 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251; *Harty v. Central R. Co.*, 42 N. Y. 468; *Quigley v. Delaware, etc., Canal Co.*, 142 Pa. St. 388, 24 Am. St. Rep. 504.

Not for Protection of Persons Walking Along or Parallel with Track. — The statutes have been held to have no application to, and not to be intended for, the benefit of one walking along the track¹ or parallel with the same, and not using the crossing at the time of the accident.²

Persons in Vicinity of Crossing. — It has been held by some courts that the duty to signal at a crossing exists not only with reference to persons approaching or in the act of passing the crossing, but with reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident or injury by the passing of engines at that place.³ Other courts have held that such statutes are designed only for the protection of those traveling on the highway at or near the crossing,⁴ and have no application to individuals near the crossing but not intending to cross, or to cattle or teams fastened or pasturing near the spot.⁵

(c) **At What Crossings Warnings to Be Given.** — What constitutes a public highway or road within the meaning of the statute requiring warnings to be given at such points, must depend upon the terms of the statute under which the duty arises.⁶

One of the purposes of such statutes is to protect persons lawfully using a highway from danger arising from the fright of horses by passing trains. *Voak v. Northern Cent. R. Co.*, 75 N. Y. 320. See also *Ransom v. Chicago, etc., R. Co.*, 62 Wis. 178, 51 Am. Rep. 718, 19 Am. & Eng. R. Cas. 16.

Consol. Stat. Canada, c. 66, § 104, must be construed as inuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of the train to ring a bell or sound a whistle, as they are directed to do by said statute; whether such damage arises from actual collision or by a horse being brought over near the crossing and taking fright at the appearance or noise of the train. *Grand Trunk R. Co. v. Rosenberger*, 9 Can. Sup. Ct. Rep. 311, 19 Am. & Eng. R. Cas. 8, *affirming* 8 Ont. App. 482, which *affirms* 32 U. C. C. P. 349.

1. Persons Walking Along Track. — *Central R., etc., Co. v. Raiford*, 82 Ga. 400, 37 Am. & Eng. R. Cas. 481; *Chicago, etc., R. Co. v. McKnight*, 16 Ill. App. 596; *O'Donnell v. Providence, etc., R. Co.*, 6 R. I. 211.

Yet in such cases a failure to comply with the statute is evidence of negligence to be considered by the jury. *Central R., etc., Co. v. Raiford*, 82 Ga. 400, 37 Am. & Eng. R. Cas. 481. And it would not be appropriate in such a case to instruct the jury, without proper explanation and qualification, that "the requirements of blowing the whistle, ringing the bell, and checking the speed are not for the protection of persons using the track as a thoroughfare in its length and not in crossing it." *Georgia R., etc., Co. v. Daniel*, 89 Ga. 463.

Brakeman on Car. — Statutes requiring the railroad to signal on approaching crossings have no application to the case of a brakeman who sues for damages on account of personal injuries sustained by being struck by a low overhead bridge, while on the top of a car in the discharge of his duties. *Louisville, etc., R. Co. v. Hall*, 91 Ala. 112, 24 Am. St. Rep. 863, 48 Am. & Eng. R. Cas. 170.

2. Walking Parallel with Track. — *Louisville, etc., Consol. R. Co. v. Lee*, 47 Ill. App. 384;

East Tennessee, etc., R. Co. v. Feathers, 10 Lea (Tenn.) 103, 15 Am. & Eng. R. Cas. 446; *Rosenberger v. Grand Trunk R. Co.*, 8 Ont. App. 482, 15 Am. & Eng. R. Cas. 448.

3. Wakefield v. Connecticut, etc., R. Co., 37 Vt. 330, 86 Am. Dec. 711.

4. St. Louis, etc., R. Co. v. Payne, 29 Kan. 166, 13 Am. & Eng. R. Cas. 632.

5. St. Louis, etc., R. Co. v. Payne, 29 Kan. 166, 13 Am. & Eng. R. Cas. 632; *Neely v. Charlotte, etc., R. Co.*, 33 S. Car. 136. See also *Hale v. Columbia, etc., R. Co.*, 34 S. Car. 294.

Liability to Persons Near Crossing, but Not Intending to Cross, Depends on Circumstances. — If one in the vicinity of a crossing, but not intending to cross, may hold the railroad company liable for injuries caused by failure to give the statutory signals, the liability must grow out of peculiar facts and circumstances by reason of which the injured party has a right, in the exercise of ordinary care, to rely upon and wait for the signals, and making an omission to give them negligence. *Maney v. Chicago, etc., R. Co.*, 49 Ill. App. 105.

6. At What Crossings Warnings Required. — A place, not on a public road, where a railroad company was in the habit of stopping its trains for the sole purpose of taking on or putting off passengers who had notified those in charge of the trains to do so, and when such trains would also stop at other places for this purpose, is not a "regular depot or stopping place" within the meaning of *Alabama Code*, § 1699, requiring the bell to be rung or the whistle blown within a quarter of a mile of a depot or crossing. *Cook v. Central R., etc., Co.*, 67 Ala. 533.

Considering the purpose of the enactment, the *Texas* statute has been held to require a signal at the crossing of every road which is in fact public and where the extent of travel makes it the duty of the owners of railway trains to look after the safety of those using the road as a highway. *Missouri Pac. R. Co. v. Lee*, 70 Tex. 496, 35 Am. & Eng. R. Cas. 364.

As to signaling at crossings which are such by custom or license, see *infra*, this section. *Crossings by Custom or License*.

Crossings Within City Limits.—Some of the statutes requiring signals at the crossings of highways do not apply to crossings within the limits of cities,¹ while under other statutes no such distinction exists.²

What Is a Traveled Public Road or Place.—Where the evidence tends to show that the public road has been traveled and worked from ten to fifteen years, it is a sufficient showing of a "traveled public road" named in the statute requiring signals at public crossings. *State v. St. Joseph*, etc., R. Co., 46 Mo. App. 466. See also *Strother v. South Carolina*, etc., R. Co., 47 S. Car. 375, where it was held that a use for twenty years gave the public a prescriptive right and made the crossing "a traveled place."

The fact that a street has been discontinued by resolutions of the commissioners of highways, but not practically closed, the discontinuance being conditional upon the railroad company opening another road and preparing it for travel, does not relieve the company from the statutory duty of giving warning on approaching such crossing. *Rodrian v. New York*, etc., R. Co., (Supreme Ct.) 28 N. Y. St. Rep. 625.

Highway Must Be Actually Opened or Railroad Notified—Highway.—Although a highway crossing a railroad track has been regularly laid out, yet until it has been actually opened or notice "of such laying out" has been served upon an officer of the railroad corporation as required by statute, the duty of ringing a bell or sounding a whistle upon a train approaching the crossing does not attach; the highway is not "a traveled public road or street." *Cordell v. New York Cent.*, etc., R. Co., 64 N. Y. 535, reversing 6 Hun (N. Y.) 461.

The Road or Street Must Be Both Public and Traveled, and does not include an alley which is not traveled or capable of being traveled. *Byrne v. New York Cent.*, etc., R. Co., 94 N. Y. 12, reversing 28 Hun (N. Y.) 438.

Worked and Repaired as a Highway.—Where the evidence showed that a road intersected by a railroad was traveled by the public, and had been worked and repaired by the authorities having charge of highways in that district, this was held *prima facie* evidence that it was a public highway, legally established, at the crossing of which the railroad should signal. *Illinois Cent. R. Co. v. Benton*, 69 Ill. 174.

Failure to Record Road as Highway.—Where there has been such a user of a road by the public for twenty years as would justify a record of it as a public highway, and it has either been kept in repair or taken charge of by the public authorities, the fact that they have failed to perform their duty to record it does not change the mandate of the statute that it shall be deemed a public highway. *Lewis v. New York*, etc., R. Co., 123 N. Y. 496, affirming 52 Hun (N. Y.) 614, 24 N. Y. St. Rep. 435, 5 N. Y. Supp. 313, 1 Silv. (N. Y.) 393.

1. No Application to Crossings Within City Limits.—*Clark v. Missouri Pac. R. Co.*, 35 Kan. 350.

The statute requiring signals at crossings does not apply to street crossings within the limits of the city; and a failure to give such signals does not establish negligence, but is

only a circumstance tending to show negligence. *Missouri Pac. R. Co. v. Pierce*, 33 Kan. 61, 19 Am. & Eng. R. Cas. 318; *Louisville*, etc., R. Co. v. *French*, 69 Miss. 121; *Bleyle v. New York Cent.*, etc., R. Co., (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675, affirmed 113 N. Y. 626, 22 N. Y. St. Rep. 993.

Sounding of Whistle Not Prohibited.—The New York statute requiring signals to be given at highway crossings, but excepting therefrom crossings in cities, is not intended to prohibit the sounding of a whistle in a city. The statute can only be construed to mean that there is no duty enjoined upon companies to give signals within cities. *Mayer v. New York Cent.*, etc., R. Co., (Supreme Ct.) 29 N. Y. St. Rep. 183, 55 Hun (N. Y.) 608, affirmed 132 N. Y. 579, 43 N. Y. St. Rep. 965.

2. Georgia Statute.—The duties required of railroad companies by the provisions of Ga. Code, §§ 706, 707, apply to streets as well as to public and private road crossings. *Western*, etc., R. Co. v. *Atlanta*, 74 Ga. 774, 19 Am. & Eng. R. Cas. 233.

Under the Illinois Statute the word "highway," as used in the statute requiring signals to be given before crossing "any public highway," includes a public street in an incorporated town. *Mobile*, etc., R. Co. v. *Davis*, 130 Ill. 146, 42 Am. & Eng. R. Cas. 70, reversing 31 Ill. App. 490, 24 Ill. App. 250.

Signals on Crossing Streets Expressly Required.—**The Wisconsin Statute**, requiring all trains to cause a bell to be rung before crossing any of the streets of an incorporated city, and limiting the rate of speed of trains therein, applies to all streets actually traveled within the city limits, though only streets by user, but not to those that are merely laid out in plats or adopted by the city authorities. *Ewen v. Chicago*, etc., R. Co., 38 Wis. 613.

The charter of the Illinois Central railroad company fixed its duty as to the giving of signals of trains approaching highway crossings. Afterwards a general law was passed on the subject of such signals, prescribing different duties in that regard, and the new rule was made applicable to all railroads. It was held that the legislature had the power to impose these new duties upon all railroads, whether incorporated before or afterward. The right to impose such duties grows out of the police power. *Illinois Cent. R. Co. v. Slater*, 129 Ill. 91, 16 Am. St. Rep. 242, affirming 28 Ill. App. 73. See also *Western Union R. Co. v. Fulton*, 64 Ill. 271; *Chicago*, etc., R. Co. v. *Fenn*, 3 Ind. App. 250.

Penalty for Failure to Comply with Requirement of Statute.—If § 5478, Mansf. Ark. Dig., which provides a penalty for failure of a railway company to signal at a highway crossing, is unconstitutional in so far as it awards a part of the penalty to an informer, instead of awarding the entire penalty to the school fund, its remaining provisions are legally separable and will stand. *St. Louis*, etc., R. Co. v. *State*, 56 Ark. 166.

Kansas Gen. Stat. 206, § 60, is unconstitutional.

(d) *Constitutionality of Statutes.* — The constitutionality of such statutes has been frequently drawn in question, but they have been held valid as a proper exercise of the police power of the state.¹

(3) *Duty Without Statute to Signal at Places of Known Danger.* — Independently of statute, it is the duty of those in charge of a train to give notice of its approach at all points of known or reasonably apprehended danger.²

In Cities and Towns. — Thus it is the duty of the company to give reasonable and proper signals when approaching a much-traveled public street in a city or town.³

Where View Is Obstructed. — So where the crossing is dangerous to travelers by reason of obstructions concealing the approach of the train, the duty of the company to give notice is more imperative than at other places along its route.⁴

(4) *Place to Give Signals — Distance from Crossing.* — The place at which signals should be given, and the distance from the crossing, are usually provided for by the statute creating the duty.⁵

Distance from Crossing. — The particular distance from the crossing at which

tional for the same reason. *Atchison, etc., R. Co. v. State*, 22 Kan. 1.

1. *Proper Exercise of Police Power.* — *Kaminitzsky v. Northeastern R. Co.*, 25 S. Car. 53; *Pittsburgh, etc., R. Co. v. Brown*, 67 Ind. 45, 33 Am. Rep. 73; *Galena, etc., Union R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471.

2. *Dangerous Places.* — *Chicago, etc., R. Co. v. Dillon*, 123 Ill. 570, 5 Am. St. Rep. 559, 32 Am. & Eng. R. Cas. 1, *affirming* 24 Ill. App. 203; *Pennsylvania Co. v. Krick*, 47 Ind. 368; *Artz v. Chicago, etc., R. Co.*, 34 Iowa 153, 5 Am. Ry. Rep. 469; *Gates v. Burlington, etc., R. Co.*, 39 Iowa 45, 9 Am. Ry. Rep. 75; *Texas, etc., R. Co. v. Anderson*, 2 Tex. App. Civ. Cas., § 203; *Winstanley v. Chicago, etc., R. Co.*, 72 Wis. 375, 35 Am. & Eng. R. Cas. 370.

3. *In Cities and Towns.* — *Louisville, etc., R. Co. v. Morris*, (Ky. 1892) 20 S. W. Rep. 539; *Ketchum v. Texas, etc., R. Co.*, 38 La. Ann. 777; *Loucks v. Chicago, etc., R. Co.*, 31 Minn. 526, 19 Am. & Eng. R. Cas. 305; *Bliley v. New York Cent., etc., R. Co.*, (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675, *affirmed* in 113 N. Y. 626, 22 N. Y. St. Rep. 993. See also *Matter of Highway Com'rs, 74 Hun* (N. Y.) 46.

It may be negligence for a railroad company not to sound the whistle of a locomotive before it crosses a private way in a city, or not to place at the crossing of such way a sign with the warning "Look out for the cars," although there is no express provision of law requiring those things to be done in such a place. *Winstanley v. Chicago, etc., R. Co.*, 72 Wis. 375, 35 Am. & Eng. R. Cas. 370.

4. *When View Is Obstructed.* — *Continental Imp. Co. v. Stead*, 95 U. S. 161; *Thomas v. Delaware, etc., R. Co.*, 8 Fed. Rep. 729, 19 Blatchf. (U. S.) 533; *Chicago, etc., R. Co. v. Triplett*, 38 Ill. 482; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313, 7 Am. Ry. Rep. 365; *Peoria, etc., R. Co. v. Siltman*, 88 Ill. 529, 21 Am. Ry. Rep. 352; *Funston v. Chicago, etc., R. Co.*, 61 Iowa 452, 14 Am. & Eng. R. Cas. 640; *Loucks v. Chicago, etc., R. Co.*, 31 Minn. 532, 19 Am. & Eng. R. Cas. 305; *New York, etc., R. Co. v. Randel*, 47 N. J. L. 144, 23 Am.

& Eng. R. Cas. 308; *Cordell v. New York Cent., etc., R. Co.*, 70 N. Y. 119, 26 Am. Rep. 550; *Houston, etc., R. Co. v. Wilson*, 60 Tex. 142.

The absence of a statute requiring the ringing of a bell or the sounding of a whistle in approaching highway crossings will not excuse the company for a failure to do so under all circumstances. Where the view of approaching trains is obstructed, or it is impossible or very difficult to hear them, and in similar cases, it is clearly the duty of the company to give such signals, although not required by statute. *Artz v. Chicago, etc., R. Co.*, 34 Iowa 153, 5 Am. Ry. Rep. 469.

Whether Failure to Signal Is Negligence Per Se. — The failure of a railroad company to give any signal when nearing a public crossing is not of itself negligence in *Indiana*, unless the peculiar circumstances, the concealment of the train or the like, may render it necessary and proper. *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335, 5 Am. Rep. 201.

It has been held in *North Carolina*, however, that the failure to give signals in approaching a highway, where the train is hidden by an embankment, cut, or curve, is negligence *per se*. *Hinkle v. Richmond, etc., R. Co.*, 109 N. Car. 472, 26 Am. St. Rep. 581.

5. *Place to Give Signals.* — *Chicago, etc., R. Co. v. Dougherty*, 110 Ill. 521, 19 Am. & Eng. R. Cas. 292.

Until Engine Has Passed Crossing. — The *Missouri* statute (Mo. Rev. Stat., § 806) does not require that the warning shall be continued until the train has passed the crossing, but only until the engine has passed. *Bell v. Hannibal, etc., R. Co.*, 72 Mo. 50, 4 Am. & Eng. R. Cas. 580; *Zimmerman v. Hannibal, etc., R. Co.*, 71 Mo. 476, 2 Am. & Eng. R. Cas. 191.

Starting Beyond Crossing. — Where a train has run beyond a crossing and has stopped for wood and water, the statute does not require it to give a signal of its starting up again. The statute only enjoins the ringing of a bell or the sounding of a whistle when the cars are approaching a crossing. *Wilson v. Rochester, etc., R. Co.*, 16 Barb. (N. Y.) 167.

signals should be given depends upon the provisions of the various statutes. According to the terms of the majority of the statutes in this country and Canada, however, the distance specified is eighty rods from the crossing.¹

Warning Must Be at Sufficient Distance to Be Effectual. — But in all cases the warning should be given at a sufficient distance from the crossing to be effectual for the purpose intended.²

1. Eighty Rods from Crossing — *Connecticut*. — *Baies v. New York*, etc., R. Co., 60 Conn. 259; *Andrews v. New York*, etc., R. Co., 60 Conn. 293.

Illinois. — *Toledo*, etc., R. Co. *v. Fergusson*, 42 Ill. 449; *Chicago*, etc., R. Co. *v. Dougherty*, 110 Ill. 521, 19 Am. & Eng. R. Cas. 292.

Indiana. — *Pittsburgh*, etc., R. Co. *v. Martin*, 82 Ind. 476, 8 Am. & Eng. R. Cas. 253.

Kansas. — *Missouri Pac. R. Co. v. Pierce*, 33 Kan. 61, 19 Am. & Eng. R. Cas. 318; *Clark v. Missouri Pac. R. Co.*, 35 Kan. 350.

Massachusetts. — *Coakley v. Boston*, etc., R. Co., 159 Mass. 32.

Minnesota. — *Kelly v. St. Paul*, etc., R. Co., 29 Minn. 1.

Missouri. — *Zimmerman v. Hannibal*, etc., R. Co., 71 Mo. 476, 2 Am. & Eng. R. Cas. 191; *Kenney v. Hannibal*, etc., R. Co., 105 Mo. 270; *Cathcart v. Hannibal*, etc., R. Co., 19 Mo. App. 113; *Barr v. Hannibal*, etc., R. Co., 30 Mo. App. 248.

New Hampshire. — *Evans v. Concord R. Corp.*, 66 N. H. 194.

New York. — *Cranston v. New York Cent.*, etc., R. Co., (Supreme Ct.) 32 N. Y. St. Rep. 592, 37 Hun (N. Y.) 590, *affirmed* in 125 N. Y. 724, 35 N. Y. St. Rep. 994; *Grippen v. New York Cent. R. Co.*, 40 N. Y. 34.

Rhode Island. — *Gardner v. New York*, etc., R. Co., 17 R. I. 790.

Texas. — *Brown v. Griffin*, 71 Tex. 654; *Gulf*, etc., R. Co. *v. Anderson*, 76 Tex. 244, 42 Am. & Eng. R. Cas. 160; *Texas*, etc., R. Co. *v. Bailey*, 83 Tex. 19.

Utah. — *Olsen v. Oregon Short Line*, etc., R. Co., 9 Utah 129.

Wisconsin. — *Cahoon v. Chicago*, etc., R. Co., 85 Wis. 570.

Canada. — *Lett v. St. Lawrence*, etc., R. Co., 1 Ont. Rep. 545; *Rosenberger v. Grand Trunk R. Co.*, 8 Ont. App. 482, 15 Am. & Eng. R. Cas. 448; *Hollinger v. Canadian Pac. R. Co.*, 21 Ont. Rep. 705, 55 Am. & Eng. R. Cas. 192.

Repeal of New York Statute. — The New York statute of 1854, requiring railroad companies to signal at eighty rods from grade crossings, has been repealed by the General Repealing Act of 1886. *Lewis v. New York*, etc., R. Co., 123 N. Y. 406, *affirming* 52 Hun (N. Y.) 614, 24 N. Y. St. Rep. 435, 1 Silv. (N. Y.) 393. See also *Petrie v. New York Cent.*, etc., R. Co., 66 Hun (N. Y.) 282.

But there still remains a provision of the Penal Code which declares that engineers failing to signal eighty rods from a crossing shall be guilty of a misdemeanor. *Vandewater v. New York*, etc., R. Co., 135 N. Y. 583, *reversing* 63 Hun (N. Y.) 186.

Train Starting Within Eighty Rods of Crossing. — The requirement of the statute applies in cases where the cars begin to move within the eighty rods, as well as to cases where the point of starting is more than eighty rods distant.

Lake Shore, etc., R. Co. *v. Johnsen*, 135 Ill. 641, *affirming* 35 Ill. App. 430. But see *Central Texas*, etc., R. Co. *v. Nycum*, (Tex. Civ. App. 1896), 34 S. W. Rep. 460.

Distance — How Ascertained. — The eighty rods from the crossing, at which point the law requires the blowing of the whistle, may be eighty rods in a direct line, instead of the curved line of the track. The purpose of the statute ought not to be sacrificed to its letter. *Andrews v. New York*, etc., R. Co., 60 Conn. 293.

Other Statutory Provisions. — For the provisions of other statutes in regard to the distance from the crossing at which signals must be made, see:

Alabama. — *Alabama*, G. S. R. Co. *v. McAlpine*, 71 Ala. 545, 15 Am. & Eng. R. Cas. 544; *Cook v. Central R.*, etc., Co., 67 Ala. 533.

Georgia. — *Georgia R. Co. v. Cox*, 61 Ga. 455; Ga. Code, 1895, § 2222 (400 yards from crossing).

New Jersey. — *New York*, etc., R. Co. *v. Leaman*, 54 N. J. L. 202. See also *Harty v. Central R. Co.*, 42 N. Y. 468 (300 yards from crossing).

South Carolina. — *Neely v. Charlotte*, etc., R. Co., 33 S. Car. 136 (500 yards from crossing).

Iowa. — In cities in Iowa the whistle is not required to be used, but the bell must commence to ring sixty rods from the crossing and continue until the crossing is reached. *Lapsley v. Union Pac. R. Co.*, 50 Fed. Rep. 172, *affirmed* in 51 Fed. Rep. 174.

2. Warning Effectual for Purpose Intended. — The real question is: Was the whistle sounded, and in a proper manner, and substantially at the place fixed by law and where it would be likely to be heard by those for whose benefit it is required? *Andrews v. New York*, etc., R. Co., 60 Conn. 293.

Sufficient Warning though Statute Not Fully Complied With. — Although the statute was not fully complied with, yet if the bell was rung or whistle sounded for such a distance from the place of the accident as fully and fairly to give the deceased timely and sufficient warning that the train was approaching, in time to prevent him from crossing or attempting to cross the track, the company is not necessarily liable. *Cook v. New York Cent. R. Co.*, 5 Lans. (N. Y.) 401.

Ringling Merely Before Crossing Not Enough. — The bell should be rung not only before crossing a street, but so long as there is danger of encountering passers-by. *Whiton v. Chicago*, etc., R. Co., 2 Biss. (U. S.) 282.

Acts Rendering Signals Unavailing. — It is not a compliance with the statute or the exercise of ordinary care to give signals and at the same time, by careless acts or omissions, such as running trains very close together, to render them unavailing as warnings of danger. Chi-

(5) *Character of Warning* — **Warning Should Be Effective in Character.** — The warnings given must be of such a character and made at such a time that they will serve to protect the traveler from injury if he be in the exercise of ordinary care.¹

Signal Should Comply with Statute. — The signal given should be the one prescribed by the statute for the particular locality.²

Usual and Customary Signals. — Where there is no statute designating the character of the signal necessary to be given, the company must adopt such signals as are usual and customary.³

Use of Both Bell and Whistle. — Statutes requiring signals by bell or whistle do not under ordinary circumstances require the use of both.⁴

(6) *Private Crossings* — **Signals at.** — A railroad company is not bound as a general rule to give the statutory signals on approaching the crossing of private ways.⁵

cago, etc., R. Co. v. Boggs, 101 Ind. 522, 51 Am. Rep. 761, 23 Am. & Eng. R. Cas. 282.

Excessive Speed. — A company does not discharge its whole duty to the public merely by ringing a bell, where the speed of the train is such as to render the notice thereby given of no avail. *Bleyle v. New York Cent., etc., R. Co.*, (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675, affirmed in 113 N. Y. 626, 22 N. Y. St. Rep. 993.

And hence, where a train approaches a crossing at the rate of thirty miles an hour, the sounding of the whistle three hundred yards from the crossing is not sufficient. *Louisville, etc., R. Co. v. Goetz*, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627.

1. **Signals Should Serve as a Protection.** — *Continental Imp. Co. v. Stead*, 95 U. S. 161; *Louisville, etc., R. Co. v. Goetz*, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627; *Bleyle v. New York Cent., etc., R. Co.*, (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675, affirmed in 113 N. Y. 626, 22 N. Y. St. Rep. 993; *Roberts v. Chicago, etc., R. Co.*, 35 Wis. 679.

"While the law does not point out any particular mode or manner in which notice of approaching trains shall be given, it does require that some suitable and adequate means adapted to the circumstances shall be adopted and applied." *Philadelphia, etc., R. Co. v. Killips*, 88 Pa. St. 405.

Where Circumstances Render One Mode of Warning Ineffectual. — If the bell or whistle can give no warning on account of a high intervening bank, the company should employ some other means of giving warning. *Roberts v. Chicago, etc., R. Co.*, 35 Wis. 679.

Order for Erection of Sufficient Signal. — Proofs showing that the view at a crossing is so obstructed that trains could be seen either way but a short distance, that the usual signals were not always given and could not be heard, and that the street was a crowded one, will justify a court under the provisions of the *New York* statutes in ordering the erection of an electric-bell signal, though it appear that persons of extreme prudence might avoid injuries. *Matter of Highway Com'rs*, 74 Hun (N. Y.) 46.

2. See the statutes. See also *Cleveland, etc., R. Co. v. Asbury*, 120 Ind. 289; *New York, etc., R. Co. v. Leaman*, 54 N. J. L. 202.

3. **Signals Usual and Customary.** — *Paducah,*

etc., R. Co. v. Hoehl, 12 Bush (Ky.) 41, 18 Am. Ry. Rep. 338; *Georgia Pac. R. Co. v. Freeman*, 83 Ga. 583.

In the absence of specific requirements as to signals, warnings must be given in a reasonable manner. *Crawford v. Delaware, etc., R. Co.*, 54 N. Y. Super. Ct. 262.

4. **Use of Both Bell and Whistle Not Required** — *Alabama.* — *East Tennessee, etc., R. Co. v. Deaver*, 79 Ala. 216.

Connecticut. — *Rowen v. New York, etc., R. Co.*, 59 Conn. 364.

Illinois. — *Chicago, etc., R. Co. v. Damerell*, 81 Ill. 450; *Ohio, etc., R. Co. v. Reed*, 40 Ill. App. 47; *St. Louis, etc., R. Co. v. Pflugmacher*, 9 Ill. App. 300.

Massachusetts. — *Tyler v. Old Colony R. Co.*, 157 Mass. 336.

Missouri. — *Braddy v. Kansas City, etc., R. Co.*, 47 Mo. App. 519; *Cathcart v. Hannibal, etc., R. Co.*, 19 Mo. App. 113; *Turner v. Kansas City, etc., R. Co.*, 78 Mo. 578, 19 Am. & Eng. R. Cas. 506; *Kenney v. Hannibal, etc., R. Co.*, 105 Mo. 270; *McCormick v. Kansas City, etc., R. Co.*, 50 Mo. App. 109; *Summer-ville v. Hannibal, etc., R. Co.*, 29 Mo. App. 48; *Terry v. St. Louis, etc., R. Co.*, 89 Mo. 586; *Turner v. Kansas City, etc., R. Co.*, 78 Mo. 578, 19 Am. & Eng. R. Cas. 506.

West Virginia. — *Spicer v. Chesapeake, etc., R. Co.*, 34 W. Va. 514, 45 Am. & Eng. R. Cas. 28.

See *infra*, this section, *Precautions Adopted — Question for Jury.*

Missouri — Crossings in Cities. — The statute (Laws of Mo. 1881, p. 79, § 1) does not impose the alternative duty on railroads to sound the bell or whistle at street crossings in cities. They are only required to ring the bell. *Coffin v. St. Louis, etc., R. Co.*, 22 Mo. App. 601.

5. **Signals at Private Ways** — *United States.* — *Thomas v. Delaware, etc., R. Co.*, 8 Fed. Rep. 729, 19 Blatchf. (U. S.) 533.

Georgia. — *Georgia R. Co. v. Cox*, 61 Ga. 455. *Kentucky.* — *Johnson v. Louisville, etc., R. Co.*, 91 Ky. 651, 13 Am. & Eng. R. Cas. 623.

Maryland. — *Annapolis, etc., R. Co. v. Pumphrey*, 72 Md. 82, 42 Am. & Eng. R. Cas. 599.

Minnesota. — *Locke v. First Div. St. Paul, etc., R. Co.*, 15 Minn. 350; *Czech v. Great Northern R. Co.*, (Minn. 1897) 70 N. W. Rep. 791.

(7) *Effect on Liability of Failure to Give Signals.* — Where those in charge of the train approach a crossing without giving the statutory signals, they are guilty of such negligence as renders the company liable to one who, without contributory negligence, is injured while attempting to cross the track.¹

Missouri. — *Bauer v. Kansas Pac. R. Co.*, 69 Mo. 219; *Hodges v. St. Louis, etc., R. Co.*, 71 Mo. 50, 2 Am. & Eng. R. Cas. 190; *Maxey v. Missouri Pac. R. Co.*, 113 Mo. 1.

New York. — *Byrne v. New York Cent., etc., R. Co.*, 94 N. Y. 12.

Canada. — *Bennett v. Grand Trunk R. Co.*, 3 Ont. Rep. 446, 13 Am. & Eng. R. Cas. 627.

See also *Sanborn v. Detroit, etc., R. Co.*, 91 Mich. 538, 50 Am. & Eng. R. Cas. 114.

Public Crossing Within Meaning of New York Statute. — Where a railroad crossed a city street almost at grade, and about forty feet beyond crossed a private way much used by the public, of which the railroad employees had notice, it was held that the statute requiring signals to be given eighty rods from highway crossings applied to the private way under such circumstances. *Cranston v. New York Cent., etc., R. Co.*, (Supreme Ct.) 32 N. Y. St. Rep. 592, 11 N. Y. Supp. 215, 57 Hun (N. Y.) 590, affirmed 125 N. Y. 724, 35 N. Y. St. Rep. 994.

Effect of Custom or Peculiar Nature of Locality.

— A well-known custom of a railroad to signal on approaching a private crossing may raise a duty to do so. *Blackwell v. Lynchburg, etc., R. Co.*, 111 N. Car. 157, 32 Am. St. Rep. 786; *Keith v. Intercolonial Coal Min. Co.*, 18 Nova Scotia 226. See also *infra*, this section, *Crossings by Custom or License*.

And the same duty may arise when from the peculiar situation of the crossing, rendering it dangerous, ordinary prudence would suggest that signals should be given. *Thomas v. Delaware, etc., R. Co.*, 8 Fed. Rep. 729, 19 Blatchf. (U. S.) 533; *Czech v. Great Northern R. Co.*, (Minn. 1897) 70 N. W. Rep. 791; *Cordell v. New York Cent., etc., R. Co.*, 70 N. Y. 119, 26 Am. Rep. 550.

Question for Jury. — Whether under the circumstances of the particular case ordinary care would have required the giving of warning signals, is a question for the jury. *Thomas v. Delaware, etc., R. Co.*, 8 Fed. Rep. 729, 19 Blatchf. (U. S.) 533; *Czech v. Great Northern R. Co.*, (Minn. 1897) 70 N. W. Rep. 791; *Hodges v. St. Louis, etc., R. Co.*, 71 Mo. 50, 2 Am. & Eng. R. Cas. 190; *Bauer v. Kansas Pac. R. Co.*, 69 Mo. 219.

1. Liability for Failure to Give Signals. — *United States.* — *Lapsley v. Union Pac. R. Co.*, 50 Fed. Rep. 172, affirmed 51 Fed. Rep. 174.

Arkansas. — *St. Louis, etc., R. Co. v. Hendricks*, 53 Ark. 201.

Georgia. — *Brunswick, etc., R. Co. v. Hoover*, 42 Ga. 426; *Georgia R., etc., Co. v. Wynn*, 74 Ga. 331.

Illinois. — *Ohio, etc., R. Co. v. Reed*, 40 Ill. App. 47; *Baltimore, etc., R. Co. v. Wetmore*, 65 Ill. App. 292.

Indiana. — *Bellefontaine, R. Co. v. Hunter*, 33 Ind. 335, 5 Am. Rep. 201; *Baltimore, etc., R. Co. v. Walborn*, 127 Ind. 142; *Cincinnati, etc., R. Co. v. Butler*, 103 Ind. 31, 23 Am. & Eng. R. Cas. 262.

Iowa. — *Hughes v. Chicago, etc., R. Co.*, 88 Iowa 404.

Kansas. — *Atchison, etc., R. Co. v. Morgan*, 31 Kan. 77, 13 Am. & Eng. R. Cas. 499; *Clark v. Missouri Pac. R. Co.*, 35 Kan. 350; *Missouri Pac. R. Co. v. Pierce*, 33 Kan. 61, 19 Am. & Eng. R. Cas. 318.

Kentucky. — *Paducah, etc., R. Co. v. Hoehl*, 12 Bush (Ky.) 441; *Louisville, etc., R. Co. v. Goetz*, 79 Ky. 442, 42 Am. Rep. 227, 14 Am. & Eng. R. Cas. 627; *Esbridge v. Cincinnati, etc., R. Co.*, 89 Ky. 367, 42 Am. & Eng. R. Cas. 176.

Michigan. — *Chicago, etc., R. Co. v. Miller*, 46 Mich. 532, 6 Am. & Eng. R. Cas. 89; *Sanborn v. Detroit, etc., R. Co.*, 91 Mich. 538, 50 Am. & Eng. R. Cas. 114.

Minnesota. — *Kelly v. St. Paul, etc., R. Co.*, 29 Minn. 1.

Missouri. — *Karle v. Kansas City, etc., R. Co.*, 55 Mo. 476; *Johnson v. Chicago, etc., R. Co.*, 77 Mo. 546; *Petty v. Hannibal, etc., R. Co.*, 88 Mo. 306, 28 Am. & Eng. R. Cas. 618; *Gratiot v. Missouri Pac. R. Co.*, 116 Mo. 450; *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236, 20 Am. St. Rep. 601.

New York. — *Cordell v. New York Cent., etc., R. Co.*, 64 N. Y. 535; *Gorton v. Erie R. Co.*, 45 N. Y. 660; *Beisiegel v. New York Cent. R. Co.*, 34 N. Y. 622, reversing 33 Barb. (N. Y.) 429; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 90 Am. Dec. 761, 32 How. Pr. (N. Y.) 61, 3 Abb. Pr. N. S. (N. Y.) 82, reversing 32 Barb. (N. Y.) 159; *Renwick v. New York Cent. R. Co.*, 36 N. Y. 132, 34 How. Pr. (N. Y.) 91.

Pennsylvania. — *Philadelphia, etc., R. Co. v. Stinger*, 78 Pa. St. 219; *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259, 98 Am. Dec. 346.

South Carolina. — *Murray v. South Carolina R. Co.*, 10 Rich. L. (S. Car.) 227, 70 Am. Dec. 219; *Petrie v. Columbia, etc., R. Co.*, 29 S. Car. 303, 35 Am. & Eng. R. Cas. 430; *Strother v. South Carolina, etc., R. Co.*, 47 S. Car. 375. See also *Mack v. South-Bound R. Co.*, (S. Car. 1898) 29 S. E. Rep. 905.

Utah. — *Olsen v. Oregon Short Line, etc., R. Co.*, 9 Utah 129; *Bitner v. Utah Cent. R. Co.*, 4 Utah 502.

Virginia. — *Roberts v. Alexandria, etc., R. Co.*, 83 Va. 312.

Wisconsin. — *Hoye v. Chicago, etc., R. Co.*, 62 Wis. 666, 19 Am. & Eng. R. Cas. 347; *Milwaukee, etc., R. Co. v. Hunter*, 11 Wis. 160, 78 Am. Dec. 699.

Where a jury find that the injured person would not have ventured upon the track at a crossing, and would have incurred no risk of collision with the train, but for the negligence of the engineer in failing to give timely warning of its approach, the corporation is liable to answer in damages, although the plaintiff may have been careless in exposing himself to danger. *Hinkle v. Richmond, etc., R. Co.*, 109 N. Car. 472, 26 Am. St. Rep. 581.

Except in a case of sudden and unexpected emergency, the fact that the engineer of the locomotive was otherwise engaged upon it, and therefore did not give the statutory signal on approaching a highway crossing, is no justification to a railroad company. *Petrie v. Colum-*

Failure to Signal Held Negligence in Law. — In some cases the omission of the company to perform its statutory duty in regard to the giving of signals has been termed negligence *per se* or as a conclusion of law.¹

Failure Is Prima Facie Negligent. — In others it has been termed *prima facie* negligence.²

Omission to Signal Does Not Render Company Liable Per Se. — The mere omission to ring a bell or sound a whistle will not *per se* render the company liable in all cases. It must be shown as a just inference from the evidence that the injury was caused by reason of such neglect.³

bia, etc., R. Co., 29 S. Car. 303, 35 Am. & Eng. R. Cas. 430.

Unscheduled Train. — It is negligence to run an unscheduled train at an extraordinary speed across a public highway without signaling its approach by bell and whistle. *Roberts v. Alexandria*, etc., R. Co., 83 Va. 312. See also *Lyman v. Boston*, etc., R. Co., 66 N. H. 200, 45 Am. & Eng. R. Cas. 163.

Habitual Failure to Give Signals. — An habitual failure to give signals and warnings at a railroad crossing is an indictable offense in *Kentucky*. *Louisville*, etc., R. Co. v. Com., 13 Bush (Ky.) 388.

Accident Beyond the Crossing. — Where the accident happened just beyond the crossing, the fact that the requirements of the statute were disregarded as to signals on approaching the crossing may be considered by the jury in determining the question of negligence on the part of the company. *Western*, etc., R. Co. v. Jones, 65 Ga. 631, 8 Am. & Eng. R. Cas. 267.

1. Negligence Per Se — Georgia. — *Atlanta*, etc., R. Co. v. Wyly, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262.

Illinois. — *Terre Haute*, etc., R. Co. v. Voelker, 129 Ill. 540, 39 Am. & Eng. R. Cas. 615, affirming 31 Ill. App. 314.

Indiana. — *Pittsburgh*, etc., R. Co. v. Martin, 82 Ind. 476, 8 Am. & Eng. R. Cas. 253; *Chicago*, etc., R. Co. v. Boggs, 101 Ind. 522, 51 Am. Rep. 761, 23 Am. & Eng. R. Cas. 282; *Cincinnati*, etc., R. Co. v. Butler, 103 Ind. 31, 23 Am. & Eng. R. Cas. 262; *Pittsburgh*, etc., R. Co. v. Shaw, 15 Ind. App. 173.

Iowa. — *Reed v. Chicago*, etc., R. Co., 74 Iowa 188.

Pennsylvania. — *Philadelphia*, etc., R. Co. v. Stinger, 78 Pa. St. 219.

South Carolina. — *Strother v. South Carolina*, etc., R. Co., 47 S. Car. 375.

Texas — *Texas*, etc., R. Co. v. Howard, 2 Tex. Unrep. Cas. 429; *Texas*, etc., R. Co. v. Anderson, 2 Tex. App. Civ. Cas., § 202; *Galveston*, etc., R. Co. v. Cook, (Tex. 1891) 16 S. W. Rep. 1038; *Houston*, etc., R. Co. v. Rogers, (Tex. Civ. App. 1897) 39 S. W. Rep. 1112.

West Virginia. — *Nuzum v. Pittsburgh*, etc., R. Co., 30 W. Va. 228.

While negligence, as a general rule, is a question for the jury, yet where the statute makes a certain act, having a material bearing on the case, imperative upon the agents of a railroad company, the court may instruct the jury that proper diligence required such act. *Atlanta*, etc. R. Co. v. Wyly, 65 Ga. 120, 8 Am. & Eng. R. Cas. 262; *Chicago*, etc., R. Co. v. Boggs, 101 Ind. 522, 51 Am. Rep. 761, 23 Am. & Eng. R. Cas. 282.

Whether Gross Negligence. — In some cases the failure to give the required statutory sig-

nals has been declared to be gross negligence. *Ohio*, etc., R. Co. v. *Eaves*, 42 Ill. 288; *Indianapolis*, etc., R. Co. v. *Stables*, 62 Ill. 313. *St. Louis*, etc., R. Co. v. *Faitz*, 23 Ill. App. 498, the expression probably having reference to the then received *Illinois* doctrine of comparative negligence. See the titles *COMPARATIVE NEGLIGENCE*, vol. 6, p. 360; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 379. But see *Chicago*, etc., R. Co. v. *Harwood*, 90 Ill. 425, where it is denied that, as matter of law, such failure is gross negligence.

Again, such a failure may be evidence of such gross negligence or wanton negligence as to entitle the plaintiff to recover, notwithstanding negligence intervening on the part of the plaintiff. *Louisville*, etc., R. Co. v. *Webb*, 97 Ala. 310; *Thomas v. Chicago*, etc., R. Co., 86 Mich. 496. But compare *Alabama G. S. R. Co. v. Linn*, 103 Ala. 134. See the title *CONTRIBUTORY NEGLIGENCE*, vol. 7, pp. 382 *et seq.*, 443. Or of gross negligence, entitling the plaintiff to exemplary damages. *Leavenworth*, etc., R. Co. v. *Rice*, 10 Kan. 426. But whether a failure to give signals is gross or simple negligence must depend upon circumstances. *Louisville*, etc., R. Co. v. *Webb*, 97 Ala. 308; *Leavenworth*, etc., R. Co. v. *Rice*, 10 Kan. 426.

2. Prima Facie Negligence. — *Orcutt v. Pacific Coast R. Co.*, 85 Cal. 291; *Galena*, etc., *Union R. Co. v. Loomis*, 13 Ill. 549, 56 Am. Dec. 471; *Illinois Cent. R. Co. v. Gillis*, 68 Ill. 317; *Terre Haute*, etc., R. Co. v. *Barr*, 31 Ill. App. 57; *Terre Haute*, etc., R. Co. v. *Black*, 18 Ill. App. 45; *St. Louis*, etc., R. Co. v. *Terhune*, 50 Ill. 151, 99 Am. Dec. 504; *Great Western R. Co. v. Geddis*, 33 Ill. 304; *Barr v. Hannibal*, etc., R. Co., 30 Mo. App. 248; *Huckshold v. St. Louis*, etc., R. Co., 90 Mo. 548, 28 Am. & Eng. R. Cas. 659; *Gulf*, etc., R. Co. v. *Breitling*, (Tex. 1890) 12 S. W. Rep. 1121.

Compare Chicago, etc., R. Co. v. *Brady*, (Neb. 1897) 71 N. W. Rep. 721, where it was held that it was error to instruct the jury that a failure to give the signals required by statute was *prima facie* evidence of negligence.

Where an injury at a railroad crossing is caused by a locomotive upon which the statutory requirements as to signals have been neglected, the railroad company operating the locomotive is *prima facie* liable for such injury, unless the person sustaining it contributed thereto by his own negligence; and it need not be further proved by the plaintiff that the failure to ring the bell or blow the whistle was the proximate cause of the injury. *Orcutt v. Pacific Coast R. Co.*, 85 Cal. 291.

3. Company Not Liable Per Se — United States. — *Chicago*, etc., R. Co. v. *Houston*, 95 U. S. 697.

Illinois. — *Galena*, etc., *Union R. Co. v.*

Question for Jury. — The question whether the failure to ring a bell or sound a whistle was the cause of the injury sustained is a question of fact for the determination of the jury.¹

(8) *Statutory Signals Not Sufficient in All Cases.* — The fact that the statutory signals were given is not enough in all cases to absolve the railroad company from a charge of negligence; other precautions may be required under some circumstances and in some localities.² But the company can only

Dill, 22 Ill. 271; Illinois Cent. R. Co. v. Phelps, 29 Ill. 447; Chicago, etc., R. Co. v. McKean, 40 Ill. 218; Chicago, etc., R. Co. v. Lee, 68 Ill. 576; Toledo, etc., R. Co. v. Jones, 76 Ill. 311; Chicago, etc., R. Co. v. Harwood, 90 Ill. 425.

Iowa. — Artz v. Chicago, etc., R. Co., 34 Iowa 154.

Kansas. — Atchison, etc., R. Co. v. Morgan, 31 Kan. 77, 13 Am. & Eng. R. Cas. 499.

Missouri. — Huckshold v. St. Louis, etc., R. Co., 90 Mo. 548, 28 Am. & Eng. R. Cas. 659.

Nebraska. — Missouri Pac. R. Co. v. Geist, 49 Neb. 489; Omaha, etc., Valley R. Co. v. Talbot, 48 Neb. 627.

New York. — Pakalinsky v. New York Cent., etc., R. Co., 82 N. Y. 424, 2 Am. & Eng. R. Cas. 251; Chrystal v. Troy, etc., R. Co., 124 N. Y. 519; Steves v. Oswego, etc., R. Co., 18 N. Y. 422.

North Carolina. — Parker v. Wilmington, etc., R. Co., 86 N. Car. 221, 8 Am. & Eng. R. Cas. 420.

Ohio. — Cleveland, etc., R. Co. v. Elliott, 28 Ohio St. 340.

Texas. — Texas, etc., R. Co. v. Wright, 62 Tex. 515, 23 Am. & Eng. R. Cas. 304; Central Texas, etc., R. Co. v. Nycum, (Tex. Civ. App. 1896) 34 S. W. Rep. 460.

Mere negligence, followed by an accident, will not render the company liable in those cases where such negligence did not cause the accident. Atchison, etc., R. Co. v. Morgan, 31 Kan. 77, 13 Am. & Eng. R. Cas. 499 and note, pp. 502, 503; Stepp v. Chicago, etc., R. Co., 85 Mo. 229; Karle v. Kansas City, etc., R. Co., 55 Mo. 476; Reynolds v. New York Cent., etc., R. Co., 58 N. Y. 248. See also Harlan v. St. Louis, etc., R. Co., 65 Mo. 22.

The failure to ring a bell on a moving railroad engine, as required by a city ordinance, constitutes negligence. Such negligence alone will warrant a recovery when it appears that obedience to the requirements of the ordinance would have prevented the injury sued for, but not otherwise. Hanlon v. Missouri Pac. R. Co., 104 Mo. 381.

1. Question for Determination of Jury. — Illinois Cent. R. Co. v. Benton, 69 Ill. 174; Chicago, etc., R. Co. v. McDaniels, 63 Ill. 122, 7 Am. Ry. Rep. 60; Terre Haute, etc., R. Co. v. Jones, 11 Ill. App. 322; Indianapolis, etc., R. Co. v. Blackman, 63 Ill. 117, 7 Am. Ry. Rep. 56; Chicago, etc., R. Co. v. Lee, 68 Ill. 576; Chicago, etc., R. Co. v. Dvorak, 7 Ill. App. 555; McCormick v. Kansas City, etc., R. Co. 50 Mo. App. 109; Sauerborn v. New York Cent., etc., R. Co., 69 Hun (N. Y.) 429, affirmed in 141 N. Y. 553; Cordell v. New York Cent., etc., R. Co., 64 N. Y. 535, reversing 6 Hun (N. Y.) 461; Calhoun v. Gulf, etc., R. Co., 84 Tex. 226; Chicago, etc., R. Co. v. Wilson, 133 Ill.

55, 42 Am. & Eng. R. Cas. 153, affirming 35 Ill. App. 346.

2. Statutory Signals Not Sufficient in All Cases — *United States.* — Grand Trunk R. Co. v. Ives, 144 U. S. 408; Morris v. Chicago, etc., R. Co., 26 Fed. Rep. 22; Clark v. Canadian Pac. R. Co., 69 Fed. Rep. 543.

Connecticut. — Bates v. New York, etc., R. Co., 60 Conn. 259.

Illinois. — Chicago, etc., R. Co. v. Perkins, 125 Ill. 127.

Maine. — Webb v. Portland, etc., R. Co., 57 Me. 117.

Massachusetts. — Bradley v. Boston, etc., R. Co., 2 Cush. (Mass.) 539; Com. v. Boston, etc., R. Corp., 101 Mass. 201; Eaton v. Fitchburg R. Co., 129 Mass. 364; Favor v. Boston, etc., R. Corp., 114 Mass. 350, 19 Am. Rep. 364; Linfield v. Old Colony R. Corp., 10 Cush. (Mass.) 562, 57 Am. Dec. 124; Norton v. Eastern R. Co., 113 Mass. 366; Shaw v. Boston, etc., R. Corp., 8 Gray (Mass.) 45.

New Jersey. — New York, etc., R. Co. v. Randel, 47 N. J. L. 144, 23 Am. & Eng. R. Cas. 308.

New York. — Bleyle v. New York Cent., etc., R. Co., (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675, affirmed in 113 N. Y. 626, 22 N. Y. St. Rep. 993; Cordell v. New York Cent., etc., R. Co., 70 N. Y. 119; Crawford v. Delaware, etc., R. Co., 54 N. Y. Super. Ct. 262; Cumming v. Brooklyn City R. Co., 104 N. Y. 669, 5 N. Y. St. Rep. 737; Dyer v. Erie R. Co., 71 N. Y. 228; Finklestein v. New York Cent., etc., R. Co., 41 Hun (N. Y.) 34; Lindeman v. New York Cent., etc., R. Co., (Supreme Ct.) 11 N. Y. St. Rep. 837, 46 Hun (N. Y.) 679; McGrath v. New York Cent., etc., R. Co., 63 N. Y. 522; Reynolds v. New York Cent., etc., R. Co., 58 N. Y. 248; Thompson v. New York, etc., R. Co., 110 N. Y. 636, 16 N. Y. St. Rep. 869; Vandewater v. New York, etc., R. Co., 74 Hun (N. Y.) 32; Weber v. New York Cent., etc., R. Co., 58 N. Y. 451; Zimmer v. New York Cent., etc., R. Co., affirmed in 67 N. Y. 601, 7 Hun (N. Y.) 552. See also Hickey v. New York Cent., etc., R. Co., 8 N. Y. App. Div. 123.

North Dakota. — Coulter v. Great Northern R. Co., 5 N. Dak. 568.

Texas. — Texas, etc., R. Co. v. Howard, 2 Tex. Unrep. Cas. 429.

Utah. — English v. Southern Pac. R. Co., 13 Utah 407.

Wisconsin. — Roberts v. Chicago, etc., R. Co., 35 Wis. 679.

Canada. — Ham v. Grand Trunk R. Co., 11 U. C. C. P. 86.

Where the highest degree of diligence may justly be required, a literal compliance with the statute will not suffice, and this is especially so where the duty which the statute was intended to enforce did not originate in and is

be required to take such precautions, however, as have respect to the moving of its trains and the operation of its road, and should not be forced to do any act outside of or disconnected with such operations.¹

Precautions Adopted — Question for Jury. — The question whether or not all reasonable precautions have been adopted is one properly left for the consideration and determination of the jury.²

(9) **Evidence as to Signals — Burden of Proof.** — Where a charge of negligence in not giving the statutory signals is made, the burden of proof is on the plaintiff.³ But under some statutes proof of damage received at a crossing

not measured by the statute, but existed at common law. *Bates v. New York, etc., R. Co.*, 60 Conn. 259.

Excessive Speed. — In *Thompson v. New York Cent., etc., R. Co.*, 110 N. Y. 636, 16 N. Y. St. Rep. 869, it was held that the giving of signals required by law does not, under all circumstances, render the railway company free from negligence, especially where the evidence tends to show that the train was being run at an undue and highly dangerous rate of speed through a city or village. See also *Louisville, etc., R. Co. v. Com.*, 13 Bush (Ky.) 388; *Weber v. New York Cent., etc., R. Co.*, 58 N. Y. 451; *Bleyle v. New York Cent., etc., R. Co.*, (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675, *affirmed* in 113 N. Y. 626, 22 N. Y. St. Rep. 993.

View Obstructed. — Where the plaintiff was injured at a crossing where the view of an approaching train was obstructed by a deep cut and a watchhouse erected by the company, and where the sound of falling water prevented the noise of the train or signals from being heard — the train was running about sixty miles an hour — it was held that under such circumstances the mere ringing of the bell and sounding the whistle did not excuse the company from giving further warning. *Richardson v. New York Cent. R. Co.*, 45 N. Y. 846.

Backing Train. — Where a train is backing at a rate of four miles an hour near a street crossing unprotected by gates, with cars in front, merely giving the statutory signals will not necessarily relieve the railroad from the duty of using other precautions to warn persons who may be on or near the crossing. *McCaffrey v. Delaware, etc., Canal Co.*, (Supreme Ct.) 16 N. Y. Supp. 495, *affirmed* in 137 N. Y. 568.

Opening Train at Crossing. — Where a train is opened at a public crossing for the purpose of allowing a traveler to cross and is then closed without giving him time to do so, it is negligence whether the signals were given or not. *Ft. Worth, etc., R. Co. v. Dennis*, (Tex. Civ. App. 1896) 33 S. W. Rep. 884.

Order Dispensing with Particular Signal. — Notwithstanding an order of the railroad commissioners dispensing with the blowing of a locomotive whistle on approaching a certain highway crossing, it is the engineer's duty to blow it at such crossing if this is necessary to prevent an accident, and if the exercise of ordinary care requires it. *Rowen v. New York, etc., R. Co.*, 59 Conn. 364.

Train Without Engine. — Though the statute requiring signals when a locomotive approaches a crossing is not applicable by its terms to a train of cars without an engine, yet

those in charge of such a train will not be relieved from the obligation to take such other proper precaution to avoid injury as the circumstances require. *Ohio, etc., R. Co. v. McDanel*, 5 Ind. App. 108.

1. Precautions Incident to Operation of Road. — *Weber v. New York Cent., etc., R. Co.*, 58 N. Y. 451; *McGrath v. New York Cent., etc., R. Co.*, 63 N. Y. 522.

2. Precautions Adopted — Question for Jury. — *Favor v. Boston, etc., R. Corp.*, 114 Mass. 352, 19 Am. Rep. 364; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Com. v. Boston, etc., R. Corp.*, 101 Mass. 201; *Eaton v. Fitchburg R. Co.*, 129 Mass. 364; *Finklestein v. New York Cent., etc., R. Co.*, 41 Hun (N. Y.) 34; *Byrne v. New York Cent., etc., R. Co.*, 104 N. Y. 362, 58 Am. Rep. 512, *affirming* 36 Hun (N. Y.) 647; *Bailey v. Jourdan*, 18 N. Y. App. Div. 387; *Crawford v. Delaware, etc., R. Co.*, 54 N. Y. Super Ct. 262; *Langenecker v. Pennsylvania R. Co.*, 105 Pa. St. 328; *Texas, etc., R. Co. v. Howard*, 2 Tex. Unrep. Cas. 429.

Whether the proper signals were given or the necessary precautions to prevent injury were used by the company at the time the accident occurred, is a question of fact to be determined by the jury. *Paducah, etc., R. Co. v. Hoehl*, 12 Bush (Ky.) 47, 18 Am. Ry. Rep. 338.

It is not, however, for the jury to determine what signals should have been given in a particular case; and a general submission of that question to them without qualification or limitation is error. *Dyer v. Erie R. Co.*, 71 N. Y. 228.

Compare Chicago, etc., R. Co. v. Dougherty, 110 Ill. 521, 19 Am. & Eng. R. Cas. 292, *reversing* 14 Ill. App. 196, further appeal, 125 Ill. 127, where it was held that where a statute requires every railroad corporation to cause a bell of at least thirty pounds' weight to be rung or a steam whistle to be sounded at the distance of at least eighty rods before a public highway is reached by a train or locomotive, and kept so ringing or being sounded until the highway is reached, when this was done the railroad company had discharged its duty, whether such signal given was heard or not, and that the statute did not require the giving of such signals of the approach of a train as to enable others absolutely to ascertain its approach and avoid being injured.

So in *Dyson v. New York, etc., R. Co.*, 57 Conn. 9, 14 Am. St. Rep. 82, it was held that a statute that required a company to take certain precautionary measures at crossings was exhaustive and defined the whole of the ordinary duty of the company in the matter.

3. Burden of Proof. — *Wabash, etc., R. Co. v. Hicks*, 13 Ill. App. 407; *Ohio, etc., R. Co.*

throws upon the railroad the burden of establishing that the statutory duty of giving signals at that point was performed.¹

Negative and Positive Evidence. — It has been declared as a general rule that evidence that signals were not heard is not of equal weight with affirmative evidence that they were given.² The jury is, however, the proper judge of the weight of the evidence,³ and circumstances may exist justifying it in giving greater weight to negative than to positive evidence.⁴

g. FLYING SWITCH. — In making a running switch⁵ at a point where its track crosses a public street, a railroad company is bound to exercise a high degree of care.⁶

Negligence Per Se. — It is negligence *per se* for a railroad company to make a flying switch across the streets of a town, along which persons are constantly accustomed to walk, without taking precautions for the safety of the public.⁷

v. Reed, 40 Ill. App. 47; *Peoria, etc., R. Co. v. Foltz*, 13 Ill. App. 535; *Bleyle v. New York Cent., etc., R. Co.*, 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675, *affirmed* in 113 N. Y. 626, 22 N. Y. St. Rep. 993.

1. Burden of Proof on Company. — *Alabama* Code of 1876, § 1699, exacts certain positive duties of those in charge of a train approaching a public crossing or other place mentioned in the statute, rendering the railroad company liable for all damages to persons or property occasioned by the failure to observe these requirements and imposing on it the burden of showing compliance with the statute if the injury occurs at one of the places therein mentioned. *South, etc., Alabama R. Co. v. Thompson*, 62 Ala. 494.

2. Affirmative and Negative Evidence — *England.* — *Ellis v. Great Western, etc., R. Co.*, L. R. 9 C. P. 551, 43 L. J. C. P. 304, 31 L. T. 874.

United States. — *Griffith v. Baltimore, etc., R. Co.*, 44 Fed. Rep. 574.

Illinois. — *Wabash, etc., R. Co. v. Hicks*, 13 Ill. App. 407; *Chicago, etc., R. Co. v. Robinson*, 106 Ill. 142, 19 Am. & Eng. R. Cas. 396, *reversing* 9 Ill. App. 89; *Chicago, etc., R. Co. v. Still*, 19 Ill. 499, 71 Am. Dec. 236.

Minnesota. — *Evison v. Chicago, etc., R. Co.*, 45 Minn. 370; *Kelly v. St. Paul, etc., R. Co.*, 29 Minn. 1, 6 Am. & Eng. R. Cas. 93.

Missouri. — *Cathcart v. Hannibal, etc., R. Co.*, 19 Mo. App. 113; *Summerville v. Hannibal, etc., R. Co.*, 29 Mo. App. 48.

New York. — *Bleyle v. New York Cent., etc., R. Co.*, (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675, *affirmed* in 113 N. Y. 626, 22 N. Y. St. Rep. 993.

Wisconsin. — *Bohan v. Milwaukee, etc., R. Co.*, 61 Wis. 391, 19 Am. & Eng. R. Cas. 276.

It is not sufficient to show by one or more witnesses that they did not hear a signal, without further showing that they were in a position to hear it had a signal been given. *Ohio, etc., R. Co. v. Reed*, 40 Ill. App. 47; *Bleyle v. New York Cent., etc., R. Co.*, (Supreme Ct.) 11 N. Y. St. Rep. 585, 46 Hun (N. Y.) 675.

Habit of Ringing. — The testimony of a fireman on a locomotive engine, whose duty it is to ring the bell when the engine is in motion, that, although he had no independent recollection of ringing it on a certain occasion, yet it was his uniform and invariable habit to ring it, so that it had become second nature with

him to do so, and that from these facts he was able to state positively that he did ring it on the occasion referred to, is competent and sufficient evidence to justify the jury in finding that the bell was rung, notwithstanding the testimony of other witnesses that they were in position to have heard it if it had been rung, and that it was not rung. *Evison v. Chicago, etc., R. Co.*, 45 Minn. 370.

3. Chicago, etc., R. Co. v. Kuster, 22 Ill. App. 188. See the titles JURY AND JURY TRIALS; QUESTIONS OF LAW AND FACT.

4. Negative Evidence Given Superior Weight. — Thus, where witnesses who were near at hand and in a position to see and hear testify that they did not hear a signal as a train approached the crossing, they may be believed as against others who state affirmatively that the signal was given. *Chicago, etc., R. Co. v. Cauffman*, 38 Ill. 424.

5. "A 'Running' or 'Flying Switch' is performed by attaching the cars to be thrown upon the other track to the engine. The train is then put in motion, running toward the switch, and before it is reached, and when sufficient momentum to answer the purpose has been acquired, the engine is detached, passes on the main track, and after passing, the switch is changed, and the cars thus detached, by the momentum thus acquired, are carried along the side track to the point intended." *Illinois Cent. R. Co. v. Baches*, 55 Ill. 383; *Baltimore, etc., R. Co. v. Kean*, 65 Md. 394, 28 Am. & Eng. R. Cas. 580; *Howard v. St. Paul, etc., R. Co.*, 32 Minn. 214, 19 Am. & Eng. R. Cas. 283; *Stevens v. Missouri Pac. R. Co.*, 67 Mo. App. 356; *Brown v. New York Cent. R. Co.*, 32 N. Y. 597, 88 Am. Dec. 353.

6. Care Required in Making Flying Switch. — *Chicago, etc., R. Co. v. Garvy*, 58 Ill. 83; *French v. Taunton Branch R. Co.*, 116 Mass. 537; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Stevens v. Missouri Pac. R. Co.*, 67 Mo. App. 356; *Brown v. New York Cent. R. Co.*, 32 N. Y. 597, 88 Am. Dec. 353; *Cookson v. Pittsburg, etc., R. Co.*, 179 Pa. St. 184; *Ferguson v. Wisconsin Cent. R. Co.*, 63 Wis. 145, 19 Am. & Eng. R. Cas. 285; *Butler v. Milwaukee, etc., R. Co.*, 28 Wis. 487; *Ward v. Chicago, etc., R. Co.*, 85 Wis. 601. See also *Chicago, etc., R. Co. v. Taylor*, 69 Ill. 461, 18 Am. Rep. 626; *Louisville, etc., R. Co. v. Schmidt*, 126 Ind. 290.

7. Negligence Per Se. — *Alabama G. S. R. Co. v. Anderson*, 109 Ala. 299; *Kentucky*

and also taking special pains to give the public full warning of the danger.¹

Whether Reasonable Precautions Taken Is for Jury. — Whether reasonable precautions have been taken to prevent accidents is ordinarily a question for the consideration of the jury.²

E. BACKING CARS. — Special care to prevent accidents is required of the railroad company where it undertakes to back a train or engine at a highway crossing,³ and signals or lights at the end of the car should be provided, to warn passengers at the crossing of the impending danger.⁴

Cent. R. Co. v. Smith, 93 Ky. 449; French v. Taunton Branch R. Co., 116 Mass. 537; O'Connor v. Missouri Pac. R. Co., 94 Mo. 150, 32 Am. & Eng. R. Cas. 61; Stevens v. Missouri Pac. R. Co., 67 Mo. App. 356, Brown v. New York Cent. R. Co., 32 N. Y. 597, *affirming* 31 Barb. (N. Y.) 385, 88 Am. Dec. 353; Stillwell v. New York Cent. R. Co., 34 N. Y. 29.

1. Warning to Public. — Delaware, etc., R. Co. v. Converse, 139 U. S. 469, 49 Am. & Eng. R. Cas. 323; Illinois Cent. R. Co. v. Baches, 55 Ill. 379; Fulmer v. Illinois Cent. R. Co., 68 Miss. 355; Philadelphia, etc., R. Co. v. Troutman, 11 W. N. C. (Pa.) 453, 6 Am. & Eng. R. Cas. 117; Lewis v. Galveston, etc., R. Co., 73 Tex. 504, 39 Am. & Eng. R. Cas. 372. See also Illinois Cent. R. Co. v. Hammer, 72 Ill. 347.

Man Stationed on Detached Section. — The detached section should be under the control of a guard or brakeman to give warning of its approach and for the purpose of decreasing the speed where danger is to be apprehended. Schindler v. Milwaukee, etc., R. Co., 87 Mich. 400.

Moderate Speed for Detached Portion of Train. — Care must be taken to carry the section of the train over the crossing at a rate of speed which will not necessarily endanger the public. Stevens v. Missouri Pac. R. Co., 67 Mo. App. 356. See also Hinckley v. Cape Cod R. Co., 120 Mass. 257.

As to what is an improper rate of speed see Louisville, etc., R. Co. v. Davis, 91 Ala. 487, where eight or ten miles an hour was held improper; Illinois Cent. R. Co. v. Baches, 55 Ill. 379, where a rate of five miles in a city was held negligent; Fulmer v. Illinois Cent. R. Co., 68 Miss. 355, where the same was held with regard to a rate of fifteen or twenty miles on a sharp down grade crossed by two public roads in a business community.

2. Reasonable Care Question for Jury. — Reifsnyder v. Chicago, etc., R. Co., 90 Iowa 76; York v. Maine Cent., R. Co., 84 Me. 117; White v. Fitchburg R. Co., 136 Mass. 321, 18 Am. & Eng. R. Cas. 140; Howard v. St. Paul, etc., R. Co., 32 Minn. 214, 19 Am. & Eng. R. Cas. 283; Reagan v. St. Louis, etc., R. Co., 93 Mo. 348, 3 Am. St. Rep. 542; Lehigh, etc., Coal R. Co. v. Lear, (Pa. 1887) 9 Atl. Rep. 267, 32 Am. & Eng. R. Cas. 74.

3. Care to Be Observed in Backing Trains — *California.* — Robinson v. Western Pac. R. Co., 48 Cal. 409.

Georgia. — Brunswick, etc., R. Co. v. Gibson, 97 Ga. 489.

Illinois. — Lake Erie, etc., R. Co. v. Zoffinger, 107 Ill. 199, 15 Am. & Eng. R. Cas. 371. See also Chicago, etc., R. Co. v. Garvey, 58 Ill. 85.

Indiana. — Lake Shore, etc., R. Co. v.

Boytz, 16 Ind. App. 640; Hathaway v. Toledo, etc., R. Co., 46 Ind. 25.

Iowa. — Clampit v. Chicago, etc., R. Co., 84 Iowa 71.

Kansas. — Kansas Pac. R. Co. v. Pointer, 14 Kan. 37.

Massachusetts. — Linfield v. Old Colony R. Corp., 10 Cush. (Mass.) 564, 57 Am. Dec. 124.

Michigan. — McWilliams v. Detroit Cent. Mills Co., 31 Mich. 274; Battishall v. Humphreys, 64 Mich. 494, 28 Am. & Eng. R. Cas. 597.

Minnesota. — Johnson v. St. Paul, etc., R. Co., 31 Minn. 283, 15 Am. & Eng. R. Cas. 467; Bolinger v. St. Paul, etc., R. Co., 36 Minn. 418, 1 Am. St. Rep. 680, 29 Am. & Eng. R. Cas. 408; Klotz v. Winona, etc., R. Co., (Minn. 1897) 71 N. W. Rep. 257.

New York. — Eaton v. Erie R. Co., 51 N. Y. 544; Maginnis v. New York Cent. R. Co., 52 N. Y. 215; McGovern v. New York Cent., etc., R. Co., 67 N. Y. 417.

Tennessee. — Iron Mountain R. Co. v. Dies, 98 Tenn. 655.

Texas. — Missouri, etc., R. Co. v. Batsell, (Tex. Civ. App. 1896) 34 S. W. Rep. 1047; Gulf, etc., R. Co. v. West, (Tex. Civ. App. 1896) 36 S. W. Rep. 101.

Wisconsin. — Whalen v. Chicago, etc., R. Co., 75 Wis. 654.

Canada. — Levoy v. Midland R. Co., 3 Ont. Rep. 623, 15 Am. & Eng. R. Cas. 478.

What Is Reasonable Care. — Where a train is backing towards a crossing, the fact that a bell was rung does not, as a matter of law, establish reasonable care, and it is for the jury to determine as to whether any other precautions should have been taken under the circumstances. Byrne v. New York Cent., etc., R. Co., 104 N. Y. 362, 58 Am. Rep. 512. See also Barry v. New York Cent., etc., R. Co., 92 N. Y. 289, 44 Am. Rep. 377, 13 Am. & Eng. R. Cas. 615.

Special precautions for heedless or venture-some travelers are not required. Smith v. Maine Cent. R. Co., 87 Me. 339.

4. Signals or Lights at End of Car. — Illinois Cent. R. Co. v. Ebert, 74 Ill. 399; Chicago, etc., R. Co. v. Goebel, 119 Ill. 515; Chicago, etc., R. Co. v. Walsh, 157 Ill. 672; Kissenger v. New York, etc., R. Co., 56 N. Y. 538; Barry v. New York Cent., etc., R. Co., 92 N. Y. 289, 13 Am. & Eng. R. Cas. 615, 44 Am. Rep. 377; Bohan v. Milwaukee, etc., R. Co., 58 Wis. 30, 15 Am. & Eng. R. Cas. 374.

Knowledge of Person Injured. — The fact that the person injured knew that the company was not accustomed to keep a watchman on the rear car has no effect upon the question of the company's negligence. Galveston, etc., R. Co. v. Eitzen, (Tex. Civ. App. 1897) 39 S. W. Rep. 625.

Stationing Brakeman on Rear Car. — The duty of the company in this regard is best observed, however, by stationing a brakeman on the end of the rear car, and such a lookout has been required of the company in many instances.¹

i. FRIGHTENING TEAMS — (1) *In General.* — The authority to operate a railroad includes the right to make the noise incident to the operation of engines and cars, and a railroad company, while exercising this right in a reasonable and lawful manner, is not liable for injuries caused by teams taking fright at noises proceeding from such sources while the train is passing or approaching a crossing.²

(2) *Negligent and Malicious Acts* — (a) *In General.* — On the other hand, if the acts of the servants of the company are negligent or malicious, and are done while in the discharge of their business for the company, the latter will be held liable.³ In such cases, however, it should in some way appear that the act of the railroad company was the proximate cause of the injury,⁴ and

1. Brakeman on End of Rear Car. — Hollinger *v.* Canadian Pac. R. Co., 21 Ont. Rep. 705, 55 Am. & Eng. R. Cas. 192; Brunswick, etc., R. Co. *v.* Gibson, 97 Ga. 489; Chicago, etc., R. Co. *v.* Garvy, 58 Ill. 83; Lake Shore, etc., R. Co. *v.* Boyts, (Ind. App. 1896) 43 N. E. Rep. 667; Cooper *v.* Lake Shore, etc., R. Co., 66 Mich. 261; Johnson *v.* St. Paul, etc., R. Co., 31 Minn. 283, 15 Am. & Eng. R. Cas. 467; Cookson *v.* Pittsburg, etc., R. Co., 179 Pa. St. 184; Whalen *v.* Chicago, etc., R. Co., 75 Wis. 654; Duame *v.* Chicago, etc., R. Co., 72 Wis. 523, 7 Am. St. Rep. 879, 35 Am. & Eng. R. Cas. 416. See also Savannah, etc., R. Co. *v.* Shearer, 58 Ala. 672; Finklestein *v.* New York Cent., etc., R. Co., 41 Hun (N. Y.) 34.

Where the company was required by law to station a man on the last car of every train moving reversely in any town, to warn persons standing on or crossing the track of the approach of the train, it was held that it did not comply with this direction by having a man at the front end of the last car, where he could not see persons crossing the track. * Levey *v.* Midland R. Co., 3 Ont. Rep. 623, 15 Am. & Eng. R. Cas. 478.

Approaching Private Crossing. — In Green *v.* Chicago, etc., R. Co., (Mich. 1896) 68 N. W. Rep. 988, it was held that it was a question for the jury whether the railroad company was negligent in not stationing a lookout on the rear car, where the train was backed at a slow rate of speed and in broad daylight and approaching a private crossing.

2. Noise Incident to Operation of Trains — *Alabama.* — Stanton *v.* Louisville, etc., R. Co., 91 Ala. 382.

Arkansas. — St. Louis, etc., R. Co. *v.* Roberts, 56 Ark. 387; St. Louis, etc., R. Co. *v.* Lewis, 60 Ark. 409.

Delaware. — Burton *v.* Philadelphia, etc., R. Co., 4 Harr. (Del.) 252.

Indiana. — Cincinnati, etc., R. Co. *v.* Gaines, 104 Ind. 526, 54 Am. Rep. 334; Leavitt *v.* Terre Haute, etc., R. Co., 5 Ind. App. 513.

Maine. — Whitney *v.* Maine Cent. R. Co., 69 Me. 208.

Maryland. — Philadelphia, etc., R. Co. *v.* Burkhardt, 83 Md. 516.

Massachusetts. — Norton *v.* Eastern R. Co., 113 Mass. 366; Favor *v.* Boston, etc., R. Corp., 114 Mass. 350, 19 Am. Rep. 364.

North Carolina. — Morgan *v.* Norfolk Southern R. Co., 98 N. Car. 247.

Wisconsin. — Abbot *v.* Kalbus, 74 Wis. 504, 39 Am. & Eng. R. Cas. 594.

See also Hill *v.* Portland, etc., R. Co., 55 Me. 438, 92 Am. Dec. 601.

Right to Fire Up. — The right to fire up an engine at any particular place depends upon the character of the place and not whether there happens to be a person near at the time. Lamb *v.* Old Colony R. Co., 140 Mass. 79, 54 Am. Rep. 449.

Sounding of Whistle as Regular Warning. — Where a person succeeds in driving across a track safely before an approaching train, no recovery can be had for the horse afterwards taking fright at the sounding of the whistle given as the regular warning of the train's approach to the station. Campbell *v.* New York Cent., etc., R. Co., (Supreme Ct.) 4 N. Y. Supp. 265, 21 N. Y. St. Rep. 685, affirmed 130 N. Y. 631, 40 N. Y. St. Rep. 982. Provided the same be made in a prudent and careful manner. St. Louis, etc., R. Co. *v.* Lewis, 60 Ark. 409; St. Louis, etc., R. Co. *v.* Roberts, 56 Ark. 387.

In Ocheltree *v.* Chicago, etc., R. Co., 96 Iowa 246, it was held that if the engineer was justified, as a reasonably prudent man, in concluding from the conduct of the team that it would not be frightened by the giving of signals which were required for the proper management of the train he was not negligent in giving them.

Noise of Train Crossing Bridge. — Where a highway crosses a track near the entrance to a railroad bridge, the company is not liable in damages to a traveler on the highway, caused by his team taking fright from the noise of a train on the bridge, where it is operated in the customary manner, although the corporation had knowledge of the peculiar liability to the happening of accidents at such a place, and although the train approached without warning signals. Favor *v.* Boston, etc., R. Corp., 114 Mass. 350, 19 Am. Rep. 364.

3. Negligent and Malicious Acts. — Stanton *v.* Louisville, etc., R. Co., 91 Ala. 382, Toledo, etc., R. Co. *v.* Harmon, 47 Ill. 298, 95 Am. Dec. 489; Chicago, etc., R. Co. *v.* Heinrich, 157 Ill. 388; Indianapolis Union R. Co. *v.* Boettcher, 131 Ind. 82; Houston, etc., R. Co. *v.* Abrahams, (Tex. Civ. App. 1897) 40 S. W. Rep. 1034; Stott *v.* Grand Trunk R. Co., 24 U. C. C. P. 347.

4. Proximate Cause of Injury. — Dugan *v.* St. Paul, etc. R. Co., 40 Minn. 544. See the

it is for the jury to determine whether in a particular case the act when so performed was negligence.¹

(b) *Improper Sounding of Whistle.* — Where the sounding of the whistle is negligent, unnecessary, wilful, or wanton, and contributes directly to the injury, the company will be held liable.²

(c) *Escape of Steam.* — So where the engineer negligently or maliciously causes or allows the steam to escape, thereby causing teams to take fright, the company will be responsible for his act.³

(3) *Failure to Give Signals.* — It is the duty of those in charge of the train to give some timely warning of its approach for the protection of those who may be riding or driving on the highway, that they may secure themselves against injury by reason of the frightening of their teams.⁴ The failure

titles CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368; DAMAGES, *post*; NEGLIGENCE.

Sounding the whistle under a bridge as a passenger was passing over, which caused the horses to run away through fright and injure him, was a sufficient proximate cause of injury to create a liability on the company. *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259, 98 Am. Dec. 346.

1. *Question for Jury.* — *St. Louis, etc., R. Co. v. Lewis*, 60 Ark. 409; *St. Louis, etc., R. Co. v. Roberts*, 56 Ark. 387; *Hill v. Portland, etc., R. Co.*, 55 Me. 438, 92 Am. Dec. 601; *Presby v. Grand Trunk R. Co.*, 66 N. H. 615; *Laible v. New York Cent., etc., R. Co.*, 13 N. Y. App. Div. 574. See also *Ochiltree v. Chicago, etc., R. Co.*, 99 Iowa 373; *Ward v. Chicago, etc., R. Co.*, 97 Iowa 50.

In *Akridge v. Atlanta, etc., R. Co.*, 90 Ga. 232, it was held that a railroad company has no right to continue blowing a locomotive whistle in a city, town, or village, for the purpose of giving a signal of its approach to the station, after the engineer discovers that a blast of the whistle already given has frightened a horse drawing a vehicle along the public road, and that it will probably be more frightened by his continuing to blow till the signal is completed, the driver seated in the vehicle being engaged in an effort to control the animal. But it is a question for the jury whether the circumstances were such as to apprise the engineer, or put him on notice, of the peril which would be occasioned by continuing to blow the whistle.

2. *Improper Sounding of Whistle.* — *Georgia R. Co. v. Carr*, 73 Ga. 557; *Chicago, etc., R. Co. v. Heinrich*, 157 Ill. 388; *Dugan v. St. Paul, etc., R. Co.*, 40 Minn. 544; *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259, 98 Am. Dec. 346; *Philadelphia, etc., R. Co. v. Killips*, 88 Pa. St. 405; *Gulf, etc., R. Co. v. Box*, 81 Tex. 670; *Gulf, etc., R. Co. v. Singer*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1004.

Whistling in Passing Over and Under Bridge. — Where a railroad track crosses the highway by an overhead bridge, and the plaintiff's team passing beneath, without the knowledge of those in charge of the train passing above, is frightened by the sounding of the whistle and runs away, whereby the plaintiff is injured, the company, in the absence of any showing that the whistling was unnecessary, is not liable, although the crossing was known to be one of extraordinary danger. *Cincinnati, etc., R. Co. v. Gaines*, 104 Ind. 526, 54 Am. Rep.

334. But see *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259, 98 Am. Dec. 346, where a train whistled under a bridge over which a traveler was passing, and it was held that if danger might reasonably be apprehended it was the duty of the company to give some warning.

Blowing Whistle in Cities. — The *Georgia Code*, § 710, makes it unlawful for railroad companies to blow their whistles before approaching highway crossings within the limits of cities, towns, or villages, but provides for the ringing of a bell; and a violation of the above statute by blowing a whistle in a city, thereby causing a horse to run away, renders a company liable for the resulting injury. *Georgia R. Co. v. Carr*, 73 Ga. 557.

3. *Escape of Steam.* — *Toledo, etc., R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82; *Presby v. Grand Trunk R. Co.*, 66 N. H. 615; *Keech v. Rome, etc., R. Co.*, 59 Hun (N. Y.) 617, 35 N. Y. St. Rep. 902; *Borst v. Lake Shore, etc., R. Co.*, 4 Hun (N. Y.) 346.

Action of Flagman. — Where a flagman is stationed at a crossing and beckons a person to drive on, who has been waiting some time for an opportunity to cross, he has a right to assume that there will be nothing done to increase the danger; and a sudden escape of steam which causes his horse to take fright will render the company liable. *Borst v. Lake Shore, etc., R. Co.*, 4 Hun (N. Y.) 346.

Automatic Valve. — In a *New Hampshire* case it was said that the fact that the escape of steam from the locomotive was regulated by an automatic valve was no justification for allowing the steam to escape, and it was a question of fact for the jury whether the company was negligent in permitting the escape of the steam. *Presby v. Grand Trunk R. Co.*, 66 N. H. 615.

In *Louisville, etc., R. Co. v. Schmidt*, 147 Ind. 638, where the traveler inquired of the engineer and was told to cross, and it was found that the steam gauge allowed the steam to escape at a certain pressure, and the steam at the time was about that pressure, it was held that the company was liable. But see *Duvall v. Baltimore, etc., R. Co.*, 73 Md. 516, 49 Am. & Eng. R. Cas. 313.

4. *Failure to Give Signals.* — *Bowen v. Gainesville, etc., R. Co.*, 95 Ga. 688; *Lonergan v. Illinois Cent. R. Co.*, 87 Iowa 755; *Rupard v. Chesapeake, etc., R. Co.*, 88 Ky. 280; *Whitney v. Maine Cent. R. Co.*, 69 Me. 208; *Pollock v. Eastern R. Co.*, 124 Mass. 158, 17 Am. Ry.

to give signals, however, will not excuse negligence on the part of the traveler in attempting to drive across the track in the face of an approaching train.¹

j. **OBSTRUCTIONS AT CROSSING.** — So the railroad may become liable for obstructions by cars, etc., at the crossings, which are calculated to frighten teams.²

Questions for Jury. — But in such cases the inquiry whether the location of the obstruction was the proximate cause of the injury,³ and as to the negligence of the company in so placing on the highway an object likely to frighten horses, should be left to the jury.⁴ The responsibility of the railroad company in this class of cases must necessarily depend upon the question whether the use which the company was making of the highway at the time of the injury was

Rep. 402; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Green v. Eastern R. Co.*, 52 Minn. 79; *Gulf, etc., R. Co. v. Breitling*, (Tex. 1890) 12 S. W. Rep. 1121; *Grand Trunk R. Co. v. Rosenberger*, 9 Can. Sup. Ct. Rep. 311, 19 Am. & Eng. R. Cas. 8.

No Actual Collision. — The failure to give signals will render the company liable although there was no actual collision with the train. *Pollock v. Eastern R. Co.*, 124 Mass. 158, 17 Am. Ry. Rep. 402.

Person Not Attempting to Cross. — Under the statute imposing a duty upon a railroad company to ring a bell at highway crossings, and making the neglect of such duty a misdemeanor punishable by fine, and declaring that the company shall "be liable for all damages which shall be sustained by any person by reason of such neglect," a person who was unloading corn into a crib on the railroad company's depot grounds near two highway crossings can recover from the company for injuries received by reason of his horses becoming frightened at an engine which was driven past without the required signal being given, although the plaintiff was not at the time attempting to cross the track. *Lonergan v. Illinois Cent. R. Co.*, 87 Iowa 755, 56 Am. & Eng. R. Cas. 323.

1. Driving Across Track in Face of Approaching Train. — *Norton v. Eastern R. Co.*, 113 Mass. 366; *Grows v. Maine Cent. R. Co.*, 67 Me. 100.

2. Obstructions at Crossings. — *Kyne v. Wilmington, etc., R. Co.*, 3 Houst. (Del.) 185; *Louisville, etc., Consol. R. Co. v. Pritchard*, 131 Ind. 564; *Great Western R. Co. v. Decatur*, 33 Ill. 381; *Myers v. Richmond, etc., R. Co.*, 87 N. Car. 345, 8 Am. & Eng. R. Cas. 293; *Harrell v. Albemarle, etc., R. Co.*, 110 N. Car. 215; *Texas, etc., R. Co. v. McManus*, (Tex. Civ. App. 1896) 38 S. W. Rep. 241; *Sherman, etc., R. Co. v. Bridges*, (Tex. Civ. App. 1897) 40 S. W. Rep. 536; *Missouri, etc., R. Co. v. Jones*, (Tex. Civ. App. 1896) 35 S. W. Rep. 322.

If the fright of the horses was caused by the default of the defendant in leaving cars standing at a crossing, in the absence of any evidence that they were unusually vicious or excitable, they would not be considered uncontrollable because they shied, or were momentarily beyond the control of the driver. *Peterson v. Chicago, etc., R. Co.*, 64 Mich. 621.

Act of Persons Not Employees. — If a car at which the plaintiff's horses took fright was placed by the defendant at a point upon its track which did not obstruct a highway cross-

ing, and was afterwards moved onto the highway by persons for whom the defendant was not responsible, the company is not liable to the plaintiff for injuries sustained, unless it negligently permitted the car to remain upon the highway an unreasonable length of time. *Cleveland, etc., R. Co. v. Wynant*, 114 Ind. 525, 5 Am. St. Rep. 644, 35 Am. & Eng. R. Cas. 328.

Derailed Car. — Where the plaintiff's horse took fright from cars derailed near a crossing, it is error to allow the plaintiff to prove that the cars were not removed for several days after the accident. *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580.

Obstructing Crossing by Signpost. — The plaintiff's horse, which she was driving along the highway, became frightened, and the vehicle to which it was attached came, in consequence, into collision with one of the posts supporting the signboard required by the statute (C. S. C., c. 66) to be erected by railroads across highways, and was damaged. It was held that the defendants would not be liable merely for putting posts in the highway, as the law allows them so to do, provided they place them in a reasonably proper manner, with a due regard to all the surrounding circumstances, although the posts necessarily obstruct the use of the road over the spots where they are placed. *Soule v. Grand Trunk R. Co.*, 21 U. C. C. P. 308.

3. Proximate Cause. — In *Selleck v. Lake Shore, etc., R. Co.*, 93 Mich. 375, it was held that whether or not the obstruction of a crossing by a freight train was the proximate cause of the injury, was properly submitted to the jury, where it appeared that such freight train was obstructing the highway in violation of statute, by reason of which the plaintiff's horses were frightened by smoke and steam from a passing train which was obstructed by the freight train, so that they ran away and injured the plaintiff.

4. Question for Jury. — *Peterson v. Chicago, etc., R. Co.*, 64 Mich. 621; *Myers v. Richmond, etc., R. Co.*, 87 N. Car. 345, 8 Am. & Eng. R. Cas. 293; *Pennsylvania R. Co. v. Horst*, 110 Pa. St. 226; *Texas, etc., R. Co. v. McManus*, (Tex. Civ. App. 1896) 38 S. W. Rep. 241.

The fact that horses had often been frightened at the same objects, and that the railroad company had allowed them to remain there long afterwards, does not prove gross negligence *per se*, and is a fact to be decided by the jury. *Texas, etc., R. Co. v. Hill*, 71 Tex. 451.

a reasonable one or not; and this in turn depends upon the character of the object, the urgency of the occasion, the manner in which the road was frequented, and the hazard to travelers attending an obstruction at the particular locality. These are all matters to be determined by a jury under proper instruction by the court.¹

k. PRIVATE CROSSINGS. — At private crossings the rules as to the rights and obligations of the railroad company and the traveler are somewhat different from those that govern at public highway crossings. A railroad is not ordinarily bound to maintain or repair a private way over its tracks, but such duty may become obligatory either by charter or contract.² The duties of the traveler and of the railroad company at such crossings have been treated under the specific heads of this article, and reference is made thereto.³

l. CROSSINGS BY CUSTOM OR LICENSE — (1) *In General.* — The duty of the railroad to the public, as laid down, is as a general rule confined to public crossings,⁴ and in order to hold the railroad company strictly to all the duties imposed upon it as to the management of its trains it is only necessary that the highway should be in ordinary public use.⁵

Acquiescence in Public Use. — Yet where the public, for a series of years, has been in the habit of crossing the railroad, the acquiescence of the railroad company in the public use amounts to a license or permission to cross at that point, and imposes the duty upon it, as to all persons so crossing, to exercise reasonable care in the movement of its trains so as to protect them from injury.⁶

1. *Myers v. Richmond, etc., R. Co.*, 87 N. Car. 345; *Chicago, etc., R. Co. v. Williams*, 56 Kan. 333.

2. **Private Crossings.** — *Ferguson v. Virginia, etc., R. Co.*, 13 Nev. 185; *Keefe v. Sullivan County R. Co.*, 63 N. H. 271, 23 Am. & Eng. R. Cas. 301.

3. If a railroad corporation so constructs a private crossing over its track, at grade, in a city, as to hold it out as a suitable place for foot-passengers to cross, it is bound to use reasonable precautions to protect them while so crossing. *Murphy v. Boston, etc., R. Co.*, 133 Mass. 121, 14 Am. & Eng. R. Cas. 675.

Sign Denial of Right to Cross. — A railroad corporation constructed its tracks across a private way which connected two public ways of a city, and over which there was much travel. At the crossing the corporation put up a sign, upon which was the following: "This is not a public way, and is dangerous." It was held, in an action against the corporation, by a person injured at the crossing by being struck by a locomotive engine of the defendant, that the corporation was not entitled to a ruling, as matter of law, that this sign was a denial of the right of crossing and that a person crossing did so at his own risk. *O'Connor v. Boston, etc., R. Corp.*, 135 Mass. 352.

4. **Duty Confined to Public Crossings.** — *Thomas v. Delaware, etc., R. Co.*, 8 Fed. Rep. 729, 19 Blatchf. (U. S.) 533; *Alabama G. S. R. Co. v. Linn*, 103 Ala. 134; *Chenery v. Fitchburg R. Co.*, 160 Mass. 211.

Where the company blocks the highway crossing and compels persons desirous of crossing to enter upon its grounds, such an entry is not a trespass, and it is for the jury to say whether the relation of such a person upon the track of the railroad is that of a licensee of the company. *Mayer v. Chicago, etc., R. Co.*, 63 Ill. App. 309.

5. *Sweeny v. Old Colony, etc., R. Co.*, 10 Allen (Mass.) 368, 87 Am. Dec. 644; *Pittsburg, etc., R. Co. v. Dunn*, 56 Pa. St. 280; *Delaney v. Milwaukee, etc., R. Co.*, 33 Wis. 67; *Philadelphia, etc., R. Co. v. Troutman*, 11 W. N. C. (Pa.) 453, 6 Am. & Eng. R. Cas. 117; *International, etc., R. Co. v. Jordan*, 1 Tex. App. Civ. Cas., § 859, 10 Am. & Eng. R. Cas. 301; *Barry v. New York Cent., etc., R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377, 13 Am. & Eng. R. Cas. 615. See generally the title DEDICATION.

Crossing by Footpath. — Where a person is injured by a passing train in attempting to cross the track of a railroad by a footpath, a few feet distant from a public crossing, his right of recovery against the railroad company is the same as if he had used the public road; provided the danger from the cars would not have been less at the public road, and his precautions would not have been more availing. *Baltimore, etc., R. Co. v. Owings*, 65 Md. 502, 28 Am. & Eng. R. Cas. 639.

Streets Laid Out and Adopted by Municipal Authorities. — Where the statute required that all railroad companies should "cause the bell on the engine to be rung before crossing any of the streets" of an incorporated city, and that their trains should not go faster than six miles an hour until "they have passed all traveled streets of said city," it was held that such provisions applied to all actually traveled streets within the city limits though such only by user, and not only to streets dedicated by recorded plats or laid out and adopted by the municipal authorities. *Ewen v. Chicago, etc., R. Co.*, 38 Wis. 613.

6. **Acquiescence in Public Use** — *United States*. — *Cahill v. Chicago, etc., R. Co.*, 74 Fed. Rep. 285. See also *Owens v. Pennsylvania R. Co.*, 41 Fed. Rep. 187.

Alabama. — *Alabama G. S. R. Co. v. Linn*, 103 Ala. 134.

(2) *Forced Maintenance of Crossings.* — At the same time the railroad company cannot be forced to maintain crossings for the sole convenience of the public, and at such places extend to them the same degree of care required in other places.¹ As against a bare licensee the company has a right to run its

Connecticut. — *Pomponio v. New York, etc.*, R. Co., 66 Conn. 528.

Iowa. — *Clampit v. Chicago, etc.*, R. Co., 84 Iowa 71, 49 Am. & Eng. R. Cas. 468; *Reifsnnyder v. Chicago, etc.*, R. Co., 90 Iowa 76.

Kentucky. — *Louisville, etc.*, R. Co. v. *Schuster*, (Ky. 1888) 7 S. W. Rep. 874, 35 Am. & Eng. R. Cas. 407.

Massachusetts. — *Murphy v. Boston, etc.*, R. Co., 133 Mass. 121, 14 Am. & Eng. R. Cas. 675.

Michigan. — *Adams v. Iron Cliffs Co.*, 78 Mich. 271, 18 Am. St. Rep. 441, 41 Am. & Eng. R. Cas. 414; *Schindler v. Milwaukee, etc.*, R. Co., 87 Mich. 400.

Minnesota. — *Kelly v. Southern Minnesota R. Co.*, 28 Minn. 98.

Missouri. — *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211.

New York. — *Vandewater v. New York, etc.*, R. Co., 74 Hun (N. Y.) 32; *Barry v. New York Cent., etc.*, R. Co., 92 N. Y. 289, 13 Am. & Eng. R. Cas. 615, *affirming* 28 Hun (N. Y.) 441, 44 Am. Rep. 377; *Byrne v. New York Cent., etc.*, R. Co., 104 N. Y. 362, 58 Am. Rep. 512; *Swift v. Staten Island Rapid Transit R. Co.*, 123 N. Y. 645, 33 N. Y. St. Rep. 604, 3 Silv. App. (N. Y.) 184, *affirming* 52 Hun (N. Y.) 614, 24 N. Y. St. Rep. 359, 1 Silv. (N. Y.) 375.

North Carolina. — *Troy v. Cape Fear, etc.*, R. Co., 99 N. Car. 298, 6 Am. St. Rep. 521, 34 Am. & Eng. R. Cas. 13.

Ohio. — *Harriman v. Pittsburgh, etc.*, R. Co., 45 Ohio St. 11, 4 Am. St. Rep. 507, 32 Am. & Eng. R. Cas. 37.

Pennsylvania. — *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269, 3 Am. Rep. 628; *Taylor v. Delaware, etc.*, Canal Co., 113 Pa. St. 162, 57 Am. Rep. 446, 28 Am. & Eng. R. Cas. 656.

Texas. — *St. Louis, etc.*, R. Co. v. *Crosnoe*, 72 Tex. 79, 37 Am. & Eng. R. Cas. 313.

Washington. — *Roth v. Union Depot Co.*, 13 Wash. 525.

Wisconsin. — *Delaney v. Milwaukee, etc.*, R. Co., 33 Wis. 67; *Whalen v. Chicago, etc.*, R. Co., 75 Wis. 654.

See also *Chicago, etc.*, R. Co. v. *Wymore*, 40 Neb. 645.

Where a railroad company, through its employees and officers, has knowledge of the constant use of a footpath across its track, makes no objections thereto, and directs no obstructions to such use, it will be presumed to assent to it, thus giving all who use such crossing a license therefor. A person who is injured while crossing the track at such place is not a trespasser upon the railroad, but is entitled to all the rights of one rightfully upon it, and may recover for injuries resulting from the company's want of care. *Clampit v. Chicago, etc.*, R. Co., 84 Iowa 71, 49 Am. & Eng. R. Cas. 468.

Persons Habitually Walking On or Across Tracks. — A license to walk on a track cannot be established by proof showing that the place was remote from any station, and that persons living near it had been in the habit of walking

on it; that the engineer had seen persons walking on it, though not more frequently than on other portions of the track similarly situated; and that no steps had been taken to prevent such persons from so doing. *Missouri Pac. R. Co. v. Brown*, (Tex. 1891) 18 S. W. Rep. 670.

Roads Opened After Construction of Railroad. — In some cases the statutory duties of the railroad company at crossings are not held to exist in the case of roads opened after the construction of the railroad track, until they are duly established as public roads under the law. *International, etc.*, R. Co. v. *Jordan*, 1 Tex. App. Civ. Cas., § 859, 10 Am. & Eng. R. Cas. 301.

A "Traveled Place," within the meaning of a statute requiring railroad companies to give signals when their locomotives approach any public highway or traveled place, means a place where the public have a legal right to cross the track, and not a place where people are accustomed to cross to reach a store and post office, where such crossing is not a public one and the company does not know of or acquiesce in its use. *Barber v. Richmond, etc.*, R. Co., 34 S. Car. 444.

Evidence of Negligence. — In the absence of statutes regulating the time and manner of giving signals, the failure of an engineer in charge of a locomotive to ring the bell or sound the whistle on approaching a highway crossing, or a point where the public have been habitually permitted to cross at the intersection of a mill road or farm road frequently used, is evidence of negligence to be submitted to the jury. *Hinkle v. Richmond, etc.*, R. Co., 109 N. Car. 472, 26 Am. St. Rep. 581.

1. Forced Maintenance of Crossings. — *Chenery v. Fitchburg R. Co.*, 160 Mass. 211.

Mere knowledge and passive acquiescence on the part of a company where persons are using a certain place as a crossing are not sufficient to make it a public crossing, so as to charge the company with additional care; and under such circumstances it is error to instruct the jury that if the company, with knowledge of the use of such crossing, did not prevent it or protest against it, then the crossing became a public one, with all the duties, burdens, and obligations thereby created. *Atchison, etc.*, R. Co. v. *Parsons*, 42 Ill. App. 93.

Notice and Subsequent Acquiescence. — The public can acquire no right to cross a track where there is no regular road until the company has notice and subsequently acquiesces in such crossing; therefore, where a person sues for an injury at such place, it is error to charge that the company was bound to use care and caution in running at that point if the people were in the habit of crossing there. *Matze v. New York Cent., etc.*, R. Co., 1 Hun (N. Y.) 417, 3 Thomp. & C. (N. Y.) 513.

Even if there was any evidence from which a license might be inferred, such license created no legal right and imposed no duty upon the defendant, except the general duty

trains in the usual way, without special precautions, if the circumstances do not of themselves give warning of his probable presence, and he is not seen until too late.¹

Without Invitation from Company. — If a person attempts to cross merely by license, and not under circumstances from which an inducement or invitation can be inferred, the company owes him no such degree of care as is ordinarily accorded a traveler on a public highway.² Mere permission or license to cross is not necessarily an invitation.³ But the construction of the crossing and its character may be such as to constitute an invitation.⁴ The question whether there is an invitation, express or implied, is generally one for the jury.⁵ to be determined by considering whether the construction was such as reasonably to induce the public to believe that the crossing was a public way.⁶

which every man owes to others to do them no intentional wrong or injury. *Matze v. New York Cent., etc., R. Co., 1 Hun (N. Y.) 417, 3 Thomp. & C. (N. Y.) 513.*

Abandoned Way. — A railway company is not bound to guard against accidents at the crossing of an old, abandoned way which was never legally laid out. *Omaha, etc., Valley R. Co. v. Martin, 14 Neb. 295, 19 Am. & Eng. R. Cas. 236.*

Structures Not Part of Crossing. — Where a railroad company constructed steps at the ends or sides of its freight-house platform, which steps were essential to the use of the freight-house by its employees and the public with whom it transacted business, and the steps connected with no street sidewalks or public way, the fact that the public used such steps in going to and from the freight and passenger depot, or for convenience used it to shorten the distance in going to and fro between different portions of the town, does not make them a part of the public crossing. *Illinois Cent. R. Co. v. Beard, 49 Ill. App. 232.*

1. Bare Licensee. — *Chenery v. Fitchburg R. Co., 160 Mass. 211; June v. Boston, etc., R. Co., 153 Mass. 79; Alabama G. S. R. Co. v. Linn, 103 Ala. 134; Hall v. Cleveland, etc., R. Co., 15 Ind. App. 496.*

Although a company has, by permitting people repeatedly to cross its tracks at a point where there is no public right of passage, given an implied license so to do, it owes no duty of active vigilance to those crossing to guard them from accident. The company is not restricted by the license in the use of its track; nor will a departure in some degree or particular by its employees from the ordinary course of procedure make it liable for an injury resulting therefrom, unless the doing of an act is shown which might reasonably be expected to cause injury to a person lawfully on the track under the license; the licensees acting under it take the risks incident to the business. *Sutton v. New York Cent., etc., R. Co., 66 N. Y. 243, reversing 4 Hun (N. Y.) 760. See also Nicholson v. Erie R. Co., 41 N. Y. 525; Morrissey v. Eastern R. Co., 126 Mass. 377, 30 Am. Rep. 686; Stewart v. Pennsylvania R. Co., (Ind. 1883) 14 Am. & Eng. R. Cas. 679.*

2. Without Invitation from Company. — *Hanks v. Boston, etc., R. Co., 147 Mass. 495, 35 Am. & Eng. R. Cas. 321; Wright v. Boston, etc., R. Co., 142 Mass. 296, 28 Am. & Eng. R. Cas. 652; Clark v. Michigan Cent. R. Co., (Mich. 1897) 71 N. W. Rep. 327.*

3. What Amounts to an Invitation. — *Wright v. Boston, etc., R. Co., 142 Mass. 296, 28 Am. & Eng. R. Cas. 652.*

4. Circumstances Constituting an Invitation. — *Stewart v. Pennsylvania R. Co., (Ind. 1883) 14 Am. & Eng. R. Cas. 679; Kelly v. Southern Minnesota R. Co., 28 Minn. 98, 6 Am. & Eng. R. Cas. 264; Taylor v. Delaware, etc., Canal Co., 113 Pa. St. 162, 57 Am. Rep. 446, 28 Am. & Eng. R. Cas. 656.*

Proof that a path had existed over the defendant's track for twenty-five years, and that the company had not fenced it, and in cleaning its ditches had thrown the dirt on either side so as to leave the path unobstructed, and that no objection had been made to crossing the track, except when cars were passing, and that the company sometimes even opened freight trains to allow persons to pass, is not sufficient to warrant a jury in finding that it held out any inducement or invitation to use the path; and a person injured in crossing could not recover without proof that the injury was wilful or reckless. *Wright v. Boston, etc., R. Co., 142 Mass. 296, 28 Am. & Eng. R. Cas. 652.*

The Establishment of a Flag Station at a railroad crossing is legal evidence of the consent of the railroad corporation to whom the easement and right of passage with trains belong that the street may be used as a highway. *Webb v. Portland, etc., R. Co., 57 Me. 117.*

5. Question for Jury. — *Taylor v. Delaware, etc., Canal Co., 113 Pa. St. 162, 57 Am. Rep. 446, 28 Am. & Eng. R. Cas. 656; Hanks v. Boston, etc., R. Co., 147 Mass. 495; Fitchburg R. Co. v. Page, 131 Mass. 391, 7 Am. & Eng. R. Cas. 86; Chenery v. Fitchburg R. Co., 160 Mass. 211; Cahill v. Chicago, etc., R. Co., 74 Fed. Rep. 285; Skjeggerud v. Minneapolis, etc., R. Co., 38 Minn. 56.*

6. Wright v. Boston, etc., R. Co., 142 Mass. 296, 28 Am. & Eng. R. Cas. 652; Chenery v. Fitchburg R. Co., 160 Mass. 211.

A public crossing may be inferred from the use made of it by the public and the railroad company. And if the same is treated as a regular crossing in the manner of its use a jury will be justified in finding it such. *Chicago, etc., R. Co. v. Reith, 65 Ill. App. 461.*

View of Crossing. — The jury may satisfy themselves as to the nature of the crossing by a view of the same where such course may seem necessary. *Hanks v. Boston, etc., R. Co., 147 Mass. 495. See also Tully v. Fitchburg R. Co., 134 Mass. 499. See generally the title JURY AND JURY TRIAL.*

VI. DUTY OF TRAVELER — CONTRIBUTORY NEGLIGENCE. — The traveler's duty to exercise care at crossings, and what conduct will amount to contributory negligence on his part, have been fully considered under another title.¹

VII. FARM CROSSINGS — 1. What Term Includes. — The term "farm crossing" includes a passage either over or under a railroad track, by means of which connection may be had between portions of the same tract of land separated by a railroad.²

Where the Farm Lies Wholly upon One Side of the Right of Way, a private way across the railroad cannot properly be called a farm crossing.³

2. Right of Landowner. — As a general rule the landowner has a reasonable right to farm crossings over a right of way condemned through his premises, at such places as the necessities of his farm demand; provided such crossings and the use thereof will not interfere with the paramount rights of the railroad company.⁴ This right is derived by analogy from the well-established doctrine

1. See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 427.

2. **Term Defined.** — *Wheeler v. Rochester*, etc., R. Co., 12 Barb. (N. Y.) 227. See also *Burke v. Grand Trunk R. Co.*, 6 U. C. C. P. 484; *Louisville, etc., R. Co. v. Hughes*, 2 Ind. App. 68.

Not "Established Roads" — *Pennsylvania*. — In *Ambler's Appeal*, (Pa. 1886) 4 Atl. Rep. 187, it is held that ground occupied as a private farm crossing over a railroad track, is not an established road within the meaning of the Pennsylvania Act of Feb. 19, 1849, § 12, providing that such roads or ways must not be impeded or obstructed by a railroad.

Crossing as Distinguished from Gate. — A farm crossing over the track of a railroad is to be considered as an easement, while a gate is a part of the fence which is required to be placed wherever there is such farm crossing. *Wabash R. Co. v. Kime*, 42 Ill. App. 272.

3. Crossing from Farm Wholly on One Side of Railroad. — In *Indiana* it has been held that a private way across a railroad from a farm lying wholly on one side of the right of way, to a highway on the opposite side of the right of way, is not a farm crossing within the meaning of § 5, of the Act of April 13, 1885 (Ind. Acts 1885, p. 224), which provides that "all gates and bars at farm crossings [must] be constructed and maintained and kept closed by the owner of such farm crossing." *Louisville, etc., R. Co. v. Hughes*, 2 Ind. App. 68.

Similarly it has been held in the same state, that where a landowner puts up gates in the right-of-way fence, to enable him to go from his land to a private side track on the railroad right of way, said gates do not constitute "a private farm crossing" within the meaning of the Indiana Acts of April 8 and 13, 1885, and the railroad company is liable in damages for the killing of stock belonging to a third person, which entered on its right of way through said gates. *Wabash R. Co. v. Williamson*, 3 Ind. App. 190.

But where a Company Buys Land on One Side of Its Track, after it has constructed a farm crossing thereon, it has been held that it cannot close the crossing, where the landowner retains a private right of way over the land sold, to enable him to reach a public highway. *Lakenan v. Hannibal, etc., R. Co.*, 36 Mo. App. 363.

4. Right of Landowner to Crossings. — *Kansas*

City, etc., R. Co. v. Kregelo, 32 Kan. 608, 20 Am. & Eng. R. Cas. 241; *Gulf, etc., R. Co. v. Rowland*, 70 Tex. 298, 35 Am. & Eng. R. Cas. 286; *Vézina v. Reg.*, 17 Can. Sup. Ct. Rep. 1, 44 Am. & Eng. R. Cas. 73. See also *Chicago, etc., R. Co. v. Cosper*, 42 Kan. 561; *Atchison, etc., R. Co. v. Gough*, 29 Kan. 94, 10 Am. & Eng. R. Cas. 151; *Cotton v. New York, etc., R. Co.*, (Supreme Ct.) 48 N. Y. St. Rep. 89, 20 N. Y. Supp. 347; *Canada Southern R. Co. v. Clouse*, 13 Can. Sup. Ct. Rep. 157, 35 Am. & Eng. R. Cas. 206.

Limitation upon Right — Necessity the Criterion. — In *Henderson v. Chicago, etc., R. Co.*, 48 Iowa 216, it is held that a railroad company whose line runs through the lands of an owner, is only required to provide a crossing for such owner when his interests and convenience require it. Compare *Aylesworth v. Chicago, etc., R. Co.*, 30 Iowa 459.

Illustration. — In *Carroll v. Great Western R. Co.*, 14 U. C. Q. B. 614, the plaintiff owned land along a river at a point where there was a bend or elbow in the stream. He conveyed to the defendants the strip required for their track, which ran close to the bank at this bend, so as to leave no passage from his land above to that below, but he had access to each part separately by the highway. It was held that the defendants were not bound to furnish any such passage.

In Nebraska railroad companies are required to make and keep in good repair an adequate means of crossing the track, when requested by the owner of land crossed by the road of a company to do so. *Fremont, etc., R. Co. v. Lamb*, 11 Neb. 592, 5 Am. & Eng. R. Cas. 367.

If Farm Crossings Are a Part of the Plan of a Railroad where its right of way crosses the farm, and are shown on the map and profile of the road on record, and are taken into consideration by the commissioners in making the award of damages, the court or jury upon appeal should assess the damages to the owner of the land with reference to such plan of construction, and the railroad company becomes bound thereby to construct such crossings. *Kansas City, etc., R. Co. v. Kregelo*, 32 Kan. 608, 20 Am. & Eng. R. Cas. 241.

Crossing upon His Own Land. — It is the right of a person whose lands are taken to have the crossing upon his own land. *Wheeler v. Rochester, etc., R. Co.*, 12 Barb. (N. Y.) 227.

that a grantor impliedly reserves a way of necessity over premises conveyed.¹

3. Duty to Construct — *a. IN GENERAL.* — In the absence of any agreement or statutory provision requiring it to do so, no obligation rests upon a railway company to construct and maintain farm crossings at its own expense, the presumption being that when the right of way was secured, the railway indemnified the landowner for the expense of constructing and keeping in repair all necessary crossings.²

b. BY STATUTE. — The duty of the railroad company to construct such crossings is generally of either statutory or contractual origin, and statutes regulating the duty of railways in this respect may now be found in the majority of the states of the Union and in Canada.³

1. Way of Necessity Reserved. — *Gulf, etc., R. Co. v. Rowland*, 70 Tex. 298.

2. Duty to Construct. — *Cook v. North, etc., R. Co.*, 50 Ga. 211; *Chicago, etc., R. Co. v. Eichman*, 47 Ill. App. 156; *Atchison, etc., R. Co. v. Gough*, 29 Kan. 94, 10 Am. & Eng. R. Cas. 151; *Kansas City, etc., R. Co. v. Kregelo*, 32 Kan. 608, 20 Am. & Eng. R. Cas. 241; *Gulf, etc., R. Co. v. Rowland*, 70 Tex. 298, 35 Am. & Eng. R. Cas. 286; *Gulf, etc., R. Co. v. Jones*, 3 Tex. App. Civ. Cas., § 21. See also *infra*, this section, *By Statute*.

Residence Crossings. — Railroad companies cannot be compelled to erect and maintain residence crossings at their own expense, for the use and benefit of individuals, when no statute existed at the time of the construction of the roads requiring such action on their part. *People v. Detroit, etc., R. Co.*, 79 Mich. 471, 42 Am. & Eng. R. Cas. 257.

Government Railways. — The right to have a farm crossing over one of the government railways is not a statutory right, and in awarding damages, full compensation for the future as well as for the past for the want of a farm crossing, should be granted. *Vézina v. Reg.*, 17 Can. Sup. Ct. Rep. 1, 44 Am. & Eng. R. Cas. 73. See also *Brown v. Toronto, etc., R. Co.*, 26 U. C. C. P. 206. Compare *Clarke v. Rochester, etc., R. Co.*, 18 Barb. (N. Y.) 350; *Wademan v. Albany, etc., R. Co.*, 51 N. Y. 569; *Smith v. New York, etc., R. Co.*, 63 N. Y. 59.

3. Duty Imposed by Statute. — See the codes and statutes of the various jurisdictions. And see further the following cases:

Illinois. — *Chicago, etc., R. Co. v. Eichman*, 47 Ill. App. 156; *Chalcraft v. Louisville, etc., R. Co.*, 113 Ill. 86; *Louisville, etc., R. Co. v. Chalcraft*, 14 Ill. App. 516.

Nebraska. — *Fremont, etc., R. Co. v. Lamb*, 11 Neb. 592.

New York. — *Clarke v. Rochester, etc., R. Co.*, 18 Barb. (N. Y.) 350; *Smith v. New York, etc., R. Co.*, 63 N. Y. 58; *Kerr v. West Shore R. Co.*, (Supreme Ct.) 18 N. Y. St. Rep. 63.

Pennsylvania. — *Dubbs v. Philadelphia, etc., R. Co.*, 148 Pa. St. 66.

Texas. — *International, etc., R. Co. v. Bost.*, 2 Tex. App. Civ. Cas., § 383; *Houston, etc., R. Co. v. McKinney*, 55 Tex. 176. See also *Houston, etc., R. Co. v. Adams*, 58 Tex. 476.

Canada. — *Brown v. Toronto, etc., R. Co.*, 26 U. C. C. P. 206.

Existence of Previously Constructed Crossing. — The mere fact that a railroad company may have built a crossing upon other lands of the owner, the use of which, however, would be

attended with danger, has been held insufficient to relieve it of its statutory duty to make a farm crossing over its track for the use and convenience of such owner. *Illinois Cent. R. Co. v. Willenborg*, 117 Ill. 203, 57 Am. Rep. 862.

Iowa — A Public Duty Imposing Enforcement upon State. — Under the Iowa statute it has been held that the right of construction of a private railway crossing is so far public in its nature as to impose upon the state the duty of its enforcement, and that the existence of such right, under particular circumstances, is consequently within the jurisdiction of the board of railroad commissioners to determine. *State v. Mason City, etc., R. Co.*, 85 Iowa 516; § 1258 Iowa Code.

Massachusetts — Power of County Commissioners. — Under the statutes of Massachusetts, the county commissioners may judge of the expediency of a bridge over, or a passage under, a crossing proposed to be made by a contemplated railroad. *Boston, etc., R. Corp. v. Doherty*, 154 Mass. 315.

In New Hampshire it has been held that a provision in the charter of a railroad corporation that the road shall be so constructed as not to obstruct the safe and convenient use of any private way which it crosses, imposes upon the corporation the duty of maintaining a safe and convenient crossing for such private way. *Keefe v. Sullivan County R. Co.*, 63 N. H. 271.

The owner of land over which a railroad is constructed has no right of action against the company for damages resulting from the want of necessary farm crossings and cattle passes, unless it appear that the company have agreed to provide them, or that the landowner has made application to three justices of the peace, and obtained their report, determining where and within what time such crossings and passes shall be made, agreeably to the Act of 1850, c. 593, § 5. *Horne v. Atlantic, etc., R. Co.*, 36 N. H. 440.

New York. — The provisions of the general railroad act, requiring railroad companies to construct farm crossings, applies to all lands alike, whether the company has condemned a right of way over them, or has acquired the right of way by agreement and conveyance. *Clarke v. Rochester, etc., R. Co.*, 18 Barb. (N. Y.) 350; *Smith v. New York, etc., R. Co.*, 63 N. Y. 58; *Vézina v. Reg.*, 17 Can. Sup. Ct. Rep. 1; *Jones v. Seligman*, 81 N. Y. 190, 3 Am. & Eng. R. Cas. 236.

The provision of the general railroad act was designed to compel the corporations to

Retroactive Character of Statutes. — In *Illinois* it has been held that a statute by which it is made incumbent upon railway companies organized under charters granted previous to its enactment, to construct and maintain farm crossings, is valid as a police regulation.¹ In *New York*, on the contrary, it is held that such a law is not applicable to corporations chartered previous to its passage.²

Such Statutes Do Not Require the construction and maintenance of farm crossings, where they are not shown to be necessary and convenient.³

c. UNDER CONTRACT. — Where the owner of real estate conveys to a railroad company a right of way over his premises, with a proviso that the company shall construct adequate crossings over its road, it cannot, after its acceptance of the grant and the construction of its road, exonerate itself from the obligations of the contract.⁴

construct and maintain such crossings over their lines as are necessary to enable owners, having land abutting on either or both sides of the road, to reach and work their properties, and is not limited to the right of adjoining owners to crossings solely for agricultural purposes, but they may be ordered for the purpose of enabling owners to remove the natural products of the land, as stone, minerals, etc., therefrom. *Buffalo Stone, etc., Co. v. Delaware, etc., R. Co.*, 130 N. Y. 152, *affirming* (*Buffalo Super. Ct.*) 27 N. Y. St. Rep. 216.

Where the defendant, a corporation organized in another state, having been authorized by statute (c. 244, Laws of 1855) to contract with corporations in this state and to sue and be sued in its courts, leased the road of a railroad corporation of this state, the lease containing a provision requiring the lessee "to do and perform all acts and things" which the lessor "would be bound by law to do and perform" had the lease not been made, it was held that the duty of constructing farm crossings, in the cases prescribed, was imposed upon it. *Buffalo Stone, etc., Co. v. Delaware, etc., R. Co.*, 130 N. Y. 152, *affirming* (*Buffalo Super. Ct.*) 21 N. Y. St. Rep. 216.

The provision of the general railroad act of 1850, § 44, was not repealed by the change made in 1890, when the railroad laws were codified. *Peckham v. Dutchess County R. Co.*, (Supreme Ct.) 47 N. Y. St. Rep. 182.

1. *Illinois Cent. R. Co. v. Willenborg*, 117 Ill. 203, 57 Am. Rep. 862.

2. *Millman v. Oswego, etc., R. Co.*, 10 Barb. (N. Y.) 87. See also *Marsh v. New York, etc., R. Co.*, 14 Barb. (N. Y.) 364.

3. See *Kerr v. West Shore R. Co.*, (Supreme Ct.) 18 N. Y. St. Rep. 63.

The Word "Necessary" in a statute requiring railroad corporations to construct farm crossings "when and where the same may become necessary for the use of the proprietors of the lands adjoining such railroad," has been held to have been used in its more popular sense, and to be equivalent to the words "reasonably convenient." In *Chalcraft v. Louisville, etc., R. Co.*, 113 Ill. 86, *sub nom.* *Louisville, etc., R. Co. v. Chalcraft*, 14 Ill. App. 516, it was held that in determining the question whether a proposed bridge is a necessary farm crossing within the meaning of the statute, it is not enough to show that the crossing would add somewhat to the convenience of the landowner; but the safety and convenience of the

corporation in the operation of its trains and in the care and use of its right of way, should be regarded, and the final rights of both parties kept in view, so as to furnish reasonable safety and security to each without the imposition of an unreasonable burden or duty upon either.

In *Dubbs v. Philadelphia, etc., R. Co.*, 148 Pa. St. 66, it was held that the fact that a farmer, whose land is intersected by a railroad, cannot pass over one part of his farm to another without either crossing the railroad or going half a mile out of his way, makes the construction of a crossing necessary within the meaning of a statute (Code Pa. Feb. 19, 1849) making it the duty of all railroad companies, "for the accommodation of all persons owning or possessing land through which the railroad may pass, * * * to make or cause to be made a good and sufficient causeway or causeways, whenever the same may be necessary to enable the occupant or occupants of the said land to cross or pass over the same with wagons, carts, and implements of husbandry, as occasion may require."

Railroad Cannot Be Compelled to Construct in Most Convenient Place. — The plaintiff conveyed a right of way to the defendant railroad company over his lands, and in the construction of the railroad it crossed a private road that he had constructed across the land, and was so elevated as to make the crossing impassable. The company constructed a crossing at another point, but this was inconvenient, and was constructed at such a grade as to make it impracticable for loaded teams. A deed conveying the right of way made no reservation of the road. It was held that the statute does not require companies to construct and keep up farm crossings; that the landowner was not entitled to the old road as a matter of right, and was only entitled to claim a crossing over the company's right of way, and this having been given him, if it was inconvenient or did not suit him, he could at his own expense change it to some other more convenient place. This was the extent of his right. *International, etc., R. Co. v. Bost*, 2 Tex. App. Civ. Cas., § 383.

4. *Gray v. Burlington, etc., R. Co.*, 37 Iowa 119.

Illustrations of Contracts. — The owner of land conveyed a right of way over his land to defendants in 1869, and the deed contained the following stipulation: "The company to make and maintain a farm crossing, with gates

Effect of Subsequent Condemnation. — Where such a contract has been entered into, a subsequent statutory condemnation will not relieve the road of its obligations.¹

Laches of Owner. — Where the owner of land has made a special agreement for a crossing over a railway, but allows such agreement to fall through, it has been held that he cannot afterwards set up general statutory rights to have other crossings made.²

Whether Contract Runs with the Land. — Being merely a part of the consideration for the conveyance of the right of way, the right of action for a breach of such an agreement will not pass to the alienee of the owner,³ nor will it bind the lessee of the company, where the covenant is contained in a separate agreement, even though the lessee may have notice of it at the time it executes the lease.⁴

Measure of Damage for Failure to Execute. — In an action against a railroad company for the breach of a contract to provide the plaintiff with "a good crossing" in consideration of his conveying to it a strip of land through his farm for the construction of its road, the measure of damages is what it will reasonably

at the present farm lanes, the fence at crossing to be returned as much as possible." The company's engineer treated for the conveyance, but had no power to agree for a second crossing, though it was said he had promised if he should find a second crossing necessary he would, so far as in him lay, get it done, and the deed was executed upon this understanding. It was held that the defendants could not be compelled to make a second crossing for use in winter; and that upon the construction of the words above set forth they were bound to continue the crossing, not close it up or impair it or alter its character as a farm crossing, but were not obliged to keep it free from snow. *Cameron v. Wellington, etc., R. Co.*, 28 Grant's Ch. (U. C.) 327, reversing 27 Grant's Ch. (U. C.) 95.

A railway purchased a right of way through C.'s farm, paying \$662 in money and agreeing to make and maintain at its own expense five farm crossings, two of them to be under crossings. C. wished the agreement put into writing, but the agent of the company assured him that the law would compel the company to maintain the crossings as agreed, and having received advice to the same effect from a lawyer, C. signed the deed. The company some years afterwards decided to fill up that portion of the road on which were the under crossings used by C., who thereupon brought suit for damages for an injunction. It was held (Ritchie, C. J., dissenting) that the evidence showed that the plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not, therefore, compel the company to provide an under crossing through the solid embankment formed by the filling up of the road, the cost of which would be altogether disproportionate to his own estimate of its value and of the value of the farm; but that the company was bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location, and number of said crossings to be determined on a reference to a master. *Canada Southern R. Co. v. Clouse*, 13 Can. Sup. Ct. Rep. 139, 35 Am. & Eng. R. Cas. 296, reversing 11 Ont. App. 287, varying 4 Ont. Rep. 28.

Where, in negotiating for the sale of lands taken by the Canada Southern railway for the purposes of their railway, the agent of the company signed a written agreement with the owner of the land, which contained a clause to the effect that such owner should "have liberty to remove for his own use all buildings on the said right of way, and that in the event of there being constructed on the same lot a trestle bridge of sufficient height to allow the passage of cattle the company will so construct their fence on each side thereof as not to impede the passage thereunder." It was held, that under this agreement the only obligation on the company was to maintain a cattle-pass so long as the trestle bridge was in existence, and it did not prevent them from discontinuing the use of such bridge and substituting a solid embankment therefor without providing a pass under such embankment. *Canada Southern R. Co. v. Erwin*, 13 Can. Sup. Ct. Rep. 162, 35 Am. & Eng. R. Cas. 311, reversing 11 Ont. App. 306.

1. Subsequent Condemnation. — *Gray v. Burlington, etc., R. Co.*, 37 Iowa 119.

2. Darnley v. London, etc., R. Co., L. R. 2 H. L. 43.

3. Rights of Alienee of Covenantee. — See *Cincinnati Southern R. Co. v. Hudson*, 88 Ky. 480, in which it was held that the fact that the plaintiff had parted with the fee in his land, without reserving the right to prosecute a suit for breach of a covenant to construct and maintain a suitable crossing, and had only a life estate, presented no defense to the action. The right of action did not pass to the plaintiff's alienee any more than it would have done if the promise had been to pay money, the construction of the crossing being a part of the consideration for the conveyance to the company.

4. Lessee of Road Not Bound. — A separate agreement at the time a landowner conveys a right of way to a company, made in part consideration of the conveyance, that the company would construct certain farm crossings and cattle-guards on the premises, is not a covenant running with the land, and does not bind a lessee of the road, although it leases with notice of the agreement. *Cook v. Milwaukee, etc., R. Co.*, 36 Wis. 45.

costs to make a good crossing at the point named in the contract, and such damages as may have directly resulted up to the time of trial from the inconvenience of not having the crossing.¹

4. Duty to Repair. — After the railroad company has constructed such crossings it becomes its further duty to keep them in a reasonably safe condition.² In some jurisdictions this duty includes the duty to build and keep in repair the fences along the sides of its track with gates or bars for the use of adjoining owners at farm crossings; and such gates or bars are a part of the fence which the company is bound to maintain and keep in repair.³

5. Enforcement of Obligations. — The remedy of a landowner whose land is divided by a railroad track, for a refusal or neglect of the company to construct him a suitable farm crossing, whether the duty to do so arises under contract or by statute, may be prosecuted by an action at law,⁴

1. *Cincinnati Southern R. Co. v. Hudson*, 88 Ky. 480.

2. **Duty to Keep in Safe Condition.** — *Chicago, etc., R. Co. v. Harris*, 54 Ill. 528; *Woods v. Missouri, etc., R. Co.*, 51 Mo. App. 500; *Hungerford v. Syracuse, etc., R. Co.*, 46 Hun (N. Y.) 339; *Prince v. New York Cent., etc., R. Co.*, 38 N. Y. St. Rep. 793, 60 Hun (N. Y.) 581; *Grasse v. Milwaukee, etc., R. Co.*, 36 Wis. 582. See also *Illinois Cent. R. Co. v. Arnold*, 47 Ill. 173, 57 Am. Rep. 862.

A company which fails to remove a farm crossing constructed for an adjoining landowner under an agreement binding only on the contracting parties, after its termination, and continues it as a crossing, is obligated to use ordinary care to see that the crossing is not dangerous, while so continued, to those who accept the invitation to use it for the purposes for which it is maintained. *Stewart v. Cincinnati, etc., R. Co.*, 89 Mich. 315, 49 Am. & Eng. R. Cas. 456.

If a railway company knows that a gate erected under section 8 of the Railway Clauses Act, 1845, is out of repair by reason of a spring catch being ineffective, there is evidence of negligence for the jury, although the gate was provided with other fastenings. *Brooks v. London, etc., R. Co.*, 33 W. R. 167.

Agreement to Maintain Two Crossings. — Where a company enters into an agreement to maintain two crossings on a farm, its obligation to keep them both in proper condition is the same as in the case of the single crossing is required by the statute. *Grasse v. Milwaukee, etc., R. Co.*, 36 Wis. 582.

Where No Duty Is Owed. — Where a railroad owes no duty to one to keep a private crossing in repair, he cannot recover for an injury sustained by his wagon thereon, caused by the crossing being out of repair. *Mann v. Chicago, etc., R. Co.*, 86 Mo. 347.

3. **Duty as to Building and Maintaining Fences, etc.** — *Hungerford v. Syracuse, etc., R. Co.*, 46 Hun (N. Y.) 339. See also *Chalcraft v. Louisville, etc., R. Co.*, 113 Ill. 86.

The statutory duty to keep them in repair necessarily includes the duty to keep them safely and securely closed. *Woods v. Missouri, etc., R. Co.*, 51 Mo. App. 500.

Where a farm crossing is constructed over the railroad for the benefit of an adjacent landowner, it is the duty of the corporation, under the statute, to guard it by a continuous fence, and to erect suitable bars or gates, in order to

give convenient access to it; and if injury arise through the want of such bars or gates, the corporation will be liable, unless some facts exist by which they are relieved from the responsibility. *Hurd v. Rutland, etc., R. Co.*, 25 Vt. 116.

Refusal to Permit Bars to Be Erected. — If the landowner refused to have bars placed at such crossing, and forbade the corporation to make them, when they offered to do so, or were in the act of erecting them, this, as against such landowner, would operate as a legal excuse for the omission to build the fence, even if an express agreement had been made by the parties for the erection of gates instead of bars. For the nonperformance of the agreement, and the refusal to erect gates, as stipulated, the remedy of the party would be only by action on the contract for damages, and the effect of the refusal to have bars erected would be to replace upon the landowner the obligation which rested upon him at common law, to keep his cattle on his own premises, and from the premises and railway of the corporation. *Hurd v. Rutland, etc., R. Co.*, 25 Vt. 116.

4. **Action to Compel Performance.** — *Illinois Cent. R. Co. v. Willenborg*, 117 Ill. 203, 57 Am. Rep. 862, 26 Am. & Eng. R. Cas. 358; *Jones v. Seligman*, 81 N. Y. 190; *affirming* 16 Hun (N. Y.) 230, 3 Am. & Eng. R. Cas. 236.

Where a conveyance of the right of way stipulates that the grantor is to have two crossings over the railroad, if he requests them, and he accordingly serves notice on the company that he requires such crossings, he will not be denied relief because he undertook to dictate the locality and kind of crossings, or because he asked more than in this respect he was entitled to. *Gray v. Burlington, etc., R. Co.*, 37 Iowa 119.

Must Show that He Has No Adequate Means of Crossing. — A party petitioning to compel a company to provide an open crossing to connect the parts of a pasture through which the road runs, should at least show that he has no other adequate means of crossing. In the absence of the entire evidence, the finding of the court below to the effect that the facilities provided by the railroad are adequate will not be disturbed. *Curtis v. Chicago, etc., R. Co.*, 62 Iowa 418, 13 Am. & Eng. R. Cas. 593.

Additional Crossings. — A company in the discharge of its duty of providing farm crossings is not vested with any absolute discretion as to the number or character of the crossings.

or by mandamus.¹

Construction by Farm Owner. — So also where the railroad company neglects or refuses to provide such crossings where the same are necessary for the use of the land, the farm owner may himself construct them at the expense of the company.²

6. Location of Crossings. — Farm crossings should be erected with reference to the convenience of both the landowner and the railroad company; the interest of neither party alone is to be considered, but the crossing must be suitable and convenient, looking to all the circumstances.³

Under-grade Crossings. — Where a landowner is entitled to a crossing, and it appears that a surface crossing is impracticable, the company may be compelled to construct an under-grade crossing.⁴

The power must be exercised in a proper manner, having due regard to the necessities and convenience of the owner of the land, who may maintain an action to compel the corporation to erect necessary and suitable crossings; or, where crossings have been made which are insufficient, to construct additional ones; and in such an action the question as to the propriety of additional crossings is one of fact for the court. *Jones v. Seligman*, 81 N. Y. 190, 3 Am. & Eng. R. Cas. 236, *affirming* 16 Hun (N. Y.) 230.

Action for Damages. — Where a right of way is acquired across a village lot, and the road is so constructed as to cut off access from one part to the other, and it appears that a crossing would cost more than one side of the lot, and there is nothing to show that the use of the lot renders a crossing necessary, the court will not direct a crossing, but will leave the lot owner to his remedy for damages. *Clarke v. Rochester*, etc., R. Co., 18 Barb. (N. Y.) 350.

Action Not Barred by Award of Damages. — The award and payment of damages in proceedings to condemn land taken for the road does not preclude the former owner from maintaining an action to compel the corporation to fulfil the duty imposed upon it as to crossings. *Jones v. Seligman*, 81 N. Y. 190, 3 Am. & Eng. R. Cas. 236, *affirming* 16 Hun (N. Y.) 230.

1. Mandamus. — *State v. Chicago*, etc., R. Co., 79 Wis. 259, 49 Am. & Eng. R. Cas. 304; *Boggs v. Chicago*, etc., R. Co., 54 Iowa 435.

Wisconsin Rev. Stat., § 1810, as amended by c. 193, Laws of 1881, makes it the absolute duty of railroad companies to make suitable and convenient farm crossings for the use of occupants of adjoining lands; and they can be compelled by mandamus to make such crossings, unless they can show a valid excuse for not doing so. *State v. Chicago*, etc., R. Co., 79 Wis. 259, 49 Am. & Eng. R. Cas. 304.

2. Construction by Landowner. — *Illinois Cent. R. Co. v. Willenborg*, 117 Ill. 203, 57 Am. Rep. 862. See also, to like effect, *Chalcraft v. Louisville*, etc., R. Co., 113 Ill. 86; *Kansas City*, etc., R. Co. *v. Kregelo*, 32 Kan. 608; *Chicago*, etc., R. Co. *v. Cosper*, 42 Kan. 561; *Connecticut*, etc., R. Co. *v. Holton*, 32 Vt. 43.

Limitation upon Right. — To authorize a landowner to make a farm crossing the necessities of the farm must require a crossing at that particular place, and its use must not interfere with the paramount use of the railroad company by seriously tending to increase the

danger of collisions, or otherwise. *Kansas City*, etc., R. Co. *v. Kregelo*, 32 Kan. 608; *Chicago*, etc., R. Co. *v. Cosper*, 42 Kan. 561. In *Chalcraft v. Louisville*, etc., R. Co., 113 Ill. 86, it was held that where the erection of a proposed farm crossing will directly affect the operation of the road by seriously tending to increase the danger of collisions, this shall be a sufficient reason why such crossing shall not be made; and if attempted to be made by the landowner, he may be restrained from doing so by injunction.

3. Location. — *Clarke v. Rochester*, etc., R. Co., 18 Barb. (N. Y.) 350; *Jones v. Seligman*, 81 N. Y. 190; *Wademan v. Albany*, etc., R. Co., 51 N. Y. 568, *criticising* and in effect *overruling* *Wheeler v. Rochester*, etc., R. Co., 12 Barb. (N. Y.) 227; *Connecticut*, etc., R. Co. *v. Holton*, 32 Vt. 43.

Charter Construed. — A provision in a charter making it the duty of the company "where the said road shall intersect any farms or lands of any individual, to provide and keep in repair suitable wagon ways over or under said road, so that he may pass the same," means that a suitable wagon way shall be provided by the company in cases where the road crosses the lands, not at a point where the road merely intersects the lands. *Ellsworth v. Central R. Co.*, 34 N. J. L. 93.

Iowa Statute. — In *Van Vrankin v. Wisconsin*, etc., R. Co., 68 Iowa 576, it was held that while the choice of location was in the landowner such choice must be exercised in a reasonable manner.

4. Under-grade Crossings. — *Jones v. Seligman*, 81 N. Y. 190, *affirming* 16 Hun (N. Y.) 230; *Beardsley v. Lehigh Valley R. Co.*, 65 Hun (N. Y.) 502. But it seems that the crossing is to be made under the road only in cases where the road is so constructed as to admit of no proper passage over it. *Wheeler v. Rochester*, etc., R. Co., 12 Barb. (N. Y.) 227.

Changing Grade of Approaches. — Where a conveyance of land to a railroad company provided that the grantee was to furnish the grantor, his heirs and assigns, with two convenient crossings over its railroad, the location to be thereafter designated by the grantor, one of which, the one now in question, was to be a crossing at grade, and a crossing was built by the railroad at a point selected by the grantor, adapted to the grade of the road as then fixed, any obstruction by gates or bars subsequently placed at such crossing, or any change of grade of its road, entitles the grantor or his

Sufficiency. — It seems almost unnecessary to state that, under the statutes requiring railroads to construct farm crossings, no more is required in the construction than is necessary and suitable to the purpose had in view.¹

7. Precautions to be Observed by the Railroad Company — *a.* IN GENERAL. — Farm crossings being in their nature private crossings, the precautions to be observed by the railroad company are by no means the same as the duties laid down for such corporations at the intersection of public highways.²

b. IN REGARD TO SIGNALS. — Thus the company is not bound as a general rule to give the statutory signals in approaching such crossings.³

c. GATES AND BARS. — So the company is only required to use reasonable care and diligence to keep closed gates and bars erected and maintained at such crossings,⁴ and cannot be held liable for injuries resulting from the negligence of the persons for whose benefit such appliances were originally erected.⁵

assigns to nominal damages; but the plaintiff is not entitled to demand from the defendants the expense of changing the grade of the approaches to the crossing. *Williams v. Clark*, 140 Mass. 238, 24 Am. & Eng. R. Cas. 460.

1. Sufficiency of Crossing. — *Gray v. Burlington*, etc., R. Co., 37 Iowa 119; *Omaha*, etc., R. Co. *v.* *Severin*, 30 Neb. 318; *Green v. Norris*, etc., R. Co., 24 N. J. L. 486.

Sufficiency a Question for the Jury. — Where a question arises as to the sufficiency of crossings constructed by a railroad, it should be submitted to the jury. *Jones v. Seligman*, 81 N. Y. 190.

2. See *supra*, this title, *Injuries at Crossings* — *Duty of Railroad Company*.

3. Signals. — The failure to ring the bell or blow the whistle of a locomotive at a private crossing in the open country, guarded by gates on either side, where there was no station for passengers or for freight, nor any side track, and where no trains ever stopped; where for more than twenty years no whistle had ever been sounded, nor whistling-post put up, nor any request therefor made by the owners of the property entitled to use the crossing; and where the line of the railroad on either side was nearly straight — is not evidence to go to the jury of culpable negligence on the part of a railroad company. (*Alvey, C. J.*, dissenting.) *Philadelphia*, etc., R. Co. *v.* *Fronk*, 67 Md. 339, 1 Am. St. Rep. 390, 32 Am. & Eng. R. Cas. 31. See also *Annapolis*, etc., Short Line R. Co. *v.* *Pumphrey*, 72 Md. 82.

Where Private Crossing Near Public. — While the failure of those in charge of a railroad train to give signal of its approach to a private crossing is not generally regarded as negligence, yet where a signal which it is the duty of the company to give, and which is usually given at a public crossing, may be heard at a private crossing near by, those entitled to use the private crossing have the right to rely upon the signal being given, and the failure to give it is negligence as to them as well as to persons traveling on the public highway. *Cahill v. Cincinnati*, etc., R. Co., 92 Ky. 345, 49 Am. & Eng. R. Cas. 390.

Where Failure Might Constitute Negligence. — If the owner of property has been accustomed to allow to others a permissive use of it, such as tends to produce a confident belief that the use will not be objected to, and therefore to act on the belief accordingly, he must be held to exercise his rights in view of the circum-

stances so as not to mislead others to their injury without a proper warning of his intention to recall the permission. In such a case, when the user by the public of a path crossing a railway track might not constitute it such a crossing as to impose on the company the statutory duty to signal the approach of its train, yet the failure to do so might, according to the facts of the case, constitute negligence. *Houston*, etc., R. Co. *v.* *Boozer*, 70 Tex. 530, 8 Am. St. Rep. 615, 34 Am. & Eng. R. Cas. 63.

4. *Peoria*, etc., R. Co. *v.* *Babbs*, 23 Ill. App. 454.

The company is not required to patrol the line of its road to see if gates at farm crossings are left open; nor to keep a guard upon it sufficient to discover and counteract danger from their being open, immediately; nor can it be charged with negligence unless it has had a reasonable time to discover the fact of their being open, or has been notified and has failed to act in proper time. *Chicago*, etc., R. Co. *v.* *Sierer*, 13 Ill. App. 261.

Casual Breach or Defect. — Where a company is required by statute to erect and maintain along its right of way suitable fences with bars or gates at farm crossings and cattle-guards, which it has done, it is not liable if a casual breach occurs or a defect therein appears by reason of which stock is injured. *Chicago*, etc., R. Co. *v.* *Sierer*, 13 Ill. App. 261.

Gate Not Under Control of Company. — Where a company has built for a landowner a gate, in accordance with the statute, it cannot afterwards control the use of the gate; and as between it and the landowner, the company is not chargeable with negligence in failing to close the gate, even after notice to its officers that it is open. *Diamond Brick Co. v. New York Cent.*, etc., R. Co., 58 Hun (N. Y.) 396.

Duty to Furnish Landowner with Locks. — The provision in § 4, c. 98, Minn. Gen. Laws 1877, that railroad companies may furnish landowners with locks for gates at farm crossings, is permissive and not mandatory; and in case no such locks are furnished, the question of the negligence of the corporation in any particular case, as respects the opening or closing of such gates, or their being securely fastened, is open for investigation, and is not affected by the statutory provision referred to. *Sather v. Chicago*, etc., R. Co., 40 Minn. 91, 38 Am. & Eng. R. Cas. 283.

5. Negligence of Landowner. — *Henderson v. Chicago*, etc., R. Co., 39 Iowa 220; *Hender-*

Where the company has erected bars or gates at the crossing in pursuance of the statute, the landowners are bound to keep them shut when not open for use in crossing the track,¹ and before the landowner can recover by reason of injury from the bars being down, he must show either that the company had actual notice that they were down or that they had been down for such a length of time that the company might be presumed to have had notice.²

CROSSWALK. (See also the titles HIGHWAYS; STREETS AND SIDEWALKS.) — See note 3.

CROW. — See note 4.

CRUDE. — The definition of “crude” is, in a natural state; not cooked or prepared by fire or heat; undressed; not altered, refined, or prepared for use by any artificial process; raw.⁵

son *v.* Chicago, etc., R. Co., 43 Iowa 620, 14 Am. Ry. Rep. 484.

Persons for whose convenience railroad companies maintain gates at private crossings assume the risk of increased danger to their property resulting from having gates instead of fences. *Evansville, etc., R. Co. v. Mosier*, 114 Ind. 447.

1. **Duty to Keep Gates Closed.** — *Pennsylvania Co. v. Spaulding*, 112 Ind. 47, 35 Am. & Eng. R. Cas. 184; *Diamond Brick Co. v. New York Cent., etc., R. Co.*, (Supreme Ct.) 28 N. Y. St. Rep. 95, 7 N. Y. Supp. 868, 55 Hun (N. Y.) 605, 5 Silv. (N. Y.) 321.

Exclusive Use by Landowner. — It cannot be implied that the company was under obligation to keep gates, used exclusively by the landowners, closed. *Evansville, etc., R. Co. v. Mosier*, 114 Ind. 447.

2. **Notice to Company.** — *Hungerford v. Syracuse, etc., R. Co.*, 46 Hun (N. Y.) 339.

But it has been held that the fact that bars a private crossing which a company is required to maintain, were left down by the landowner, does not discharge the company from liability for injuries resulting, if it has not used due care to keep them closed. *Bartlett v. Dubuque, etc., R. Co.*, 20 Iowa 188.

3. **Crosswalk — Michigan Statute.** — A Michigan statute provided that cities should be responsible for injuries caused by defects in the carriageways and *crosswalks* of public streets, but not for those caused by defects in sidewalks. Upon the question of what constitutes *crosswalks*, in *O'Neil v. Detroit*, 50 Mich. 135, the court said: “What is to be deemed sidewalk and what *crosswalk*, the statute does not determine, but the practice of the city authorities in levying sidewalk rates appears to have settled a construction. The walk in front of a man's lot, so far as the lot extends, but no farther, is deemed his sidewalk, and is required to be made and repaired by him; and if the lot be a corner lot, he builds and keeps in repair the walk on the side so far as the lot extends and no farther. Then from the end of these walks across the street for its whole width the city constructs the passageway, and it does so under the authority conferred upon it to construct *crosswalks*. The *crosswalks* are thus seen to extend for the whole distance between the extended boundary lines of the intersecting streets, while the sidewalks stop at such boundary lines, meeting the *crosswalks* there.”

In *Frary v. Allen Tp.*, 91 Mich. 669, it was held that within a statute making it the duty of townships, villages, etc., to keep *crosswalks* in reasonable repair, a *crosswalk* in order to fall within the protection of the statute need not necessarily span the whole street. The court said: “It is next claimed that the walk where plaintiff was injured is not a *crosswalk*, and because the township made a sluiceway across the roadbed under this *crosswalk* as originally constructed it has ceased to be a *crosswalk*; in other words, that, inasmuch as the covering to the culvert serves a double purpose, the portions of the *crosswalk* which serve but the purposes of a walk have lost their identity or character as portions of the *crosswalk*. This contention cannot be sustained. *O'Neil v. Detroit*, 50 Mich. 133, is cited upon the point that *crosswalks* extend the entire distance across the street spanned by them; but that case is far from holding that they must span the entire street, otherwise they are not *crosswalks*. In many instances, and in nearly all cases where there is a paved street, the pavement itself takes the place of the plank or stone *crosswalk* between the curb lines, but that fact does not destroy the character of the walks leading from the sidewalks to the curbing.”

4. “The phrase, ‘as the *crow* flies,’ is a popular and picturesque expression to denote a straight line, which I think is clearly the proper mode of measuring the distance from one given point to another.” *Stokes v. Grissell*, 14 C. B. 688, 78 E. C. L. 688.

5. *Recknagel v. Murphy*, 102 U. S. 198. This was a customs case. See generally the title REVENUE LAWS.

Patent Law. — The application of a peculiar process, previously patented and used for preserving animal and vegetable food and other perishable articles, the vegetable substances to be preserved being taken in a raw or *crude* state, to the preserving of green corn, is not a patentable invention, although the corn is cut from the cob before it is preserved. The court said: “At the argument the principal distinction taken, and which was very strongly and ably urged, was that Winslow cuts his corn from the cob, and that this is not putting it into the cans ‘in a raw or *crude* state,’ but in a state one step removed from *crude*. I do not understand the English patent to mean by *crude* that the vegetables must be in the precise state in which they grew, but as equiva-

CRUEL. — Inhuman conduct towards living creatures; wanton or careless infliction of pain upon the body; injury of the person or feelings; abuse; ill-treatment.¹

lent to 'raw,' that is, uncooked; and in this sense the corn is *crude*, as much so as the peas and beans that are shelled, or the vegetable, that may be sliced. Winslow took no such distinction, for he says that his method applies to ears of corn; though he adds that he does not recommend their use. And, at the time of his discovery, it could hardly be invention to cut the corn from the cob before applying it to the Durand process. A patent may sometimes be obtained, perhaps, for putting an old process to a new use; but I recall no case in which one has been upheld where the new use has been so closely analogous to the old as is shown here." Jones *v.* Hodges, Holmes (U. S.) 39. See generally the title PATENT LAW.

Crude Logs. — A bill of particulars described the logs concerning which suit was brought, as "round and *crude* sawlogs;" while the evidence simply showed that the contract was for logs, without prescribing that they should be round and *crude*. It was held that the objection was technical, and without merit. The court said: "The word 'round,' as applied to logs, has a well-known meaning, indicating that their shape is circular or cylindrical. The word *crude*, as applied to sawlogs, means their natural state or condition after having been severed from the remainder of the trunk and other portions of the tree. It means that they have not been polished or dressed, altered, refined, or prepared for use by artificial process. We think it a matter of which we might take judicial knowledge, that all sawlogs are round and *crude*." Bucki *v.* McKinnon, 37 Fla. 391. See generally the title LOGS AND LUMBER.

1. Abbott's L. Dict.

Cruel Weapon. (See generally DEADLY AND DANGEROUS WEAPONS; and see the titles

ASSAULT, vol. 2, p. 970; HOMICIDE.) — A Wisconsin statute defined manslaughter as "the involuntary killing of another by any weapon, or by any means, neither *cruel* or unusual, in the heat of passion, in any cases other than such as are herein declared to be justifiable or excusable homicides." In construing this statute the court in Schlect *v.* State, 75 Wis. 488, said: "There are three ingredients of the offense, which, concurring, are supposed to distinguish this one from any other criminal homicide. They are: (1) involuntary; (2) a weapon neither *cruel* or unusual; and (3) the heat of passion. * * * What is a *cruel* weapon, we need not define. If a pistol is a *cruel* weapon, then any weapon that is most likely to take life, or commonly used to take life, is a cruel one, and all weapons are *cruel*. It must be some other than such a common weapon that can be distinguished as *cruel*. It is a usual weapon or not unusual. This is evident."

Cruelly — Wilfulness. — In Com. *v.* McClellan, 101 Mass. 34, it was held that an averment that the defendant did *cruelly* beat a certain horse, was sufficient. The court said: "It is further said that the word *cruelly* describes merely the effect of the beating, and not the intent or disposition with which it is done; and therefore that the beating might be *cruel* if it inflicted great pain on the animal, though it was not wilful or malicious but accidental. But the word clearly includes both the wilfulness and *cruel* temper of mind with which the act was done, and the pain inflicted by the act. If the act were merely accidental, or did not give pain, it would not be *cruel*, in the ordinary sense of the word as applied to such an act." See generally the title CRUELTY TO ANIMALS, *post*; and see WILFUL.

CRUEL AND UNUSUAL PUNISHMENT.

BY JOSEPH WALKER MAGRATH.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles CONSTITUTIONAL LAW, vol. 6, p. 882; CUMULATIVE PUNISHMENT, post; PUNISHMENT; SENTENCE.

I. CONSTITUTIONAL PROVISIONS. — The Constitution of the *United States* provides that "cruel and unusual" punishments shall not be inflicted.¹ This prohibition is a restriction upon the national government only, and does not apply to the state governments,² but the constitutions of almost all the states

1. Constitutional Provision. — *United States* Constitution, Amendment VIII.

This amendment is addressed to the courts of the *United States* exercising criminal jurisdiction, and is mandatory to them, and a limitation upon their discretion. *Ex p. Watkins*, 7 Pet. (U. S.) 568.

Origin of Provision. — In *In re Kemmler*, 136 U. S. 436, the court, *per* Fuller, C. J., said: "The provision in reference to cruel and unusual punishments was taken from the well-known Act of Parliament of 1688, entitled 'An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown,' in which, after rehearsing various grounds of grievance, and among others that 'excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects; and excessive fines have been imposed; and illegal and cruel punishments inflicted,' it is declared that 'excessive bail ought not to be required, nor excessive fines

imposed, nor cruel and unusual punishments inflicted.' Stat. 1 W. & M., c. 2."

2. Prohibition in United States Constitution Does Not Apply to States — *United States*. — *Pervear v. Com.*, 5 Wall. (U. S.) 475; *Eilenbecker v. District Ct.*, 134 U. S. 31; *In re Kemmler*, 136 U. S. 436; *McElvaine v. Brush*, 142 U. S. 155; *Trezza v. Brush*, 142 U. S. 160; *O'Neil v. Vermont*, 144 U. S. 323. See also *Barron v. Baltimore*, 7 Pet. (U. S.) 243; *Livingston v. Moore*, 7 Pet. (U. S.) 469; *Twitchell v. Com.*, 7 Wall. (U. S.) 321; *Fox v. Ohio*, 5 How. (U. S.) 410; *Withers v. Buckley*, 20 How. (U. S.) 84; *U. S. v. Cruikshank*, 92 U. S. 542.

Maryland. — *Foot v. State*, 59 Md. 264.

Massachusetts. — *Com. v. Hitchings*, 5 Gray (Mass.) 482; *Com. v. Murphy*, 165 Mass. 66.

New York. — *Barker v. People*, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322, *affirming* 20 Johns. (N. Y.) 457.

Vermont. — *State v. Hodgson*, 66 Vt. 134.

See also the title CONSTITUTIONAL LAW, vol. 6, p. 961.

contain provisions of a similar character, and for the most part such provisions are identical with the one mentioned.¹

What Punishment Is Prohibited. — These provisions are generally understood as prohibiting any cruel or degrading punishment not known to the common law, and probably also those degrading punishments which, in any state, had become obsolete when its existing constitution was adopted, and punishments so disproportioned to the offense as to shock the sense of the community.²

II. FORM OF PUNISHMENT — 1. Death — *a.* NOT PROHIBITED. — The infliction of death is not a cruel or unusual punishment where it involves the mere extinguishment of life, without torture,³ and where the crime committed is of sufficient enormity to warrant it.⁴

b. MODE OF EXECUTION. — It has been held not within the constitutional prohibition for the death penalty to be executed by publicly shooting,⁵ or by passing an electric current through the body of the convict until life is extinct.⁶

1. State Provisions. — See the constitutions of the various states.

In the "Body of the Liberties of the Massachusetts Colony in New England," of 1641, the following language was used: "For bodilie punishments we allow amongst us none that are inhumane, barbarous, or cruel." Colonial Laws of Massachusetts (1889), p. 43.

2. What Punishment Is Prohibited. — *Matter of Bayard*, 63 How. Pr. (N. Y. Supreme Ct.) 73, 25 Hun (N. Y.) 546, citing *Ho Ah Kow v. Nunan*, 5 Sawy. (U. S.) 552, 18 Am. L. Reg. N. S. 676. See also *State v. Rodman*, 53 Minn. 393.

In *Wilkerson v. Utah*, 99 U. S. 130, the court, *per* Clifford, J., said: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to [where the prisoner was drawn or dragged to the place of execution, in treason; where he was embowelled alive, beheaded, and quartered, in high treason; cases of public dissection, in murder; and of burning alive, in treason committed by a female], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the constitution."

In *In re MacDonald*, (Wyoming 1893) 33 Pac. Rep. 18, the court, *per* Groesbeck, C. J., said: "The constitutional provisions aimed at cruel and unusual punishments were probably intended to prevent the imposition of obsolete, painful, and degrading punishments, such as the whipping post, the pillory, and such as making capital a grade of offenses like larceny, forgery, and the like. 'Probably any punishment declared by statute for an offense which was punishable in the same way by the common law could not be regarded as cruel or unusual, in the constitutional sense.' Cooley, Const. Lim. (4th ed.) 408."

In *Turnipseed v. State*, 6 Ala. 664, the court, *per* Collier, C. J., speaking of a statute providing that "no cruel or unusual punishment shall be inflicted on any slave," said: "The statute, it is apprehended, does not use the epithets as synonymous, nor in contrast with each other; but it was merely intended to make the enactment sufficiently broad to embrace a high offense against good morals, no matter under what circumstances committed.

'Cruel,' as indicating the infliction of pain of either mind or body, is a word of most extensive application; yet every cruel punishment is not, perhaps, unusual; nor, perhaps, can it be assumed that every uncommon infliction is cruel. But be this as it may, there may be punishment that is both cruel and unusual; thus, if a slave should be punished, even without bodily torture, in a manner offensive to modesty, decency, and the recognized proprieties of social life, the offender would be chargeable."

In *In re Kemmler*, 136 U. S. 436, the court, *per* Fuller, C. J., said: "If the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."

See also an account by Campbell, J., in *Done v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 364, of ancient punishments, and of some cruel punishments inflicted in New York before the Revolution.

3. Death Penalty Permissible. — *In re Kemmler*, 136 U. S. 436, affirming *People v. Kemmler*, 119 N. Y. 580. In delivering the opinion of the Court of Appeals of New York in this case, Gray, J., said: "Punishment by death, in a general sense, is cruel; but as it is authorized and justified by a law adopted by the people as a means to the end of the better security of society, it is not cruel within the sense and meaning of the constitution."

See also *State v. Anderson*, 10 Oregon 448.

4. Crime Must Be Such as to Deserve Death. — The law-making power could not inflict the death penalty as a punishment for a simple misdemeanor, for in such case it would be a cruel and unusual punishment within the constitutional prohibition. *Thomas v. Kinkead*, 55 Ark. 502.

5. Shooting. — *Wilkerson v. Utah*, 99 U. S. 130, affirming *People v. Wilkinson*, 2 Utah 158. In the federal court Clifford, J., reviewed numerous authorities on military law for the purpose of showing that shooting was a recognized method of executing the death sentence. The sentence in this case was, however, pronounced by a civil tribunal.

6. Electrocution. — *People v. Durston*, 119 N. Y. 569; *People v. Kemmler*, 119 N. Y. 580, affirmed 136 U. S. 436.

2. Imprisonment — *a.* A PROPER PUNISHMENT. — It is beyond question that imprisonment for a reasonable time, proportioned to the nature of the offense, is a proper punishment for crime, and is not open to any constitutional objection.¹

b. PLACE OF CONFINEMENT. — The imprisonment should, however, be in some place where the health and life of the convict will not be jeopardized; and it has been held in *North Carolina* that a sentence to five years' imprisonment in a county jail was cruel and unusual, because such jail was a close prison, and confinement therein for such a length of time would be dangerous to life.²

In the case first cited the court, *per* O'Brien, J., said: "We entertain no doubt in regard to the power of the legislature to change the manner of inflicting the penalty of death. The general power of the legislature over crimes, and its power to define and punish the crime of murder, is not and cannot be disputed. The amendments prescribed no new punishment for the offense. The punishment now, as before, is death. The only change made is in the mode of carrying out the sentence. The infliction of the death penalty in any manner must necessarily be accompanied with what might be considered, in this age, some degree of cruelty, and it is resorted to only because it is deemed necessary for the protection of society. The act, on its face, does not provide for any other or additional punishment. In behalf of the relator, this legislation is assailed in no other way than by attempting to show that the new mode of carrying out a death sentence subjects the person convicted to the possible risk of torture and unnecessary pain. This argument would apply with equal force to any untried method of execution, and, when carried to its logical results, would prohibit the enforcement of the death penalty at all. * * * Whether the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases, was a question for the determination of the legislature. It was a question peculiarly within its province, and the means at its command for ascertaining whether such a mode of producing death involved cruelty, within the meaning of the constitutional prohibition, were certainly as satisfactory and reliable as any that are consistent with the limited functions of an appellate court. The determination of the legislature of this question is conclusive upon this court. The amendment to the code of criminal procedure changing the mode of inflicting the death penalty does not upon its face, nor in its general purpose and intent, violate any provision of the constitution. The testimony taken by the referee, while not available to impeach the validity of the legislation, may, we think, be regarded as a valuable collection of facts and opinions touching the use of electricity as a means of producing death, and for that reason as part of the argument for the relator, but nothing more. We have examined this testimony, and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the constitution, though it is certainly unusual. On the contrary, we agree with the court below that it removes

every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions, and in the manner contemplated by the statute, must result in instantaneous and consequently in painless death."

These decisions are severely criticised by Mr. R. S. Morrison, in an article entitled "The Nullity of Protective Law," 30 Cent. L. J. 137.

1. Imprisonment Proper. — *State v. White*, 44 Kan. 514; *Com. v. Murphy*, 165 Mass. 66; *People v. Morris*, 80 Mich. 634; *Lillard v. State*, 17 Tex. App. 114.

Imprisonment for Debt. — Chapter 304, How. Annot. Stat. *Michigan*, authorizing the arrest and imprisonment of a debtor who has fraudulently assigned, removed, disposed of, or concealed any of his property, or is about to do so, does not provide for cruel or unusual punishment, as the act provides for the debtor's release upon either paying or securing the payment of the debt claimed, or giving bond conditioned that he will within thirty days thereafter apply for an assignment of all his property and a discharge under the laws, and diligently prosecute the same until he receives such discharge. *Dummer v. Nungesser*, 107 Mich. 481.

Imprisonment of an Epileptic. — Imprisonment in the penitentiary of one convicted of an assault with intent to murder is not, it has been held, a cruel and unusual punishment because the convict is afflicted with epilepsy, there being no other place where he may receive punishment for his crime. *Fogarty v. State*, 80 Ga. 450.

2. Five Years in a County Jail Cruel. — *State v. Driver*, 78 N. Car. 423. See also *State v. Miller*, 75 N. Car. 73.

In the case first cited, the court, *per* Reade, J., said: "We stated that the oldest member of this court did not remember an instance where any person had been imprisoned five years in a county jail for any crime, however aggravated. And no instance was cited at the bar, * * * although inquiry was made of the bar, of such a term of imprisonment. We have examined our Revised Code, which was prior to our penitentiary system, and to our constitution of 1868, when imprisonment was altogether in the county jails, and unless we have inadvertently overlooked some crime, there was none the punishment whereof was for so long a time. * * * Now, it is true, our terms of imprisonment are much longer, but they are in the penitentiary, where a man may live and be made useful; but a county jail is a close prison, where life is soon in

c. PRISON REGULATIONS. — The enforcement upon Chinese prisoners of an ordinance declaring that every male person imprisoned in the county jail shall, immediately upon his arrival in the jail, have the hair of his head "cut or clipped to an uniform length of one inch from the scalp thereof," operates as a cruel and unusual punishment.¹

3. Whipping. — The punishment of whipping, though rarely inflicted at the present time, is not objectionable as cruel and unusual.²

4. Labor on Streets. — In *Missouri* it has been held permissible to subject a person who fails or refuses to pay a fine imposed for violation of a city ordinance, to labor on the streets or other public works as many days as the fine and costs imposed amount to in dollars.³

5. Binding Out to Service. — In *South Carolina* an act providing that if the father of a bastard child will not give the security required by law for its maintenance he shall be bound out to servitude for any time not exceeding four years, has been held valid.⁴

6. Ducking Stool. — Although the law against common scolds still exists in the *United States*, yet punishment by the ducking stool has become obsolete, fine and imprisonment having been substituted therefor.⁵

7. Deprivation of Civil Rights — Disfranchisement. — Deprivation of the right of suffrage, or of the right to hold office, is not a cruel or unusual punishment for crime.⁶

jeopardy. * * * We have already said that the punishment in this case is not only 'unusual' but unheard of, and that it is 'cruel.' It is therefore in violation of the constitution."

1. Cutting Off Queue of Chinaman. — *Ho Ah Kow v. Nunan*, 5 Sawy. (U. S.) 552, 18 Am. L. Reg. N. S. 676. In this case the court, *per* Field, J., said: "The ordinance was intended only for the Chinese in San Francisco. This was avowed by the supervisors on its passage, and was so understood by every one. The ordinance is known in the community as the 'queue ordinance,' being so designated from its purpose to reach the queues of the Chinese, and it is not enforced against any other persons. The reason advanced for its adoption, and now urged for its continuance, is, that only the dread of the loss of his queue will induce a Chinaman to pay his fine. That is to say, in order to enforce the payment of a fine imposed upon him, it is necessary that torture should be superadded to imprisonment. Then, it is said, the Chinaman will not accept the alternative, which the law allows, of working out his fine by his imprisonment, and the state or county will be saved the expense of keeping him during the imprisonment. Probably the bastinado, or the knout, or the thumbscrew, or the rack, would accomplish the same end; and no doubt the Chinaman would prefer either of these modes of torture to that which entails upon him disgrace among his countrymen and carries with it the constant dread of misfortune and suffering after death. It is not creditable to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character was possible."

2. Whipping. — *Foote v. State*, 59 Md. 264; *Garcia v. Territory*, 1 N. Mex. 415; *Cornell v. State*, 6 Lea (Tenn.) 624; *Com. v. Wyatt*, 6 Rand. (Va.) 694. But see *In re MacDonald*, (Wyoming 1893) 33 Pac. Rep. 18.

3. Labor on Streets. — *Ex p. Bedell*, 20 Mo. App. 125.

4. Binding Out to Service. — *State v. Adams*, 1 Brev. (S. Car.) 279. In this case the court, *per* Brevard, J., said: "The legislature may constitutionally declare that for any particular immoral or disorderly act, or any act productive of injurious consequences or inconvenience to society, the person committing the same shall be subject to a temporary privation of his personal liberty. The mode by which this restraint shall be imposed can make no difference, unless the same should be unusually harsh or cruel. The compelling a citizen to serve as a bondman, or apprentice, for a term not exceeding four years, cannot be a more severe regulation than to compel a prisoner to labor in a penitentiary house for a given time; and is very different from a state of slavery for life."

5. Ducking Stool. — In *James v. Com.*, 12 S. & R. (Pa.) 220, this form of punishment was held not to exist in *Pennsylvania*, and *Duncan, J.*, reviewed at some length the history of this and other obsolete punishments.

As to common scolds, see generally the title NUISANCES. And for a description of the ducking stool as operated in olden times, see *Law Notes*, May, 1897, p. 15.

6. Disfranchisement. — *Harper v. Com.*, 93 Ky. 290; *Barker v. People*, 20 Johns. (N. Y.) 457; *Huber v. Reily*, 53 Pa. St. 112.

The act claimed to be unconstitutional in *Harper v. Com.*, 93 Ky. 290, inflicted the punishment of disfranchisement upon any person who should "for compensation, percentage, or commission, set up, conduct, or carry on a game of cards, whereby money or other thing may be won or lost." The court, *per* Bennett, J., said: "There is no doubt that gambling is a great social and moral evil that leads to crime and dissipation, and wrecks fortunes, and brings poverty and misery upon the helpless and innocent; and it is certainly not only

Debarring from Lawful Business. — But deprivation of the right to transact lawful business, as a punishment for crime, is almost or quite unheard of in the *United States*, and is within the constitutional prohibitions.¹

III. DEGREE OF PUNISHMENT — 1. General Rule. — The constitutional provisions against cruel and unusual punishments are directed not so much against the amount or duration as against the character of the punishment,² and a statute, or a sentence of a trial court, will not be set aside on the ground that the punishment which it provides for or imposes is cruel or unusual in degree, save perhaps in very extreme cases, where the punishment is so severe and out of all proportion to the offense as to shock public sentiment and violate the judgment of reasonable people.³

the duty of the commonwealth to enact such penalties against the gamblers themselves as will deter them, but to enact such penalties against such persons as hire themselves out to set up and carry on the gambling hells. And if it requires confinement in the penitentiary and disfranchisement to prevent or check the practice, the legislature has the constitutional right, and it is its duty, to enact such a law. * * * We think the legislature was clearly within the exercise of its constitutional power in enacting the law."

Disqualification for Office. — *Harper v. Com.*, 93 Ky. 290.

1. Debarring from Lawful Business. — *Robison v. Miner*, 68 Mich. 549. The act declared unconstitutional in this case provided that druggists convicted a second time of selling liquors in violation of its provisions should be debarred, for a period of five years, from selling any liquor, even for the purposes for which it was lawful for druggists to make such sales; and that liquor dealers who violated its provisions should, in addition to other punishment, forfeit the tax paid by them, and be incapable of continuing their business for one year after conviction.

2. Prohibitions Apply to Form More than to Amount. — *State v. Rodman*, 58 Minn. 393.

In *Aldridge v. Com.*, 2 Va. Cas. 447, the court, *per* Dade, J., said that the provision of the *Virginia* Constitution denouncing cruel and unusual punishments "was never designed to control the legislative right to determine *ad libitum* upon the adequacy of punishment, but is merely applicable to the modes of punishment."

3. Courts Will Not Interfere Save in Extreme Cases. — *State v. Becker*, 3 S. Dak. 29. See also *People v. Whitney*, 105 Mich. 622.

Punishments Not Cruel or Unusual. — The following punishments have been held not cruel or unusual:

Manslaughter. — Fifty years' imprisonment for manslaughter, the record not showing the age or previous character of the prisoner nor the circumstances under which the crime was committed. *Jones v. Territory*, 4 Okla. 45.

Burglary. — Imprisonment for life for burglary in the second degree, after a previous conviction of grand larceny. *State v. Moore*, 121 Mo. 514, 42 Am. St. Rep. 542, *affirmed* in *Moore v. Missouri*, 159 U. S. 673.

Carnal Abuse of Children. — Confinement and hard labor for not less than five nor more than twenty-one years, for a person who carnally and unlawfully knows any female under the

age of eighteen years. *State v. White*, 44 Kan. 514.

Imprisonment in the state prison for life or for any term of years, or for any term in any other penal institution in the state, for carnally knowing and abusing a female child under the age of sixteen years, and this although in the case at bar the female was nearly sixteen years of age and freely consented to the intercourse. *Com. v. Murphy*, 165 Mass. 66.

Robbery. — Twenty years' imprisonment for robbery. *People v. Clark*, 106 Cal. 32.

"White Caps." — Imprisonment in the state prison for not more than ten nor less than two years, and a fine not exceeding two thousand dollars, for combining to do any unlawful act in the night-time, or while wearing white caps or other disguises; the prisoners in the case at bar having received the minimum punishment. *Hobbs v. State*, 133 Ind. 404.

Assault and Battery. — Three years' imprisonment for assault and battery with a cowhide. *Cornelison v. Com.*, 84 Ky. 583.

Two years' imprisonment, to be worked on the roads, for an unprovoked assault and battery, accompanied with robbery of the victim. *State v. Apple*, 121 N. Car. 584.

Imprisonment in the state prison or a county jail not exceeding two years, or a fine not exceeding five thousand dollars, or both, for an assault with a deadly weapon. *Ex p. Mitchell*, 70 Cal. 1.

Two years' imprisonment for an assault upon the wife of the prisoner and severely beating her. *State v. Pettie*, 80 N. Car. 367, 30 Am. Rep. 88.

Twelve months' imprisonment for assault upon the prisoner's paramour and stabbing her with a knife, another assault having been made while the indictment for the first was pending. *State v. Reid*, 106 N. Car. 714.

Prowling, etc. — Imprisonment in the penitentiary for from ten to twenty years, for "feloniously prowling and traveling in disguise." *Ligan v. State*, 3 Heisk. (Tenn.) 159.

Embezzlement. — A fine of five hundred dollars and confinement at hard labor in the state prison for one year, for embezzlement of sixty-two dollars and fifty cents by a county officer. *State v. Borgstrom*, (Minn. 1897) 72 N. W. Rep. 799.

Horse Stealing. — Imprisonment for not less than three nor more than fifteen years, for horse stealing. *People v. Morris*, 80 Mich. 634.

Larceny. — Confinement and hard labor not exceeding seven years, for larceny from the

Statute Authorizing Unlimited Punishment. — In *Wisconsin* it has been held that a statute fixing a minimum but no maximum punishment for an offense which it creates cannot be declared unconstitutional because on its face it purports to authorize an unlimited fine, and life imprisonment, which would be a cruel and unusual punishment for the offense in question; but that it must be held valid as fixing the minimum punishment, and sentence may be pronounced under it.¹

2. Successive Terms of Imprisonment. — A person is not subjected to cruel or unusual punishment merely because, upon being convicted of two or more offenses, he is sentenced to an equal number of terms of imprisonment, each to commence at the expiration of the one preceding it.² But in *Louisiana*

premises of a railway company. *Matter of Tutt*, 55 Kan. 705.

Receiving Stolen Goods. — Imprisonment for not more than five years, for receiving stolen goods, though the goods be of such small value that the thief would not be liable to more than one year's imprisonment. *People v. Smith*, 94 Mich. 644.

False Pretenses. — Imprisonment for not less than two years, for obtaining money by false pretenses, no maximum punishment being fixed, and the prisoner in the case at bar having been sentenced for two years. *State v. Williams*, 77 Mo. 310, *affirming* 12 Mo. App. 415.

Fraud. — A fine of one thousand dollars or imprisonment in the county jail for twelve months, for a criminal fraud the fruits of which amounted to over nine hundred dollars. *Hathcock v. State*, 88 Ga. 91.

Libel. — Imprisonment for three months and a fine of one thousand dollars, for a criminal libel, the prisoner to be committed to jail "until the said fine shall be paid or secured to be paid, or he be otherwise legally discharged," and the only way in which the fine could be legally discharged without payment being by the prisoner's suffering imprisonment one day for each dollar thereof, or for one thousand days in addition to the original three months. *In re MacDonald*, (Wyoming, 1893) 33 Pac. Rep. 18.

Immoral Publication. — Imprisonment for two years, for selling a paper devoted mainly to scandals and accounts of immoral conduct. *State v. Van Wye*, 136 Mo. 227.

Obstructing Highways. — Imprisonment in the penitentiary not exceeding five years, or a fine not exceeding five hundred dollars and imprisonment in the county jail not exceeding one year, for wilfully obstructing a highway, the punishment of the case at bar having been assessed at a fine of twenty dollars and costs. *State v. Teeters*, 97 Iowa 458.

Violation of Liquor Laws. — A fine of not less than two hundred nor more than one thousand dollars, and imprisonment for not less than ninety days nor more than one year, for a first offense of illegally selling liquor. *State v. Barnes*, 3 N. Dak. 319.

Imprisonment which can never under any circumstances exceed three years for the same offense. *State v. Hodgson*, 66 Vt. 134.

A fine of not less than three hundred nor more than one thousand dollars, or imprisonment for not less than six nor more than twelve months, or both, for the same offense. *Ex p. Swann*, 96 Mo. 44.

A fine of ten dollars and costs of prosecution, and imprisonment in the house of correction not less than twenty nor more than thirty days, for the same offense. *Com. v. Hitchings*, 5 Gray (Mass.) 482.

A fine of not less than fifty nor more than two hundred dollars and costs, or imprisonment in the county jail not less than twenty days nor more than six months, for the first offense, and a fine of not less than one hundred nor more than five hundred dollars, and imprisonment in the state prison for not less than six months nor more than two years, for every subsequent offense of the same nature. *People v. Whitney*, 105 Mich. 622.

A fine of not less than one hundred nor more than five hundred dollars, or imprisonment for not less than ninety days nor more than one year, or both, for a first offense of such character by a druggist. *Luton v. Newaygo Circuit Judge*, 69 Mich. 610.

A fine of not less than one hundred nor more than five hundred dollars, and imprisonment for not less than sixty days nor more than six months, for keeping a place where liquors are illegally sold. *State v. Becker*, 3 S. Dak. 29.

A fine of fifty dollars and imprisonment at hard labor in the house of correction for three months, for the same offense. *Pervear v. Com.*, 5 Wall. (U. S.) 475.

A fine of two hundred dollars and imprisonment in the penitentiary for ninety days, for violation of a restraining order under the *South Carolina* dispensary law. *Ex p. Keeler*, 45 S. Car. 537.

Violating Game Laws. — Various punishments, not exceeding in any case a fine of one hundred dollars or imprisonment in the county jail for three months, or both, for violations of the game laws. *State v. De Lano*, 80 Wis. 259.

1. Statute Fixing Minimum Punishment Upheld though No Maximum Fixed. — *State v. Fackler*, 91 Wis. 418. The statute passed upon in this case is section 4449, Rev. Stat. *Wisconsin*.

2. Cumulative Sentence Permissible. — *Lillard v. State*, 17 Tex. App. 114; *State v. O'Neil*, 58 Vt. 140, 56 Am. Rep. 557. See also the title SENTENCE.

In the case last cited the court, *per* Royce, C. J., said: "The constitutional inhibition of cruel and unusual punishments * * * has no application. The punishment imposed by statute for the offense with which the respondent O'Neil is charged cannot be said to be excessive or oppressive. If he has subjected

such a sentence has been held to be in contravention of the constitution, where the prisoner had been convicted on a great number of counts charging as many separate offenses what was really one continuing offense.¹

3. Increased Punishment for Second or Subsequent Offense. — There is no constitutional objection to the imposition upon a person who commits a crime after having been convicted of one or more previous crimes, of a heavier punishment than he would be subject to were such offense his first.²

4. Place of Committing Crime as Affecting Degree of Punishment. — It has been held that the constitutional provisions against cruel and unusual punishment are not violated where the legislature provides that larceny committed in a specified city shall subject the offender to a heavier punishment than he would be subject to were the offense committed in any other part of the state,³ or that a convict who commits any crime during his term of imprisonment shall be subject to the same punishment as if the crime were committed outside of the prison by a person not in confinement.⁴

CRUELTY. (As to cruelty to prisoners, see the title PRISONS. As to cruelty to animals, see the title CRUELTY TO ANIMALS, *post*. As to the cruelty, or, as some statutes phrase it, cruelty and inhuman treatment, or cruel treatment, which constitutes a good ground for divorce, see the title DIVORCE. As to cruelty to apprentices, see the title APPRENTICES, vol. 2, p. 488. As to cruelty resulting in death, see the title HOMICIDE. As to cruelty of master, see the title MASTER AND SERVANT. As to the constitutional provisions against cruel and unusual punishments, see the title CRUEL AND UNUSUAL PUNISHMENT, *ante*.) — What constitutes cruelty to a person depends upon the relations of the parties concerned.⁵

himself to a severe penalty, it is simply because he has committed a great many such offenses. [He had been found guilty of three hundred and seven offenses of unlawfully selling intoxicating liquor.] It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that if punishment for each were inflicted on him he might be kept in prison for life." But see the dissenting opinion of Field, J., in *O'Neil v. Vermont*, 144 U. S. 323, *affirming* this case.

1. When Cumulative Sentence Is Cruel and Unusual. — A cumulative sentence on seventy-two different counts for violations of a city ordinance, of a fine of ten dollars on each count, or, in default of payment, imprisonment in the parish prison for thirty days on each count, making a total fine of seven hundred and twenty dollars, or imprisonment for two thousand one hundred and sixty days, is in violation of the constitutional prohibition against excessive fines or cruel and unusual punishments; where the seventy-two offenses are charged to have been committed within the space of one hour and forty minutes, each occurring within one and one-half minutes after the one preceding. *State v. Whitaker*, 48 La. Ann. 527. See also the dissenting opinion of Field, J., in *O'Neil v. Vermont*, 144 U. S. 323.

2. Cumulative Punishment Authorized. — *Kelly v. People*, 115 Ill. 586, 56 Am. Rep. 184; *State v. Moore*, 121 Mo. 514, 42 Am. St. Rep. 542, *affirmed* in *Moore v. Missouri*, 159 U. S. 673. See also *People v. Whitney*, 105 Mich. 622; *State v. Hodgson*, 66 Vt. 134. And see generally the title CUMULATIVE PUNISHMENT, *post*.

In *State v. Moore*, 121 Mo. 514, 42 Am. St. Rep. 542, the court, *per* Burgess, J., said: "The increased severity of the punishment for the subsequent offense is not a punishment for the same offense for the second time, but a severer punishment for the subsequent offense, the law which imposes the increased punishment being presumed to be known by all persons, and to deter those so inclined from the further commission of crime; and we are unable to see how the statute which imposes such increased punishment violates the provisions of our constitution hereinbefore quoted. We are not inclined to think the punishment imposed for the second offense of so grave a character, either cruel or unusual."

3. Heavier Punishment for Crime in Specified City than Elsewhere. — *Matter of Bayard*, 25 Hun (N. Y.) 546, 63 How. Pr. (N. Y.) 73, *reversing* 61 How. Pr. (N. Y.) 294.

4. Crimes by Convicts. — *People v. Huntley*, (Mich. 1897) 71 N. W. Rep. 178.

5. Cruelty towards weak and helpless persons takes place where a party, bound to provide for and protect them, either abuses them by whipping them unnecessarily, or by neglecting to provide for them those necessities which their helpless condition requires. Exposing a person of tender years, under a party's care, to the inclemency of the weather, *Rex v. Ridley*, 2 Campb. 650; keeping a child, unable to provide for himself, without adequate food, *Rex v. Friend*, R. & R. C. C. 20; or an overseer neglecting to provide food and medical care to a pauper having urgent and immediate occasion for them, *Rex v. Meredith*, R. & R. C. C. 46, are examples of this species of cruelty.

CRUELTY TO ANIMALS.

By JOSEPH WALKER MAGRATH.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *CRUELTY TO ANIMALS AND CHILDREN*, *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 5, p. 695.
For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles: *ANIMALS*, vol. 2, p. 341, and references there given; *DOGS*; *MALICIOUS MISCHIEF*.

I. DEFINITION. — The word "cruelty" as used in statutes against cruelty to animals includes every act, omission, or neglect whereby unjustifiable pain, suffering, or death is caused or permitted.¹

1. **Definition of Cruelty.** — *State v. Porter*, 112 N. Car. 887; *State v. Neal*, 120 N. Car. 613.

Cruelty to animals may consist of overwork-

ing or underfeeding them, or depriving them of proper protection, or all these elements may combine and constitute the offense. *State v. Bosworth*, 51 Conn. 1.

II. NOT A COMMON-LAW OFFENSE. — The common law did not look upon animals as possessed of any rights, and cruelty to them was not indictable on the ground that it gave them pain, or punished for their protection.¹ Such acts were indictable only when they worked an injury to the owner of the animal by diminishing or destroying the value of his property, thus constituting a trespass or malicious mischief;² or when publicly committed so as to constitute a nuisance.³

III. THE STATUTORY OFFENSE — 1. Nature of the Offense. — At the present time there are in force in *England, Canada,* and the *United States,* statutes which are, as a rule, very similar, punishing cruelty to animals.⁴ There is, however, a difference of opinion as to the nature of the offense created by them. The doctrine of the common law, that animals have no inherent rights, is adhered to in one construction of such statutes; which is, that they do not define any offense against the rights of the animals which are in a sense protected by them, but that the offense is against the public morals, which the commission of cruel and barbarous acts tends to corrupt.⁵ But they have also been construed to be intended directly for the protection of the animals themselves. Such construction, however, has been usually given in cases where this offense has been distinguished from those injuries to animals which constitute offenses against property, and of which malice towards the owner is a necessary ingredient.⁶

1. Cruelty Not Indictable at Common Law. — *State v. Bruner*, 111 Ind. 98; *Stephens v. State*, 65 Miss. 329; *People v. Brunell*, 48 How. Pr. (N. Y. Gen. Sess.) 435; *Branch v. State*, 41 Tex. 622.

At common law, the shooting of captive doves as they were liberated from a trap, merely for the purpose of sport and to improve marksmanship, would not be a crime or misdemeanor. *Waters v. People*, 23 Colo. 33.

Mr. Bishop, in his work on Criminal Law, says that each one of the cases under the common law, wherein a malicious mischief indictment failed because no malice appeared against the owner of the animal claimed to have been injured, is a direct adjudication that cruelty to animals is not of itself indictable at common law. 1 Bishop's New Criminal Law, § 595.

Contrary Doctrine. — Nevertheless it has been held that cruelty to animals was indictable at common law as a misdemeanor. *Ross's Case*, 3 C. H. Rec. (N. Y.) 191; *Stage Horse Cases*, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 51.

Mr. Bishop considers that these cases are founded upon a misinterpretation of cases of malicious mischief to animals and of public cruelty amounting to nuisance. Bishop's New Cr. Law, § 594. See the two following notes for examples of such cases.

2. Where Property Rights Are Affected. — *Stephens v. State*, 65 Miss. 329; *People v. Brunell*, 48 How. Pr. (N. Y. Gen. Sess.) 435.

The common law punished cruelty to animals only so far as it affected the property rights of the owners, and the injury or damage done the owner was but a trespass. *Branch v. State*, 41 Tex. 622.

3. Nuisance. — Public cruelty to a cow, and beating her to death in or near a public street, was an indictable offense at common law as a public nuisance, and it was not necessary to prove that the beating was the cause of the cow's death, as the gist of the offense is the

public cruelty to the common nuisance. *U. S. v. Jackson*, 4 Cranch (C. C.) 483.

In *U. S. v. Logan*, 2 Cranch (C. C.) 259, it was held that public cruelty to a horse was an indictable offense; and in *U. S. v. McDuell*, 5 Cranch (C. C.) 391, it was held that it was an indictable offense at common law to incite, provoke, and encourage a fierce and dangerous dog to bite and tear a cow.

While the meagre reports of these cases do not show the ground on which the acts were held indictable, it is reasonable to infer that it was the same as in *U. S. v. Jackson*, 4 Cranch (C. C.) 483, *supra*.

4. The First of the English Statutes directed to the enforcement of benevolence and kindness to inferior animals was passed in 1822. It was to prevent "cruel and improper treatment of cattle." See *Grise v. State*, 37 Ark. 456.

Distinct Offenses. — The first part of section 1, chapter 74 of *West Virginia Acts of 1875*, which provides that "if any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill * * * any domestic animal, every such offender shall, for every such offense, be deemed guilty of a misdemeanor," creates seven separate and distinct offenses of a similar character. *State v. Gould*, 26 W. Va. 258.

5. Offense Against Public Morals. — *Com. v. Turner*, 145 Mass. 296; *State v. Porter*, 112 N. Car. 887.

6. Protection of Animals Intended. — In *Stephens v. State*, 65 Miss. 329, the court, *per* Arnold, J., speaking of a statute making it a criminal offense to cruelly beat, abuse, starve, torture, or purposely injure certain animals, said: "This statute is for the benefit of animals, as creatures capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners." To the

2. What Animals Are Protected. — With regard to the animals protected, the statutes against cruelty fall naturally into two classes: (1) those which protect all animals, in the construction of which the word "animal" is usually held to include all living creatures except man;¹ and (2) those which protect only certain enumerated animals or classes of animals. In the note are given the decisions as to what animals are or are not within the terms of such statutes.²

same effect are *State v. Bruner*, 111 Ind. 98; *Hodge v. State*, 11 Lea (Tenn.) 528, 47 Am. Rep. 307.

Cruelty Distinguished from Wanton Killing or Injuring. — Article 680 of the *Texas Penal Code* (Penal Code 1895, art. 787), providing a punishment for any person who "shall wilfully or wantonly kill, maim, wound, disfigure, poison, or cruelly and unmercifully beat and abuse" any domesticated animal or bird, is intended for the protection of the animals themselves, as distinguished from the protection of their owner, intended by the preceding article, which provides a punishment for any person who shall "wilfully kill, maim, wound, poison, or disfigure" any such animal or bird belonging to another, "with intent to injure the owner thereof." *McCleskey v. State*, (Tex. App. 1890) 13 S. W. Rep. 997. To the same effect are *State v. Brocker*, 32 Tex. 611; *State v. Rector*, 34 Tex. 565; *Turman v. State*, 4 Tex. App. 586; *Irvin v. State*, 7 Tex. App. 78; *Jones v. State*, 9 Tex. App. 178; *McLaurine v. State*, 28 Tex. App. 530. See also *State v. Avery*, 44 N. H. 392.

Cruelty Distinguished from Killing in Cultivated Land Insufficiently Fenced. — A person cannot be convicted of cruelty to animals under the above section, where he has killed or wounded a hog inside of cleared or cultivated land in his charge, which land is surrounded by an insufficient fence, as in such case the offense is that of "dogging stock when fence insufficient," denounced by article 799. *McCleskey v. State*, (Tex. App. 1890) 13 S. W. Rep. 997. To the same effect, see *Payne v. State*, 17 Tex. App. 40; *McRay v. State*, 18 Tex. App. 331; *Brewer v. State*, 28 Tex. App. 565.

1. What the Term "Animal" Includes. — "The word 'animal,' as used in this title [Cruelty to Animals], does not include the human race, but includes every other living creature." *New York Penal Code* (1891), § 669.

A Dog, whether listed for taxation or not, is within the protection of the *Indiana Act* of March 11, 1889 (Elliott's Supp., §§ 329-337; Horner's Anno. Stat. 1896, § 6654 *et seq.*), relative to cruelty to animals. *State v. Giles*, 125 Ind. 124.

A Goose, or other domestic fowl, is an animal within the protection of Rev. Stat. of Indiana (1881), § 2101, relative to cruelty to animals. *State v. Bruner*, 111 Ind. 98.

The section here construed was superseded by the Act of March 11, 1889 (Elliott's Supp., §§ 329-337; Horner's Anno. Stat. Ind. 1896, § 6654 *et seq.*), which defines the word "animal" as including all domestic fowls. See *State v. Giles*, 125 Ind. 124.

Game Cocks are within the protection of the *New York Penal Code*, § 665, prohibiting the keeping or using of any place for baiting or fighting any bird or animal. *People v. Klock*, 48 Hun (N. Y.) 275.

A Fox is within the protection of *Massachusetts Pub. Stat.*, c. 207, § 53, providing a punishment for any person who, "having the charge or custody of an animal, * * * knowingly and wilfully authorizes or permits it to be subjected to unnecessary torture, suffering, or cruelty of any kind." *Com. v. Turner*, 145 Mass. 296.

In this case, the court, *per* W. Allen, J., said: "The word 'animal' must be held to include wild and noxious animals, unless the purpose of the statute or the context indicate a limited meaning. There is nothing in the general purpose and intent of the statute that would prevent it from including all animals, within the common meaning of that word. * * * It is as obnoxious to the reason of the statute wantonly to torture a wild animal, held in subjection by force, as to torture a tame animal."

2. What the Term "Domestic Animal" Includes.

— **A Cock** is a domestic animal within the meaning of 12 and 13 Vict., c. 92, § 29, which provides that the word "animal," as used in section 2 of the same act, shall be taken to mean any horse, etc., or any other domestic animal. Therefore, cruelty to a cock is an offense within section 2. *Budge v. Parsons*, 3 B. & S. 382, 113 E. C. L. 382, 9 Jur. N. S. 796.

Linnets kept in cages, and trained and used as decoy birds, are domestic animals within the protection of the English statutes against cruelty. *Colan v. Pagett*, 12 Q. B. Div. 66.

A Mule is a domestic animal, and thus within the protection of the *West Virginia* statute against cruelty to domestic animals. The courts will take judicial notice of this fact, there being no wild mules in the state. *State v. Gould*, 26 W. Va. 258.

What the Term "Domestic Animals" Does Not Include — Parrots. — *Swan v. Sanders*, 50 L. J. M. C. 67, 44 L. T. 424, 14 Cox C. C. 566.

A Sea Gull which is tame enough to come when called, and feed out of its owner's hands, and which is not entirely deprived of its liberty, is not a domestic animal within the protection of the English statutes against cruelty. *Yates v. Higgins*, (1896) 1 Q. B. 166.

Rabbits which have been caught and kept in confinement for five or six days are not domestic animals, and are, therefore, not within the protection of the English Cruelty to Animal Acts of 1849 (12 and 13 Vict., c. 92) and 1854 (17 and 18 Vict., c. 60). *Aplin v. Porritt*, (1893) 2 Q. B. 57, 17 Cox C. C. 662.

Lions kept in a cage are not domestic animals, and therefore not within the protection of the English statutes against cruelty, even though they are reduced to such a state of subjection that their owner enters the cage in public with a woman, who does a skirt dance while the owner keeps the lions in subjection with a whip and a pole, and one of the lions is afterwards made to jump over a board several times. *Harper v. Marcks*, (1894) 2 Q. B. 319.

3. What Acts Are Punishable — *a.* CRUEL OR NEEDLESS KILLING. — Though the right of man to slaughter animals for his own use is undisputed, such animals must be slaughtered in as merciful a manner as possible; a method of killing them which involves unnecessary suffering is punishable as cruelty.¹ And any wilful, wanton, or needless killing of an animal is, as a general rule, considered cruel.²

Poisoning an Animal is within the *New York* statutes against cruelty.³

***b.* OMISSION TO KILL WOUNDED OR DISEASED ANIMAL.** — The mere omission to kill an animal which is wounded or diseased past recovery is not punishable under the *English* statutes,⁴ but it is otherwise if the animal be kept in such a manner that it is unavoidably put to intense pain in moving about a field to graze and thus support its life.⁵

***c.* UNNECESSARILY OR CRUELLY BEATING.** — Unnecessarily or cruelly beating an animal is punishable.⁶

Lizards and Chameleons, confined by chains and rings around their necks, and sold as pet ornaments or toys, are not domestic animals, and are therefore not within the protection of section 512 of the Criminal Code of *Canada*, punishing cruelty to domestic animals. *In re Racey*, 49 Alb. L. J. 252.

When Wild Animals May Become Domestic. — In *Harper v. Marks*, (1894) 2 Q. B. 319, Wright, J., said: "I will only add that I agree with the argument for the appellant to this extent, that animals, however wild by nature, may become domestic under some circumstances. I should think that leopards trained to hunt for their master, otters trained to catch fish, and elephants trained to assist in the capture of wild elephants, might be held to be domestic. Speaking for myself, I should be prepared, if necessary, to say that they were. Domestic is not the same thing as domesticated, but I think that an animal ought to be regarded as a domestic animal which is of a kind ordinarily domesticated, and which is in fact itself domesticated."

"Useful Beasts," etc. — Chickens are within the protection of section 2482, Code of *North Carolina*, making cruelty to "any useful beast, fowl, or animal" a misdemeanor. *State v. Neal*, 120 N. Car. 613.

Cattle. — Pigs are within the protection of the *Missouri* Rev. Stat. (1889), § 3621, making cruelty to "any horse, ox, or other cattle" a misdemeanor. *State v. Pruett*, 61 Mo. App. 156, 1 Mo. App. Rep. 356.

1. Slaughtering in Cruel Manner. — It is cruelty, within the meaning of the *New York* statute, to slaughter hogs by a method which involves suspending them by one leg and dislocating the leg, and also plunging them in boiling water before they are dead. *Davis v. Society*, etc., 16 Abb. Pr. N. S. (N. Y. C. Pl.) 73.

2. Wilful or Wanton Killing. — Wounding a pig and leaving it to die has been held cruel. *Adcock v. Murrell*, 54 L. J. P. 776.

Impaling a chicken on a sharp stick, or beating a hen to death, is cruel. *State v. Neal*, 120 N. Car. 613.

Evidence of Wilful and Wanton Killing. — In *Collier v. State*, 4 Tex. App. 12, the defendant was indicted for wilfully and wantonly killing a horse. The evidence showed that the horse had been shot, and was found dead some distance from the house of the defendant's

brother, with whom he was staying, and that the tracks of the horse were traced back to a broken place in the defendant's brother's fence. When inquiries were made about the animal the defendant said nothing. There was evidence that the defendant's brother had borrowed a gun a few days before that on which the horse was found dead, and that the defendant had had the gun shooting rabbits about sundown on the preceding evening. It was held that this evidence was not sufficient to sustain a verdict of guilty, as it pointed no more to the defendant as the guilty person than to his brother.

Cruel Killing. — In *Hunt v. State*, 3 Ind. App. 383, it was held that "cruel" killing of an animal was not an offense under Rev. Stat. 1881, § 2101 (Horner's Anno. Stat. 1896, § 2101), providing a punishment for any person who "cruelly beats or needlessly mutilates or kills any animal," as the statute only punished "needless" killing.

The section here construed was superseded by the Act of March 11, 1889 (Elliott's Supp., §§ 329-337). *State v. Giles*, 125 Ind. 124. The latter act provides a punishment for any one who "cruelly kills" an animal.

Needless Killing. — The "needless killing" of chickens is cruelty within the meaning of section 2482, Code of *North Carolina*, though done without torture. *State v. Neal*, 120 N. Car. 613.

3. Poisoning. — The administering of poison to an animal, or unjustifiably exposing the poison with the intent that the same shall be taken by the animal, is cruelty within the meaning of the *New York* statutes, as section 660 of the Penal Code, which defines such offense, is embraced within title 16, the caption of which is "Cruelty to Animals." *People v. Davy*, (Supreme Ct.) 32 N. Y. Supp. 106.

In connection with this case it may be useful to note that in several states the statutes against cruelty appear under the caption "Malicious Mischief." Yet the offenses of cruelty to animals and malicious mischief are quite distinct. See the title MALICIOUS MISCHIEF.

4. Omission to Kill. — *Everitt v. Davies*, 38 L. T. 360, 26 W. R. 332; *Powell v. Knights*, 38 L. T. 607, 26 W. R. 721.

5. Keeping in Manner Which Causes Suffering. — *Everitt v. Davies*, 38 L. T. 360, 26 W. R. 332.

6. Beating. — *State v. Hackfath*, 20 Mo. App.

d. CRUELLY DRIVING. — A person who cruelly drives or cruelly treats any domestic animal, such as a horse, is punishable under the *Georgia* statutes.¹

e. NEGLECT. — Neglect which would naturally cause suffering is punishable though no great suffering has in fact resulted therefrom.²

f. WORKING IN UNUSUAL MANNER. — It is not of itself cruelty to work an animal in an unusual manner, but abuse of the animal while being so worked would be punishable.³

g. WORKING ANIMAL INTENDED FOR SLAUGHTER. — The *English* statute against cruelty to animals prohibits the working of animals brought to a slaughter-house for the purpose of being slaughtered, whether such slaughter-house be a private or a licensed one.⁴

614; *Com. v. Miller*, 3 *Lanc. L. Rev.* (Pa.) 175.

In *People v. Stakes*, 1 *Wheel. Cr. Cas.* (N. Y.) 111, the defendant was found guilty of cruelty to animals in having beaten his horses over the head, neck, and shoulders with the butt end of his whip, because the horses were unable or refused to draw a heavy load.

In *Tinsley v. State*, (Tex. Crim. App. 1893) 22 S. W. Rep. 39, the defendant was indicted for cruelly beating a horse. The facts were that the defendant was riding the horse, when some negroes, at the defendant's instance, undertook to place a hog on the horse's back. The horse jumped and threw both the defendant and the hog to the ground. The defendant then picked up a small plank and struck the horse several blows over the hips, until the plank broke. He then tied the horse to a fence, took up a stick about four feet long and as thick as his wrist, and struck the horse several blows with it. The horse jumped through the fence, and the defendant followed him and again struck him. It was held that the defendant was rightly convicted. The court, *per Davidson, J.*, said: "The chastisement inflicted upon the horse was cruel in the extreme, and manifested a spirit of heartless and brutal rage. Such a punishment and such infliction of violence is foreign to and not dictated by any feeling incident to humanity, save that of cruelty."

Continued Beating. — Where the evidence shows that a person beat his horse for quite a long time, although at intervals of a few minutes, the jury may properly find that there was one continued beating, rather than several beatings. *State v. Avery*, 44 N. H. 392.

Evidence of Beating. — In *State v. Gould*, 26 W. Va. 258, it was held that the jury had a right to infer that the defendant cruelly beat a mule, where a witness testified that the mule went into a barn, and the defendant followed it with a clapboard in his hand, and that the witness heard the defendant striking the mule in the barn, but could not see him.

1. Cruelly Driving or Treating. — *McKinne v. State*, 81 Ga. 164. The statute on which the indictment in this case was founded is the Act of Oct. 12, 1879 (Penal Code of *Georgia*, 1895, § 703), which is as follows: "Every person who shall instigate, engage in, or do anything in furtherance of an act of cruelty to a domestic animal, shall be punished," etc. The defendant raised the point that no single, direct, and immediate act of cruelty was made penal by such statute, but only anything done in furtherance of such an act, or, as the court expressed it, that "the chief offender, the principal in the

business, is not dealt with by the law, but his aiders and abettors, those who bear to him a relation analogous to that of principals in the second degree or accessories before the fact in felony, are alone denounced as criminal." The court refused to construe the statute as being restricted to aiding and abetting, and said, *per Bleckley, C. J.*: "Besides, it is no strain upon language to hold that he who inflicts an act of cruelty promotes, engages in, or does something in furtherance of such act, though it be his own. The very doing of the act is engaging in or doing something that furthers it. All that is done whilst the act is in progress furthers it and promotes its accomplishment."

Evidence. — On the trial of an indictment for cruelly driving and treating horses, evidence as to the value of the animals before the alleged ill-treatment, and of the extent to which their value was diminished by such treatment, is not irrelevant, as it tends to show the severity of the treatment to which the animals were subjected. *McKinne v. State*, 81 Ga. 164.

2. Neglect. — The offense of failure, by one who has charge or custody of an animal, to provide it with proper food, drink, shelter and protection from the weather, under the *Massachusetts* statute (Pub. Stat., c. 207, § 252), is committed by a person who unnecessarily leaves a horse harnessed to a carriage, in the woods, where it remains more than twenty-four hours uncared for, and without food and drink, except what food the horse obtains by browsing in the woods. This is true even though it does not appear, when the horse is found, that it has actually suffered from exposure or hunger, and when it is given water it drinks but half a pail, and it is then driven home, a distance of twelve miles, without other food than the grass found by the roadside. *Com. v. Curry*, 150 Mass. 509.

3. Working in Unusual Manner. — In *People v. Special Sess.*, 4 *Hun* (N. Y.) 441, the court, *per Davis, P. J.*, said: "Although a dog is not a 'beast of burden,' yet it is not cruelty to train and subject him to any useful purpose. His use upon a treadmill or an inclined plane, or in any mode by which his strength or docility may be made serviceable to man, is commendable and not criminal; but his abuse while so employed, whenever it amounts to cruelty, is a crime, and punishable precisely under the same circumstances as the cruel usage of the higher animals."

4. Working Animal Intended for Slaughter. — The statute 12 and 13 *Vict.*, c. 92, § 9, pro-

h. TEASING. — Tying an article to an animal's tail is not necessarily cruelty, unless actual suffering or torture results therefrom.¹

i. KILLING OR WOUNDING FOR SPORT — (1) *Shooting Wild Game.* — Statutes against cruelty to animals have never been construed to prohibit the shooting and killing of game in its wild state.²

(2) *Trap Shooting.* — There is a variance of decisions in the several states as to whether it is within the prohibition of the statutes against cruelty to shoot captive pigeons or doves set free to act as targets. But as a general rule such shooting is not unlawful where wounded birds are immediately killed.³

(3) *Coursing Rabbits.* — It is not baiting animals, within the prohibition of the *English* statute, to turn rabbits loose in an inclosed field from which they cannot escape, and incite dogs to chase and kill them, for the purpose of seeing which dog can kill the greater number.⁴

(4) *Fox Hunting.* — It is cruelty, within the *Massachusetts* statutes, to turn loose a captive fox, and, five minutes afterwards, to set hounds to chase it.⁵

vides "that if any person keeping or using or having the management of any place for the purpose of slaughtering horses or other cattle (not intended for butcher's meat), shall use or employ, or cause or permit to be used or employed, any horse or other cattle brought to or delivered at, or which shall be in or upon, such place for the purpose of being slaughtered, or shall permit or suffer any such horse or other cattle to leave the said place to be employed in any manner of work, every such person shall be liable to forfeit," etc. A person who had charge of the kennels of a hunt, where there was a place which was used solely as a slaughter-house for the purpose of slaughtering horses and other cattle sent as food for the hounds, was held liable under this statute for having permitted a horse, which had been received for the purpose of being so slaughtered, to leave the place to be employed in work. The court held that the section applied to the keeper of a private slaughter-house as well as of a licensed slaughter-house. *Colam v. Hall*, L. R. 6 Q. B. 206.

1. *Tying Article to Animal's Tail.* — The mere tying of brush and boards to the tail of a horse is not necessarily cruel, under the statute providing a punishment for any person "who shall maliciously and cruelly maim, beat, or torture any horse, ox, or other cattle." In order to make such an act cruelty, it must appear that actual torture was produced. *State v. Pugh*, 15 Mo. 509. In this case the court, *per* Ryland, J., said: "The torture here alluded to must consist in some violent, wanton, and cruel act necessarily producing pain and suffering to the animal. Now it is manifest that from tying a brush or board to the tail of a horse, different effects may follow from the circumstances accompanying the act, as well as from the manner and place in which the act is done, or from the nature and qualities of the animal. A fiery, high-mettled, and wild horse may kill himself in order to escape from the troublesome and frightful appendage to his tail. A gentle, faithful old farm horse, with more hard sense than the mischievous lad who sought to frighten him, may not mind the brush or board, but may carry it to his owner to have it taken off without suffering or fatigue. Suppose the tying had been in a stable, so that the

animals could not have had room to run or to hurt themselves, this could not have been the torture provided in our statute."

2. *Shooting Wild Game.* — The *North Carolina* statute in reference to cruelty to animals provides (*North Carolina Code*, § 2490) that "nothing in this chapter shall be construed as prohibiting the lawful shooting of birds, deer, and other game for the purposes of human food." *State v. Porter*, 112 N. Car. 887.

3. *Trap Shooting Not Cruel.* — In *Missouri* and *Pennsylvania* it is held not to be cruelty within the statutory prohibition for a person to test or display his skill in marksmanship by shooting pigeons turned loose to act as targets, where the object is to kill and not to wound the birds, and those which are wounded are immediately captured and killed, all the birds killed being used as food. *State v. Bogardus*, 4 Mo. App. 215; *Com. v. Lewis*, 140 Pa. St. 261.

In *New York* such shooting was held to be within the prohibition of the statute against cruelty. *Paine v. Bergh*, 1 N. Y. City Ct. 160.

In order to avoid the effect of this decision, the legislature passed the Act of 1875 (*Laws of 1875*, c. 107, § 1; 1 *Birdseye's Rev. Stat. N. Y.*, 1896, p. 68, § 33), providing that the statutes for prevention of cruelty to animals should not "be construed to prohibit or interfere with the shooting, by members of sportsmen's clubs or incorporated societies, of pigeons; provided that in each case, as soon as they can be captured or taken after being shot, such pigeons, if living, shall immediately be killed."

Trap Shooting Held Cruel. — In *Colorado* and *North Carolina*, however, such shooting has been held to be within the statutory provisions against cruelty. *Waters v. People*, 23 Colo. 33; *State v. Porter*, 112 N. Car. 887.

4. *Coursing Rabbits Not Baiting.* — *Pitts v. Millar*, L. R. 9 Q. B. 380, 9 Moak 341.

5. *Turning Fox Loose to Be Chased by Hounds Cruel.* — *Com. v. Turner*, 145 Mass. 296. In this case the court, *per* W. Allen, J., said: "It is argued that the fox is a noxious animal, which man may lawfully kill; that hunting it with dogs is a proper mode of killing it; and that therefore the suffering inflicted by that mode of killing is not unnecessary within the meaning of the statute. [*Pub. Stat. Mass.*, c. 207, § 53.] The statute does not apply to foxes

(5) *Dog Fighting*. — It is cruelty, under the *Massachusetts* statutes, for the owner of a dog to permit it to be bitten, mangled, and tortured by another dog.¹

(6) *Cock Fighting*. — In *England* it is not an offense to assist in cock fighting unless at a place kept for the purpose,² but it is cruelty within the statute to set a cock to fight another which has had its thigh broken.³ In *Alabama* it is an indictable offense to engage in fighting cocks in a public place.⁴ In *Pennsylvania* cock fighting is not indictable as cruelty to animals.⁵

j. *SURGICAL OPERATIONS*. — It is obvious that a surgical operation performed for the benefit of an animal is not cruel, however painful it may be;⁶ and an operation which is necessary to make an animal useful to man, such as castration of a young horse or bull, is not considered as within the prohibition of statutes against cruelty.

Other operations, such as dishorning cattle, spaying sows, etc., cause the animal acute suffering, and are performed for the sole purpose of increasing its value. The courts of *England*, *Scotland*, and *Ireland* have several times considered and passed upon the question whether such operations are cruel within the meaning of the statutes; but there is such an irreconcilable conflict between the decisions, that the question cannot be considered as definitely settled.⁷

in their natural free condition, but only when they are in the dominion and custody of man. The right to kill a captive fox does not involve the right to inflict unnecessary suffering upon it in the manner of its death, any more than the right to kill a domestic animal involves the right to inflict unnecessary suffering upon it, or cruelly to kill it. It cannot be said, as matter of law, that throwing a captive fox among dogs, to be mangled and torn by them, is not exposing it to unnecessary suffering. It is argued that there was not sufficient evidence to prove that the fox was in the custody or charge of the defendant when the suffering was inflicted upon it. It is not necessary to consider whether there was evidence of suffering from fear when the fox was in the custody of the defendant in the presence of the dogs, because we have no doubt that, by letting loose the fox for the purpose of being hunted by the dogs, the defendant permitted it to be hunted and permitted it to be subjected to all the suffering which it endured, and which naturally followed its being hunted in pursuance of that purpose. It was the act of the defendant while he had the custody of the fox that put it within the power of the dogs, and it is immaterial that they were restrained for five minutes before starting in fresh pursuit."

1. *Dog Fighting Cruel*. — *Com. v. Thornton*, 113 Mass. 457.

2. *Cock Fighting Not Punishable unless at Place Kept for That Purpose*. — *Clark v. Hague*, 2 El. & El. 281, 105 E. C. L. 281, 8 Cox C. C. 324; *Morley v. Greenhalgh*, 3 B. & S. 374, 113 E. C. L. 374, 9 Jur. N. S. 745; *Coyne v. Brady*, 12 Ir. C. L. Rep. 577.

For a discussion of the English law on the subject of cock fighting, see 23 Ir. L. T. 1, 5.

3. *Cruelty to Fight Injured Cocks*. — *Budge v. Parsons*, 3 B. & S. 382, 113 E. C. L. 382, 9 Jur. N. S. 796.

4. *Cock Fighting in Public Place Indictable*. — *Finnem v. State*, (Ala. 1897) 22 So. Rep. 593.

What Is a Public Place. — A place, however secluded, becomes public when between

seventy-five and one hundred people meet to gether there for the purpose of witnessing a cock fight, and any person who so desires is permitted to be present. *Finnem v. State*, (Ala. 1897) 22 So. Rep. 593.

5. *Cock Fighting Not Indictable*. — *Morrow's Case*, 26 Pittsb. L. J. (Pa.) 86. In this case the court said that in cock fighting the injury to the birds was rather an incident than an end, and that to support an indictment some direct act of cruelty must be shown.

6. *Surgical Operations*. — See *Com. v. Lufkin*, 7 Allen (Mass.) 579.

7. *Spaying Sows Not Cruel*. — In *Lewis v. Fermor*, 18 Q. B. Div. 532, 16 Cox C. C. 176, it was held that the spaying of sows was not cruelty within the meaning of the English statutes, as the operation, though painful, was commonly performed upon such animals and was commonly believed to benefit the owner by increasing its value. And this was considered to be true even though the operation might be in fact useless.

Dishorning Cattle. — Dishorning cattle is not cruelty within the meaning of the English statutes. *Callaghan v. Society, etc.*, 16 L. R. Ir. 325, 16 Cox C. C. 101; *Reg. v. McDonagh*, 28 L. R. Ir. 204.

In *Renton v. Wilson*, 15 Justiciary Cas. (Sc.) 84, the horns were shorn from oxen close to the skull. It was proved that the operation caused great pain, but that it was in common use throughout three counties in Scotland as a means of preventing the cattle goring each other when in railway trucks. The court held that dishorning, being a customary operation for a legitimate and useful purpose, was not in contravention of the *Scotland Cruelty to Animals Act of 1850* (13 & 14 Vict., c. 92).

Dishorning cattle was held to be cruelty in the two cases following: *Brady v. M'Argle*, 14 L. R. Ir. 174, 15 Cox C. C. 516; *Ford v. Wiley*, 23 Q. B. Div. 203. And see the observations of Hawkins, J., in this latter case.

Cutting Cocks' Combs Cruel. — Cutting the combs of cocks and thereby causing them great

4. Intent. — To constitute cruelty to animals the act complained of must have been done with an evil intent.¹

Evil Intent Implied. — It is not necessary, however, that there should be an express purpose to cause suffering. A man is presumed to know what will be the necessary result of his actions, and where an act shows a reckless disregard

pain, for the purpose of making them more serviceable in cock fighting, or in winning prizes at an exhibition, is cruelty within the *English* statute 12 & 13 Vict., c. 92, § 2, as the purpose for which the comb is cut is not such as to prevent the word "cruel" from applying; it does not benefit the animal for the use of man or for any other lawful or proper purpose. *Murphy v. Manning*, 2 Exch. Div. 307, 20 Moak 558.

1. Evil Intent. — Under a statute punishing cruelty to animals, the motive with which an act is done is the test whether or not it is criminal. To be guilty of an offense under such a statute, a person must be actuated by a spirit of cruelty or a disposition to inflict unnecessary pain and suffering on animals. *Stephens v. State*, 65 Miss. 329.

To constitute cruelty the act must be both wilful and malicious. *State v. Avery*, 44 N. H. 392.

See also *Ross's Case*, 3 C. H. Rec. (N. Y.) 191, and the *Stage Horse Cases*, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 51, in which, proceeding upon the assumption that cruelty to animals was an offense at common law, it was held that deliberation was a necessary element of the offense, as evidencing a wicked intent to inflict injury upon the animal. That this offense did not exist at common law, see *supra*, this title, *Not a Common-law Offense*.

Negligence or Recklessness. — A person cannot be convicted under the *Missouri* Rev. Stat. (1889), § 2896, of overdriving a horse, where the evidence does not show that the defendant was negligent or reckless in overdriving the horse. *State v. Roche*, 37 Mo. App. 480.

Wilful or Wanton Act. — In order to constitute the killing of animals an offense under the *Texas* Penal Code (art. 787, Code of 1895), the act of killing must have been either wilful or wanton. To make the killing a wilful act it must have been committed with an evil intent, with legal malice and without legal justification. To make the killing a wanton act it must have been committed regardless of the rights of the owner of the animals, in a reckless spirit, and under such circumstances as evidenced a wicked or mischievous intent. *Thomas v. State*, 14 Tex. App. 200.

Malicious or Needless Act. — Under the *New York* Sess. Laws, 1866, c. 682, and 1867, c. 375, in relation to cruelty to animals, it was necessary, in order to constitute an offense, that the act charged should have been maliciously or needlessly done. *Warner v. Perry*, 14 Hun (N. Y.) 337.

Malice Distinguished from Wanton Cruelty. — In *State v. Avery*, 44 N. H. 392, the defendant was indicted for cruelly beating a horse. The court, *per* Bellows, J., said: "The court instructed the jury that malice was not limited to ill-will to an animal, or its owner, or to wanton cruelty; but the act will be malicious

if it results from any bad or evil motive; as from cruelty of disposition, from violent passion, a design to give pain to others, or a determination to show that he will do what he will with his own property, without regard to the remonstrances of others. Of these instructions we think the defendant had no cause to complain. * * * The law in question was designed to restrain the exercise of cruelty to animals, and is founded upon a high moral principle, which denounces the wanton and unnecessary infliction of pain, even upon animals created for the use of man, as contrary alike to the principles of Christianity and the spirit of the age. At the same time, there is no purpose to interfere with the infliction of such chastisement as may be necessary for the training or discipline by which such animals are made useful. The distinction is between that chastisement which is really administered for purposes of training and discipline, and the beating and needless infliction of pain which is dictated by a cruel disposition, by violent passions, a spirit of revenge, or reckless indifference to the sufferings of others. If resorted to in good faith and for a proper purpose, it will not be necessarily malicious because it may be deemed to be excessive; but the undue severity should be carefully weighed by the jury in determining whether it was not in fact dictated by a malevolent spirit, and not by any justifiable motive. It is not, however, like the case of a parent or master, who has the right to inflict only moderate and reasonable chastisement, and is liable to punishment if he exceed it; but, under the law now in question, there is no liability for such excess unless it be found to be malicious. At the same time it must be considered that the chastisement which at first may be inflicted with a lawful motive, may, in its progress, engender such brutal and malignant passions as in the end to change entirely its character, and render the beating malicious within the meaning of the act; and this should operate as a salutary admonition to keep guard over the passions, lest the beating which, although always or at least generally of questionable utility, the law will excuse, may degenerate into an unmanly and malicious crime. We are satisfied, then, that there was no error in declining to charge the jury that they must find that the act was done out of a spirit of wanton cruelty; for the malice, upon the principles we have stated, cannot be so limited."

"Unlawful" Killing. — On the trial of an indictment for wilfully and wantonly killing a dumb animal, it is error to charge that if the jury believe that the defendant "unlawfully" killed the animal as charged they should convict, because the killing might have been unlawful, and yet not wilful and wanton as required by the law. *Jones v. State*, 9 Tex. App. 178.

of consequences, and of the suffering which it must cause an animal, the law implies an evil intent.¹

Knowledge of Suffering. — The owner or person in charge of animals is not, however, criminally liable for suffering which they may endure without his knowledge,² unless he has voluntarily contributed to the suffering, as, for instance, where he has left a horse which is sick and unfit to work, among other horses intended to be worked.³

1. Evil Intent Implied. — *Hunt v. State*, 3 Ind. App. 383; *Com. v. Wood*, 111 Mass. 408; *People v. Brunell*, 48 How. Pr. (N. Y. Gen. Sess.) 435; *People v. Tinsdale*, 10 Abb. Pr. N. S. (N. Y. Gen. Sess.) 374.

Striking a horse with such violence as to kill it is punishable though there be no intent to torture or kill the horse. *State v. Hackfath*, 20 Mo. App. 614.

In *Com. v. Lufkins*, 7 Allen (Mass.) 579, the court, *per* Hoar, J., said: "The motive of intending to inflict injury or suffering is not, by the terms of the statute, made an essential element of the offense. And although the most common case to which the statute would apply is undoubtedly that in which an animal is cruelly beaten or tortured for the gratification of a malignant or vindictive temper, yet other cases may be suggested, where no such express purpose could be shown to exist, which would be within the intent as well as the letter of the law. Thus, cruel beating or torture for the purpose of training or correcting an intractable animal; pain inflicted in wanton or reckless disregard of the suffering it occasioned, and so excessive in degree as to be cruel; torture inflicted by mere inattention and criminal indifference to the agony resulting from it, as in the case of an animal confined and left to perish from starvation — we can have no doubt would be punishable under the statute, even if it did not appear that the pain inflicted was the direct and principal object. Severe pain inflicted upon an animal for the mere purpose of causing pain or indulging vindictive passion is cruel. And so it is if inflicted without any justifiable cause, and with reasonable cause to know that it is produced by the wanton or reckless conduct of the person who occasions it."

Proper Exercise of Judgment. — In *Com. v. Wood*, 111 Mass. 408, the court, *per* Ames, J., said: "The instructions given to the jury were all that the defendant was entitled to. The jury were told that 'if, in the proper exercise of his own judgment, he thought he was not overdriving the horse, he must be acquitted,' and that he could not be convicted unless upon proof that he knowingly and intentionally overdrove. A 'proper exercise of his own judgment' means the honest exercise of his judgment, as distinguished from mere recklessness of consequences, or wilful cruelty. Under such instructions, the jury would be required to consider his alleged inexperience and want of knowledge as to the proper treatment of horses. Their verdict imports that 'knowingly and intentionally' he did wilfully and cruelly overdrive the horse."

Carelessness Held Not Criminal. — In *Westbrook v. Field*, 51 J. P. 726, the defendant was charged with causing a sheep to be tortured. It was shown that he put a sheep whose leg was

broken, in a pen with other sheep, which trampled upon it. It was held that his act, though careless, did not amount to causing the sheep to be tortured.

2. Knowledge of Suffering. — In *Small v. Warr*, 47 J. P. 20, the defendant, the manager of a colliery, was convicted of cruelty in allowing horses to be worked while suffering from raw wounds. It was not proved that he was present when the horses were worked, or that he had any knowledge of their condition. It was held that the conviction was wrong, as it was necessary, to constitute the offense, that the defendant should have had some knowledge of the facts.

To the same effect was *Elliott v. Osborn*, 65 L. T. 378, 17 Cox C. C. 346, where the alleged cruelty was the failure of the consignee of cattle to remove their head ropes for two days after they arrived.

Driving Sick Horse. — In the *Stage Horse Cases*, 15 Abb. Pr. N. S. (N. Y. C. Fl.) 51, the court, *per* J. F. Daly, J., said: "It is clear that the mere fact of driving a sick, sore, lame, or disabled horse, is not *per se* the tormenting or torturing intended by the act. The driving of such horse directly to its stable is not an offense, nor driving it for exercise, nor driving it carefully in a manner proportioned to its condition, where it has become disabled, lame, or sick on the road. And whether a horse suffering from certain sores or disorders is injured or suffers torment or torture by being driven, is in many cases such a question for the determination of medical experts as renders it exceedingly doubtful as a case of patent torturing or tormenting within the act. Here, then, in the case of drivers arrested for driving diseased horses, arises the question as to how far such drivers are guilty of any offense if ignorant of the condition of the horses or inexperienced in detecting those signs, familiar to veterinary surgeons, of suffering on the part of the animal. Upon indictment for offenses *malum in se*, ignorance or mistake of fact is an excuse which is available to the prisoner as a defense. As appears from the proofs, the drivers are not allowed to select the horses which they are to drive, nor can I see how they are to be bound to the same knowledge of the horse which a surgeon would possess, nor how they can be arraigned for tormenting or torturing the horse if they are driving it pursuant to their orders and are wholly ignorant of its physical condition. There is a vast difference between such an act in which there is neither motive, malice, nor wantonness on the part of the driver, and those acts of cruelty which the legislature intended to punish, which evidence a savage and unfeeling heart and a wilful disregard to the sufferings of the helpless brute."

3. Leaving Sick Horse to Be Worked. — The

Accident. — A person will not be punished for having accidentally inflicted pain.¹

5. Ownership and Custody of Animal — *a. OWNERSHIP.* — The statutes against cruelty to animals apply equally to the owners and to other persons, so that when cruelty is charged the ownership of the animal is entirely immaterial.² The fact that a person has committed a trespass by striking the horse of another does not render the act cruel, where such striking, if done by the owner for the same purpose, would not have been so.³

b. CUSTODY. — It is generally not necessary, to constitute the offense, that the person charged should have had the custody of the animal alleged to have been cruelly treated.⁴ In some cases, however, custody must be shown,⁵ though the nature of the custody, whether as owner or otherwise, is immaterial.⁶

Pound Keeper. — It has been held that the keeper of a common pound is not guilty of cruelty, under the *English* statute, where he neglects to provide impounded animals with food and water.⁷

Horse-car Conductor. — The conductor of a horse car is as much responsible for

owner of an omnibus line, who, knowing that a horse is sick and unfit to work, leaves him among the working horses in the stable, to be required and compelled to do the ordinary routine work of a working horse, does contribute towards the furtherance of an act of cruelty to animals under a penal statute of *New York*, even though he is not present when the animal is actually driven. *People v. Brunell*, 48 How. Pr. (N. Y. Gen. Sess.) 435.

The Superintendent of an Omnibus Line is guilty of doing an act towards the furtherance of an act of cruelty to an animal, under the *New York* penal statute, when one of the drivers takes out a horse which is unfit to work, such driver acting under the orders of the superintendent. *People v. Brunell*, 48 How. Pr. (N. Y. Gen. Sess.) 435.

1. Accident. — *Com. v. McClellan*, 101 Mass. 34; *State v. Roche*, 37 Mo. App. 480.

2. Ownership Immaterial. — *Com. v. Whitman*, 118 Mass. 458; *Benson v. State*, 1 Tex. App. 6; *Darnell v. State*, 6 Tex. App. 482; *State v. Gould*, 26 W. Va. 258.

In *State v. Bruner*, 111 Ind. 98, the court, *per* Niblack, J., said: "A man may be guilty of cruelty to his own animal, or to an animal without any known owner, or which has, in fact, no owner."

Art. 2344, *Pasch. Dig. (Texas Pen. Code, 1895, art. 786)*, provides that if any person shall wilfully kill, etc., any horse, etc., of another, with intent to injure the owner thereof, he shall be fined, etc.

Art. 2345 (*Texas Pen. Code, 1895, art. 787*) provides that if any person shall wilfully and wantonly kill, maim, wound, poison, or cruelly and unmercifully beat and abuse any dumb animal, such as is enumerated in the preceding article, he shall be fined, etc.

In the latter section the words "the property of another" cannot be supplied by intent, as modifying "animal." The offense is the same whether committed upon one's own animal or the animal of another. *State v. Bocker*, 32 Tex. 611, *overruling State v. Smith*, 21 Tex. 748 and *followed in Benson v. State*, 1 Tex. App. 6.

3. Striking Another's Animal Not Cruelty Re-

cause a Trespass. — In *Com. v. Lufkin*, 7 Allen (Mass.) 579, the owner of a horse drove him to the defendant's house and stopped there, and the defendant struck the horse for the purpose of driving him away. The court said that the jury should have been made to understand that if the defendant struck the horse without any intent to torture or injure him, and the blows given, if they had been given by his owner for a like purpose of driving him away, would not have been so excessive as to be cruel, the defendant would not be an offender under the statute against cruelty to animals simply because he was a trespasser in striking the horse.

4. Custody of Animal Not Necessary. — *Com. v. Whitman*, 118 Mass. 458.

5. When Custody Must Be Shown. — To constitute the offense of cruelty to animals under *Pub. Stat. of Rhode Island*, c. 96, § 1 (Gen. Laws 1896, c. 114, § 1), providing that "whoever, having the charge or custody of any animal, either as owner or otherwise, shall inflict unnecessary cruelty upon the same, or shall unnecessarily fail to provide the same with proper food, drink, shelter or protection from the weather," shall be punished, it is necessary that the person accused should have had charge and custody of the animals. An allegation in the complaint that he was the owner of the animals merely, charges no offense, because one may be the owner of an animal of which another person has the custody and control, and in such case it is no offense for the owner to neglect to provide it with food, etc. *State v. Spink*, (R. I. 1896) 36 Atl. Rep. 91.

6. Nature of Custody Immaterial. — *State v. Clark*, 86 Me. 194.

7. Pound Keeper. — The keeper of a common pound is not within the terms of the Act 12 & 13 Vict., c. 92, § 5, which enacted that every person who should impound or confine in any pound or receptacle of a like nature any animal should provide food and water for it, under a penalty. The act was not intended to apply to the keeper of the pound, but to the person who took the animal there and caused it to be confined. *Dargan v. Davies*, 2 Q. B. Div. 118.

cruelty to the horses, in overloading the car, as the driver.¹

6. Justification. — It is not cruelty to inflict pain or suffering on an animal where the object to be attained thereby is a good one, as the training of the animal or the saving of human life.² Nor is it cruelty to wound or kill an animal in order to preserve one's property from its depredations, where other means have failed.³

1. Horse-car Conductor. — *People v. Tinsdale*, 10 Abb. Pr. N. S. (N. Y. Gen. Sess.) 374. In this case the court said that the conductor was, perhaps, more responsible than the driver, because a driver is usually more or less in subjection to the orders of the conductor.

2. When Infliction of Suffering Is Justified by Object in View. — Where inflicting even severe pain on an animal becomes necessary, as striking a horse while in training or to save human life or limb, it will not be cruelty if done without malice and as reasonably as circumstances will permit. *Cornelius v. Grant*, 7 Sc. Sess. Cas., 4th ser., Just. 13.

In *Com. v. Lufkin*, 7 Allen (Mass.) 579, the court, *per Hoar, J.*, said: "It certainly is not true, as an abstract proposition, that it is immaterial what may be the motive of a person who inflicts pain upon an animal, in determining the criminality of the act. Pain inflicted for a lawful purpose and with a justifiable intent, though severe, does not come within the statute meaning of cruel. * * * To drive a horse at a rate of speed most distressing to the brute, when the object is to save human life, for example, or to attain any other object of adequate importance, may yet be lawful."

Presumption of Good Intent. — In *State v. Isley*, 119 N. Car. 862, the defendant was indicted for cruelty to animals. It appeared that a horse was running loose in the street, on which there were many people, and that the defendant, a police officer, picked up a rock weighing about five pounds, and as the horse turned to run on the sidewalk, the defendant threw the rock, struck the horse between the ears, and knocked him down. It was held that the trial court erred in directing a verdict of guilty, because the defendant, being a police officer, was presumed to have acted in good faith, and until this presumption was overcome by proof of a "wilful" purpose to injure the horse, he stood excused.

Scientific Experiments. — In *New York* it is provided that nothing in the statutes against cruelty to animals "shall be construed to prohibit or interfere with any properly conducted scientific experiments or investigations, which experiments shall be performed only under the authority of the faculty of some regularly incorporated medical college or university of the state of New York." 1 *Birdseye's N. Y. Rev. Stat.* 1896, p. 69, § 38.

3. Protection of Property. — *Grise v. State*, 37 Ark. 456; *Stephens v. State*, 65 Miss. 329; *Thomas v. State*, 14 Tex. App. 200; *Davis v. State*, 12 Tex. App. 11; *Lott v. State*, 9 Tex. App. 206; *Branch v. State*, 41 Tex. 622.

In *Farmer v. State*, 21 Tex. App. 423, the defendant, in order to preserve his horse from injury, shot and wounded another horse which was attacking and pursuing it. It was held that he could not be convicted of wilfully and

wantonly wounding an animal, under the *Texas* penal statutes.

On the trial of an indictment under the *Texas* statute (Pen. Code 1895, art. 787), for wilfully and wantonly killing a cow, evidence that the animals with which the cow that was killed ran were breachy animals, and in the habit of trespassing upon crops, should be allowed to go to the jury, in order that they might consider it in determining whether the killing was wilfully and wantonly done, without excuse, and under circumstances evidencing a lawless spirit, or whether the facts negated such motives and promptings and wantonness. *Reedy v. State*, 22 Tex. App. 271.

Contrary Doctrine. — In *North Carolina* it is no defense to an indictment for killing an animal, that it was killed in order to prevent its destroying the defendant's crops. *State v. Butts*, 92 N. Car. 784; *State v. Neal*, 120 N. Car. 613.

Reasonable Ground to Fear Injury to Property.

— In *Hunt v. State*, 3 Ind. App. 383, the defendant was prosecuted under a statute imposing a fine for needlessly mutilating or killing any animal. The defendant who was hunting saw his father's sheep, which were in an enclosure, running towards the woods as fast as possible, with several hounds after them, which were about twenty-five feet behind them when they entered the woods. The hounds were in fact following a fox trail, but the defendant had no knowledge of the fact that a hunt was in progress, or of the chase of the hounds, until he saw the sheep running with the hounds behind them. Several sheep had been recently killed in the enclosure by dogs, and the defendant supposed that the hounds were chasing the sheep, and for the purpose of protecting his father's property he shot and killed one of the hounds. It was held that the defendant had reasonable ground to suppose that the killing was necessary to protect his father's property, and he was not liable criminally.

Setting Trap. — In *Tennessee* it is held that a person has a right to set a trap on his premises to protect the same from the ravages of mischievous and depredating dogs. And if a dog is caught in such a trap and mutilated, the dog not having been lured on the premises by any bait, the owner of the premises is not guilty of "needless torture and mutilation" of the animal within the meaning of the statute. *Hodge v. State*, 11 Lea (Tenn.) 528, 47 Am. Rep. 307. In this case, the court, *per Cooke, J.*, said: "A literal construction of this act would seem to indicate that no one is permitted to kill or wound any living creature, however noxious, even a blackbird or a crow, or a skunk or a serpent, unless under some necessity, without being guilty of a penal offense. We do not understand such to be the

Intoxication, and circumstances resulting therefrom, furnish no excuse for a person who cruelly treats an animal in his custody.¹

An "Impulse of Anger" does not palliate a wilful and needless killing.²

Acting under Orders of Superior. — The conductor and driver of a horse car are not excused from liability for cruelty to the horses, in overloading them by taking on too many passengers, on account of the fact that they are in the employ of the railroad company and acting under orders from their superiors.³

Payment of Value of Animal Killed. — It has been held that under a statute making the needless killing of an animal a misdemeanor, payment to its owner of the value of an animal killed does not mitigate the offense, nor does failure to make compensation aggravate it.⁴

7. Punishment. — The statutes against cruelty to animals generally provide a specific punishment for the offense, or else, by making it a misdemeanor, leave it to be punished by fine or imprisonment, or both, like other misdemeanors.⁵

IV. SOCIETIES FOR THE PREVENTION OF CRUELTY TO ANIMALS — 1. In General — Public Aid. — In many of the states there now exist societies whose object is to prevent cruelty and to bring to justice those who ill-treat animals. These societies, in some instances, receive financial assistance from the government, which mainly consists in the payment to them of all or a portion of

meaning of this act. Whilst its object was to prevent cruelty to animals, and was intended as a humane provision for their protection, it was not intended to deprive a man of the right to protect himself, his premises and his property, against the intrusions of worthless, mischievous, or vicious animals, by such means as are reasonably necessary for that purpose. The object of the statute was to protect animals from wilful or wanton abuse, neglect, or cruel treatment, and not from the incidental pain or suffering that may be casually or incidentally inflicted by the use of lawful means of protection against them."

1. Intoxication. — In *Com. v. Curry*, 150 Mass. 509, the defendant was indicted under *Massachusetts Pub. Stat.*, c. 207, § 52, for unnecessarily failing to provide a horse in his custody with proper food, drink, and shelter. The alleged offense consisted in leaving the horse, harnessed to a carriage, in the woods all night, no food or water being supplied to the horse. The defendant claimed that while driving through the woods he lost his way, got "bewildered," and could not find his way out, and that he therefore left the horse and carriage and walked to a certain place for assistance. The question was raised as to whether the defendant was intoxicated at the time, and the court said that such question was material only in determining whether he unnecessarily left the horse, and that if the defendant got bewildered because he had voluntarily become intoxicated, his bewilderment was not a defense, though it might be if it resulted from other causes; but added that the jury could properly find that if the defendant got bewildered at all intoxication was the only reasonable explanation of his condition.

In *State v. Avery*, 44 N. H. 392, the defendant was indicted for cruelly beating a horse. It was held that the trial court properly declined to instruct the jury that if the defendant was intoxicated at the time, he could not have the

wilful, malicious intent which was essential to the commission of the offense charged.

2. Impulse of Anger. — *State v. Neal*, 120 N. Car. 613.

3. Acting under Orders of Superior. — *People v. Tinsdale*, 10 Abb. Pr. N. S. (N. Y. Gen. Sess.) 374.

4. Payment for Animal Does Not Affect Offense. — *Grise v. State*, 37 Ark. 456.

Payment as Showing Act Not Wanton. — In *Lott v. State*, 9 Tex. App. 206, the defendant was indicted for wounding a hog. He offered evidence to show that as soon as he had killed the hog he sent the value of it in money to the owner, and paid him for it. It was held error in the trial court to exclude this evidence, as the jury should have been allowed to consider it in determining whether the killing was wilfully and wantonly done, or whether the facts offered to be proved negatived such motives.

5. Punishment. — The *Arkansas Act* for the prevention of cruelty to animals (*Sand. & Hills' Dig. Ark. Stat.* 1894, § 1516 *et seq.*) makes the forbidden cruelty, or needless killing, etc., misdemeanors, but does not provide how such offenses are to be punished. They are, therefore, punishable by fine and imprisonment, or both, under the general statute (*Sand. & Hills' Dig. Ark. Stat.* 1894, § 2294), which provides for such omissions. *State v. Greenlees*, 41 Ark. 353.

The *Maryland Act* of March 27, 1890 (*Laws of 1890*, c. 198), in relation to cruelty to animals, which is a general law on the subject, applicable to the whole state, and makes such cruelty a misdemeanor, and therefore punishable by fine or imprisonment, or both, superseded the local law of Baltimore city (1 Code Public Local Laws, art. 4, § 242) providing for the punishment of cruelty to any horse, ox, or other animal by a fine of not less than five nor more than twenty dollars. *State v. Falkenham*, 73 Md. 463.

such fines as are imposed and collected for cruelty.¹

2. Powers of Officers and Agents — *a. TO MAKE ARRESTS.* — In *New York*, the officers and agents of all duly incorporated societies for the prevention of cruelty to animals are declared to be peace officers, and, as such, have power to arrest any person who commits, in their presence, any violation of the law in respect to cruelty to animals,² but they have no authority to stop a vehicle in order to examine the horses to ascertain whether any offense is being committed in driving them.³

b. TO KILL INJURED OR DISEASED ANIMAL. — The statutes of some states have given to any officer of these societies the right to kill or cause to be killed any animal found not properly cared for, and appearing, in the judgment of two or more citizens called by him to view such animal in his presence, to be diseased or injured past recovery for any useful purpose,⁴ but such statutes are of doubtful constitutionality.⁵

1. Fines Collected Paid to S. P. C. A. — Under the *Massachusetts* statutes (Pub. Stat. Mass., c. 207, § 58), all fines collected upon "the complaint or information of any officer or agent of the Massachusetts Society for the Prevention of Cruelty to Animals, under this act, shall inure and be paid over to the said society in aid of the benevolent objects for which it was incorporated." *Massachusetts Soc., etc., v. Boston*, 142 Mass. 24.

The *New York* Penal Code, § 668, provides that "all fines, penalties, or forfeitures imposed or collected for a violation of the provisions of this title, or of any act for the prevention or punishment of cruelty to animals, now in force or hereafter passed, must be paid on demand to the American Society for the Prevention of Cruelty to Animals; except where the prosecution shall be instituted or conducted by a society for the prevention of cruelty to animals duly incorporated under the general laws of this state, in which case such fine, penalty, or forfeiture must be paid on demand to such society."

This provision applies to fines collected in a city incorporated after the above section became a law, although the charter of such city gives it ample authority to deal with all offenses of that character, as such a charter does not amount to a repeal of the above section. *American Soc., etc., v. Gloversville*, 73 Hun (N. Y.) 40.

The above section applies to fines collected in the city of Cohoes. *American Soc., etc., v. Cohoes*, (Supreme Ct.) 4 N. Y. St. Rep. 808.

2. Power to Arrest. — *Fox v. Mohawk, etc.*, *Humane Soc.*, 20 Misc. Rep. (N. Y. Supreme Ct.) 461; *Stage Horse Cases*, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 51; *Davis v. American Soc., etc.*, 75 N. Y. 362, *affirming* 6 Daly (N. Y.) 81, which *affirmed* 16 Abb. Pr. N. S. (N. Y.) 73. See also the title *ARREST*, vol. 2, p. 873.

3. No Power to Stop Vehicle to Examine Horses. — *Stage Horse Cases*, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 51.

In this case it was also held that they had no authority to take charge of the horses or vehicles in any case, nor to send them to the stables, nor to assume any authority or control over them, nor to interfere between the driver of a stage and his passengers and to require the return of the fares paid when the horses were taken.

But under the statute now in force (*New York* Penal Code, 1891, § 656), they have a right to take charge of the animals or vehicles in charge of a person arrested by them.

4. What Condition Justifies Killing. — A horse is injured past recovery for any useful purpose, and may therefore be lawfully killed (under the *New York* Penal Code, § 656) by an officer of a society for the prevention of cruelty to animals, when such horse is in an emaciated condition, having bruises about the head and body, which are raw and bloody; and is lying among a lot of stones, unable to get upon his feet. *Sahr v. Scholle*, 89 Hun (N. Y.) 42.

Judgment as to Necessity Not Conclusive upon Owner. — Where a horse has been so killed by an officer of a society for the prevention of cruelty to animals, the determination of the two reputable citizens called to view it, as to the necessity of the killing, is not conclusive on the owner of the horse. He may have his action for damages against the officer, in which case it is incumbent upon the defendant, in order to justify under the statute, to prove that the horse was actually injured past recovery for any useful purpose. *Sahr v. Scholle*, 89 Hun (N. Y.) 42. To the same effect see *Brill v. Ohio Humane Soc.*, 4 Ohio Cir. Ct. Rep. 358.

5. Statute Held Unconstitutional. — The provision of Rev. Stat. of *Maine*, c. 124, § 42, which gives to an officer or agent of a society for the prevention of cruelty to animals the right to take possession of any horse or other animal which is diseased, disabled, injured, or not properly cared for, and have the same valued by two reputable persons called by him to view such animal, and thereupon cause the animal to be destroyed; and further providing that the price so fixed upon shall be the measure of the value of the animal, and not providing for any notice, actual or constructive, to the owner, in order that he may be heard, is in violation of the fundamental law which prohibits any person being deprived of his property without due process of law. *King v. Hayes*, 80 Me. 206.

A similar statute of *Ohio* (Bates' Anno. Stat., § 3725a) was held unconstitutional. *Brill v. Ohio Humane Soc.*, 4 Ohio Cir. Ct. Rep. 358.

See the title *DUE PROCESS OF LAW*.

CRUELTY TO CHILDREN. — As cruelty grows out of the special relations of the parties, the question of cruelty to children will receive treatment in full in other titles of this work.¹

Exposure. — Exposure of a person of tender years to the inclemency of the weather is cruelty.²

Keeping Without Food. — Keeping an infant, unable to provide for itself, without adequate food, so as to injure its health, is cruelty whether such infant be child, apprentice, or servant, if the party is obliged by duty or contract to provide for it.³

1. See the titles APPRENTICES, vol. 2, p. 488; GUARDIAN AND WARD; PARENT AND CHILD; SCHOOLS.

Theatres. — As to the employment of children of tender years in public entertainments, see the title THEATRES.

2. *Rex v. Ridley*, 2 Campb. 650.

Injury from Exposure. — At common law the act of exposing a child to the inclemency of the weather must result in an injury to its health in order to constitute the crime. *Reg. v. Hogan*, 5 Eng. L. & Eq. 553; *Shannon v. People*, 5 Mich. 72; *Lynam v. People*, 65 Ill. App. 687. See *infra*, next note.

In *Lynam v. People*, 65 Ill. App. 687, it was held that section 53 of the Code of *Illinois*, providing that any person who shall wilfully or unnecessarily expose to the inclemency of the weather, or shall in any other manner injure the health or limb of any child, apprentice, or other person under his legal control, shall be fined, was intended to enlarge the scope of the common law, and to make it a crime to expose a child of tender years to the inclemency of the weather, regardless of the consequences to its health.

Meaning of Exposure. — *Shannon v. People*, 5 Mich. 90, was a case arising on the construction of a statute imposing a penalty on exposing a child with intent to abandon it. The court said: "The difficulty arises upon the word 'expose,' and what shall be said to be a sufficient exposure of the child to bring the act within the prohibition of this section, is a question of some difficulty. The term 'expose' in such a connection does not appear to have become a legal term, the meaning of which is settled by judicial decision, either in this country or in England. * * * The question, therefore, upon this point, is simply this: Did the acts of the party leaving or abandoning the child, viewed in connection with the time, place, and all the accompanying and surrounding circumstances, subject the child to the hazard of such personal injury? If so, this is an exposure. * * * This may be rendered more definite by saying that if the child be left at such a time, in such a place, and under such circumstances, as would render a parent, or other person (to whom it is confided) of ordinary prudence and humanity, reasonably apprehensive of such injury to the child, then the hazard may be said to exist, and it is an exposure within the statute." *Manning, J.*, said: "I agree with my brethren, except in the construction given by them to the statute; and in that we differ but slightly. The word 'expose,' on which the construction of the section hinges, is here used, it seems to me, in the sense of 'to cast out to chance; to

place abroad, or in a situation unprotected' — one of the definitions given to the word by Webster; and that every abandonment, therefore, where there is no provision made for the protection of the child at the time of the abandonment, or previously, comes within the statute. Nothing short of this, I think, will satisfy the words of the statute, or fully meet the evil it was intended to suppress. 7 AM. AND ENG. ENCYC. OF LAW (1st ed.), 532, 533."

English Statute. — The unlawful abandonment or exposure of a child less than two years old, to the danger of its life or permanent injury to its health, is an indictable misdemeanor, triable at quarter sessions and punishable by penal servitude from three to five years, or imprisonment with or without hard labor for not over two years, and (or) fine (5 & 6 Vict., c. 38, § 1; 24 & 25 Vict., c. 100, §§ 27, 71; 54 & 55 Vict., c. 69, § 1). To be unlawful the abandonment must be wilful. It has been held that the offense is committed by sending the infant as a parcel in a hamper by train (*Reg. v. Falkingham*, L. R. 1 C. C. 222); and by the father of an infant who refused to take in his child when left on his doorstep by his wife, after he knew that she left it there as giving up her custody of it (*Reg. v. White*, L. R. 1 C. C. 311).

3. *Rex v. Friend*, R. & R. C. C. 20.

It was said by *Martin, B.*, and *Erle, J.*, in *Reg. v. Mabbett* (5 Cox C. C. 339), that it is the bounden duty of all persons having children, when they themselves cannot support them, to endeavor to obtain the means of getting them support; and that if they wilfully abstain from going to the Union (*i. e.*, the almshouse), where they have by law a right to support, and the children die, they are criminally responsible.

Adult. — In *Collins v. State*, 97 Ga. 433, it was held that the provisions of the *Georgia Act* "for the prevention of cruelty to children" did not include "a male person who has attained the physical strength and stature of manhood and who is almost as large as his father, but not quite as strong," such person not being a child in the sense in which the word was used in the act. The statute applies only to children of tender years.

A Servant Who Is an Adult. "if not provided with proper nourishment, may remonstrate, may leave the service, or may complain to a magistrate. The withholding of proper food from such a person may be a breach of contract; but it is not a crime of which the law will take cognizance." *Rex v. Ridley*, 2 Campb. 650.

Child Capable of Judging for Itself. — Where a child was between fourteen and seventeen

Who May Be Liable for Cruelty. — Laws in reference to cruelty to children have recently been enacted, and under such statutes it has been held that one who voluntarily assumes the custody of a child may be guilty of cruelty.¹

CRUISE. (See also VOYAGE, and see the title MARINE INSURANCE.) — It has been said that a cruise is nothing more than a voyage.²

CRY. — To cry is to make oral and public proclamation of, to notify or advertise by outcry, especially things lost or found, goods to be sold, etc. Public advertisement by outcry, proclamation, as by hawkers of their wares.³

years of age, capable of acting and judging for herself, and was not prevented from going out and complaining of the treatment she received, or otherwise acting for herself, it was held that an indictment alleging her as "an infant of tender years," and under the "care and control" of the prisoners, was not proved. Anonymous, 5 Cox C. C. 279.

Necessity of Actual Injury to Child. — Where a child was left without food from Monday evening till Thursday morning, and but for the attention of a neighbor the child must have suffered most severely, and might probably have died for want of food, it was held that the conduct of the mother in absenting herself, irrespective of any actual injury to the child, was not a misdemeanor at common law, and that therefore it was necessary to prove the averment that the child was greatly injured and weakened; and that the evidence that the child had suffered to some, but not to any serious, extent, was not sufficient if it did not show any serious injury to the health. Reg. v. Phillpott, Dears. C. C. 179; Reg. v. Hogan, 2 Den. C. C. 277. See also Cowley v. People, 83 N. Y. 464, note *infra*.

1. **Under a Statute of New York State.** entitled "An Act to prevent and punish wrongs to children" (Laws of 1876, c. 122), enacting that whoever, having the care or custody of any child, shall wilfully cause or permit the life of it to be endangered, or the health of it to be injured, or it to be placed in such a situation that its life may be endangered or its health be likely to be injured, shall be guilty of a misdemeanor, it was held that though a parent or relative may perhaps excuse non-performance when indicted at common law for neglect of his child, by the plea that he had not the means to get food for the child or himself, yet one who, with no natural or legal duty, voluntarily takes the care and custody of a child, must either do his duty to it in giving it food, or must yield to others or to the public, the care and the opportunity to feed it, or he becomes amenable to the statute, irrespective of the possession of means of support, as an ingredient of the offense. Cowley v. People, 83 N. Y. 464.

Statutory Construction — Course of Conduct. — Under the statute of *New York* (L. 1876, c. 122), to prevent and punish wrongs to children (see *supra*), the court, in *Cowley v. People*, 83 N. Y. 464, said: "Doubtless one might cause the life of a child to be endangered, or its health injured, as are the words of the section, by a single act; as by putting him to ride upon a vicious and ungovernable horse, or by putting him to tend a dangerous piece of machinery. That could be done on a single day. Doubtless, also, he might cause the

same by a course of conduct made up of successive acts or negligences; as by putting him at menial service in a pest-house and keeping him there, or by continuously exposing him to the rigor of the seasons with a lack of clothing. That might run on for many days. Both the single act and the course of conduct might endanger life or injure health; and if one is within the purview of the statute, why is not the other? Take then the other word of the statute, 'permit.' It conveys exactly the idea of what is claimed to have been shown by the facts in the case, and what we must, from the verdict, assume was shown to the satisfaction of the jury. There was an allowance, a sufferance, a toleration, an authorization by the plaintiff in error, of a routine of diet that the medical witnesses pronounced injurious to the health of children. With the care and custody of the child in his hands, and with the power to change that routine, and with the duty of knowing that it ought to have been changed, he suffered it to go on; he started it and (*per* and *mitto*) he sent it through the course of the days and weeks and months during which the boy was with him."

Statute — Societies. (See also the title SOCIETIES.) — Under L. 1875, c. 130, providing that societies for the prevention of cruelty to children may prefer a complaint, before any court or magistrate having jurisdiction, for the violation of any law relating to or affecting children, a society may prosecute cases arising under Code Crim. Pro., § 899, declaring one who neglects to provide for his child according to his means, a disorderly person, and giving the magistrate power to require a written undertaking to support the child. *People v. Strickland*, 13 Abb. N. Cas. (Yonkers City Ct.) 473.

2. *The Brutus*, 2 Gall. (U. S.) 539.

Cruise imports a definite place as well as time of commencement and termination, unless such construction is repelled by the context. When not otherwise specially agreed, a *cruise* begins and ends in the country to which a ship belongs, and from which she derives her commission. *The Brutus*, 2 Gall. (U. S.) 539.

3. **Municipal Regulations.** — *Rochester v. Close*, 35 Hun (N. Y.) 210. In that case it was held, where a city had been authorized to "regulate the ringing of bells and the *erying* of goods and other commodities for sale at auction or otherwise, and to prevent disturbing noises in the streets," that this did not extend to the prohibition of the auction of jewelry after sunset. The court said: "We think the statute does not confer any authority on the council to regulate or prohibit a sale of goods at auction within the store or building of the

CRYOLITE. — Cryolite is a double fluoride of aluminum and sodium.¹

CT. — The abbreviations "ct." and "c." are used to represent "cent" or "cents."²

CUBIC. — See note 3.

CUCKING-STOOL. (See generally COMMON SCOLD, vol. 6, p. 235; and see the titles CRUEL AND UNUSUAL PUNISHMENT, *ante*; NUISANCES.) — A cucking-stool was a chair upon which a person was placed and ducked; an engine invented for the punishment of scolding and unquiet women.⁴

CUJUS EST SOLUM EJUS EST USQUE AD CÆLUM ET AD INFEROS. (See generally the titles ABATEMENT OF NUISANCES, vol. 1, p. 63; BOUNDARIES, vol. 4, p. 756; DEEDS; EASEMENTS; LIGHT AND AIR; NUISANCES; MINES AND MINING; REAL PROPERTY; TREES; TIMBER; WATERCOURSES.) — *Cujus est solum ejus est usque ad cælum et ad inferos*, means, he who owns the soil owns it to the sky and to the centre of the earth.⁵

CUL-DE-SAC. — A *cul-de-sac* is a street open at one end only; a blind alley.⁶

CULPABLE. — The word "culpable" means not only criminal but censurable; and, when the term is applied to the omission by a person to preserve the means of enforcing his own rights, "censurable" is more nearly equivalent.⁷

seller, but that it relates solely to the manner or custom of advertising a sale by public outcry, and authorizes the council to regulate that custom or manner of advertising, but not to interfere in any manner with the sale, whether at auction or in any other manner adopted by the seller." See generally the titles HAWKERS AND PEDDLERS; MUNICIPAL CORPORATIONS; ORDINANCES.

1. Pittsburgh Reduction Co. v. Cowles Electric Smelting, etc., Co., 55 Fed. Rep. 306. This was a patent case.

2. Hunt v. Smith, 9 Kan. 153; Jackson v. Cummings, 15 Ill. 449.

3. Cubic Yard. (See also the title WEIGHTS AND MEASURES.) — In Corcoran v. Chess, 131 Pa. St. 356, the court said: "The contract is free from ambiguity. A 'cubic yard' is a term well known to every one. It means twenty-seven cubic feet; and when the parties used this term in their contract, we must presume, in the absence of evidence to the contrary, they understood it in its ordinary and popular meaning."

4. James v. Com., 12 S. & R. (Pa.) 230; Co. 3d Inst. 219, 4 Bl. Com. 168.

5. See Coke's Litt. 4a.

6. Street. (See generally the titles PARKS; PRIVATE WAYS; STREETS AND SIDEWALKS.) — In Perrin v. New York Cent. R. Co., 40 Barb. (N. Y.) 70, the question was whether a certain strip of land, having but one entrance off of a street, was a street or a park. The court said: "These premises are in no sense a public street, as there is but one entrance, which is at its intersection with Jones street at the east end, and does not terminate at the west end, or communicate elsewhere with any other street or other passage-way. It is what is called a *cul-de-sac*, like Jauncey court which leads from Wall street in the city of New York. I cannot believe it was intended for a mere lane or alley for passage, although that is possible. I conclude that was not in fact the intention, for the reason that the plaintiff has nowhere so expressed it, but on the contrary has expressed an entirely different intention. He has declared it to be a park, and

has omitted to give it any other designation." This case, however, was reversed in Perrin v. New York Cent. R. Co., 36 N. Y. 123. The appellate court said: "It is beyond controversy, that this strip of land was to be left open and vacant for the use of the owners and occupants of the adjoining lots, for all the purposes of a street; and there is nothing to indicate that the plaintiff entertained any other or different purpose. * * * This finding is based on the fact that he designated the strip of land 'park' on the map. What it was called, I think of very little importance, when its use and principal purpose is obvious beyond possible conjecture. It cannot be denied, that it was to be used as a passage-way or street; this became a necessity, from the location of the lots abutting upon it; this necessity rendered it inappropriate as a park. Nor does it answer the strict definition of 'park' as platted on the map. A park is, in its strict sense, a piece of ground inclosed for purposes of pleasure, exercise, amusement, or ornament. This strip of land was uninclosed — open to the common, and was intended so to remain. Nor was it set apart either for pleasure ground or for purposes of exercise, amusement, or decoration. Its shape and situation was unsuitable for either purpose. It was opened for use, and use alone, and that use was as a passage-way or street. This was its primary and chief design, and, so far as the case shows, its only design. Although called a park, as we have seen, it was not a park."

7. Waltham v. Wright, 8 Allen (Mass.) 121

Culpable Homicide has been described as a crime varying from the very lowest *culpability* up to the very verge of murder. Lord Moncrieff, Arkley's R. 72. See the title HOMICIDE.

Culpable Negligence. (See the titles CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368; NEGLIGENCE.) — *Culpable* negligence is the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do, under all the circumstances surrounding the particular case. Scott v. Crews, 2 S. Car. 537;

CULTIVATE. (See the title ADVERSE POSSESSION, vol. I, p. 827. And see generally the title CROPS, *ante.*) — To cultivate is to till or husband the ground; to improve or forward the product of the earth by labor.¹

Hot Springs R. Co. v. Newman, 36 Ark. 610; Kay v. Pennsylvania R. Co., 65 Pa. St. 273; Woodman v. Nottingham, 49 N. H. 392; Johnson v. West Chester, etc., R. Co., 70 Pa. St. 366. In Chicago, etc., R. Co. v. Carpenter, 12 U. S. App. 398, it is said: "A man is guilty of *culpable* negligence when he does or omits to do an act that an ordinarily prudent person in the same situation, and with equal experience, would not have done or omitted to do; or when he voluntarily exposes himself to a danger which there was no occasion for him to incur in the proper discharge of his duties."

Same — Limitation of Actions Against Representative. (See generally the title DEBTS OF DECEDENTS.) — A *Massachusetts* statute provided that one having a claim against the estate of a deceased person, which had not been prosecuted within the time limited by law, might proceed in equity upon such claim unless he had been guilty of *culpable* negligence. In construing the phrase "*culpable* negligence" the court, in *Waltham Bank v. Wright*, 8 Allen (Mass.) 122, says: "It is not easy to give a precise definition of the phrase '*culpable* neglect,' as used in the statute; or to lay down a fixed rule of interpretation which may serve as a test of all cases arising under it. '*Culpable* means not only criminal, but censurable; and when the term is applied to the omission by a person to preserve the means of enforcing his own rights, '*censurable*' is more nearly an equivalent. As he has merely lost a right of action which he might voluntarily relinquish, and has wronged nobody but himself, '*culpable* neglect' would seem to convey the idea of neglect for which he was 'to blame;' that is, the neglect which exists where the loss can fairly be ascribed to his own carelessness, improvidence or folly." And, in *Sykes v. Meacham*, 103 Mass. 287, the court said: "It is hardly necessary to consider the question whether the phrase '*culpable* neglect,' as used in the statute, means anything more than gross neglect or failure to make reasonable inquiry. It is sufficient that the plaintiff does not present a case in which justice and equity, in any sense which a court of chancery can give to those words, require that judgment should be rendered in favor of this claim."

1. *State v. Allen*, 13 Ired. L. (35 N. Car.) 36; *Clark v. Phelps*, 4 Cow. (N. Y.) 190.

Improved or Cultivated. (See also IMPROVE.) — A *New York* highway act authorizing the laying out of a public highway through land lying in a state of nature, or through improved or *cultivated* land, was held not to authorize the commissioners to lay out a highway through buildings, mills, or manufactories, etc., and their appurtenances. The court said: "The terms, to improve or *cultivate*, may be considered synonymous. To *cultivate* is defined: 'to improve the product of the earth by manual industry.' When speaking of improved land, it is generally understood to be such as has been reclaimed, is used for the purpose of husbandry, and is

cultivated as such, whether the appropriation is for tillage, meadow, or pasture. The more valuable improvements on land, comprising buildings and their immediate appurtenances, could not have been in contemplation, as appears evident by the exception itself. When, therefore, the exception protects a garden or orchard of four years, and is silent as to other improvements the removal of which would be attended with greater inconvenience and loss to the owner, it goes far to give a construction to the meaning of the words. A fair inference may be drawn from this provision, that the legislature intended to confine the power of laying out roads within the limits I have stated. It became necessary to guard the right of the owner with respect to a garden and orchard; for they fall within the terms '*improved* and '*cultivated*.' A garden is formed by *cultivation* of the land strictly; the land on which an orchard is planted is generally used in like manner. If the act had been silent as to these, there would be nothing opposed to their appropriation by the commissioners if they deemed it proper. Could the legislature intend that a garden should be protected, and yet allow every other appendage to the dwelling-house to be removed; that barns and out-houses be taken down to give place to a road?" *Clark v. Phelps*, 4 Cow. (N. Y.) 203.

But in *Lyon v. Hamor*, 73 Me. 56, a mill site upon which a mill had been erected was held to be *cultivated* or improved land within a statute allowing private ways from such lands. See the title PRIVATE WAYS.

Cultivated Field. (See generally the title FENCES.) — A town lot may be a *cultivated* field. A statute of *North Carolina* makes it a misdemeanor for any person "to unlawfully and wilfully burn, destroy, pull down, injure, or remove any fence, etc., * * * surrounding or about any yard, garden, *cultivated* field, or pasture." On the trial of an indictment under the act, it was held that a town lot "which had been *cultivated* the year preceding that in which the alleged offense was committed, and was prevented from being *cultivated* in the latter year by the removal of the fence," was a *cultivated* field within the meaning of the phrase as used in the act. The court said: "Worcester says a lot is a 'piece of land,' and a field is 'a *cultivated* tract of land.' The term 'lot' is usually applied to parcels of land lying in cities and towns. It may consist of one acre, or more or less; and, if enclosed and *cultivated*, is just as much a 'field,' according to the definition, as if it lay in the country. An acre of land lying in the country, fenced and *cultivated*, would certainly be called a field. The fact of its lying on the one or the other side of the corporate boundary of a town would make no difference. If it is a garden, of course it should be so charged in the bill of indictment." *State v. McMinn*, 81 N. Car. 585.

A statute provided that it should be a misdemeanor to destroy or remove a fence sur-

CULVERT. (See generally the title RAILROADS.)—A culvert is a covered waterway of wood or stone.¹

rounding *cultivated* grounds. This was held to apply to grounds in course of preparation for making a crop, though no crop had been actually planted. The court said: "The word *cultivated* may refer either to past or present time. A field on which a crop of wheat is growing is a *cultivated* field, although not a stroke of labor may have been done in it since the seed was put into the ground; and it is a *cultivated* field after the crop is removed. It is, strictly, a *cultivated* piece of ground. Mr. Bailey, in his dictionary, defines *cultivate* to be, 'to till or husband the ground,' to forward the product of the earth, by general industry.' Here the land had been prepared for tillage, by being cleared and fenced in, and a crop had actually been raised upon it the year preceding. After a crop is removed from a field, it is often very important to the owner as a pasture. Can it be presumed that the legislature intended to withdraw such a field from its protection?" *State v. Allen*, 13 Ired. L. (35 N. Car.) 37.

Cultivated is not confined to lands upon which a crop is growing. *Barrett v. Nelson*, 29 Kan. 594.

Inclosed or Cultivated Field.—A field need not necessarily be inclosed by a lawful fence, in order to be an "inclosed or *cultivated* field," within an act requiring railroad companies to fence their tracks along such fields. *Biggerstaff v. St. Louis, etc., R. Co.*, 60 Mo. 567. See generally the titles FENCES; RAILROADS.

State of Cultivation.—In an act limiting a widow's dower to lands in a state of *cultivation*, "'a state of *cultivation*' must be the converse to a state of nature; and whenever lands have been wrought with a view to the production of a crop, they must be considered as becoming and continuing in 'a state of *cultivation*,' until abandoned for every purpose of agriculture, and designedly permitted to revert to a condition similar to their original one." Lands in a state of *cultivation* are not necessarily such as produce an income; they do not, *ipso facto*, cease to be in a state of *cultivation* because naturally sterile and unprofitable for agriculture. *Johnson v. Perley*, 2 N. H. 56. See generally the title DOWER.

Suitable for Cultivation.—Land situated in the mountains, six miles from the sea, difficult of access for want of roads; of uneven, but not steep, surface; of a rich soil, covered with brush and timber which must be removed before it can be ploughed; valuable as timber land, but more valuable, after the removal of the timber, for agricultural purposes,—such land is "suitable for *cultivation*," within a constitutional provision that such land belonging to the state shall be granted only to actual settlers. The phrase includes "all lands ready for occupation, or which by ordinary farming processes are fit for agricultural purposes." It is not confined to those which are "presently or immediately fit for tillage, without other preparation than appertains to the ordinary operations of husbandry," and are capable of *cultivation* without the neces-

sity of clearing the timber. *Manley v. Cunningham*, 72 Cal. 236. See generally the title STATE LANDS.

Liens. (See also the title CROPS, *ante*.)—In *Mooney v. Hough*, 84 Ala. 85, it was held that the act giving a lien to a tenant in common for articles advanced for "*cultivating* and gathering crops," was not to be construed narrowly or technically. The court said: "We are not inclined to give to the language employed a narrow or technical meaning; but treating the words '*cultivating* and gathering' as the synonym of 'producing and utilizing,' and at most expressing an object to be accomplished, we regard the words 'provisions, supplies, teams, material, labor, services, and money,' as intended to embrace all the agencies, appliances, and helps, which are necessarily or customarily employed in the attainment of such object. In these are implied not only field labor, its wages, food and raiment, but indoors labor for the preparation of the same. All cannot do field labor; and these indoors, auxiliary services and servitors must be provided for, and taken into account. Taken altogether, we think the statute embraces, and was intended to embrace, the preparation of the land, for that is part of the *cultivation*. It also embraces the working of the crops, their harvesting, and all else connected with their preservation and utilization." See generally the title JOINT TENANTS AND TENANTS IN COMMON.

Same—Things Necessary for Cultivation.—An act gave a lien upon a farm for "an advance of money, purchase of supplies, farming utensils, working stock, or other things necessary for the *cultivation* of a farm or plantation." In construing this, the court said, in *Herman v. Perkins*, 52 Miss. 813: "What is embraced in the words, 'other things necessary for the *cultivation* of the farm,' must be learned by resort to the usages and customs of the agricultural interest. The statute implies that the farmer has the land. What he needs, and what the statute proposes to secure, is the common and usual outfit provided from time to time, to make the crop. * * * The only rule that can be adopted with safety is to take into the account the system of agriculture as we actually have it,—the character of food, clothing, etc., usually consumed by laborers; the implements and provender appropriate for that use,—and in that light determine whether an account in whole or in part is in excess of the statute." It was held in that case that there is a rebuttable presumption that where the farmer in good faith has taken up goods on the faith of the lien they are necessary. Where the goods were used to pay laborers with, the seller was protected by the lien.

1. *Oursler v. Baltimore, etc., R. Co.*, 60 Md. 367.

Distinguished from Ditch.—In *Kowalka v. St. Joseph*, 73 Mich. 322, it was held that a ditch or drain running along the side of a village street, where it served the purposes of a gutter, did not become a *culvert* by being cov-

CUMBER. — See note 1.

CUMULATIVE BEQUESTS. — See the title LEGACIES AND DEVISES.

ered and used as a sidewalk. The court said: "When this ditch crossed Port street, or Main street, it became, perhaps, and most likely, a *culvert*. In such places it would meet the common understanding of a *culvert*. But when it ran along the side or on the outer edge of the street, where it served the purposes of a gutter or ordinary roadside ditch, the fact that it was covered, and used and maintained as a sidewalk, could not make it a *culvert*. An examination of a large number of scientific dictionaries confirms us in the view here taken. A *culvert* is said to be, like a bridge or viaduct, an arched drain to carry water under a road from one side to the other; and Webster defines it as 'an arched drain for the passage of water under a road or canal.' It is not often, if ever, that such a drain runs under the road or canal, and in the same direction. The drain in question here ran alongside the Main street, on the west side, to carry the surplus waters to the river. Where it crossed Port street it was undoubtedly a *culvert*, and one falling into it, and injured thereby, upon that street, could recover. The same may be said where it crosses Main street. But where it ran along Main street, on either side of it, the village was not obliged to cover it, or maintain it covered, for street purposes. The traveling public could not have found fault had it been kept as an open gutter. It was planked for sidewalk purposes, and not as a *culvert*. It cannot be considered as a *culvert*, without enlarging the meaning of that word, as commonly used and known, not only by the general public, but by engineers and other scientific authority."

Wood or Stone. — A deed conveying land to a railroad company was conditioned upon the erection of a *culvert*. It was held that the word *culvert* did not necessarily imply a stone arch. The court said: "A *culvert* was understood, in its ordinary and common parlance meaning, as a waterway, or water-pass-

age, whether of wood or stone, square or arched. [The deed] only meant that such provision should be made for the passage of the water that collected in the old bed of the river, through the railroad as newly constructed, as would drain, 'as far as practicable,' the old river bed. The kind of waterway, or its precise location, was not provided for." *Oursler v. Baltimore, etc., R. Co.*, 60 Md. 367.

1. Cumbering the Street, Distinguished from Encroaching upon the Street. — In *Grand Rapids v. Hughes*, 15 Mich. 57, it was held that a power given to municipal corporations to pass penalties for *cumbering* streets, would not warrant imposition of penalties for encroachments upon streets. The court said: "Our laws have always made a distinction between *cumbering* or obstructing a public way, and encroaching upon it. The former term has been applied to impediments to travel and passage placed in the open street, and tending to make its use difficult or dangerous; while the latter has embraced the actual inclosure of a portion of the street by fences or walks, or occupation by buildings. The mode of dealing with the two offenses has almost always been different, and the penalties also. We need only to refer to Code of 1827, pp. 396, 397, §§ 25, 26; Code of 1833, p. 111; Rev. Stat. of 1838, p. 128; Rev. Stat. of 1846, p. 138; Comp. Laws, p. 366; Laws of 1861, p. 153. The city charters have made the same distinction, and we are not at liberty to overlook it. An encroachment upon a street may, in one sense, be said to *cumber*, but as the legislature has never employed the two words as synonymous terms, we cannot hold that a power to impose penalties for *cumbering* or obstructing the streets will authorize proceeding in the same manner for encroachments."

See generally the title STREETS AND SIDEWALKS.

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 - b. *Qualifications and Exceptions*, 476.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the following titles in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE: EXAMINATION OF WITNESSES*, vol. 8, p. 870; *NEW TRIAL; TRIAL*.

For other matters of *SUBSTANTIVE LAW AND EVIDENCE* related to this subject, see the following titles in this work: *ADMISSIONS; ALIBI; ARBITRATION AND AWARD; CONFESSIONS; CORROBORATIVE EVIDENCE; CRIMINAL LAW; EMINENT DOMAIN; EVIDENCE*, and references there given; *EXPERT AND OPINION EVIDENCE; HOMICIDE; INSANITY; SUPPRESSION OF EVIDENCE; WITNESSES*.

I. DEFINITION AND GENERAL NATURE. — Cumulative evidence is additional evidence of the same kind to the same point.¹ While this definition

1. Definition of Cumulative Evidence — *Connecticut*. — Waller v. Graves, 20 Conn. 305; Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669; Hart v. Brainerd, 68 Conn. 50.

Georgia. — Brinson v. Faircloth, 82 Ga. 185.

Indiana. — De Hart v. Aper, 107 Ind. 460; Cooper v. Ellis, 3 Ind. App. 142; Humphries v. Marshall, 12 Ind. 609; Merryman v. Ryan, 24 Ind. 262; Houston v. Bruner, 39 Ind. 376; Winsett v. State, 57 Ind. 26; Dodds v. Vannoy, 61 Ind. 89; Shirel v. Baxter, 71 Ind. 352; Lefever v. Johnson, 79 Ind. 554; Kochel v. Bartlett, 88 Ind. 237; Andis v. Richie, 120 Ind. 138; Zouker v. Wiest, 42 Ind. 169; Hines v. Driver, 100 Ind. 315.

Iowa. — Morrow v. Chicago, etc., R. Co., 61 Iowa 487; Murray v. Weber, 92 Iowa 757; Means v. Yeager, 96 Iowa 694; German v. Maquoketa Sav. Bank, 38 Iowa 368; Able v. Frazier, 43 Iowa 175; Wayt v. Burlington, etc., R. Co., 45 Iowa 217.

Kansas. — McMullen v. Winfield Bldg., etc., Assoc., 4 Kan. App. 459; Clark v. Norman, 24 Kan. 515; State v. Tyson, 56 Kan. 686.

Maine. — Glidden v. Dunlap, 28 Me. 379; McLaughlin v. Doane, 56 Me. 289; Yeaton v. Chapman, 65 Me. 126.

Massachusetts. — Parker v. Hardy, 24 Pick. (Mass.) 246

Minnesota. — Layman v. Minneapolis St. R. Co., 66 Minn. 452; Lowe v. Minneapolis St. R. Co., 37 Minn. 283; Gilmore v. Brost, 39 Minn. 190; Nininger v. Knox, 8 Minn. 140; Schacherl v. St. Paul City R. Co., 42 Minn. 42.

Mississippi. — Vardeman v. Byrne, 7 How. (Miss.) 365.

Missouri. — Howland v. Reeves, 25 Mo. App. 458; State v. Stumbo, 26 Mo. 306; State v. Ray, 53 Mo. 345; State v. Rockett, 87 Mo. 666.

Nebraska. — Casey v. State, 20 Neb. 138.

Nevada. — Gray v. Harrison, 1 Nev. 502; Wall v. Trainor, 16 Nev. 131.

New York. — Guyot v. Butts, 4 Wend. (N. Y.) 579; Parshall v. Klinck, 43 Barb. (N. Y.) 203; Fleming v. Hollenback, 7 Barb. (N. Y.) 271; Cole v. Fall Brook Coal Co., 61 Hun (N. Y.) 623, 40 N. Y. St. Rep. 834; Brisbane v. Adams, 1 Sandf. (N. Y.) 195; Plattsburgh First Nat. Bank v. Heaton, 6 Thomp. & C. (N. Y.) 37; Lawrence v. Ely, 38 N. Y. 42, 97 Am. Dec. 768; Abrams v. Van Brunt St., etc., R. Co., 13 Civ. Pro. Rep. (N. Y. Supreme Ct.) 402.

Ohio. — Redman v. Culbertson, 2 Cinc. Super. Ct. Rep. 18.

Oregon. — Lander v. Miles, 3 Oregon 40.

Pennsylvania. — Com. v. Williams, 2 Ashm. (Pa.) 69.

has been generally accepted by the courts, the cases are not unanimous in defining the term, and a number of other definitions will be found in the reports, most of them, however, differing but slightly from the one given.¹

Texas. — *Houston, etc., Cent. R. Co. v. Forsyth*, 49 Tex. 171.

Vermont. — *Bradish v. State*, 35 Vt. 452.

Wisconsin. — *Keeler v. Jacobs*, 87 Wis. 545; *Krueger v. Merrill*, 66 Wis. 28.

The California Code of Civil Procedure, section 1838, defines cumulative evidence to be additional evidence of the same character to the same point.

Additional Testimony as to a Conversation. — A defendant testified concerning a certain conversation had between himself and the plaintiff, which conversation, as he stated it, amounted in law to a contract. The plaintiff in his testimony denied ever having such conversation as the defendant testified to. Judgment was rendered in favor of the plaintiff. The defendant then moved for a new trial on the ground of newly discovered evidence. The newly discovered evidence was the testimony of a certain witness, in substance, that he was present at the time of said conversation, and heard the same, and that it was in substance the same as the defendant had stated that it was in his testimony. This was held to be cumulative evidence. *Mitchell v. Stillings*, 20 Kan. 276.

Cumulation of Expert Testimony. — A., a physician, who attended the defendant at the time of his injury, testified that in his opinion the injury was of a character calculated to produce epilepsy. It was held that this testimony was cumulative of the evidence of the other physicians who, with all the data that A. had and more, testified to the same thing. *People v. Kloss*, 115 Cal. 567.

Homicide — Additional Evidence of Facts Testified to. — When witnesses are examined in respect to the condition of the pistol used in a homicide, and on the point whether or not the defendant shot at the deceased, additional evidence on these points is merely cumulative. *O'Shields v. State*, 55 Ga. 696.

Cumulative Evidence as to Capacity. — Newly discovered evidence of a boy's schoolfellows as to his capacity to write a certain paper purporting to be written by him, is cumulative of evidence given to the same point by his teachers and by medical men. *Gardner v. Gardner*, 2 Gray (Mass.) 434.

Cumulation of Witnesses as to Soundness of Horse. — Where on a trial before a jury it was in issue whether a horse was sound at the time of a sale, and there was evidence on both sides upon the point, and after the trial a witness was found who would swear that the horse was not lame at the sale or for a long time thereafter until he got a hurt which made him seriously lame, it was held that such testimony would be only cumulative of the evidence given at the trial. *Orand v. Walker*, 41 Ga. 657.

Cumulative Evidence as to Genuineness of Signature. — Where upon the trial of a case the genuineness of a signature was put in issue and made the subject of proof, it was held that evidence subsequently discovered, tending to prove the signature a forgery, was cumulative. *Wright v. Carillo*, 22 Cal. 596.

Newly Discovered Evidence Which Is Nothing but Data, by which the recollections of witnesses are refreshed, enabling them to testify more positively to facts to which they had previously testified at the trial of a cause, is cumulative evidence. *Plumb v. Campbell*, 129 Ill. 101.

Letters Corroborating Parol Evidence. — Miscellaneous letters found after the trial of a case, tending to corroborate and strengthen one side of the case, upon facts to which parol testimony was given at the trial, are merely cumulative evidence. *Wimpy v. Gaskill*, 79 Ga. 620.

Cumulative Evidence as to Time of Contract. — In *Milton v. Blackshear*, 8 Fla. 161, an application for a new trial was put upon the ground that the defendant would be able to prove by a re-examination of a witness, one Hartsfield, that he (the witness) was present when a contract was made between the plaintiff and the defendant, and that the contract was, that the plaintiff would sell the defendant certain lumber at eight dollars per thousand feet, to be paid for when the account should be presented to the defendant for payment. At the trial, one Graves had testified that he was the miller who had charge of the plaintiff's mills; that the lumber in question was sold and delivered, and that the custom of the mill was, where there was no contract, the price of lumber was eight dollars per thousand cash or when called for during the year, or eight dollars if paid by the end of the year; otherwise, ten dollars per thousand; and that the defendant said he would pay cash. It was held that as there was no material variance between the testimony of Graves touching the terms of the contract, and that proposed to be obtained by a re-examination of Hartsfield, the latter's testimony would be merely cumulative.

1. Other Definitions. — "Cumulative evidence means additional evidence of the same kind or degree as that previously given. * * * All evidence material to the issue, after any such evidence has been given, is in a certain sense cumulative; that is, is added to what has been given before. It tends to sustain the issue. But cumulative evidence, in legal phrase, means evidence from the same or a new witness — simply repeating, in substance and effect, or adding to, what has been before testified to." *Parshall v. Klineck*, 43 Barb. (N. Y.) 212. See also *Cole v. Van Keuren*, 51 How. Pr. (N. Y. Supreme Ct.) 451.

"Cumulative evidence is such as tends to support the same facts which were before attempted to be proved." *Doe v. Babineau*, 11 New Bruns. 89.

Cumulative evidence is that which speaks to facts in relation to which there was evidence on the trial. *McGavock v. Brown*, 4 Humph. (Tenn.) 251; *Noel v. McCrory*, 7 Coldw. (Tenn.) 623.

Cumulative evidence is evidence which but multiplies witnesses to any one or more of the facts before investigated, or only adds other circumstances of the same general character. *Waller v. Graves*, 20 Conn. 305; *Gans v. Harmon*, 44 Wis. 323.

Evidence That Is Not Cumulative. — Evidence different in kind from that already introduced to establish the same point is not cumulative.¹ Nor is evidence cumulative of other evidence of the same kind if it is upon a different issue.²

Evidence of New Fact Respecting the General Point in Issue. — Evidence is cumulative if it relates to the same subordinate or specific fact to which proof was before adduced,³ but not when it tends to prove a new fact respecting the general question or point in issue.⁴

In *Reed v. Clark*, 47 Cal. 194, Niles, J., in delivering the opinion of the court, said: "The alleged newly discovered evidence goes entirely to the point of the unchastity and improper conduct of the plaintiff. This was one of the questions in controversy at the trial, and upon which much evidence was introduced. The defendant now asks for a new trial, that he may multiply witnesses to acts upon the part of the plaintiff of the same general character as those proven at the former trial, and differing therefrom only in the times and manner of their commission. This evidence is merely cumulative."

In *Shute v. Jones*, (Supreme Ct.) 24 N. Y. Supp. 637, the court said: "Cumulative evidence is 'that which goes to prove what has already been established by other evidence.' (Bouv. Law Dict.) And so whatever tends to prove the same point to which other evidence is offered is, in law, cumulative."

1. Evidence Different in Kind to Establish the Same Point — *Connecticut*. — *Waller v. Graves*, 20 Conn. 305.

Georgia. — *Hughes v. Coursey*, 46 Ga. 115.

Illinois. — *Fletcher v. People*, 117 Ill. 184.

Indiana. — *Cooper v. Ellis*, 3 Ind. App. 142; *Humphries v. Marshall*, 12 Ind. 609; *Houston v. Bruner*, 39 Ind. 376; *Kochel v. Bartlett*, 88 Ind. 237; *Hines v. Driver*, 100 Ind. 315.

Massachusetts. — *Parker v. Hardy*, 24 Pick. (Mass.) 246; *Watts v. Howard*, 7 Met. (Mass.) 478; *Gardner v. Gardner*, 2 Gray (Mass.) 434.

Mississippi. — *Tardeman v. Byrne*, 7 How. (Miss.) 365.

New York. — *Guyot v. Butts*, 4 Wend. (N. Y.) 579; *Wilcox Silver Plate Co. v. Barclay*, 48 Hun (N. Y.) 54; *Powell v. Jones*, 42 Barb. (N. Y.) 24.

Ohio. — *Redman v. Culbertson*, 2 Cinc. Super. Ct. Rep. 18.

Texas. — *Riojas v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 268.

Virginia. — *Preston v. Otey*, 88 Va. 491; *Wynne v. Newman*, 75 Va. 811; *St. John v. Alderson*, 32 Gratt. (Va.) 140.

Wisconsin. — *Dierolf v. Winterfield*, 26 Wis. 176.

Compare *Plattsburgh First Nat. Bank v. Heaton*, 6 Thomp. & C. (N. Y.) 37.

Evidence is not necessarily cumulative because it tends to support a point to which some sort of evidence was given on the former trial; as where it is of an entirely different character and species from that given on the former trial, and tending to support the same point, in a separate and distinct way. *Schlencker v. Risley*, 4 Ill. 483, 38 Am. Dec. 100.

"The courts have sometimes used expressions seeming to warrant the inference that proof which goes to establish the same issue that the evidence on the first trial was introduced to establish, is cumulative. If the

evidence newly discovered, as well as that introduced on the trial, had a direct bearing on the issue, it may be cumulative; but we are not to look at the effect to be produced as furnishing a criterion by which all doubts in relation to this kind of evidence are to be settled; the kind and character of the facts make the distinction. It is their resemblance that makes them cumulative. The facts may tend to prove the same proposition, and yet be so dissimilar in kind as to afford no pretence for saying they are cumulative." *Marcy, J.*, in *Guyot v. Butts*, 4 Wend. (N. Y.) 582. See also *St. John v. Alderson*, 32 Gratt. (Va.) 140; *Klopp v. Jill*, 4 Kan. 482; *Preston v. Otey*, 88 Va. 491.

Evidence is not cumulative merely because former evidence may have indirectly tended to establish the same fact. *Wolf v. Mahan*, 57 Tex. 171.

Evidence is not cumulative of that previously introduced merely because it tends indirectly to strengthen it. *State v. Watson*, 7 S. Car. 63.

Evidence Not Cumulative of Contradictory Evidence on Same Point. — At the trial of a case the only evidence on a certain point was that introduced by the plaintiff in support of his alleged ground of action. It was held that evidence offered by the defendant to the same point, but directly contradicting the plaintiff's evidence, was not cumulative. *Lincoln v. Holmes*, 20 Neb. 39.

2. Evidence of the Same Kind upon a Different Point. — *Cooper v. Ellis*, 3 Ind. App. 142.

3. Illustration. — At the trial of a case, in order to prove that the plaintiff on or about the 22d of September, 1860, had paid to one W. twelve thousand dollars, as a consideration for the defendant's check, the plaintiff testified that on or about that date he received the greater portion of the money, upon a check drawn by one L. on the Bank of the Commonwealth. On a motion by the plaintiff for a new trial on the ground of newly discovered evidence, evidence which consisted merely of a check drawn by L. on the Bank of Commerce, dated September 19, 1860, with the canceling mark of the bank upon it, was held to be cumulative evidence. *Oakley v. Sears*, 7 Robt. (N. Y.) 111.

4. Evidence Tending to Prove a New Fact — *United States*. — *Aiken v. Bemis*, 3 Woodb. & M. (U. S.) 348.

Georgia. — *Dale v. State*, 88 Ga. 552; *Irwin v. Morell, Dudley (Ga.)* 72; *Long v. State*, 54 Ga. 564.

Idaho. — *Flannagan v. Newberg*, 1 Idaho 78.

Indiana. — *Blackburn v. Crowder*, 110 Ind. 127.

Iowa. — *Bogges v. Read*, 83 Iowa 543.

Nebraska. — *Gray v. Harrison*, 1 Nev. 502; *Wail v. Trainor*, 16 Nev. 131.

Admissions of Party Cumulative of Each Other but Not of Other Testimony. — If a fact is

New York. — *Cole v. Cole*, 50 How. Pr. (N. Y. Supreme Ct.) 59.

Vermont. — *Gilman v. Nichols*, 42 Vt. 313.

Wisconsin. — *Keeler v. Jacobs*, 87 Wis. 545; *Dierolf v. Winterfield*, 26 Wis. 175; *Finch v. Phillips*, 41 Wis. 387; *Wilson v. Flank*, 41 Wis. 94; *Smith v. Smith*, 51 Wis. 665; *Smith v. Grover*, 74 Wis. 171; *Bigelow v. Sickles*, 75 Wis. 427; *Hinton v. Cream City R. Co.*, 65 Wis. 323; *Goldsworthy v. Linden*, 75 Wis. 24.

See also *Perkins v. Dana*, 19 Vt. 589; *Knowles v. Northrop*, 53 Conn. 360. But see *Adams v. Bush*, 23 How. Pr. (N. Y. Supreme Ct.) 262.

Evidence is not cumulative merely because it tends to establish the same ultimate or principally controverted fact. *Able v. Frazier*, 43 Iowa 177.

"In a case in which a fact to be established is not sworn to directly by witnesses, but must be established by proof of other facts from which the main fact is to be inferred, then evidence of different facts from which the inference may be drawn is not strictly cumulative." *Galveston, etc., R. Co. v. Matula*, 79 Tex. 577.

In *People v. Superior Ct.*, 10 Wend. (N. Y.) 286, the turning point of the cause was whether a bill of exchange was or was not left at a bank for collection before noon of a certain day, and both parties produced testimony as to the time when the bill was left. It was held that the evidence of a witness, not produced on the trial, corroborating and supporting testimony which was produced, that the bill was left after noon, was cumulative.

Boggess v. Read, 83 Iowa 548, was an action for slander in charging a clergyman with lewdness. There was a verdict for the plaintiff, a motion for a new trial on the ground of newly discovered evidence, and an appeal. *Granger, J.*, who delivered the opinion of the Appellate Court, said: "When evidence is additional to other evidence on the same point, as distinguished from an ultimate fact, it is cumulative. * * * As a defense in this case the defendant attempted to show lewdness or adulterous conduct. On the trial already had, there was evidence of particular facts tending to show lewdness. Additional evidence as to such particular facts would be cumulative. But the showing of newly discovered evidence is that witnesses will testify to other facts from which the ultimate fact of lewdness may be found. The defendant purposes to prove acts not before attempted to be established. Such evidence we do not regard as cumulative within the rule for denying a party a new trial."

In *Longdon v. Kelly*, 51 Mo. App. 572, it was held that evidence tending to prove that a balance, alleged to be due from the defendant to the plaintiff, had been paid, was not cumulative of evidence that the plaintiff had, by his conduct, released the defendant from any obligation to pay said balance.

Evidence Explaining and Adding to Conversations Before Testified to. — A brought an action against B for fraudulent misrepresentations of the credit of C, to whom, as a result of such misrepresentations, he loaned money, which

was lost. Upon the trial, the plaintiff proved conversations with the defendant, recommending C as good and responsible, on which he relied to support his action. The defendant offered no testimony on this point. After a verdict for the plaintiff the defendant moved for a new trial on the ground of newly discovered evidence, explaining and adding to the conversations from which the alleged misrepresentations were inferred, and proving other parts of such conversations, and altering their effect. It was held that the newly discovered evidence was not cumulative. *Simmons v. Fav*, 1 E. D. Smith (N. Y.) 107.

Evidence of New Facts Rendering an Uncertainty Certain. — Testimony which tends to render clear and positive that which was before equivocal and uncertain, by the statement of new facts, is not cumulative. *Redman v. Culbertson*, 2 Cinc. Super. Ct. Rep. 18.

Evidence of a Different Character Tending to Prove Same Proposition. — Although the evidence tends to prove the same proposition as that previously introduced, yet it is not cumulative when it is of a different character, and merely tends to prove the former proposition by proof of a new and distinct fact. *German v. Maquoketa Sav. Bank*, 38 Iowa 368; *Layman v. Minneapolis St. R. Co.*, 66 Minn. 452; *Howland v. Reeves*, 25 Mo. App. 458; *Houston, etc., Cent. R. Co. v. Forsyth*, 49 Tex. 171. See also *East Line, etc., R. Co. v. Boon*, (Tex. 1886) 1 S. W. Rep. 632. But see *Adams v. Bush*, 23 How. Pr. (N. Y. Supreme Ct.) 262.

Libel. — *Waller v. Graves*, 20 Conn. 305, was an action for libel. The ground of defense was that the libelous writing after it was signed by the defendant, and before publication, was altered by the insertion therein of material words, without the knowledge or approbation of the defendant. On the trial, one Merwin, who drew up the writing, testified that the writing as published was not like the paper written by him and signed by the defendant, in that the paper did not contain the words in question. It was afterwards discovered that one Averill, without the knowledge or consent of either the defendant or Merwin, inserted those words. On a petition for a new trial, brought by the defendant, it was held that the testimony of Averill showing this fact was not cumulative evidence. See also *Andersen v. State*, 43 Conn. 514, 21 Am. Rep. 669; *Aholtz v. Durfee*, 25 Ill. App. 43; *Casey v. State*, 20 Neb. 138; *Riojas v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 268; *Keeler v. Jacobs*, 87 Wis. 545.

Murder. — In *People v. Shea*, 16 Misc. Rep. (N. Y. Supreme Ct.) 111, it was held that as the issue on a trial for murder is whether it was committed by the defendant or some other person, and not whether it was done by some particular person other than the defendant, therefore the confession by a former witness that he committed the crime, is cumulative, and cannot furnish a basis as newly discovered evidence for a new trial.

Evidence of Material Facts of Which No Evidence Has Previously Been Introduced is no cumulative evidence. *Lander v. Miles*, 3 Ore. gon 40.

attempted to be proved by the verbal admission of a party, evidence of another verbal admission of the same fact is cumulative,¹ but evidence of the admission or confession of a party is not evidence of the same kind as the testimony of other witnesses, and therefore is not cumulative of such testimony although relating to the same controverted fact.² And *e converso* the

1. Verbal Admissions of a Party Cumulative of Each Other. — 1 Greenleaf on Evidence 2.

Georgia. — Hawkins *v.* Kermodé, 85 Ga. 116; Perry *v.* Houseley, 40 Ga. 657.

Idaho. — Flannagan *v.* Newberg, 1 Idaho 78.

Illinois. — Krug *v.* Ward, 77 Ill. 603; Elgin *v.* Renwick, 86 Ill. 498.

Indiana. — Cooper *v.* Ellis, 3 Ind. App. 142; Humphries *v.* Marshall, 12 Ind. 609; Houston *v.* Bruner, 39 Ind. 376; Zouker *v.* Wiest, 42 Ind. 169; Shigley *v.* Snyder, 45 Ind. 543; Shirel *v.* Baxter, 71 Ind. 352; Lefever *v.* Johnson, 79 Ind. 554; Dodds *v.* Vannoy, 61 Ind. 89; Hines *v.* Driver, 100 Ind. 315; Baker *v.* Carr, 100 Ind. 330.

Iowa. — Wilhelmi *v.* Thorington, 14 Iowa 537.

Kansas. — State *v.* Tyson, 56 Kan. 686.

Maine. — Yeaton *v.* Chapman, 65 Me. 126.

Nebraska. — Scofield *v.* Brown, 7 Neb. 221.

New York. — Jackson *v.* Ft. Covington, 61 Hun (N. Y.) 622, 40 N. Y. St. Rep. 67.

Tennessee. — McGavock *v.* Brown, 4 Humph. (Tenn.) 251.

Wisconsin. — Gans *v.* Harmison, 44 Wis. 323.

Illustrations. — Where, on the trial of an action, admissions of a party tending to show his liability in such action have been proved, proof of other admissions made by him having the same tendency is cumulative evidence. Cox *v.* Harvey, 53 Ind. 174; Lefever *v.* Johnson, 79 Ind. 554.

In replevin for a horse, the issue was whether the defendant had bought the horse of the plaintiff or held it as bailee. A witness testified that the defendant told him he was breaking the horse for the plaintiff. On a motion for a new trial on the ground of newly discovered evidence, the evidence relied upon was that of a witness to an admission of the defendant's that he had not bought the horse of the plaintiff, but was breaking it for him. This evidence was held to be merely cumulative. Andis *v.* Richie, 120 Ind. 138.

In a recent Iowa case, it was held that verbal admissions of a fact by a party are not cumulative of other verbal admissions by the party of the same fact if made in other conversations with other witnesses and at other times. Means *v.* Yeager, 96 Iowa 694.

Similar Declarations of Same Person. — Where to prove a certain fact evidence of the declarations of a person has been given, evidence of other substantially similar declarations of the same person is cumulative evidence. Kinney *v.* People, 108 Ill. 519; Wilson *v.* Heath, 68 Hun (N. Y.) 209.

Additional Testimony to Contradictory Statements of Witness. — At the trial of a case evidence was introduced to prove that a witness had made statements out of court varying from and contradictory of his testimony at the trial. On motion for a new trial, on the ground of newly discovered evidence, where the new evidence consisted of additional testimony as

to the contradictory statements of the aforesaid witness, it was held that such evidence was merely cumulative. Sutherlin *v.* State, 108 Ind. 389. Compare Murray *v.* Weber, 92 Iowa 757.

2. Evidence of Admissions of Party Not Cumulative of Testimony of Other Witnesses — *Idaho.* — Flannagan *v.* Newberg, 1 Idaho 78.

Illinois. — Fletcher *v.* People, 117 Ill. 184.

Indiana. — Humphries *v.* Marshall, 12 Ind. 609; Humphreys *v.* Klick, 49 Ind. 189; Rains *v.* Ballow, 54 Ind. 79; Hines *v.* Driver, 100 Ind. 315.

Iowa. — Wayt *v.* Burlington, etc., R. Co., 45 Iowa 217.

Kansas. — Klopp *v.* Jill, 4 Kan. 482.

Maine. — Warren *v.* Hope, 6 Me. 479.

Massachusetts. — Gardner *v.* Mitchell, 6 Pick. (Mass.) 114, 17 Am. Dec. 349; Chatfield *v.* Lathrop, 6 Pick. (Mass.) 417; Parker *v.* Hardy, 24 Pick. (Mass.) 246; Watts *v.* Howard, 7 Met. (Mass.) 478; Gardner *v.* Gardner, 2 Gray (Mass.) 434.

Mississippi. — Kane *v.* Burrus, 2 Smed. & M. (Miss.) 313.

Nevada. — Gray *v.* Harrison, 1 Nev. 502; Wall *v.* Trainor, 16 Nev. 131.

Texas. — Houston, etc., Cent. R. Co. *v.* Forsyth, 49 Tex. 171.

Virginia. — Preston *v.* Otey, 88 Va. 491.

Said Franklin, C., in Lefever *v.* Johnson, 79 Ind. 554: "The admission of a fact is not cumulative evidence to evidence of another kind tending to prove the fact." See also Rains *v.* Ballow, 54 Ind. 79.

"Where the newly discovered evidence refers solely to statements made by the adverse party which were not in evidence on the trial, it is not cumulative." Adams Oil Co. *v.* Stout. (Ky. 1897) 41 S. W. Rep. 563.

Illustrations. — In Parker *v.* Hardy, 24 Pick. (Mass.) 246, the question involved was as to whether a party had authorized one as his agent to sell his horse. Much evidence was introduced *pro* and *con* at the trial, bearing directly or indirectly upon this issue. A new trial was moved for on the ground of newly discovered evidence, to the effect that a certain witness would testify that he heard the plaintiff say he had given such authority. This was held not to be merely cumulative evidence. The court said: "This is a new kind of evidence; and although it is additional to other evidence tending to prove the same position, yet it is not cumulative, because it is of a different character, tending to establish the same general result by proof of a new and distinct fact."

In an action for a breach of warranty on the sale of oil warranted to be of a fair merchantable quality, each party introduced the testimony of witnesses who had examined the oil, and a verdict was found for the plaintiff. On a motion for a new trial on the ground of evidence newly discovered, of the plaintiff's ad-

testimony of a witness to a fact is not cumulative of evidence of an admission by a party of the same fact.¹

What Is Cumulative Evidence, Is a Question of Law. — No discretion is reposed in the court in determining whether or not evidence is cumulative; it is purely a question of law.²

II. POWER OF COURT TO EXCLUDE. — As a general rule, the number of witnesses that shall be heard on a single point is a matter resting in the discretion of the court,³ but the discretion must be reasonably exercised so as to deprive the parties of no material rights, and an abuse of it in this respect will be reversible error.⁴

mission that the oil was of a proper quality, such evidence was held not to be cumulative. *Gardner v. Mitchell*, 6 Pick. (Mass.) 114, 17 Am. Dec. 349.

On the trial of a suit on an account, where the answer was "payment," the defendant testified to having paid a certain sum at a particular time, to the plaintiff. The latter testified, denying that he had ever at any one time received of the defendant such sum of money. After a finding for the plaintiff, the defendant filed a motion for a new trial, on the ground that since the trial he had discovered that he could prove by a competent witness that the plaintiff had admitted to said witness that the defendant had paid to him (the plaintiff), the particular sum and at the particular time testified to by the defendant. It was held that this evidence was not cumulative. *Rains v. Ballow*, 54 Ind. 79.

In California and New York it has been held that evidence of the admissions of a party is cumulative of the testimony of witnesses to the facts alleged to have been admitted. *Bartlett v. Hogden*, 3 Cal. 56; *Shute v. Jones*, (Supreme Ct.) 24 N. Y. Supp. 637. See also *People v. Loui Tung*, 90 Cal. 377. Compare *Oakley v. Sears*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 368.

Evidence of Direct Admission Not Cumulative of Evidence of Acquiescence in Another's Statement. — Where newly discovered evidence tends to show direct admissions of the plaintiff, it is not cumulative, if the only evidence of a like nature introduced at the trial was evidence of acquiescence in statements made by his wife. *Goldsworthy v. Linden*, 75 Wis. 24.

Statement of Witness Contradicting His Testimony and Corroborating Other Side. — In *Murray v. Weber*, 92 Iowa 757, there was a motion for a new trial on the ground of newly discovered evidence. The evidence consisted of statements made by a witness for the plaintiff in regard to facts upon which there had been evidence introduced upon both sides, contradicting his testimony at the trial and corroborating the evidence introduced by the defendant. There was no evidence in reference to such statements at the trial. It was held that the evidence was not cumulative.

1. The issue in the first trial was, whether money had been paid to one A. There was evidence of an admission of A. that he had received it. The new testimony was that of a witness, who saw A. receive it. It was held that this testimony was not cumulative. *St. John v. Alderson*, 32 Gratt. (Va.) 140.

2. **Question of Cumulative Evidence One of Law.** — *Manson v. Ware*, 63 Iowa 345.

3. Court May Limit Number of Witnesses on Single Point — *Illinois*. — *Gray v. St. John*, 35 Ill. 222.

Indiana. — *Gardner v. State*, 4 Ind. 632; *Mergentheim v. State*, 107 Ind. 567.

Iowa. — *Kesee v. Chicago, etc.*, R. Co., 30 Iowa 78, 6 Am. Rep. 643; *Bays v. Herring*, 51 Iowa 286; *Everett v. Union Pac. R. Co.*, 59 Iowa 243; *Minthorn v. Lewis*, 78 Iowa 620; *Preston v. Cedar Rapids*, 95 Iowa 71.

Massachusetts. — *Cushing v. Billings*, 2 Cush. (Mass.) 158.

Michigan. — *Detroit City R. Co. v. Mills*, 85 Mich. 634.

Missouri. — *Clark v. Finn*, 12 Mo. App. 583; *Morgan v. Wood*, 38 Mo. App. 255; *Nelson v. Wallace*, 57 Mo. App. 397; *Stillwell v. Patton*, 108 Mo. 352.

New York. — *Kuhn v. American Automatic Knife, etc., Co.*, 9 Misc. Rep. (N. Y. C. Pl.) 54.

Pennsylvania. — *Myre v. Ludwig*, 1 Pa. St. 47.

Tennessee. — *Powers v. McKenzie*, 90 Tenn. 167.

Texas. — *Galveston, etc., R. Co. v. Matula*, 79 Tex. 577; *Delgado v. Gonzales*, (Tex. Civ. App. 1894) 28 S. W. Rep. 459.

Wisconsin. — *Meier v. Morgan*, 82 Wis. 289, 33 Am. St. Rep. 39; *Larson v. Eau Claire*, 92 Wis. 86.

See also *Smith v. Jensen*, 13 Colo. 213.

Excluding Additional Testimony by Same Witnesses on Same Points. — After certain witnesses had testified as to certain points in issue in a case, and a large number of persons had given testimony upon the same points, it was held that it was not error to refuse to allow said witnesses to give additional testimony on the same points, there being no reason to believe that a repetition of such testimony could have affected the result. *Couts v. Neer*, 70 Tex. 468.

In Maryland it has been held that it is not good ground for rejecting evidence admissible *per se*, that it is cumulative or other evidence in the cause. *Calvert v. Carter*, 18 Md. 73.

4. Discretion of Court Must Be Reasonably Exercised. — *Bunnell v. Butler*, 23 Conn. 65; *Burhans v. Norwood Park*, 138 Ill. 147; *Gardner v. State*, 4 Ind. 632; *Hubble v. Osborn*, 31 Ind. 249; *Kesee v. Chicago, etc., R. Co.*, 30 Iowa 78, 6 Am. Rep. 643; *Everett v. Union Pac. R. Co.*, 59 Iowa 243; *Powers v. McKenzie*, 90 Tenn. 167; *Galveston, etc., R. Co. v. Matula*, 79 Tex. 577.

The general rule is, that a judgment will not be reversed because of the refusal of competent evidence which is merely cumulative. But the proper application of this rule depends

Court May Exclude Cumulative Evidence to an Uncontroverted Fact. — It is within the discretion of the court to exclude evidence when it is merely cumulative, and only tends to establish a fact either conceded or not controverted by the adverse party.¹

Cumulative Evidence on a Controverted Point. — There are cases which hold it to be error to limit the number of witnesses to prove a fact the truth of which is contested.²

Limiting Number of Expert Witnesses. — The court may limit the number of witnesses called as experts.³

upon the peculiar circumstances of each case and the nature of the issue as to which the evidence is adduced. *Nelson v. Wallace*, 57 Mo. App. 397.

The defendant claimed that he was an illiterate man, unable to read writing, and that he signed a certain paper when intoxicated, under false representations as to its character. On the trial, the defendant testified that he could not read. He then called two witnesses and offered to prove that fact by them. This was objected to and excluded. The question as to the defendant's ability to read was submitted to the jury. It was held that the exclusion of the evidence was error; that, as the defendant's own testimony, he being an interested witness, did not conclude the plaintiff, the former had a right to fortify his testimony by that of other witnesses. *Page v. Krekey*, 137 N. Y. 307, 33 Am. St. Rep. 731.

It has been held that where the question of the insanity of a party is of controlling importance and is disputed, it is reversible error for the court to limit the number of witnesses upon the question. *Green v. Phoenix Mut. L. Ins. Co.*, 134 Ill. 310. But see *Delgado v. Gonzales*, (Tex. Civ. App. 1894) 28 S. W. Rep. 459.

Exclusion of Cumulative Evidence upon a Material Issue. — It has been held to be error to exclude cumulative evidence upon a material issue in a case. *Barhyte v. Summers*, 68 Mich. 341; *Owen v. Williams*, 114 Ind. 179.

"We are aware of no rule authorizing a court to limit the number of witnesses a party may introduce, unless it be upon some question collateral to the main issue." *Boggs, J.*, in *South Danville v. Jacobs*, 42 Ill. App. 533.

"It may be that, on a mere collateral question, the court may have a discretionary power to limit the number of witnesses who may testify on that particular question. We are aware of no rule of practice, however, which authorizes a court to prevent a party from introducing more than four witnesses to prove the issue in the case." *Walker, J.*, in *White v. Hermann*, 51 Ill. 243, 99 Am. Dec. 543.

But, in *Preston v. Cedar Rapids*, 95 Iowa 71, *Kinne, J.*, in delivering the opinion of the court, said: "The right of a trial court to limit the number of witnesses who may be called to testify to a given point has been too often recognized by this court to be an open question. * * * It is urged that, while this rule is proper, as applied to collateral issues, it should not be held applicable to the main issue in a case. We discover no reason for limiting the application of the rule to a particular class of cases or to certain issues. The power thus given trial courts, when dis-

creetly exercised, is alike applicable in all cases and to all issues."

It Requires a Plain Case of Abuse of Discretion to justify reversal. *Union R. Transfer, etc., Co. v. Moore*, 80 Ind. 458.

1. Exclusion of Cumulative Evidence to an Uncontroverted Fact. — *Mueller v. Rebhan*, 94 Ill. 142; *Clement v. Brown*, 30 Ill. 43; *Crow v. Marshall*, 15 Mo. 499; *Clafin v. Sommers*, 39 Mo. App. 419. See also *Gray v. St. John*, 35 Ill. 222; *Union Nat. Bank v. Baldenwick*, 45 Ill. 375; *Mears v. Cornwall*, 73 Mich. 78; *Fenwick v. Bowling*, 50 Mo. App. 516.

Exclusion of Letter Corroborating Uncontradicted Verbal Testimony. — In *Mears v. Cornwall*, 73 Mich. 78, it was held that the exclusion of a letter as evidence in behalf of a plaintiff, containing nothing more than the plaintiff had been permitted to testify to, which facts were unchallenged, was not prejudicial error.

Exclusion of Cumulative Evidence to a Material but Uncontradicted Fact. — In *Owen v. Williams*, 114 Ind. 179, it was held that, while it was error to exclude cumulative evidence upon a material point, such error was no ground for reversal, where the fact which such evidence was offered to prove was uncontradicted, especially where the appellate court, in deciding the questions represented in the case, considered as established the fact which the excluded evidence was intended to prove.

2. Error to Limit Number of Witnesses on Controverted Point. — *Union Nat. Bank v. Baldenwick*, 45 Ill. 375; *Fenwick v. Bowling*, 50 Mo. App. 516.

If a fact is sufficiently proven and is not controverted, or if it is expressly admitted by the adverse party, a court may, in the exercise of a sound discretion, refuse to allow its time to be wasted in hearing further evidence. When, however, a controlling fact is controverted, each party has the right to have all witnesses heard who have knowledge of facts and circumstances bearing upon the contested point, and to deny the right is error. *South Danville v. Jacobs*, 42 Ill. App. 533.

The power to determine when evidence purely cumulative shall cease is one to be exercised with the utmost care. In a case in which there is little or no controversy as to a given fact, such evidence may properly be cut off at a point where it would be improper to do so when the evidence is greatly conflicting. *Galveston, etc., R. Co. v. Matula*, 79 Tex. 577.

3. Court May Limit Number of Expert Witnesses. — *Huett v. Clark*, 4 Colo. App. 231; *Green v. Phoenix Mut. L. Ins. Co.*, 134 Ill. 310; *Fraser v. Jennison*, 42 Mich. 206; *Hilliard v. Beattie*, 59 N. H. 462; *Sixth Ave R. Co. v. Metropolitan El. R. Co.*, 138 N. Y. 548; *Pow-*

Limiting Number of Witnesses to Character or Veracity. — The court may, in the exercise of a sound discretion, limit the number of witnesses to be introduced to impeach or support the character or veracity of a party or witness.¹

Condemnation Suits. — In condemnation suits the court may exercise its discretion in limiting the number of witnesses testifying as to the value of, or the damage to, the property in controversy.²

At an Examination of Witnesses by the Court, as a Mere Matter of Favor, to ascertain whether, in the opinion of the court, a judgment already properly entered executes justice, the court may, at its discretion, limit the number of witnesses to be heard on the different points involved.³

Evidence Affirmative of the Legal Interpretation of a Writing. — It is not error in a court to refuse to admit proof which is merely affirmative of the legal interpretation of a writing adduced as evidence.⁴

III. DUTY OF PROSECUTION IN CRIMINAL CASES. — It has been generally held to be within the discretion of the prosecuting officer in a criminal case to examine only such witnesses as he thinks best,⁵ but the courts of several of

ers *v. McKenzie*, 90 Tenn. 167. Compare *Ouillette v. Overman Wheel Co.*, 162 Mass. 305.

Where the contestants of a will had examined five experts to show the testator's mental condition, it was held proper to decline to allow another to be called. *Fraser v. Jennison*, 42 Mich. 206.

1. Court May Limit Number of Witnesses to Character or Veracity. — *Bunnell v. Butler*, 23 Conn. 65; *Green v. Phoenix Mut. L. Ins. Co.*, 134 Ill. 310; *Bays v. Herring*, 51 Iowa 286; *Bays v. Hunt*, 60 Iowa 251; *Nolton v. Moses*, 3 Barb. (N. Y.) 31; *Bissell v. Cornell*, 24 Wend. (N. Y.) 354.

Court Must Exercise a Liberal Discretion in Admitting Testimony as to Character. — In *Williams v. McKee*, 98 Tenn. 139, which was an action for slander, the trial court, at the beginning of the trial, made a rule that he would limit the number of witnesses offered to impeach or sustain the character of the parties to six. The plaintiff reached his limit in the examination of witnesses to sustain his character against the attack of the defendant, and then offered to introduce a number of other supporting witnesses. But the court enforced the rule made at the beginning of the trial, and refused to admit their testimony. It was held that this was error. *Beard, J.*, who delivered the opinion of the court, said: "There is no doubt that the trial judge has the right, within reasonable limits, to restrict the number of witnesses to be examined as to any one point or fact. * * * While this is so, yet it is true that, in an action like this, involving character, it is the duty of the lower court to exercise a liberal discretion in admitting testimony tending to sustain or overthrow it. It might be, in such a case, where a narrow limit is fixed, that a party, by gathering in the enemies of his adversary, would succeed in producing a number of impeaching witnesses just within this limit, while the party so impeached might have the whole body of the county behind him ready to testify as to his good name, yet, if equally restricted, this would be of no avail to him. A rule that worked such a result could not be tolerated. In addition, we think it unwise, at least, if not positive error, for the trial judge, in the beginning, and before the testimony is introduced, to fix a limit

upon the number of witnesses that he will permit to be examined. Necessarily, each particular case will suggest where a reasonable limit has been reached, but this can only be determined as the trial progresses, and the necessities of the case thus develop." See also *Nelson v. Wallace*, 57 Mo. App. 397.

2. Discretion of the Court in Condemnation Suits. — *Union R. Transfer, etc., Co. v. Moore*, 50 Ind. 458; *Everett v. Union Pac. R. Co.*, 59 Iowa 243; *Sheldon v. Minneapolis, etc., R. Co.*, 29 Minn. 318.

Value of Property Injured by Change of Street Grade. — In an action to recover damages to property caused by a change in the grade of a street, it was held that the trial court might limit the number of witnesses allowed to testify as to the value of the property injured. *Preston v. Cedar Rapids*, 95 Iowa 71.

3. Examination of Witnesses by Court After Judgment Properly Entered. — *Burhans v. Norwood Park*, 138 Ill. 147.

4. Excluding Proof Affirmative of Legal Interpretation of Writing. — *Sims v. Pryor*, 5 Ala. 592.

Where a Matter Is Settled by a Party's Own Written Contract on which the action is brought, it is not error to refuse to allow him to introduce testimony as to such matter. *Rockwell v. Hurst*, (C. Pl.) 13 N. Y. Supp. 290.

5. General Rule — What Witnesses Shall Be Examined Within Discretion of Prosecuting Officer. — 3 Russell on Crimes (9th ed.) 528.

England. — Reg. v. Edwards, 3 Cox C. C. 82; Reg. v. Cassidy, 1 F. & F. 79; Reg. v. Thompson, 13 Cox C. C. 181.

Florida. — *Selph v. State*, 22 Fla. 537.

Illinois. — *Bressler v. People*, 117 Ill. 422.

Indiana. — *Keller v. State*, 123 Ind. 110, 18 Am. St. Rep. 318.

Louisiana. — *State v. Ford*, 42 La. Ann. 255.

Missouri. — *State v. Eaton*, 75 Mo. 586.

North Carolina. — *State v. Martin*, 2 Ired. L. (24 N. Car.) 101.

Tennessee. — *Eason v. State*, 6 Baxt. (Tenn.) 431.

Virginia. — *Hill v. Com.*, 88 Va. 633, 29 Am. St. Rep. 744.

West Virginia. — *State v. Cain*, 20 W. Va. 679.

See *Morrow v. State*, 57 Miss. 836.

the states, following the early English cases on the subject, have held that he is bound to show the whole transaction as it was, whether its tendency be to establish guilt or innocence, and he is not permitted, therefore, to suppress material evidence.¹ In some of the cases it has been held that where there are a great number of witnesses, the production of a part of them may be dispensed with, after so many have been sworn as to lead to the inference that the testimony of the rest would be merely cumulative of that already given, and where there is no ground to suspect an intent to conceal a part of the transaction.² Especially is this so when the offense with which the defendant is charged is a mere misdemeanor.³

IV. ADMISSION IN REBUTTAL. — Where evidence in strict reply to a distinct defense is at the same time incidentally cumulative to the evidence in chief, it will not be excluded on that ground.⁴ But where the plaintiff, after the

1. Rule that Prosecuting Officer Bound to Show Whole Transaction — *England*. — Reg. v. Chapman, 8 C. & P. 558, 34 E. C. L. 523; Reg. v. Orchard, 8 C. & P. 558, note *b*, 34 E. C. L. 523, note *b*; Reg. v. Holden, 8 C. & P. 606, 34 E. C. L. 547.

Michigan. — Brown v. People, 17 Mich. 429, 97 Am. Dec. 195; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; Hurd v. People, 25 Mich. 405; Wellar v. People, 30 Mich. 16; Thomas v. People, 39 Mich. 309; People v. Sweetland, 77 Mich. 53; People v. Etter, 81 Mich. 570; People v. Deitz, 86 Mich. 419; People v. Kenyon, 93 Mich. 19.

Montana. — Territory v. Hanna, 5 Mont. 248.

Texas. — Thompson v. State, 30 Tex. App. 325.

Vermont. — State v. Magoon, 50 Vt. 333.

In delivering the opinion of the court in People v. Deitz, 86 Mich. 421, Champlin, C. J., said: "The public prosecutor is not the plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty, and he has not the right to suppress testimony."

2. When Cumulative Evidence May Be Excluded. — Hurd v. People, 25 Mich. 405; Wellar v. People, 30 Mich. 16; Bonker v. People, 37 Mich. 4; People v. Sweetland, 77 Mich. 53; Judge White, in Hunnicutt v. State, 20 Tex. App. 632; Gibson v. State, 23 Tex. App. 414; Reynolds v. State, 33 Tex. Crim. Rep. 143; Mayes v. State, 33 Tex. Crim. Rep. 33.

Non-production of Witness — That His Evidence Was Cumulative Held No Excuse. — In Thomas v. People, 39 Mich. 309, a saloonist fired a pistol through his door in trying to keep out a disorderly crowd. His son and another man were the only other persons inside. It was held, on his prosecution for assault with intent to murder, that the saloonist was entitled to demand that the prosecution, having subpoenaed the stranger who had been inside, should put him on the stand. Cooley, J., who delivered the opinion of the court, said: "The prosecution now attempt an excuse for this failure [to produce the witness] by saying that he was only one of several witnesses of the transaction, so that his testimony could only have been cumulative. The excuse, under the circumstances of the case, is not sufficient. Besides the actors in the affray, [the stranger] was the only person who appears to have been in position to see what took place inside the saloon, and presumptively he could have given evidence of high importance."

3. Where Offense Charged Is a Misdemeanor. — Bonker v. People, 37 Mich. 4.

4. Cumulative Evidence Admissible in Rebuttal. — Heavy v. Odell, 10 New Bruns. 524; Com. v. Moulton, 4 Gray (Mass.) 39; Weaver v. Whilden, 33 S. Car. 190; Caldwell v. Wilson, 2 Spears L. (S. Car.) 75; State v. Prater, 26 S. Car. 198; Stillwell v. Farewell, 64 Vt. 286. See also Briggs v. McBride, 17 New Bruns. 663; Barnes v. Stacy, 79 Wis. 55.

Illustrations. — The plaintiff in an action gave, as confirmatory evidence of the defendant having committed the tort proved at Layton, proof that he was seen near the spot at the time in question, and the defendant called witnesses who swore that the defendant was at Richmond at the time. The plaintiff was allowed to give in reply additional evidence of the defendant being at Layton, such evidence being a direct contradiction of the new fact of the defendant being at Richmond. Briggs v. Aynsworth, 2 M. & Rob. 168. But see Rex v. Hilditch, 5 C. & P. 299, 24 E. C. L. 330.

In ejectment to recover garden ground it was proved for the plaintiff that the defendant had been let into possession of the garden by M., who had paid rent to the lessor of the plaintiff. The defendant's case was that M. had rented a part of his garden of the lessor of the plaintiff, and that that had been given up, and that the defendant had the residue of the garden, which was now in dispute, devised to him by his father's will in 1791. The lessor of the plaintiff proposed to give evidence in reply to show that, from the year 1794, the lessor of the plaintiff and his father received rent for the piece of ground in question. It was held that the evidence was admissible. Doe v. Mobbs, C. & M. 1, 41 E. C. L. 7.

A witness for the plaintiff denied on cross-examination having made a statement in the presence of L., who was afterwards called by the defendant and contradicted him. It was held that the plaintiff might call evidence in reply to rebut L.'s testimony and confirm that of his own witness. Whelpley v. Riley, 7 New Bruns. 275. See also Tomkins v. Tibbits, 12 New Bruns. 317; State v. Jacobs, 28 S. Car. 29.

In Texas it has been held that, after the plaintiff has made out a *prima facie* case, and the defendant has introduced opposing evidence, the plaintiff may in reply introduce evidence fortifying his case upon the points wherein it has been attacked by the defendant's testimony, although such evidence be

close of the defendant's evidence, offers further evidence not strictly in rebuttal, its admission or exclusion rests in the sound discretion of the court, and the exercise of this discretion is not subject to review, except in cases of gross abuse.¹ Ordinarily, however, the plaintiff should not be permitted to introduce evidence which is merely cumulative of that introduced by him in proving his *prima facie* case.² In each case, however, the particular circumstances should be considered, and the courts have sometimes permitted the plaintiff to introduce cumulative evidence after the close of the defendant's evidence.³

only cumulative of that introduced by him in making out his *prima facie* case. *Markham v. Carothers*, 47 Tex. 21; *Gulf, etc., R. Co. v. Holliday*, 65 Tex. 512; *Snow v. Starr*, 75 Tex. 411; *Ayers v. Harris*, 77 Tex. 108; *San Antonio, etc., Pass. R. Co. v. Robinson*, 79 Tex. 608; *Mayer v. Walker*, 82 Tex. 222; *Galveston, etc., R. Co. v. Parrish*, (Tex. Civ. App. 1897) 40 S. W. Rep. 191. See also *Mahan v. Wolf*, 61 Tex. 488.

But in *Snow v. Starr*, 75 Tex. 411, the court said: "When witnesses are numerous and a vast accumulation of testimony is to be expected, much must be left to the discretion of the trial judge, and where, as in this case, the rule has been announced in advance that merely cumulative evidence will not be admitted in rebuttal, it should not be held error to apply it, unless it should appear that its application has clearly prejudiced the complaining party."

In a *Florida Case* it was held to be within the discretion of the court to admit as rebutting evidence testimony strictly in rebuttal of the defendant's witnesses, though cumulative, from a different point of observation, of the plaintiff's evidence in chief. *Jacksonville, etc., R. Co. v. Wellman*, 26 Fla. 344.

1. Admission of Evidence Not Strictly in Rebuttal Within Discretion of Court. — *Kohler v. Wells*, 26 Cal. 606; *Braydon v. Goulman*, 1 T. B. Mon. (Ky.) 115; *Chadbourn v. Franklin*, 5 Gray (Mass.) 312; *Rucker v. Eddings*, 7 Mo. 115; *State v. Porter*, 26 Mo. 201; *Hastings v. Palmer*, 20 Wend. (N. Y.) 225; *Ford v. Niles*, 1 Hill (N. Y.) 300; *Marshall v. Davies*, 78 N. Y. 414, 58 How. Pr. (N. Y.) 231; *Alexander v. Byron*, 2 Johns. Cas. (N. Y.) 318; *Smith v. Smith*, 8 Ired. L. (30 N. Car.) 29.

2. Merely Cumulative Evidence Should Not Be Admitted. — *Browne v. Murray*, R. & M. 254, 21 E. C. L. 431; *Gilpins v. Consequa*, Pet. (C. C.) 85; *Yankee Jim's Union Water Co. v. Crary*, 25 Cal. 504; *Macon v. Harris*, 75 Ga. 761; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422; *York v. Pease*, 2 Gray (Mass.) 283; *Nelson v. Betts*, 21 Mo. App. 219; *Guilfoyle v. Pierce*, 4 N. Y. App. Div. 612, 38 N. Y. Supp. 697; *Bull v. Lambson*, 5 S. Car. 284; *Weaver v. Whilden*, 33 S. Car. 190; *Delgado v. Gonzales*, (Tex. Civ. App. 1894) 28 S. W. Rep. 459. See also *State v. Parish*, 22 Iowa 284; *Bogan v. Wilburn*, 1 Spears L. (S. Car.) 179.

Illustrations. — A caveator under the issue of testamentary capacity *vel non*, having offered evidence in chief that the testatrix was a spiritualist and consulted the spirits about her business transactions, and also evidence about a particular transaction, as to which she consulted the spirits, should not be permitted after the close of the caveatee's evidence, to

introduce additional evidence of the same character and to the same point as that given in chief. *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422.

In a suit contesting the validity of a will, it was held that, after the defendants had made out their *prima facie* case in favor of the will, and the plaintiffs had introduced their testimony *contra*, and the proofs had been offered by the defendants in rebuttal, the plaintiffs should not be permitted to bring in additional testimony in corroboration of that already offered. *Rankin v. Rankin*, 61 Mo. 295.

In *Maine* it has been held that a party may introduce cumulative evidence upon any point in issue in a case, after he has rested his case and testimony has been introduced by his opponent, unless the court had given reasonable notice that such cumulative evidence would be excluded. *Moore v. Holland*, 36 Me. 14; *Yeaton v. Chapman*, 65 Me. 126.

No particular form of notice is necessary. Any remark will be sufficient which conveys to counsel the information that such a rule will be enforced. *Yeaton v. Chapman*, 65 Me. 126.

Where Plaintiff Opens with Evidence to Anticipate the Defense. — As a general rule, in the conduct of trials, if a party elects to proceed in the first instance with proof to anticipate the defense, he should not afterwards be allowed to offer evidence on the same point in reply to the case made by the testimony of the defendant. *Matthews v. Northern Assur. Co.*, 16 L. Can. J. 82; *York v. Pease*, 2 Gray (Mass.) 282. See also *Holbrook v. McBride*, 4 Gray (Mass.) 215; *Casey v. Le Roy*, 38 Cal. 697.

Williams v. Dewitt, 12 Ind. 309, was an action upon an account. Plea, set-off. The plaintiff, without waiting for the defendant's evidence in support of his plea, introduced evidence to prove that the set-off had been settled by an arbitration between himself and the defendant. After the close of the defendant's evidence, the plaintiff offered additional testimony to prove such a settlement. To the admission of this testimony the defendant objected. The objection was overruled and the testimony admitted. On appeal this was held to be error.

3. Court Should Consider Particular Circumstances of Each Case. — *Wright v. Foster*, 109 Mass. 57; *Com. v. Moulton*, 4 Gray (Mass.) 39.

In *McLeod v. Lee*, 17 Nev. 103, the plaintiff, in the opening of his case, introduced two witnesses, who testified that a dam erected by the defendant was the cause of an overflow upon the plaintiff's land. The defendant introduced testimony upon this point. After the

Defendant's Right to Introduce Cumulative Evidence in Rebuttal. — It has been held that where a plaintiff, in rebuttal, introduces evidence of a fact in reference to which he introduced no testimony in his examination in chief, the defendant has a right to reply by introducing surrebutting testimony, although it be only cumulative.¹ But where the plaintiff's evidence in rebuttal is cumulative of his evidence in chief and contradictory of the defendant's evidence, the defendant cannot reply by introducing evidence cumulative of that previously introduced by him.²

V. ADMISSION AFTER VERDICT DIRECTED FOR DEFENDANT. — After a plaintiff has closed his case and a verdict has been directed for the defendant, it is discretionary with the court to allow the plaintiff to introduce additional evidence cumulative in character.³

VI. NEWLY DISCOVERED CUMULATIVE EVIDENCE — 1. Reopening Case to Admit It. — Newly discovered evidence, cumulative of that already introduced, does not entitle a party, as a matter of right, to have a case reopened after the evidence has been closed on both sides. Whether or not a case shall be re-opened to admit such evidence, rests entirely in the sound discretion of the court.⁴

2. As Ground for a New Trial — a. GENERAL RULE. — One of the grounds for granting a new trial is the discovery since the former trial of new evidence, which would in all probability have changed the result of that trial; but, as a

close of the defendant's evidence, the court allowed the plaintiff to re-open the case and submit further evidence upon the point. This was held not to be an abuse of discretion. *Hawley, J.*, who delivered the opinion of the court, said: "As a general rule, a plaintiff who has introduced witnesses in chief upon any given point should produce all of his testimony upon that point before he closes his case. * * * But whether a plaintiff will be permitted to re-open his proof upon any particular point, is a question which rests very much in the discretion of the courts, and should always be decided with reference to the circumstances surrounding the case. * * * When the plaintiff is acting in good faith, and the ends of justice require it, the case should be re-opened."

Where Plaintiff's Prima Facie Case Is Vigorously Attacked. — It has been held that where the plaintiff's *prima facie* case has been vigorously attacked by the defendant, he should be permitted to introduce cumulative evidence in corroboration of that previously given. *Bryan v. Watson*, 20 Ga. 480; *Davidson v. Overhulser*, 3 Greene (Iowa) 196. See also *State v. Sims*, 16 S. Car. 486.

Where Defendant Introduces Testimony upon a Point Not Raised by the Answer. — In *Bull v. Lambson*, 5 S. Car. 284, the point in issue was as to the weight of certain goods sold and delivered to the defendant. The plaintiff and the defendant both introduced evidence upon this point. After the close of the defendant's evidence, the plaintiff offered further evidence on the disputed point. It was held that, as it did not appear that the answer raised any question as to the weight of the goods delivered, the plaintiff had a right to assume that this would not be a point in dispute, and to confine himself to ordinary proof on this point without going into exhaustive proof as upon a controverted point; and that, inasmuch as the question appeared first to have been specially made by the introduction of the testimony by

the defendant, it was entirely proper to allow the plaintiff to reply to such evidence by additional proofs, although cumulative in character.

Evidence in Contradiction of Evidence Offered by Objector to Special Assessment. — In *Chytraus v. Chicago*, 160 Ill. 18, it was held that evidence in contradiction of the evidence offered by an objector to the confirmation of a special assessment may be allowed, even if it is not strictly evidence in rebuttal, but is cumulative to the *prima facie* case made by the city in the first instance.

1. Where Plaintiff Brings Out a New Fact in Rebuttal. — *Walker v. Fields*, 28 Ga. 237. See *State v. Dille*, 15 Oregon 70. Compare *Asay v. Hay*, 89 Pa. St. 77.

2. Where Plaintiff's Evidence in Rebuttal Is Cumulative. — *Heavy v. Odell*, 10 New Bruns. 524; *Bogan v. Wilburn*, 1 Spears L. (S. Car.) 179.

In a California Case it was held that it was within the discretion of the trial court to allow a defendant to testify fully as to his defense, after the plaintiff had closed his case in rebuttal, and that the court's action could not be reviewed unless the discretion was abused. *Barkly v. Copeland*, 74 Cal. 1, 5 Am. St. Rep. 413.

3. Admission of Cumulative Evidence After Verdict Ordered for Defendant. — *American Eagle Tobacco Co. v. Peirce*, 70 Mich. 633.

4. Re-opening Case to Admit Newly Discovered Cumulative Evidence. — *Hinton v. Cream City R. Co.*, 65 Wis. 323. See also *Everman v. Menomonie*, 81 Wis. 624.

After the close of the evidence, and while the court was reading its charge to the jury, the plaintiff asked permission to offer additional testimony, alleged to have been newly discovered. The evidence was cumulative in its character. The court refused the permission asked. On appeal, it was held that this was no abuse of discretion. *Seekel v. Norman*, 78 Iowa 254.

general rule, a new trial will not be granted on the ground of newly discovered evidence, when the new evidence relied upon is merely cumulative of that introduced at the former trial.¹

1. New Trial Not Granted to Admit Newly Discovered Cumulative Evidence—*United States.*

—Southard *v.* Russell, 16 How. (U. S.) 547; Dexter *v.* Arnold, 5 Mason (U. S.) 303; Ames *v.* Howard, 1 Sumn. (U. S.) 482; Alsop *v.* Commercial Ins. Co., 1 Sumn. (U. S.) 451; Wood *v.* Mann, 2 Sumn. (U. S.) 316; Baker *v.* Whiting, 1 Story (U. S.) 218; Jenkins *v.* Eldredge, 3 Story (U. S.) 299; Wiggin *v.* Coffin, 3 Story (U. S.) 1; Palmer *v.* Fiske, 2 Curt. (U. S.) 14; Chandler *v.* Thompson, 30 Fed. Rep. 38; Lowry *v.* Mt. Adams, etc., Incline Plane R. Co., 68 Fed. Rep. 827; Aiken *v.* Bemis, 3 Woodb. & M. (U. S.) 348; Shakers Soc. *v.* Watson, 37 U. S. App. 141.

Arkansas.—Burriss *v.* Wisc, 2 Ark. 33; Bourdon *v.* Mason, 5 Ark. 256; Brown *v.* Stacy, 5 Ark. 403; Bourland *v.* Skimnee, 11 Ark. 671; Kirkpatrick *v.* Wolfe, 17 Ark. 96; White *v.* State, 17 Ark. 404; Berry *v.* Elliott, 25 Ark. 89; Merrick *v.* Britton, 26 Ark. 496; Texas, etc., R. Co. *v.* Orr, 46 Ark. 182; St. Louis Southwestern R. Co. *v.* Dobbins, 60 Ark. 481; Brown *v.* St. Louis, etc., R. Co., 52 Ark. 120.

California.—Bartlett *v.* Hogden, 3 Cal. 56; Taylor *v.* California Stage Co., 6 Cal. 229; Gaven *v.* Dopman, 5 Cal. 342; Live Yankee Co. *v.* Oregon Co., 7 Cal. 41; Klockenbaum *v.* Pierson, 22 Cal. 160; Wright *v.* Carillo, 22 Cal. 596; Spencer *v.* Doane, 23 Cal. 418; Aldrich *v.* Palmer, 24 Cal. 513; Millard *v.* Hathaway, 27 Cal. 119; Meyer *v.* Mowry, 34 Cal. 514; Levitsky *v.* Johnson, 35 Cal. 41; Stoakes *v.* Monroe, 36 Cal. 383; Jones *v.* Jones, 38 Cal. 584; Russell *v.* Dennison, 45 Cal. 337; Armstrong *v.* Davis, 41 Cal. 494; People *v.* M'Donell, 47 Cal. 134; Reed *v.* Clark, 47 Cal. 194; Hobler *v.* Cole, 49 Cal. 250; People *v.* Anthony, 56 Cal. 397; People *v.* Fong Ah Sing, 70 Cal. 8; People *v.* Sutton, 73 Cal. 243; Williamson *v.* Tobey, 86 Cal. 497; People *v.* Mesa, 93 Cal. 580; People *v.* Urquidias, 96 Cal. 239; People *v.* Hong Quin Moon, 92 Cal. 41; O'Rourke *v.* Vennekohl, 104 Cal. 254; People *v.* Demasters, 109 Cal. 607; People *v.* Kloss, 115 Cal. 567; McCormick *v.* Central R. Co., 75 Cal. 506; People *v.* Burdick, (Cal. 1892) 29 Pac. Rep. 248; Christensen *v.* McBride, (Cal. 1894) 36 Pac. Rep. 398; Wells *v.* Snow, (Cal. 1895) 41 Pac. Rep. 858.

Colorado.—Martin *v.* Hazzard Powder Co., 2 Colo. 596.

Connecticut.—Waller *v.* Graves, 20 Conn. 305; Parsons *v.* Platt, 37 Conn. 563; Andersen *v.* State, 43 Conn. 514, 21 Am. Rep. 669; Travelers' Ins. Co. *v.* Savage, 43 Conn. 187; Husted *v.* Mead, 58 Conn. 55.

Florida.—Milton *v.* Blackshear, 8 Fla. 161; Coker *v.* Merritt, 16 Fla. 416; Simpson *v.* Daniels, 16 Fla. 677; Finlayson *v.* Lipsomb, 16 Fla. 751.

Georgia.—Roberts *v.* State, 3 Ga. 310; Irwin *v.* Morell, Dudley (Ga.) 72; Giles *v.* State, 6 Ga. 276; Berry *v.* State, 10 Ga. 511; Wright *v.* Greenwood, 17 Ga. 418; Dickinson *v.* Solomons, 26 Ga. 684; Coggin *v.* Jones, 29 Ga.

257; McAfee *v.* State, 31 Ga. 411; Grubb *v.* Kalb, 37 Ga. 459; Perry *v.* Houseley, 40 Ga. 657; Gardner *v.* Lamback, 47 Ga. 133; O'Shields *v.* State, 55 Ga. 696; Puryear *v.* State, 66 Ga. 753; Hines *v.* Beers, 74 Ga. 839; Carter *v.* State, 75 Ga. 747; Erskine *v.* Duffy, 76 Ga. 602; Hart *v.* Jackson, 77 Ga. 493; Poullain *v.* Poullain, 79 Ga. 11; Wimpy *v.* Gaskill, 79 Ga. 620; Verdery *v.* Savannah, etc., R. Co., 82 Ga. 675; Brinson *v.* Faircloth, 82 Ga. 185; Baker *v.* Moor, 84 Ga. 186; Johnson *v.* Pahmour, 87 Ga. 244; Munro *v.* Moody, 78 Ga. 127; Etheridge *v.* Hobbs, 77 Ga. 531; Neill *v.* State, 79 Ga. 779; Artemus *v.* State, 79 Ga. 512; Smith *v.* State, 81 Ga. 479; Harrison *v.* State, 83 Ga. 129; Johnson *v.* State, 83 Ga. 553; Hawkins *v.* Kermode, 85 Ga. 116; Edwards *v.* State, 90 Ga. 143; Dale *v.* State, 88 Ga. 552; Sweat *v.* State, 90 Ga. 315; Mitchell *v.* State, 94 Ga. 704; Tripp *v.* State, 95 Ga. 502; Latimer *v.* State, 97 Ga. 218; Walker *v.* State, 97 Ga. 197.

Illinois.—Smith *v.* Shultz, 2 Ill. 490, 32 Am. Dec. 33; Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100; Crozier *v.* Cooper, 14 Ill. 139; Laffin *v.* Herrington, 17 Ill. 399; Classen *v.* Cuddigan, 21 Ill. App. 591; Ritchey *v.* West, 23 Ill. 385; Morrison *v.* Stewart, 24 Ill. 24; Martin *v.* Ehrenfels, 24 Ill. 187; Aholtz *v.* Durfee, 25 Ill. App. 43; Jacobson *v.* Gunzburg, 150 Ill. 135, 25 Ill. App. 223; Cooper *v.* Johnson, 27 Ill. App. 504; Cleary *v.* Cummings, 28 Ill. App. 237; Fay *v.* Richards, 30 Ill. App. 477; Chicago, etc., R. Co. *v.* Clough, 33 Ill. App. 129; Chicago First Nat. Bank *v.* William Ruehl Brewing Co., 33 Ill. App. 121; Davis *v.* Mann, 43 Ill. App. 301; Adams *v.* People, 47 Ill. 376; R. J. Gunning Co. *v.* Cusack, 50 Ill. App. 290; Toledo, etc., R. Co. *v.* Seitz, 53 Ill. 452; Calhoun *v.* O'Neal, 53 Ill. 354; Reid *v.* Flanders, 62 Ill. App. 106; Madison Coal Co. *v.* Beam, 63 Ill. App. 178; Kendall *v.* Limberg, 69 Ill. 355; Krug *v.* Ward, 77 Ill. 603; Skelly *v.* Boland, 78 Ill. 438; Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388; Gottschalk *v.* Hughes, 82 Ill. 484; Claves *v.* White, 83 Ill. 540; Dyer *v.* People, 84 Ill. 624; Elgin *v.* Renwick, 86 Ill. 498; Harvey *v.* Collins, 89 Ill. 255; Laird *v.* Warren, 92 Ill. 204; McCollom *v.* Indianapolis, etc., R. Co., 94 Ill. 534; Sconce *v.* Henderson, 102 Ill. 376; Kinney *v.* People, 108 Ill. 519; Klein *v.* People, 113 Ill. 596; Fletcher *v.* People, 117 Ill. 184; Plumb *v.* Campbell, 129 Ill. 101; Lilly *v.* People, 148 Ill. 467; O'Neil *v.* O'Neil, 123 Ill. 361; Gilmore *v.* People, 124 Ill. 380; Bean *v.* People, 124 Ill. 576; Petefish *v.* Watkins, 124 Ill. 384; Sterling *v.* Merrill, 124 Ill. 522; Burns *v.* People, 126 Ill. 282; Langdon *v.* People, 133 Ill. 382.

Indiana.—Porter *v.* State, 2 Ind. 435; Jennings *v.* Loring, 5 Ind. 250; Simpson *v.* Wilson, 6 Ind. 474; Swift *v.* Wakeman, 9 Ind. 552; Bronson *v.* Hickman, 10 Ind. 3; Humphries *v.* Marshall, 12 Ind. 609; O'Brian *v.* State, 14 Ind. 469; Harris *v.* Rupel, 14 Ind. 209; State *v.* Clark, 16 Ind. 97; Cox *v.* Hutchings, 21 Ind. 219; Shigley *v.* Snyder, 45 Ind. 543; Fox *v.* Reynolds, 24 Ind. 46; Merryman *v.* Ryan, 24

Evidence Cumulative of Evidence Known but Not Used at Trial. — A new trial will not

Ind. 262; Larrimore *v.* Williams, 30 Ind. 18; Atkisson *v.* Martin, 39 Ind. 242; Martin *v.* Garver, 40 Ind. 351; Zeuker *v.* Wiest, 42 Ind. 169; Humphreys *v.* Klick, 49 Ind. 189; Cox *v.* Harvey, 53 Ind. 174; Winsett *v.* State, 57 Ind. 26; Dodds *v.* Vannoy, 61 Ind. 89; Shirel *v.* Baxter, 71 Ind. 352; Lefever *v.* Johnson, 79 Ind. 554; Hines *v.* Driver, 100 Ind. 315; Harper *v.* State, 101 Ind. 109; Marshall *v.* Mathers, 103 Ind. 458; Sutherland *v.* State, 108 Ind. 389; Pennsylvania Co. *v.* Nations, 111 Ind. 203; Andis *v.* Richie, 120 Ind. 138; Stalcup *v.* State, 129 Ind. 519; Meurer *v.* State, 129 Ind. 587; Smith *v.* State, 143 Ind. 685; Cooper *v.* Ellis, 3 Ind. App. 142; De Hart *v.* Apter, 107 Ind. 460; Dennis *v.* State, 103 Ind. 142, 7 Crim. L. Mag. & Rep. 172; Blackburn *v.* Crowder, 110 Ind. 127; Westbrook *v.* Aultman, 3 Ind. App. 83; Watts *v.* Moffett, 12 Ind. App. 399.

Iowa. — Reeves *v.* Royal, 2 Greene (Iowa) 451; Manix *v.* Malony, 7 Iowa 81; McDaniels *v.* Van Fosen, 11 Iowa 105; Sturgeon *v.* Ferrou, 14 Iowa 160; Wilhelmi *v.* Thorington, 14 Iowa 537; Shepherd *v.* Brenton, 15 Iowa 84; Alger *v.* Merritt, 16 Iowa 121; Stineman *v.* Beath, 36 Iowa 73; German *v.* Maquoketa Sav. Bank, 38 Iowa 368; Wayt *v.* Burlington, etc., R. Co., 45 Iowa 217; Hickenbottom *v.* Chicago, etc., R. Co., 57 Iowa 704; Morrow *v.* Chicago, etc., R. Co., 61 Iowa 487; Manson *v.* Ware, 63 Iowa 345; State *v.* Gleason, 68 Iowa 618; State *v.* Nadal, 69 Iowa 478; State *v.* Whitmer, 77 Iowa 557; Donnelly *v.* Burkett, 75 Iowa 613; State *v.* Oeder, 80 Iowa 72; Blair *v.* Madison County, 81 Iowa 313; State *v.* Potts, 83 Iowa 317; Boggess *v.* Read, 83 Iowa 548; Bryson *v.* Chicago, etc., R. Co., 89 Iowa 677; Eaton *v.* Cripps, 94 Iowa 176; Names *v.* Dwelling House Ins. Co., 95 Iowa 642.

Kansas. — Swartzell *v.* Rogers, 3 Kan. 374; Klopp *v.* Jill, 4 Kan. 482; Kirby *v.* Childs, 10 Kan. 635; Clark *v.* Hall, 10 Kan. 81; Thom *v.* Davis, 16 Kan. 22; Mitchell *v.* Stillings, 20 Kan. 276; Harris *v.* Thompson, 23 Kan. 372; Clark *v.* Norman, 24 Kan. 515; State *v.* Kearley, 26 Kan. 77; Sexton *v.* Lamb, 27 Kan. 432; Parker *v.* Bates, 29 Kan. 597; O'Leary *v.* Reed, 30 Kan. 749; Baughman *v.* Penn, 33 Kan. 504; State *v.* McCool, 34 Kan. 613; State *v.* Rohrer, 34 Kan. 427; Olathe *v.* Horner, 38 Kan. 312; State *v.* Stickney, 53 Kan. 308, 42 Am. St. Rep. 284; State *v.* Tyson, 56 Kan. 686; McMullen *v.* Winfield Bldg., etc., Assoc., 4 Kan. App. 459; Douglass *v.* Anthony, 45 Kan. 439; Titus *v.* Mitchell, 3 Kan. App. 90.

Kentucky. — Wells *v.* Phelps, 4 Bibb (Ky.) 563; Chambers *v.* Chambers, 2 A. K. Marsh. (Ky.) 348; Finley *v.* Tyler, 3 T. B. Mon. (Ky.) 400; Mercer *v.* Mercer, 37 Ky. 21; Klein *v.* Gibson, (Ky. 1886) 2 S. W. Rep. 116; Houston *v.* Kidwell, (Ky. 1890) 14 S. W. Rep. 377; Williams *v.* Com., (Ky. 1892) 18 S. W. Rep. 364; Palmer *v.* Mt. Sterling Nat. Bank, (Ky. 1892) 18 S. W. Rep. 234; Lewis *v.* Com., 93 Ky. 238; Sellars *v.* Cincinnati, etc., R. Co., (Ky. 1895) 29 S. W. Rep. 332; Newton *v.* Cook, (Ky. 1896) 33 S. W. Rep. 934; Adams Oil Co. *v.* Stout, (Ky. 1897) 41 S. W. Rep. 563.

Louisiana. — State *v.* Hyland, 36 La. Ann. 709; State *v.* Lamothe, 37 La. Ann. 43; State *v.* Hanks, 39 La. Ann. 234; State *v.* Harris, 39

La. Ann. 1105; State *v.* Hendrix, 45 La. Ann. 500; State *v.* Green, 49 La. Ann. 60.

Maine. — Warren *v.* Hope, 6 Me. 479; Glidden *v.* Dunlap, 28 Me. 379; Handly *v.* Call, 30 Me. 9; Snowman *v.* Wardwell, 32 Me. 275; Ham *v.* Ham, 39 Me. 263; McLaughlin *v.* Doane, 56 Me. 289; Strout *v.* Stewart, 63 Me. 227; Dodge *v.* Dodge, 86 Me. 393.

Massachusetts. — Gardner *v.* Mitchell, 6 Pick. (Mass.) 114, 17 Am. Dec. 349; Yarmouth *v.* Dennis, 6 Pick. (Mass.) 116, note; Sawyer *v.* Merrill, 10 Pick. (Mass.) 16; Gardner *v.* Gardner, 2 Gray (Mass.) 434.

Michigan. — White *v.* Peabody, 106 Mich. 144.

Minnesota. — State *v.* Dumphrey, 4 Minn. 438; Mead *v.* Constans, 5 Minn. 171; Mininger *v.* Knox, 8 Minn. 140; Johnson *v.* Coles, 21 Minn. 108; Cummings *v.* Taylor, 24 Minn. 429; Peck *v.* Small, 35 Minn. 465; Lowe *v.* Minneapolis St. R. Co., 37 Minn. 283; Gilmore *v.* Brost, 39 Minn. 190; Jones *v.* Chicago, etc., R. Co., 42 Minn. 183; Schacherl *v.* St. Paul City R. Co., 42 Minn. 42; Elmborg *v.* St. Paul City R. Co., 51 Minn. 70; Adamant Mfg. Co. *v.* Pete, 61 Minn. 464; Layman *v.* Minneapolis St. R. Co., 66 Minn. 452.

Mississippi. — Hare *v.* Sproul, 2 How. (Miss.) 772; Vardeman *v.* Byrne, 7 How. (Miss.) 365; Moody *v.* Farr, 27 Miss. 788; Newcomb *v.* State, 37 Miss. 383; Cooper *v.* State, 53 Miss. 393; Vanderburg *v.* Campbell, 64 Miss. 89; Louisville, etc., R. Co. *v.* Crayton, 69 Miss. 152.

Missouri. — Culbertson *v.* Hill, 87 Mo. 553; State *v.* Griffin, 87 Mo. 668; Beauchamp *v.* Sconce, 12 Mo. 57; State *v.* Larrimore, 20 Mo. 425; Wells *v.* Sanger, 21 Mo. 354; Boggs *v.* Lynch, 22 Mo. 563; State *v.* Stumbo, 26 Mo. 306; State *v.* Wightman, 27 Mo. 121; State *v.* McLaughlin, 27 Mo. 111; Miller *v.* Whitson, 40 Mo. 98; State *v.* Ray, 53 Mo. 345; Cook *v.* St. Louis, etc., R. Co., 56 Mo. 380; State *v.* Butler, 67 Mo. 59; State *v.* Rockett, 87 Mo. 666; Dollman *v.* Munson, 90 Mo. 85; Culbertson *v.* Hill, 87 Mo. 553; Howland *v.* Reeves, 25 Mo. App. 458; Donovan *v.* Ryan, 35 Mo. App. 160; State *v.* Potter, 108 Mo. 424; State *v.* Woodward, 95 Mo. 129; State *v.* Johnson, 139 Mo. 197.

Montana. — Caruthers *v.* Pemberton, 1 Mont. 111; Morse *v.* Swan, 2 Mont. 306; Garfield M. & M. Co. *v.* Hammer, 6 Mont. 53; Territory *v.* Clayton, 8 Mont. 1.

Nebraska. — Scofield *v.* Brown, 7 Neb. 221; Bolar *v.* Williams, 14 Neb. 386; Halliday *v.* Briggs, 15 Neb. 219; Brooks *v.* Dutcher, 22 Neb. 644; Campbell *v.* Holland, 22 Neb. 587; Livesey *v.* Festner, 28 Neb. 333; Hill *v.* Helman, 33 Neb. 731; Schreckengast *v.* Ealy, 16 Neb. 510; Flannagan *v.* Heath, 31 Neb. 776; Hill *v.* Helman, 33 Neb. 731.

Nevada. — Howard *v.* Winters, 3 Nev. 539.

New Hampshire. — Dennett *v.* Dennett, 44 N. H. 531, 84 Am. Dec. 97.

New Jersey. — Deacon *v.* Allen, 4 N. J. L. 386; Den *v.* Geiger, 9 N. J. L. 225; Den *v.* Wintermute, 13 N. J. L. 182; Tomlin *v.* Den, 19 N. J. L. 76; McDowell *v.* Perrine, 36 N. J. Eq. 632; Kirk *v.* Rickerson, 46 N. J. L. 13.

New York. — Steinbach *v.* Columbian Ins.

be granted to let in new evidence cumulative to such as was known to the

Co., 2 Cai. (N. Y.) 129; *Smith v. Brush*, 8 Johns. (N. Y.) 84; *Pike v. Evans*, 15 Johns. (N. Y.) 210; *Whitbeck v. Whitbeck*, 9 Cow. (N. Y.) 266, 18 Am. Dec. 503; *People v. Superior Ct.*, 10 Wend. (N. Y.) 286, 5 Wend. (N. Y.) 115; *Livingston v. Hubbs*, 3 Johns. Ch. (N. Y.) 124; *Fleming v. Hollenback*, 7 Barb. (N. Y.) 271; *Munn v. Worrall*, 16 Barb. (N. Y.) 221; *Peck v. Hiler*, 30 Barb. (N. Y.) 655; *Powell v. Jones*, 42 Barb. (N. Y.) 24; *Williams v. People*, 45 Barb. (N. Y.) 201; *Barteau v. Phoenix Mut. L. Ins. Co.*, 67 Barb. (N. Y.) 354, 1 Hun (N. Y.) 430, 3 Thomp. & C. (N. Y.) 576; *Sproul v. Resolute F. Ins. Co.*, 1 Lans. (N. Y.) 71; *Geneva, etc., R. Co. v. Sage*, 35 Hun (N. Y.) 95; *Myers v. Riley*, 36 Hun (N. Y.) 20; *Jackson v. Ft. Covington*, 61 Hun (N. Y.) 622, 40 N. Y. St. Rep. 67; *Ott v. Buffalo*, 61 Hun (N. Y.) 624, 40 N. Y. St. Rep. 716, *affirmed* 131 N. Y. 594; *Wilson v. Heath*, 68 Hun (N. Y.) 209; *Dunham v. Winans*, 2 Paige (N. Y.) 24; *Burnett v. Phallon*, 4 Bosw. (N. Y.) 622; *Brisbane v. Adams*, 1 Sandf. (N. Y.) 195; *Plattsburgh First Nat. Bank v. Heaton*, 6 Thomp. & C. (N. Y.) 37; *Hogan v. Carroll*, (Supreme Ct.) 7 N. Y. Supp. 183; *Seeley v. Chittenden*, 4 How. Pr. (N. Y. Supreme Ct.) 265, *affirmed* 10 Barb. (N. Y.) 303; *Adams v. Bush*, 23 How. Pr. (N. Y. Supreme Ct.) 262; *Best v. Starks*, 24 How. Pr. (N. Y. Supreme Ct.) 58; *Sheldon v. Stryker*, 27 How. Pr. (N. Y. Supreme Ct.) 387, 42 Barb. (N. Y.) 284; *Raphelsky v. Lynch*, 43 How. Pr. (N. Y. Super. Ct.) 157, 34 N. Y. Super. Ct. 31, 12 Abb. Pr. N. S. (N. Y.) 224; *Cole v. Cole*, 50 How. Pr. (N. Y. Supreme Ct.) 59; *Cole v. Van Keuren*, 51 How. Pr. (N. Y. Supreme Ct.) 451; *Gale v. New York Cent., etc., R. Co.*, 53 How. Pr. (N. Y. Supreme Ct.) 385, *affirmed* 13 Hun (N. Y.) 1; *Bulkin v. Ehret*, 29 Abb. N. Cas. (N. Y. Supreme Ct.) 62; *Abrams v. Van Brunt St., etc., R. Co.*, 13 Civ. Pro. Rep. (N. Y. Supreme Ct.) 402; *Wheelwright v. Beers*, 2 Hall (N. Y.) 391; *Tripler v. Ehehalt*, 5 Robt. (N. Y.) 609; *Oakley v. Sears*, 7 Robt. (N. Y.) 111; *Hicks v. British America Assur. Co.*, 13 N. Y. App. Div. 444; *Cameron v. Leonard*, 17 N. Y. App. Div. 127; *Plyer v. German-American Ins. Co.*, (Supreme Ct.) 1 N. Y. Supp. 395; *Whitney v. Saxe*, 15 Civ. Pro. Rep. (N. Y. City Ct.) 450; *Albert v. Sweet*, (Supreme Ct.) 9 N. Y. Supp. 86; *Roberts v. Johnstown Bank*, (Supreme Ct.) 14 N. Y. Supp. 432; *Shute v. Jones*, (Supreme Ct.) 24 N. Y. Supp. 637; *People v. Shea*, 16 Misc. Rep. (N. Y. Supreme Ct.) 111; *Lawrence v. Ely*, 38 N. Y. 42, 97 Am. Dec. 768.

North Carolina. — *Simmons v. Mann*, 92 N. Car. 12; *Sikes v. Parker*, 95 N. Car. 232; *State v. Starnes*, 97 N. Car. 423.

Ohio. — *Reed v. McGrew*, 5 Ohio 376; *Loeffner v. State*, 10 Ohio St. 598; *Perrin v. Protection Ins. Co.*, 11 Ohio 147, 38 Am. Dec. 728.

Oklahoma. — *Twine v. Kilgore*, 3 Okla. 640.

Oregon. — *Lander v. Miles*, 3 Oregon 40.

Pennsylvania. — *Com. v. Williams*, 2 Ashm. (Pa.) 69; *Com. v. Murray*, 2 Ashm. (Pa.) 41; *Com. v. Flanagan*, 7 W. & S. (Pa.) 415; *Com. v. Schoeppe*, 1 Pa. Leg. Gaz. 450; *Com. v. Yot Sing*, 7 Kulp (Pa.) 349; *Com. v. Brown*, 7 Kulp (Pa.) 103.

Rhode Island. — *Kaul v. Brown*, 17 R. I. 14; *Windham County Bank v. Kendall*, 7 R. I. 77.

South Carolina. — *State v. Jones*, 49 S. Car. 330.

South Dakota. — *Scheffer v. Corson*, 5 S. Dak. 233.

Tennessee. — *McGavock v. Brown*, 4 Humph. (Tenn.) 251; *Jones v. White*, 11 Humph. (Tenn.) 268; *Dossett v. Miller*, 3 Sneed (Tenn.) 72; *Noel v. McCrory*, 7 Coldw. (Tenn.) 623; *Burson v. Dosser*, 1 Heisk. (Tenn.) 754; *King v. State*, 91 Tenn. 617.

Texas. — *Screws v. State*, (Tex. Crim. App. 1893) 23 S. W. Rep. 796; *McAdams v. State*, 24 Tex. App. 86; *Garner v. State*, 34 Tex. Crim. Rep. 356; *Granger v. State*, (Tex. Crim. App. 1895) 31 S. W. Rep. 671; *Porter v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 695; *Scruggs v. State*, 35 Tex. Crim. Rep. 622; *Little v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 659; *Turner v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 87; *Riojas v. State*, (Tex. Crim. App. 1896) 36 S. W. Rep. 268; *Duke v. State*, (Tex. Crim. App. 1896) 38 S. W. Rep. 43; *State v. Moore*, 7 Tex. 257; *Robinson v. Martel*, 11 Tex. 149; *Latham v. Selkirk*, 11 Tex. 314; *Castro v. Worzbach*, 13 Tex. 128; *Wolf v. Mahan*, 57 Tex. 171; *Walker v. Brown*, 66 Tex. 556; *Sabine, etc., R. Co. v. Wood*, 69 Tex. 679; *Gulf, etc., R. Co. v. Brown*, (Tex. Civ. App. 1897) 40 S. W. Rep. 608; *Jester v. Francis*, (Tex. Civ. App. 1895) 31 S. W. Rep. 245; *East Line, etc., R. Co. v. Boon*, (Tex. 1886) 1 S. W. Rep. 632; *Fears v. Albea*, 69 Tex. 437, 5 Am. St. Rep. 78; *Galveston Oil Co. v. Thompson*, 76 Tex. 235; *Day v. Goodman*, (Tex. 1891) 17 S. W. Rep. 475; *Conwill v. Gulf, etc., R. Co.*, 85 Tex. 96; *Rodgers v. State*, (Tex. Crim. App. 1892) 20 S. W. Rep. 709.

Vermont. — *Myers v. Brownell*, 2 Aik. (Vt.) 407, 16 Am. Dec. 729; *Bullock v. Beach*, 3 Vt. 73; *Dodge v. Kendall*, 4 Vt. 31; *Kirby v. Waterford*, 14 Vt. 414; *Burr v. Palmer*, 23 Vt. 244; *Westmore v. Sheffield*, 56 Vt. 239.

Virginia. — *Randolph v. Randolph*, 1 Hen. & M. (Va.) 181; *Nuckols v. Jones*, 8 Gratt. (Va.) 267; *Harnsberger v. Kinney*, 13 Gratt. (Va.) 511; *St. John v. Alderson*, 32 Gratt. (Va.) 140; *Smith v. Watson*, 82 Va. 712; *Akers v. Akers*, 83 Va. 633; *Tate v. Tate*, 85 Va. 205; *Preston v. Otey*, 88 Va. 491; *Kern v. Wyatt*, 89 Va. 885.

Washington. — *McKilver v. Manchester*, 1 Wash. Ter. 255.

West Virginia. — *Bales v. State*, 3 W. Va. 685; *Dower v. Church*, 21 W. Va. 23; *Smith v. McLain*, 11 W. Va. 654; *Carter v. State Bank*, 34 W. Va. 38; *White v. Ward*, 35 W. Va. 418.

Wisconsin. — *Edmister v. Garrison*, 18 Wis. 594; *Wilson v. Plank*, 41 Wis. 94; *Gans v. Harmison*, 44 Wis. 323; *Krueger v. Merrill*, 66 Wis. 28; *Wieting v. Millston*, 77 Wis. 523; *Thrasher v. Postel*, 79 Wis. 503.

Wyoming. — *Link v. Union Pac. R. Co.*, 3 Wyoming 680.

Canada. — *Smith v. Neill*, 9 New Bruns. 105; *Doe v. Babineau*, 11 New Bruns. 89; *Hooper v. Christoe*, 14 U. C. C. P. 117; *Reg. v. McLroy*, 15 U. C. C. P. 116; *McDermott v. Ireson*, 38 U. C. Q. B. 1; *Miller v. Confederation L. Ins.*

party, though not used at the former trial.¹

Not Sufficient Ground for Setting Aside an Award of Arbitrators. — Newly discovered evidence which is merely cumulative in its character does not afford sufficient ground for setting aside an award of arbitrators.²

Reasons for the Rule. — The rule forbidding a new trial for the purpose of admitting cumulative evidence rests upon the solid ground that it is for the public good that there be an end to litigation. Were it otherwise, parties might, by deliberately holding back a part of their evidence, or by a lack of diligence in preparing their cases, or by mistaking the amount of testimony requisite, prolong litigation indefinitely.³ A contrary practice would also encourage the introduction of perjury for the purpose of presenting new evidence.⁴ Another ground upon which the rule has been held to rest is that, as evidence upon the point upon which the newly discovered evidence bears was before the jury at the trial, it is to be presumed that the evidence proposed to be added on the very same point would not, had it been presented to the jury, have altered their conclusions.⁵

b. QUALIFICATIONS AND EXCEPTIONS — Of What Evidence the Newly Discovered Evidence Must Be Cumulative. — The rule that a new trial will not be granted on the ground of newly discovered cumulative evidence applies when the evidence given at the trial, of which the new evidence is cumulative, was that of the party moving for a new trial as well as when it was that of any other witness introduced by him,⁶ but it has been held that the rule will not apply

Co., 14 Ont. App. 218, *affirming* 11 Ont. Rep. 120; *Trumble v. Hortin*, 22 Ont. App. 51; *Howarth v. McGugan*, 23 Ont. Rep. 396.

See the title **NEW TRIAL**, *ENCYC. OF PLEADING AND PRACTICE*.

This rule is recognized by statute in *Georgia*. *Grubb v. Kalb*, 37 Ga. 459; *Orand v. Walker*, 41 Ga. 657.

In *Scott v. Scott*, 9 L. T. N. S. 456, the court said: "It has never been the habit of Westminster Hall to grant new trials on the simple ground that the party can make some case stronger by corroborating testimony (even though newly discovered) if another trial were allowed."

1. Evidence Cumulative of Evidence Known to Party but Not Used. — *Travelers' Ins. Co. v. Savage*, 43 Conn. 187.

2. Award of Arbitrators. — *McDaniels v. Van Fosen*, 11 Iowa 195.

3. Public Policy Demands that There Be an End of Litigation — England. — *Scott v. Scott*, 9 L. T. N. S. 456.

United States. — *Southard v. Russell*, 16 How. (U. S.) 547.

Georgia. — *Wright v. Greenwood*, 17 Ga. 418; *Perry v. Houseley*, 40 Ga. 657.

Maine. — *Warren v. Hope*, 6 Me. 479; *Snowman v. Wardwell*, 32 Me. 275; *Ham v. Ham*, 39 Me. 263.

Missouri. — *Beauchamp v. Sconce*, 12 Mo. 57; *Wells v. Sanger*, 21 Mo. 354.

New York. — *Powell v. Jones*, 42 Barb. (N. Y.) 24; *Jackson v. Ft. Covington*, (Supreme Ct.) 15 N. Y. Supp. 793; *Lander v. Miles*, 3 Oregon 40; *Wolf v. Mahan*, 57 Tex. 171.

In delivering the opinion of the court in *Perry v. Houseley*, 40 Ga. 657, McKay, J., said: "This rule is a necessary one. If parties were to have a new trial because they have found out a new witness to prove the truth or untruth of the points upon which they have already been heard, there would be no end of litigation but the patience and purses

of the litigants. The public has some rights, and the courts are not called upon to hear and rehear, at the discretion of the parties. It is, therefore, the public policy of the country, that cumulative evidence is not a good ground for a new trial."

4. Contrary Practice Would Encourage Perjury. — *Southard v. Russell*, 16 How. (U. S.) 547; *Wright v. Greenwood*, 17 Ga. 418; *Beauchamp v. Sconce*, 12 Mo. 57; *Wells v. Sanger*, 21 Mo. 354; *Lander v. Miles*, 3 Oregon 40.

5. Evidence, if Presented, Would Probably Not Have Changed Result. — *Snowman v. Wardwell*, 32 Me. 277.

The Rule Criticised. — However, the opinion has been expressed that the rule does not rest upon any solid foundation. Thus, in *Wilcox Silver Plate Co. v. Barclay*, 48 Hun (N. Y.) 54, Justice Daniels said: "The rule or principle requiring the denial of a motion for a new trial on the ground of the evidence newly discovered being cumulative, does not rest upon any just or solid foundation. It is simply the dictate of authority which has been followed without much consideration of its foundation. It is not one to be extended to cases not falling directly within its language. For there is the same propriety and necessity for giving a party a new trial who can vindicate himself, or sustain his cause of action by cumulative evidence, as there is for any other reason. And there is certainly no justice in subjecting a person to what is really an unfounded claim, or for preventing him from maintaining an equally well-founded defense, because the evidence discovered by him by which that can be done may be of the same quality or description as that given upon the trial in which he has been defeated." See also *Clegg v. New York Newspaper Union*, 51 Hun (N. Y.) 232; *Bulkin v. Ehret*, 29 Abb. N. Cas. (N. Y. Supreme Ct.) 62.

6. Evidence Cumulative of Evidence Given by Moving Party. — *Latimer v. State*, 97 Ga. 218;

when the evidence given at the trial was elicited on the cross-examination of a witness introduced by the other side.¹

In Canada, however, the contrary has been held.²

When the Rule Does Not Apply. — It has been held that a new trial will not be refused solely because the newly discovered evidence is cumulative, if it is sufficient to render clear that which was before a doubtful case,³ or if it is of a conclusive and decisive character,⁴ or if it is of so controlling a character that it would probably change the verdict.⁵ And it is held that where the

Fox v. Reynolds, 24 Ind. 46; *Winsett v. State*, 57 Ind. 26; *Lefever v. Johnson*, 79 Ind. 554; *State v. Hendrix*, 45 La. Ann. 500; *Nininger v. Knox*, 8 Minn. 140; *Shute v. Jones*, (Supreme Ct.) 24 N. Y. Supp. 637.

1. Rule Not Applicable to Evidence Cumulative of Evidence Elicited on Cross-Examination. — *White v. Nafus*, 84 Iowa 350. See *Simmons v. Fay*, 1 E. D. Smith (N. Y.) 107.

2. Canada. — *Fawcett v. Mothersell*, 14 U. C. C. P. 104.

In Texas it has been held that a defendant in a criminal case is not entitled to a new trial on the ground of newly discovered evidence, where such evidence is cumulative of the evidence of some of the state's witnesses. It should be noted that in this case the court said: "The diligence comes in questionable shape, to say the least of it." *Porter v. State*, (Tex. Crim. App. 1895) 32 S. W. Rep. 695.

3. Evidence Sufficient to Render Clear a Doubtful Case — California. — *Levitsky v. Johnson*, 35 Cal. 41.

Connecticut. — *Waller v. Graves*, 20 Conn. 305; *Andersen v. State*, 43 Conn. 514, 21 Am. Rep. 669; *Hart v. Brainerd*, 68 Conn. 50.

Maine. — *Snowman v. Wardwell*, 32 Me. 275. *Mississippi.* — *Louisville, etc., R. Co. v. Crayton*, 69 Miss. 152.

Nebraska. — *Casey v. State*, 20 Neb. 138; *Schreckengast v. Ealy*, 16 Neb. 510; *Brooks v. Dutcher*, 22 Neb. 644.

Rhode Island. — *Windham County Bank v. Kendall*, 7 R. I. 77.

Vermont. — *Barker v. French*, 18 Vt. 460; *Burr v. Palmer*, 23 Vt. 244; *Gilman v. Nichols*, 42 Vt. 313; *Westmore v. Sheffield*, 56 Vt. 239; *Myers v. Brownell*, 2 Aik. (Vt.) 407, 16 Am. Dec. 729.

Virginia. — *Preston v. Otey*, 88 Va. 491.

In delivering the opinion of the court in *Waller v. Graves*, 20 Conn. 305, *Church, C. J.*, said: "If the evidence now claimed to be newly discovered, is merely cumulative evidence, we cannot grant a new trial, unless the effect of it will be to render clear and positive that which was before equivocal and uncertain."

4. Conclusive Evidence. — *Preston v. Otey*, 88 Va. 491; *Martin v. Ehrenfels*, 24 Ill. 187; *Chicago, etc., R. Co. v. Clough*, 33 Ill. App. 129; *Kendall v. Limberg*, 69 Ill. 355; *Krug v. Ward*, 77 Ill. 603; *Dyer v. People*, 84 Ill. 624; *Laird v. Warren*, 92 Ill. 204; *Petefish v. Watkins*, 124 Ill. 384; *Sterling v. Merrill*, 124 Ill. 522; *State v. McCool*, 34 Kan. 613; *Adams Oil Co. v. Stout*, (Ky. 1897) 41 S. W. Rep. 563.

Caton, J., in delivering the opinion of the court in *Schlenker v. Risley*, 4 Ill. 483, 38 Am. Dec. 100, said: "It is not always a fatal objection to a new trial, that the newly discov-

ered evidence is cumulative, as where it is of a decisive and conclusive character of itself, without the aid of other evidence to the same point, and where that point was not satisfactorily made out on the former trial."

5. Evidence That Would Probably Change the Verdict. — *McCormick v. Central R. Co.*, 75 Cal. 506; *Hart v. Brainerd*, 68 Conn. 50; *Preston v. Otey*, 88 Va. 491; *Westbrook v. Aultman*, 3 Ind. App. 83; *Keiser v. Decker*, 29 Neb. 92; *Hill v. Helman*, 33 Neb. 731; *Flannagan v. Heath*, 31 Neb. 776; *Clegg v. New York Newspaper Union*, 51 Hun (N. Y.) 232; *Screws v. State*, (Tex. Crim. App. 1893) 23 S. W. Rep. 796. See also *O'Rourke v. Vennekohl*, 104 Cal. 254; *Downey v. Patterson*, 38 U. C. Q. B. 513.

Prentiss, J., who delivered the opinion of the court in *Myers v. Brownell*, 2 Aik. (Vt.) 407, 16 Am. Dec. 729, said: "Where the testimony is strictly cumulative, and merely increases the weight of evidence, leaving the cause still in doubt, a new trial will not be granted. But when the point was left doubtful by the testimony on the former trial, and the newly discovered testimony will remove all doubt, or it is apparent that injustice has been done, it is certainly reasonable, and violates no rule, to grant a new trial. Indeed, every application for a new trial is addressed to the sound discretion of the court; and though the law has prescribed general rules for the regulation of this discretion, yet each application, after all, must depend, in a great measure, on the particular circumstances of the case." See also *State v. Stowe*, 3 Wash. 206; *State v. Townsend*, 7 Wash. 462.

Where a verdict for the plaintiff resulted from the strong numerical preponderance of his witnesses upon the vital issue in the case, and the defendant moved for a new trial on the ground of newly discovered evidence, consisting of the testimony of three witnesses directly contradicting the testimony of the plaintiff's witnesses, and where it was quite probable that if the testimony of these three witnesses had been given at the trial a different result would have been reached, it was held that a new trial should be granted, although the newly discovered evidence was cumulative. *Bulkin v. Ehret*, 29 Abb. N. Cas. (N. Y. Supreme Ct.) 62.

Newly Discovered Written Evidence upon Turning Point in Case. — In *Durant v. Philpot*, 16 S. Car. 116, there was a motion for a new trial, on the ground of newly discovered evidence. It was held that the new evidence, even if cumulative, being in writing and directly applicable to the very point upon which the former decision turned, furnished proper ground for a new trial.

CUMULATIVE EVIDENCE — CUMULATIVE OFFENSE.

object sought is to prove an alibi the rule making newly discovered cumulative evidence insufficient ground for a new trial does not apply.¹

That Evidence Is in Some Respects Cumulative is not sufficient objection thereto as ground for a new trial, if in any degree it has an independent and distinct bearing upon the issue.²

In **New York** an exception to the rule as to cumulative evidence has been made in relation to trials investigating the title to lands in the military tract, founded upon considerations peculiar to that class of cases.³

Rule Relaxed with Great Caution. — The rule that a new trial will not be granted on account of newly discovered cumulative evidence is a rule that will be relaxed with great caution.⁴

CUMULATIVE OFFENSE. — An offense which can be committed only by a repetition of acts of the same kind.⁵

Where Life Is at Stake. — In *Andersen v. State*, 43 Conn. 514, 21 Am. Rep. 669, Andersen, who had been convicted of murder in the first degree, petitioned for a new trial on the ground of newly discovered evidence. The newly discovered evidence was only additional evidence of the petitioner's insanity, consisting of the testimony of various persons who, on different occasions, observed his conduct, and regarded it as indicating insanity. It was held that if the court could see that it might reasonably affect the result, the fact that the evidence was in some sense cumulative ought not, in a case where life was at stake, to be decisive against the granting of a new trial.

Where Testimony at Trial Was That of Indians Given through Interpreter. — Where the testimony produced at the trial of a criminal prosecution was exclusively that of Indians, given through the medium of interpreters, it was held that the defendant was entitled on a proper showing to a new trial, on the ground of newly discovered evidence, although cumulative in character, when the newly discovered evidence was shown to be that of a white witness. *State v. Townsend*, 7 Wash. 462.

1. Evidence Tending to Prove Alibi. — *State v. Stowe*, 3 Wash. 206. See also *Tyler v. State*, 13 Tex. App. 205.

Absence of Witness to Alibi — Continuance and New Trial Refused. — The defendant in a criminal case made application for a continuance, on the ground of the absence of a witness by whom he stated he expected to prove an alibi. The court refused the continuance. At the trial, the defendant proved by several witnesses facts which constituted a complete alibi. The defendant was convicted, and moved for a new trial on the ground of the court's refusal of the application for a continuance. The court refused to grant a new trial, upon the ground that the evidence upon which the application for the continuance was asked was cumulative of that given at the trial. On ap-

peal, this decision was reversed. Judge Willson, who delivered the opinion of the court, said: "We are of the opinion that the court erred in refusing the application for a continuance, and in refusing a new trial. The testimony of the witness was very material to the defendant, and the object of it being to prove an alibi, it does not come within the objection that it is merely cumulative evidence. 'That the evidence is cumulative, when sought to establish an alibi, is no reason for its exclusion; on the contrary, the greater the number of witnesses to the facts establishing it, the stronger ordinarily would be our reliance upon and conviction of its truth.' (Pinckord v. State, 13 Tex. App. 468; Lawson v. State, 13 Tex. App. 264; Tyler v. State, 13 Tex. App. 205.)" *Smythe v. State*, 17 Tex. App. 245.

But in a Georgia Case, the court said: "The policy of the law is adverse to granting new trials on account of merely cumulative evidence, more especially where the point to which the evidence relates is the defense of alibi." *Harrison v. State*, 83 Ga. 129. See also *Wright v. State*, 34 Ga. 110.

And see the dictum of Chief Justice Savage, in *People v. Superior Ct.*, 10 Wend. (N. Y.) 286.

2. Evidence Having Independent and Distinct Bearing upon Issue. — *Stineman v. Beath*, 36 Iowa 73; *Cooper v. Eastern Transp. Line*, 23 Hun (N. Y.) 663, 11 Rep. 234. See also *Hambel v. Williams*, 37 Iowa 224; *Vardeman v. Byrne*, 7 How. (Miss.) 365.

3. New York — Trials Investigating Title to Lands in Military Tract. — *Wells v. Sanger*, 21 Mo. 354; *Jackson v. Hooker*, 5 Cow. (N. Y.) 207; *Jackson v. Crosby*, 12 Johns. (N. Y.) 254.

4. Rule Relaxed with Great Caution. — *Irwin v. Morrell*, *Dudley* (Ga.) 72.

5. Wells v. Com., 12 Gray (Mass.) 329. *E.g.*, a common scold, a common seller of intoxicating liquors, etc. See *COMMON*, vol. 6, p. 255, and references there given.

CUMULATIVE PUNISHMENT.

By JOSEPH WALKER MAGRATH.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *INDICTMENTS*, vol. 10, p. 489; *SENTENCE*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CONSTITUTIONAL LAW*, vol. 6, p. 882; *CRIMINAL LAW*, ante, and references there given; *SENTENCE*.

I. DEFINITION. — The laws of England and of many of the United States provide that a person convicted of crime shall, in case he has been previously convicted of one or more other crimes, suffer a greater punishment than that to which he would be liable were such crime his first offense. This increased punishment is termed cumulative.¹

1. **Definition.** — See *Phillips v. Com.*, 3 Met. (Mass.) 588.

Not a Separate Punishment. — Statutes providing for cumulative punishment do not create a new offense, but simply increase the punishment in the case of an old offender. *State v. Riley*, 28 Iowa 547; *Blackburn v. State*, 50 Ohio St. 428.

Propriety of Cumulative Punishment. — Mr. Bishop says: "An old offender should, in reason, be punished more severely for the same wrong than a first transgressor. Therefore, sometimes a statute provides a heavier

penalty for a second or third offense than for the first." 1 Bish. New Crim. Law, § 959.

In *State v. Wilson*, (N. Car. 1897) 28 S. E. Rep. 416, it was considered that, even without a law expressly authorizing cumulative punishment, a judge might properly, in sentencing a prisoner, consider his general bad character and the fact that he had been before convicted of several offenses.

In *Ex p. Dick*, 14 Pick. (Mass.) 86, the court, per Shaw, C. J., speaking of a statute imposing additional punishment for successive convictions, said: "It is manifest that the

II. CONSTITUTIONALITY OF STATUTES PROVIDING FOR — 1. Not Ex Post Facto.

— Such statutes have been repeatedly held not to be *ex post facto* when applied to cases where the punishment of offenses committed after their passage has been increased on account of former convictions before such passage,¹ and they are not construed to apply so as to increase the punish-

primary intention of the statute was to award the additional punishment as a punishment for the second or third offense respectively, considering such second or third offense as a more aggravated crime and deserving of severer punishment on account of the character of the accused as a convicted offender."

In 10 Alb. L. J. 296 is a paper read by Mr. Sergeant Cox, of England, at a meeting of the Social Science Congress in Glasgow, on "Cumulative Sentences on Inveterate Misdemeanants." The conclusion of his paper is as follows:

"The substance, then, of this paper resolves itself into the following propositions:

"1. The object of punishment is, first, to deter the offender from repeating the offense by fear of the consequences; secondly, to deter others from offending by the knowledge of the pain they will incur if they do so.

"2. For this purpose, the law should affix to all offenses, below a certain high class of crime, a scale of penalties increasing at a fixed ratio with every repetition of the same offense.

"3. The law should also impose some increase of sentence upon a conviction for any offense of the same nature, as, for instance, in larceny, for any crime in the nature of dishonesty; in assault, for any offense involving violence, and so forth. (This the law has already partially accomplished.) * * *

"5. One of the strongest recommendations for the adoption of a scale of cumulative punishments is that it precisely apportions the remedy to the disease."

Distinguished from Cumulative Sentence. — A careless use of the terms "cumulative punishment" and "cumulative sentence" as interchangeable has led to considerable confusion. The distinction is, nevertheless, very clear, for the term "cumulative sentence" does not refer to the punishment for a single offense, but to a sentence to two or more successive terms of imprisonment or penal servitude, each to begin at the expiration of the one preceding it. Such a sentence is usually pronounced upon a person who is convicted at one time of several offenses of the same kind. See the title SENTENCE. See also Century Dictionary, p. 1396.

1. Not Ex Post Facto — California. — *Ex p. Gutierrez*, 45 Cal. 429.

Massachusetts. — *Ross's Case*, 2 Pick. (Mass.) 172; *Com. v. Graves*, 155 Mass. 163; *Sturtevant v. Com.*, 158 Mass. 598.

Ohio. — *Blackburn v. State*, 50 Ohio St. 428; *In re Kline*, 6 Ohio Cir. Ct. Rep. 215.

Virginia. — *Rand v. Com.*, 9 Gratt. (Va.) 738.

See generally the title EX POST FACTO LAWS. The *Michigan* act decreasing the reduction made from the term of the prisoner for good behavior, in the case of convicts serving a second term (Pub. Acts 1893, No. 118, § 33), is not *ex post facto* as applied to one who is serv-

ing a term for an offense committed after the act went into effect, although his first term was served before such time. *Re Miller*, (Mich. 1896) 68 N. W. Rep. 990.

In *Rand v. Com.*, 9 Gratt. (Va.) 738, the court, *per* Daniel, J., said: "Is the increased punishment prescribed by the statute and to which the prisoner has been sentenced, one which, in legal contemplation, is to be regarded as attached to the first or to the second offense? If to the latter, there is nothing in the statute on which to base the imputation of its being of an *ex post facto* character in its design or operation. The constitution withholds from the legislature the power to convert, by statute, into a crime, an act which, at the time it was done, offended against no law; or to visit a criminal act even with penalties more severe than those which were attached to it by the law, when it was committed. No constitutional or other obstacle, however, seems to stand in the way of the legislature's passing an act declaring that persons thereafter convicted of certain offenses committed after the passage of the act, may, if shown to have committed like offenses before, be subjected to greater punishment than that prescribed for those whose previous course in life does not indicate so great a degree of moral depravity. One convicted under such a statute cannot justly complain that his former transgressions have been brought up in judgment against him. He knew, or is presumed to have known, before the commission of the second offense, all the penalties denounced against it; and if, in some sense, the additional punishment may be said to be a consequence of the first offense (inasmuch as there could be no sentence for such punishment in the absence of proof of the first conviction), still it is not a necessary consequence; but one which could only arise on the conviction for the second offense, and one, therefore, which, being fully apprised of in advance, the offender was left free to brave or avoid."

In *Blackburn v. State*, 50 Ohio St. 428, the court, *per* Bradbury, C. J., said: "The additional penalty was not imposed as a punishment for the first offense, nor for the second one, but because, having been convicted of their commission, he became one of a class of dangerous criminals, against whom more rigorous measures should be invoked. Had he abandoned his evil practices, after his first imprisonment, or even after his second term had ended, the consequences of which he now complains would not have followed. This he did not do, but instead chose to commit a third offense, and that too with his eyes wide open; for he knew, or was bound to know, when he committed this last offense, that he had become one of a class against whom severer measures had been declared to be necessary if he should again be convicted. It is the third conviction that devotes his future to continuous confine-

ment for second offenses committed before their passage.¹

2. Do Not Put Accused Twice in Jeopardy for Same Offense. — They have also been held not open to the objection that they subject a person to be twice put in jeopardy, or twice punished, for the same offense.²

ment. A law cannot properly be considered retroactive when it apprises one who has established, by previous unlawful acts, a criminal character, that if he perpetrates further crimes, the penalty denounced by the law will be heavier than upon one less hardened in crime. In such case the party is informed before he commits the subsequent offense of the full measure of the liability he will incur by its perpetration, and therefore does not fall within the class that is entitled to the protection afforded by the constitutional guaranty against the enactment of *ex post facto*, or retroactive laws, for the object sought by those guaranties, in respect to this kind of legislation, is that no transgressor of a penal statute shall be subjected by subsequent legislation to any penalty, liability, or consequence, that was not attached to the transgression when it occurred." See also the title *EX POST FACTO LAWS*.

1. Do Not Increase Punishment of Offenses Committed Before Passage. — *Riley's Case*, 2 Pick. (Mass.) 172.

Pub. Acts of *Michigan* 1893, No. 118, § 33, providing for a reduction of the "good time" allowed to prisoners who are serving a second sentence in the state prison, does not apply to a prisoner who was serving such a sentence when the act was passed, as, in its application to him, it would be *ex post facto*. *Matter of Canfield*, 98 Mich. 644.

2. Not a Second Jeopardy — *United States*. — *Moore v. Missouri*, 159 U. S. 673, affirming *State v. Moore*, 121 Mo. 514, 42 Am. St. Rep. 542.

California. — *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *People v. Delany*, 49 Cal. 394; *People v. Lewis*, 64 Cal. 401.

Illinois. — *Kelly v. People*, 115 Ill. 583, 56 Am. Rep. 184.

Kentucky. — *Taylor v. Com.*, 3 Ky. L. Rep. 785; *Boggs v. Com.*, (Ky. 1887) 5 S. W. Rep. 307; *Chenowith v. Com.*, (Ky. 1889) 12 S. W. Rep. 585.

Missouri. — *State v. Moore*, 121 Mo. 514, 42 Am. St. Rep. 542.

New York. — *People v. Bosworth*, 64 Hun (N. Y.) 72; *People v. McCarthy*, 45 How. Pr. (N. Y. Supreme Ct.) 97.

Wisconsin. — *Ingalls v. State*, 48 Wis. 647.

See generally the title *JEOPARDY*.

In *Rauch v. Com.*, 78 Pa. St. 490, the court, *per Agnew, C. J.*, said: "Clearly the substantive offense which draws to itself the greater punishment is the unlawful sale after a former conviction. This, therefore, is the very offense he is called upon to defend against. He cannot complain, if, after suffering a former conviction and sentence, he commits a second offense of the same kind. Besides, if he desires no trial upon the question of a former conviction, a court will take care of his interests and see that he is not unduly prejudiced."

In *Chenowith v. Com.*, (Ky. 1889) 12 S. W. Rep. 585, the court, *per Holt, J.*, said: "The

increased punishment is not for the former offenses; but the previous convictions merely aggravate the last offense, and add to its punishment. The accused is not required to answer to the former charges, and defend against them. Nothing is heard in reference to the former trials save the fact of conviction."

In *People v. McCarthy*, 45 How. Pr. (N. Y. Supreme Ct.) 97, the court, *per Davis, J.*, in speaking of an act subjecting "disorderly persons" to arrest and imprisonment if they were found attending certain places for unlawful purposes, said: "The objection that it is void because in conflict with the provisions of the constitution that 'no person shall be subject to be twice put in jeopardy for the same offense' is hardly worthy of serious consideration. It is not his previous offense which makes the 'professional thief' a disorderly person under the law, but it is his act of attending at the places named for unlawful purposes, such as plying his vocation, that brings him within the preventive remedies of the new statute." See also the title *JEOPARDY*.

Not a Double Punishment. — In *Maguire v. State*, 47 Md. 485, the court, *per Alvey, J.*, said: "The objection that, by allowing the jury to consider the first conviction, in passing upon the question of the traverser's guilt on the charge of a second offense, he is, to some extent, made liable to double punishment, is without foundation. It is a common thing in this state, as it is elsewhere, to find in statutes in regard to crimes and punishment, the second or third offense under the same statute, made subject to an increased punishment; and this for an obvious reason. The great object of the law is the prevention of crime; and the party charged with the commission of a second offense is supposed to have known all the penalties denounced against it. If, therefore, the punishment denounced against the first offense proves to be insufficient to restrain his vicious propensities, it is but just and right that an increased punishment should be inflicted for a second or third offense; and he has no reasonable cause of complaint that his former transgressions, under the same law, are brought up in judgment against him. No constitutional objection exists to such regulation of punishment; and provisions in statutes similar to that under which the present indictment was framed, have been uniformly sustained, whenever or wherever questioned."

In *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401, the court, *per Crockett, J.*, said: "He is not again punished for the first offense, but the punishment for the second is increased, because, by his persistence in the perpetration of crime, he has evinced a depravity which merits a greater punishment, and needs to be restrained by severer penalties, than if it were his first offense."

In *People v. King*, 64 Cal. 338, the court, *per McKee, J.*, said: "A conviction for petit larceny and a former conviction for grand larceny subjects a party to be punished as for a

3. Do Not Provide for Cruel or Unusual Punishments. — Another objection sometimes raised to these statutes is that they provide for cruel and unusual punishments. But it has been invariably held that the mere fact that a punishment is cumulative does not lay it open to this objection.¹

4. Do Not Deny Equal Protection of Laws. — It has been further objected to these statutes that they deny to persons once convicted of crime the equal protection of the laws; but this objection has also been held to be without foundation.²

III. AMOUNT OF ADDITIONAL PUNISHMENT. — The amount of additional punishment to be inflicted upon a second or subsequent conviction is usually prescribed by statute fixing a greater punishment in such case than if the offense were the first.³ It is sometimes provided that a person convicted of

felony. [Penal Code Cal., § 666, subd. 3.] Such legislation has been held constitutional. The increased punishment is not regarded as a part of the penal consequences of the first offense, but applies exclusively to the last as aggravated by the repetition of the same offense."

An information charging a person with assault with intent to rob, and with a previous conviction of petit larceny, does not charge two offenses. The charge of a previous conviction is made rather as matter of aggravation of the second offense than a distinct offense. *People v. Boyle*, 64 Cal. 153.

1. Cumulative Punishment Not Cruel or Unusual. — *Moore v. Missouri*, 159 U. S. 673, *affirming State v. Moore*, 121 Mo. 514, 42 Am. St. Rep. 542; *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401.

And this is true, even though the increased punishment passes the line fixed between misdemeanors and felonies. *State v. Barnes*, 3 N. Dak. 319.

In *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401, the court, *per* Crockett, J., said: "It may be and doubtless is true, that under our statute cases may arise in which the severity of the punishment would be out of all just proportion to the comparatively trivial nature of the offense. But that is a subject for the consideration of the legislature, and not of the courts."

The *Michigan* Act No. 207, Pub. Acts of 1889 (How. Annot. Stat., § 228365), providing that any person guilty of unlawfully selling liquors, etc., shall for the first offense be fined not less than fifty dollars nor more than two hundred dollars, and be imprisoned not less than twenty days nor more than six months, and for the second and every subsequent offense shall be fined not less than one hundred dollars nor more than five hundred dollars, and be imprisoned not less than six months nor more than two years, does not "provide for excessive fines to be imposed and cause cruel and unusual punishment to be inflicted" in violation of article 6, § 31, of the constitution. *People v. Whitney*, 105 Mich. 622.

The Revised Statutes of *Missouri* 1889, § 3959, providing that if a person who has once been convicted of crime and sentenced to imprisonment, and has been discharged either on serving out his sentence or on a pardon, be again convicted of crime, he shall receive the highest punishment provided by law for the second

offense, does not inflict a cruel or unusual punishment upon a person who, under its provisions, is sentenced to imprisonment for life on a conviction of burglary in the second degree. *State v. Moore*, 121 Mo. 514, 42 Am. St. Rep. 542. See also the title CRUEL AND UNUSUAL PUNISHMENTS, *ante*.

Punishment Proportioned to Offense. — The *Illinois* Act June 23, 1883 (1 Starr & Curt. Annot. Stat. 1896, p. 1360, par. 473), providing that persons convicted for the second or third time for certain offenses shall be punished more severely than for a first offense, does not violate the provision of art. 2, § 11, of the constitution of 1870, that "all penalties shall be proportioned to the nature of the offense." *Kelly v. People*, 115 Ill. 583, 56 Am. Rep. 184. In this case, the court, *per* Sheldon, J., said: "It is said the punishment provided for by the act is not in proportion to the nature of the offense, but is because of a former conviction for which the person charged has paid the penalty. Similar statutes have been adopted in many of the states, and they are upon the principle that it is just that an old offender should be punished more severely for a second offense — that repetition of the offense aggravates guilt."

Punishment Held Cruel and Unusual. — The *Michigan* Act providing that druggists convicted a second time for selling liquors in violation of law shall be debarred from selling any liquor, even for purposes for which it is lawful for druggists to make such sales, for a period of five years after such conviction (How. Annot. Stat., § 228366), is unconstitutional as inflicting a cruel and unusual punishment. *Robison v. Miner*, 68 Mich. 549. See the title CRUEL AND UNUSUAL PUNISHMENTS, *ante*.

2. Do Not Deny Equal Protection of Laws. — *Moore v. Missouri*, 159 U. S. 673, *affirming State v. Moore*, 121 Mo. 514, 42 Am. St. Rep. 542; *In re Boggs*, 45 Fed. Rep. 475. See also *Sturtevant v. Com.*, 158 Mass. 598.

3. Amount of Additional Punishment — England. — The statute 27 and 28 Vict., c. 47, § 2, provides that "where any person shall, on indictment, be convicted of any crime or offense punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded shall be seven years." Under this statute, a person who is convicted of false pretenses, after a previous conviction of felony, cannot be sentenced to less than seven years'

a crime must receive the maximum punishment provided therefor, in case he has previously been convicted of another crime.¹

"Double the Time of First Conviction." — The effect of a statute providing that a person convicted of crime a second time shall be imprisoned "not less than double the time of the first conviction," is merely to increase the punishment of the second offense to that extent, if it would otherwise be less. It does not authorize imprisonment for double the time of the first sentence in addition to the regular punishment for the second offense.² Where a prisoner has been pardoned before serving out his full term under a first conviction, he must, nevertheless, on being convicted a second time, be sentenced to at least double the term of the first sentence.³

penal servitude. *Reg. v. Deane*, 2 Q. B. Div. 305.

California. — Cal. Pen. Code, § 666, in reference to cumulative punishments, provides:

"1. If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the state prison for any term exceeding five years, such person is punishable by imprisonment in the state prison not less than ten years.

"2. If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the state prison for five years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the state prison not exceeding ten years."

The maximum term of imprisonment under subd. 1 not being fixed, the court may sentence a culprit to any term from ten years to the course of his natural life. Therefore, a person convicted of an assault with intent to commit robbery, after a previous conviction of grand larceny, may be sentenced to thirty-five years' imprisonment. *People v. Brooks*, 65 Cal. 295.

Under subd. 2 a person convicted of assault with a deadly weapon, after a previous conviction of manslaughter, may properly be sentenced to eight years' imprisonment. *People v. Douglass*, 87 Cal. 281.

Kentucky. — Under Gen. Stat. Ky., c. 29, art. 1, § 12 (Ky. Stat. 1894, § 1130), the punishment of confinement in the penitentiary for life becomes inevitable when a person is convicted for the third time of a felony punishable by confinement in the penitentiary. The court must so instruct, and the jury, if they find the third offense to be a felony, is bound to render a verdict accordingly. *Combs v. Com.*, 14 Ky. L. Rep. 245, (Ky. 1892) 20 S. W. Rep. 268.

Ohio. — Under Ohio Laws, vol. 82, p. 237, § 2 (Bates' Annot. Stat. 1897, § 7388-11), in reference to habitual criminals, the liability to imprisonment during life is made an inseparable incident of every third conviction for a felony, as the statute in express terms declares that the liability to be so detained shall be and constitute a part of every sentence to imprisonment in the penitentiary. The expression "every sentence" is taken to mean every sentence for a third felony. *Blackburn v. State*, 50 Ohio St. 428. In this case, the court, *per* Bradbury, C. J., said that this statute "clearly evinces an intention that, upon every third conviction for a felony, the convict shall be sentenced to a specific term of years in the

penitentiary, during which the power of parole shall be suspended, and that, on the expiration of this specific term, he shall remain in the penitentiary until discharged by death, parole, or pardon. Two additional consequences are thus attached to the third conviction; the suspension of the power of parole for a specific term to be fixed by the court, and imprisonment for life thereafter, thereby securing society from the depredations of a dangerous criminal during a specific term, unless he should be pardoned by the governor, and thereafter for life, if neither paroled nor pardoned."

1. Maximum Punishment Imperative — California. — Under Cal. Pen. Code, § 667, subd. 1, a person convicted of robbery after previous convictions of other offenses punishable by imprisonment in the state prison, must be sentenced to imprisonment for life. *People v. Harris*, 61 Cal. 136.

Massachusetts. — Under Pub. Stat. Mass., c. 215, § 8, providing that, in case of offenses punishable by fine and imprisonment in the jail or house of correction, "the offender may, at the discretion of the court, be sentenced to be punished by such imprisonment without the fine, or by such fine without the imprisonment, in all cases where he shows to the satisfaction of the court that he has not before been convicted of a similar offense," the court has no discretion in the case of a person convicted for the second time, but must impose both fine and imprisonment. *Com. v. Marchand*, 155 Mass. 8.

Missouri. — See *State v. Moore*, 121 Mo. 514, 42 Am. St. Rep. 542.

New York. — Under N. Y. Pen. Code, § 688, subd. 1, a person convicted of forgery in the first degree, after a previous conviction of forgery in the third degree, must be sentenced to imprisonment for life. *People v. Raymond*, 96 N. Y. 38, *affirming* 32 Hun (N. Y.) 123.

Texas. — See Long v. State, 36 Tex. 6.

2. Double the Time of First Imprisonment. — *Chenoweth v. Com.*, (Ky. 1889) 12 S. W. Rep. 585. In this case the court held that, under Gen. Stat. Kentucky, c. 29, art. 1, § 12 (Ky. Stat. 1894, § 1130), the jury could not, after fixing the punishment for the second offense at imprisonment for five years, add to that a term of six years, which was double the first term, thus making eleven years; but directed that judgment should be rendered increasing the term of imprisonment which the jury had fixed at five, to six years.

3. Pardon for First Offense Does Not Reduce Time of Second Imprisonment. — *Mount v. Com.*, 2 Duv. (Ky.) 93.

Deprivation of "Good Time." — A convict serving a second or subsequent term of imprisonment is sometimes deprived, wholly or in part, of the "good time," or reduction in the time of imprisonment, which is often allowed for good behavior of the convict.¹

IV. WHEN AUTHORIZED — 1. Time of Committing Second Offense — a. AFTER FIRST CONVICTION. — Most of the statutes providing for cumulative punishment are expressly made to apply only to a second offense committed after conviction for a first; and even in the absence of an express provision to that effect, such a meaning will be implied.²

1. Deprivation or Reduction of "Good Time." — See *Re Miller*, (Mich. 1896) 68 N. W. Rep. 997; *Re Prisoners*, 3 Detroit Leg. N., No. 34. In the latter case it was considered by the attorney-general that the fact that a prisoner was serving his third term in a different state prison from that in which his former terms had been served did not take his case out of the operation of the law (Pub. Acts *Michigan* 1893, No. 118, § 33) depriving convicts serving a third or subsequent term of any good time whatever.

In *New Jersey* a person sentenced to prison for the second time must, under Rev. Stat. 1896, p. 3155, § 12, in addition to his second term, serve out the time by which his first term was reduced for good conduct. *State v. Patterson*, (N. J. 1891) 22 Atl. Rep. 802.

Prison Authorities May Determine Whether Second or Subsequent Term. — Under Pub. Acts of *Michigan* 1893, No. 118, § 33, providing for a reduction of the "good time" allowed to convicts in the case of one who is serving a second term, and depriving one who is serving a third term of any good time whatever, the prison authorities have power to determine whether a convict is serving a second or other term, and it is not necessary that the question be adjudicated upon a formal hearing; though the prisoner might attack the correctness of their determination in habeas corpus. *Matter of Canfield*, 98 Mich. 644.

2. Conviction Must Precede Second Offense — *Kansas*. — *State v. Volmer*, 6 Kan. 379.

Kentucky. — *Brown v. Com.*, (Ky. 1896) 37 S. W. Rep. 496.

Massachusetts. — *Com. v. Daley*, 4 Gray (Mass.) 209; *Tuttle v. Com.*, 2 Gray (Mass.) 505.

Mississippi. — *Norton v. State*, 65 Miss. 297.

New Jersey. — *State v. Patterson*, (N. J. 1891) 22 Atl. Rep. 802.

New York. — *People v. Butler*, 3 Cow. (N. Y.) 347.

Texas. — *Long v. State*, 36 Tex. 6.

Virginia. — *Rand v. Com.*, 9 Gratt. (Va.) 738; *Com. v. Welsh*, 2 Va. Cas. 57.

In *Long v. State*, 36 Tex. 6, the court, *per Evans, P. J.*, said: "All the states of the American Union that have adopted the penitentiary system make provision for the reformation of offenders, by increasing the punishment for second and subsequent convictions. Many of the codes of the different states declare in express terms that, before the party can be visited with the increased penalty, it must appear that the subsequent offense was committed after the conviction of the former offense. Though differing in language, the same principle runs through them all, and we

are not permitted to suppose that our legislature intended to introduce a principle entirely out of harmony with the general system, by visiting the increased punishment upon an offender who has never had an opportunity of reformation from experiencing the beneficent discipline of the law."

In *Com. v. Daley*, 4 Gray (Mass.) 209, the court, *per Bigelow, J.*, said: "The infliction of increased punishments, as a consequence of second and subsequent convictions of similar offenses by the same person, is not unknown in criminal jurisprudence. Under our own system of criminal law, analogous provisions were long in force, by which persons convicted of offenses punished by imprisonment in the state prison were liable to additional punishment upon each successive sentence to confinement therein. Stat. 1833, c. 83; Rev. Stat., c. 133, § 16. The sole object of all such penal enactments is to deter persons from the repeated commission of similar offenses, by imposing additional and severer penalties for each successive violation of law; that is, to punish second offenses more severely than first, and third more severely than second; and thus by aggravating the punishment for each successive violation of law, to prevent persons from becoming old and hardened offenders. Such, we have no doubt, was the object of the provisions in the section of the statute under consideration. After a conviction of a first offense under the seventh section, the statute was intended to prevent a repetition of the offense, by holding up before the offender an increased punishment; so that, after having suffered the first penalty, he might be thereby deterred from incurring the aggravated punishment consequent on a conviction of a similar offense subsequently committed. The main purpose of every humane penal code is to prevent the commission of crime. The law does not seek to take vengeance upon its violators. It strives by its penalties to warn and hinder rather than to punish. To hold that, under this statute, a person might incur the heavier punishment provided in case of a second conviction, for an offense committed prior to the first conviction, would be contrary to those humane principles, and would reverse the due order of punishment. * * * It is no answer to this view to say that if a party has twice violated the law he ought therefore to suffer the aggravated punishment without regard to the time when the offenses were committed. Such an argument loses sight of the principle on which aggravated penalties are prescribed. That principle is that the offender is first to incur the lighter penalty, and be thereby subjected to the dis-

b. AFTER PARDON OR DISCHARGE. — Those statutes which provide for cumulative punishment for offenses committed after pardon or discharge from imprisonment for a prior offense are strictly construed; and such pardon or discharge before the commission of the second offense must be shown, in order to subject a person to the increased punishment.¹

An Escape from prison is not a discharge, within the meaning of such statutes. Therefore, a person convicted of a crime committed after he had escaped from prison, and before his recapture and regular discharge, has been held not liable to increased punishment.²

2. The Prior Conviction — *a. IN GENERAL.* — As has been seen, a prior

discipline which penal enactments are intended to exert upon the violators of law, before he can be liable to incur the more aggravated punishment. We are, therefore, of opinion that, by a true construction of the provisions of the statute by which additional punishments are prescribed, the second and third convictions therein specified are intended to be convictions of second and third offenses, and that it is incumbent on the government to prove that the offense charged against a party was committed subsequently to the previous conviction alleged in the complaint or indictment, in order to subject him to the higher penalties prescribed in cases of second and subsequent convictions."

In *Brown v. Com.*, (Ky. 1896) 37 S. W. Rep. 496, the court, *per* Du Relle, J., said: "The question presented for decision is whether the statute in question authorizes the imposition of the increased penalty for an offense not committed after the original convictions. We think not. The statute was manifestly intended to provide an increased penalty for a subsequent offense, in order to deter the offender from its repetition. After punishment is imposed for the commission of a crime, the double penalty is held *in terrorem* over the criminal, for the purpose of effecting his reformation, and preventing further and subsequent offenses by him. So we find that for a third offense the punishment of imprisonment for life is provided by the act, upon the theory, doubtless, that he must then be regarded as incorrigible. The reformatory object of the statute, namely, to provide a deterrent from future crime, would not be effected by a construction which gives to the offender no opportunity to reform. Moreover, 'doubtful questions as to the severity of the penalty are to be resolved in favor of the accused.' 4 AM. AND ENG. ENCYC. OF LAW [1st ed.] 726. We are of the opinion that the words 'convicted a second time of felony,' and 'convicted a third time of felony,' must be restricted to felonies committed subsequent to the dates of the convictions relied on to effect an increase of the penalty, for otherwise no *locus penitentiae* would be afforded to the accused."

The *New Jersey* statute (Rev. Stat. 1896, p. 3155, § 12), providing that if a person who has been imprisoned and allowed the reduction of sentence provided by law for good behavior shall be again convicted and sentenced to state prison, he shall be required to serve out the time remitted on his previous sentence, does not apply to a person whose first term is served after a second conviction, the sentence for the

second offense being meanwhile suspended. *State v. Patterson*, (N. J. 1891) 22 Atl. Rep. 802.

First Sentence Need Not Be Carried Out. — In *Kansas* it has been held that, under a statute providing an increased penalty for a person convicted of a second offense of selling liquors without a license, it is not necessary to subject a person, who has been once before convicted, to the increased penalty; that the first conviction should have been satisfied by payment of the fine imposed or by a pardon. *State v. Volmer*, 6 Kan. 379.

1. Discharge or Pardon Must Precede Second Offense. — *State v. Austin*, 113 Mo. 538; *Stevens v. People*, 1 Hill (N. Y.) 261.

Expiration of Sentence. — Under a statute imposing an increased punishment upon a person who commits a crime after a former conviction of an offense punishable by imprisonment in a state prison, and a discharge "either upon being pardoned or upon the expiration of his sentence," it is incumbent upon the state to prove that the person charged was imprisoned in the state prison pursuant to the former sentence, and the time and manner of his discharge from such imprisonment. Unless this is shown there can be no conviction of the aggravated offense. *Wood v. People*, 53 N. Y. 511. In this case the court, *per* Allen, J., said: "Mere lapse of time did not authorize the presumption that he had been imprisoned and had been discharged upon the expiration of the term for which he was sentenced, so as to cast the burden of proof upon the defendant that he was not discharged either by pardon or upon the expiration of his sentence. He may have escaped, or the judgment may have been arrested or reversed, or he may have been discharged upon habeas corpus; and as there were other means and processes by which he might have been discharged, or found at liberty, it was error for the court to assume, in the absence of evidence, that he was discharged upon the expiration of the term of imprisonment, and therefore liable to conviction for the aggravated offense."

Discharge "in Due Course of Law." — Under a statute providing an additional punishment for a person who has been before convicted and discharged "in due course of law," a person who is discharged in consequence of a pardon is within the meaning of the statute. *Evans v. Com.*, 3 Met. (Mass.) 453.

2. Escape Not a Discharge. — *Com. v. Mott*, 21 Pick. (Mass.) 492. See also *Wood v. People*, 53 N. Y. 511. See generally the title ESCAPE.

conviction is necessary to render a person liable to cumulative punishment.¹ The term "conviction" is defined and explained in another part of this work.²

b. MUST BE FOUND BY JURY. — In order to subject a person to cumulative punishment, the fact of a prior conviction must be found by the jury;³

1. Necessity for Prior Conviction. — See *supra*, this section, *Time of Committing Second Offense*.

2. Meaning of "Conviction." — See CONVICTION, vol. 7, p. 497.

Construction in Cases Involving Cumulative Punishment — *Plea of Guilty — No Judgment.* — In *Reg. v. Blaby*, (1894) 2 Q. B. 170, a plea of guilty was held to amount to a conviction, though no judgment had been pronounced.

Verdict of Guilty — No Judgment. — In *Smith v. Com.*, 14 S. & R. (Pa.) 69, a verdict of guilty was held not a sufficient conviction, it not being shown what judgment was pronounced upon the verdict.

Pendency of Writ of Error. — In *White v. Com.*, 79 Va. 611, the court, *per* Richardson, J., said: "Probably, in a prosecution alleging, as in this case, a former conviction, and where the statute imposes an increased penalty for each succeeding offense, and when the alleged prior conviction and judgment thereon is held for review on writ of error in the court of last resort, it would be safer and more in consonance with a liberal and just view of the rights of the citizen to hold * * * that pending the alleged former conviction in the appellate tribunal there is wanting that final judgment sentence essential to constitute conviction."

3. Prior Conviction Must Be Found by Jury. — *Johnson v. People*, 55 N. Y. 512, 65 Barb. (N. Y.) 342.

Under the *English* statutes 27 and 28 Vict., c. 47, § 2, a person convicted of a felony cannot be sentenced as for a second conviction unless the first conviction was averred in the indictment. He is entitled to have his identity tried by a jury, which it cannot be when a previous conviction is not upon the record. *Reg. v. Willis*, L. R. 1 C. C. 363, 2 Moak 239.

Must Be Expressly Found — *Illinois.* — In *Watson v. People*, 134 Ill. 374, the defendant was indicted for burglary. The indictment contained four separate counts, the first, second, and fourth of which charged the burglary, while the third alone charged a former conviction of burglary. The court charged the jury that if they found the defendant guilty under the first count of burglary, they should fix his punishment at twenty years' imprisonment, which was the penalty for a second offense under the Illinois statute. This was held to be error. The court, *per* Wilkin, J., said: "Under this instruction, if the jury found the defendant guilty of burglary, they were bound to fix his punishment at twenty years, whether there was any proof of a former conviction or not. What is known as the Habitual Criminal Act, in force July 1, 1883 (1 Starr & Curtis Annot. Stat. 1896, p. 1360, par. 473), expressly provides that the former conviction and judgment shall be set forth in apt words in the indictment, and, of course, like every other material allegation, it must be proved as alleged. By this instruction the jury were

not required to find that the defendant had been previously convicted of the crime of burglary, as a condition to their fixing his punishment at twenty years, and they did not so find."

Kentucky. — Under the statute providing that a person convicted for the third time of a felony punishable by imprisonment in the penitentiary shall be confined during his life, it is necessary, in order to warrant the life sentence, that the jury should find the fact of two prior convictions. It is the duty of the court to so instruct the jury as to enable them to find the fact of former convictions separate from their verdict as to the guilt or innocence of the accused in respect to the pending charge. A finding of the jury that "We find the defendant guilty, and fix his punishment at confinement in the state penitentiary during natural life," does not disclose that the jury found the fact of former convictions and does not authorize the life sentence. *Rector v. Com.*, 80 Ky. 458.

Maryland. — See *Maguire v. State*, 47 Md. 455.

Virginia. — Under a statute imposing an increased punishment for a second conviction, and requiring that the previous conviction be "admitted or by the jury found," the jury must find expressly upon the question. A general verdict of guilty does not warrant a sentence for the increased punishment, though the former conviction was charged in the indictment. *Thomas v. Com.*, 22 Gratt. (Va.) 912.

Admission of Previous Conviction — *California.* — An admission of prior conviction or convictions does away with the necessity of a special finding on the question, and in such case a general verdict of guilty warrants a sentence as for a second or subsequent offense. *People v. Brooks*, 65 Cal. 295; *People v. Johnson*, 88 Cal. 171; *Ex p. Williams*, 89 Cal. 421; *Ex p. Young Ah Gow*, 73 Cal. 438, explaining the apparently conflicting case of *People v. King*, 64 Cal. 338.

Finding of Court as to Prior Conviction. — In *Vermont* it has been held that, under a statute providing for an increased punishment on a second or third conviction of certain offenses, and also providing that it is not necessary to aver a former conviction, the record of the former conviction need not be produced before the jury, but it may be produced after a verdict of guilty, in order that the court may pronounce the proper sentence, the question of the effect of such records being purely one for the court, and not for the jury. *State v. Haynes*, 36 Vt. 667; *State v. Freeman*, 27 Vt. 522.

If, however, any *bona fide* question should arise in regard to the identity of the person, the court might order an issue upon that point to be submitted to a jury. *State v. Freeman*, 27 Vt. 522.

therefore, evidence to sustain an allegation thereof is properly introduced on the trial,¹ and cannot be objected to as tending to establish the bad character of the prisoner by proof of specific acts.²

c. EVIDENCE — Record of Former Conviction. — The first step towards proving that a person accused of crime has been before convicted of another crime is the production of the record of such conviction.³ It has been held that the production of such record or a duly authenticated copy of it is absolutely necessary,⁴ and under a statute requiring the fact of former convictions to be found from "record and other competent evidence," that unless the record is read to the jury, a finding of prior convictions is not warranted, even though the defendant admits such convictions.⁵

In *Georgia*, however, the contrary, and undoubtedly the better, rule prevails. Thus in *Hines v. State*, 26 Ga. 614, the defendant was indicted for selling liquor to a slave, being a second offense. The court told the jury "that no proof of a former conviction was necessary," and after the jury had found a general verdict of guilty, the court heard evidence as to whether the offense was a second one, and decided that it was. The defendant was thereupon sentenced to pay the fine authorized to be imposed in case of a second offense. This was held to be error, as the question whether the offense was or was not a second one was for the jury.

1. Evidence of Prior Conviction Properly Introduced. — *People v. Bosworth*, 64 Hun (N. Y.) 72.

2. Not Objectionable as Improperly Establishing Bad Character. — *Johnson v. People*, 55 N. Y. 512, 65 Barb. (N. Y.) 342.

3. Record Admissible. — *Com. v. Miller*, 8 Gray (Mass.) 484; *State v. Manecke*, (Mo. 1897) 41 S. W. Rep. 223. See also *People v. Clark*, 66 Hun (N. Y.) 626, 20 N. Y. Supp. 729. See generally the title **RECORD**.

In *Maine* the record of a prior conviction in the following form: "Indictment for being a common seller of intoxicating liquors; * * * the defendant being arraigned pleads not guilty; thereupon, the issue being presented to the jury duly impaneled, they find a verdict of guilty," etc., is properly admitted. No more extended proof has been or usually is made. The addition of the indictment would have given no more information as to the nature of the offense charged than is obtained from the record. *State v. Lashus*, 79 Me. 504.

Testimony to Supply Omission in Record. — In *Missouri*, where a person was indicted for a second offense of petit larceny, and the record of the first conviction showed that the warrant for the defendant's arrest was issued on the affidavit of a private citizen and that the defendant pleaded guilty, but did not show that the information of the prosecuting officer was filed before the defendant entered his plea, as required by law, it was held permissible to show by the oath of the justice before whom the conviction was had that the information was so filed. *State v. Hockaday*, 98 Mo. 590.

Conclusiveness of Record. — A finding that the accused has been before convicted of crime is warranted, when the record of such conviction is produced and the identity of the accused with the person referred to therein is established. *State v. Dolan*, 69 Me. 573; *Com. v. Hughes*, 133 Mass. 496.

Indefinite Record. — Where a person is charged with having committed petit larceny after a prior conviction, which, under *Missouri Rev. Stat.* (1889), § 3959, subjects him to an increased penalty, the prior conviction is not proved by the introduction of the record of a prior judgment in which it nowhere appears what the offense was of which the defendant was convicted; and this is true even though it may be inferred from the commitment in evidence that such former offense was petit larceny. *State v. Brown*, 115 Mo. 409.

Void Sentence. — In a prosecution under the *Michigan* local option law (*How. Annot. Stat.*, § 2283a *et seq.*), for a second offense of selling liquor, the former conviction is sufficiently proved by the introduction of the judgment, which has never been reversed, showing that the defendant pleaded guilty; even though the sentence imposed on such first conviction may have been void. *People v. Adams*, 95 Mich. 541.

Variance. — Under a statute providing an additional punishment for a second conviction of crime, an indictment charging a previous conviction of assault with intent to kill is not supported by the introduction of the record of the alleged conviction, which shows that the defendant was found guilty of felonious wounding. *State v. Maloney*, 118 Mo. 112.

4. Necessity for Production of Record. — *Maguire v. State*, 47 Md. 485. In this case the court, *per Alvey, J.*, added: "And as to the objection that there was not a formal and extended record offered, instead of the docket entries of the proceedings of the prior conviction, we think that altogether untenable. The indictment in that case was offered in connection with the docket entries, and the entries show that the party accused submitted under plea of guilty, and that he was thereupon fined fifty dollars and costs. This record evidence was offered in the same court in which the proceedings occurred; and in such case the docket entries, being made under the direction or inspection of the court, when offered in connection with the original papers or files of the court, stand in the place of the record, and are received in evidence as such record."

5. Admission of Defendant Does Not Obviate Necessity for Producing Record. — *Rector v. Com.*, 80 Ky. 468.

In *Pennsylvania*, however, cumulative punishment may be imposed when the attorney-general suggests a previous conviction and the defendant admits the same. *Com. v. Hagan*, 10 Pa. Co. Ct. Rep. 22.

Identity. — It must further be proved that the accused is the same person who is shown by the record to have been convicted.¹ Mere identity of names is not conclusive,² nor does the fact that the names are not the same debar the prosecution from showing that they refer to the same person.³

d. TIME AND PLACE — Conviction Before Law Providing for Cumulative Punishment Took Effect. — The principle of cumulative punishment is that the prior conviction is simply a fact in the past history of a criminal, which the law takes into consideration when prescribing the punishment for a second offense, and not an element of that offense.⁴ Therefore, a criminal is liable to the additional punishment for a second offense, though the first conviction took place before the law providing for such additional punishment went into effect,⁵ unless the law itself shows that the intention of the legislature was otherwise.⁶

1. Identity Must Be Proved. — *Maguire v. State*, 47 Md. 485; *People v. Price*, (Ct. Sess.) 6 N. Y. Crim. Rep. 141. In the latter case an indictment charging a prior conviction in another state was quashed because the grand jury in finding such indictment had acted without testimony or proof of the identity of the accused with the person formerly convicted.

It is not necessary that a witness who was present at the former trial should be introduced, but any proof which satisfies the jury is sufficient. *Reg. v. Leng*, 1 F. & F. 77.

Where an indictment for an offense alleges in aggravation a former conviction for a similar offense, a general verdict of guilty cannot be sustained, if no evidence was produced on the trial showing the identity of the defendant with the person formerly convicted, even though the defendant did not deny such identity beyond a plea of not guilty. *Com. v. Briggs*, 5 Pick. (Mass.) 429.

Photographs are admissible in evidence to establish the identity of persons accused of crime with persons formerly convicted of other crimes. *People v. Smith*, 121 N. Y. 578.

An Admission by the defendant of his identity with the person referred to in the records of previous convictions is sufficient to establish the fact. *Com. v. Hughes*, 133 Mass. 496. See also *Com. v. Hagan*, 10 Pa. Co. Ct. Rep. 22.

2. Identity of Names Not Conclusive. — Where a former conviction is alleged, the identity of the defendant on trial with the person named in the record of the former conviction is a question of fact for the jury, and it is error for the court, merely because the names are identical, to treat such question as one of law. *State v. Lashus*, 79 Me. 504.

3. Proof of Identity Though Names Differ. — *State v. Dolan*, 69 Me. 573; *People v. Wilson*, 7 N. Y. App. Div. 326. In the latter case it was held that it was competent for the policeman who arrested the defendant on the previous indictment to testify as to his identity with the prisoner then before the court.

4. First Conviction Merely a Part of History of Criminal. — *People v. Raymond*, 96 N. Y. 38, *per* Finch, J.

5. Conviction Before Law Providing for Cumulative Punishment Took Effect — California. — *Ex p. Gutierrez*, 45 Cal. 429.

Massachusetts. — *Ross's Case*, 2 Pick. (Mass.) 172; *Com. v. Graves*, 155 Mass. 163; *Sturtevant v. Com.*, 158 Mass. 598.

New York. — *People v. Raymond*, 96 N. Y. 38, *affirming* 32 Hun (N. Y.) 123.

Ohio. — *Blackburn v. State*, 50 Ohio St. 428; *In re Kline*, 6 Ohio Cir. Ct. Rep. 215.

Virginia. — *Rand v. Com.*, 9 Gratt. (Va.) 738.

In *People v. Raymond*, 96 N. Y. 38, *affirming* 32 Hun (N. Y.) 123, it was held that the Penal Code of *New York*, § 719, providing that nothing contained in the code should apply to an offense committed before it went into effect, did not prevent cumulative punishment, under section 688, where the first conviction took place before that time.

6. Laws Excluding Consideration of Past Offenses. — The *Connecticut* Act of July 6, 1895 (Pub. Acts 1895, p. 670, c. 331, § 1), provides that "every person convicted for a first violation of any of the provisions of the laws relating to the sale of spirituous and intoxicating liquors shall be punished by a fine of not less than ten nor more than two hundred dollars; for a second and all subsequent convictions, such person shall be punished by said fine, or by imprisonment not less than ten days nor more than six months, or by such fine and imprisonment both." It was held that the increased penalty for a second offense applied only to the second offense committed after the law went into effect, and that a previous conviction before that time could not subject a person to the additional punishment. *State v. Sanford*, 67 Conn. 286. In this case the court, *per* Baldwin, J., said: "The punishments provided by the first clause of section 1, for 'every person convicted of a first violation' of the liquor laws, being greater than those previously prescribed, the statute would be clearly *ex post facto*, if section 4 [*sic*] were the rule of punishment for offenses committed before it went into effect. It is not to be presumed that the legislature intended to adopt a measure so plainly contrary to the Constitution of the United States. The words quoted must, therefore, be understood as applicable only to every person thereafter convicted of a first violation thereafter committed; and the 'second and all subsequent convictions,' referred to in the second clause, seem to us to mean convictions following one secured under the provisions of the first clause. This view is confirmed by the provisions of the second section, which, after authorizing the court, 'upon a first conviction,' to certify that, in its opinion, the license should not be revoked, proceeds to declare that it shall be revoked 'for any subsequent conviction.' It cannot be doubted that this language was intended to apply only to successive convictions under the

Statute of Limitations. — Upon the same principle, proof of a prior conviction, in order to aggravate the punishment of a subsequent offense, can never be barred by the application of a statute limiting the time within which a prosecution must be begun.¹

Place. — A state law providing for cumulative punishment does not apply to a case where the prior conviction was in another state, unless there is an express provision to that effect.² Such provisions are, however, frequently found in the laws of the various states.³

c. NUMBER OF PREVIOUS CONVICTIONS. — The fact that a person has suffered more than the number of prior convictions necessary to subject him to cumulative punishment cannot have the effect of relieving him of liability to such punishment.⁴

f. NATURE OF PRIOR OFFENSE. — The object of cumulative punishment being to deter from crime, by imposing a severer penalty on one who has shown a criminal disposition by a prior offense, there is no reason why it should be inflicted only in cases where the first offense was of the same character or grade as the second. And such a limited construction is not given to laws on the subject which are reasonably susceptible of a more liberal interpretation.⁵

new law." See also *Carson v. State*, 108 Ala. 35.

1. Statute of Limitations Not Applicable. — *State v. Dolan*, 69 Me. 573; *State v. O'Neil*, 58 Vt. 140, 56 Am. Rep. 557. In the latter case the court, *per* Royce, C. J., said: "The reason for the limitation of prosecutions for the offenses charged in these cases to a period within three years from the time of commission, as for all similar limitations, is that a person should not be called upon to answer to a legal accusation after such a long time has elapsed as would, in the estimation of the law, make it difficult or impossible, by reason of the death or removal of witnesses, the loss or destruction of evidence, or the various embarrassments likely to arise from a considerable lapse of time, for him to establish his innocence. This reason has no application to a case where the only proof that can be used on the one side or the other is matter of record. We should, therefore, have no justification, even if we deemed it within the scope of our power and duty, for making applications of a rule of limitation, by analogy, in these cases."

2. Prior Conviction in Foreign State. — *People v. Caesar*, 1 Park. Cr. Rep. (Columbia Oyer & T. Ct.) 645. See also *Rand v. Com.*, 9 Gratt. (Va.) 738.

In the case first cited the court, *per* Parker, J., said: "The legislature, without doubt, has the power to inflict an increased punishment where the first offense took place in a foreign country, as well as where it took place in our own state, not because it has or can give to the courts any jurisdiction over offenses committed in a foreign state or country, but because it has full power over the offense committed here, and may mete out such punishment as the moral delinquency of the offender may seem to require. The first offense, though committed beyond our jurisdiction, may furnish a good reason for punishing the second offense committed within it, to an extent commensurate with the guilty character of the culprit and sufficient to protect the community

against further depredation. But the legislature has thought proper to authorize an increased punishment for a second offense, when the first offense was committed in another state, only in cases where such first offense, if committed here, would have been deemed a felony under our Revised Statutes [this limitation is still in force, see Penal Code, § 688], that is to say, an offense punishable in a state prison; and the first offense in this case not having been of that grade, no punishment can be inflicted for the petit larceny committed here beyond what belongs to a first conviction. The prisoner will, therefore, be punished for simple petit larceny."

3. Laws Inflicting Cumulative Punishment Where Prior Conviction in Foreign State. — *People v. Price*, 53 Hun (N. Y.) 185, *affirmed* 119 N. Y. 650; *Rand v. Com.*, 9 Gratt. (Va.) 738. See also *Rector v. Com.*, 80 Ky. 468; *People v. Smith*, 121 N. Y. 578; *People v. Caesar*, 1 Park. Cr. Rep. (Columbia Oyer & T. Ct.) 645; *Stover v. Com.*, 92 Va. 780.

In *People v. Price*, 53 Hun (N. Y.) 185, the court, *per* Landon, J., said: "No constitutional provision restrains the legislative power of New York from prescribing that where persons have been convicted for felony in another state, whether subsequently pardoned or not, they shall, upon subsequent conviction of a felony in this state, be more severely punished. * * * Here no penalty is incurred for the offense committed in Georgia, but a double penalty is inflicted upon the repetition here of the like offense."

4. More than Necessary Number of Prior Convictions. — *Boggs v. Com.*, (Ky. 1887) 5 S. W. Rep. 307; *Taylor v. Com.*, 3 Ky. L. Rep. 785.

In the case first cited the court, *per* Lewis, J., said: "We do not perceive how the previous commission of three or more felonies can alter or negative the fact that as many as two were committed before the accused was indicted and tried for the last offense."

5. Offenses Need Not Be of Same Character or Grade. — It is not necessary, in order to subject a person who is convicted of a crime after a

Cumulation Made to Depend on Nature of Prior Offense. — In some instances, however, cumulation is expressly made to depend on the nature of the prior offense, either by the enumeration of certain offenses,¹ or by the use of some such term as "similar offense,"² or "offense of the same nature."³ In such case it has been held in *Virginia* that the prior offense must itself be of such a grade as to authorize the cumulation, and that additional punishment cannot be founded upon a prior offense which was raised to the necessary grade only

previous conviction of felony to the increased punishment provided by the *New York Penal Code*, § 688, that the first offense should have been of the same character or grade as the second. *People v. Raymond*, 96 N. Y. 38, *affirming* 32 Hun (N. Y.) 123. In this case the court, *per* Finch, J., said: "The reason is the same whether both crimes are of similar character, or of the same grade, or not. Both are crimes, and the perpetration of the second, however different, shows such a persistence in evil, such a continued criminality, as to justify and make prudent a severer penalty than should be inflicted upon a first offender. If we adopted the construction sought, a prisoner might have been convicted of many felonies, and yet, by judicious changes from one to another, or running up or down the different grades, escape entirely the penalty of a second offense."

Under a statute imposing an increased penalty for a second conviction of violation of the liquor laws by selling, furnishing, or giving away liquor, a previous conviction of selling will justify the increased punishment upon a conviction of furnishing. *State v. Haynes*, 36 Vt. 667. In this case, the court, *per* Poland, C. J., said: "Selling, furnishing, or giving away are all equally violations of the act, and a conviction for violating the statute in one of these forms is available to double the penalty on a second conviction for a violation in another. It is equally within the intent and purpose of the law to punish offenders so incorrigible and hardened as not to desist after one chastisement for their breach of law."

Offenses against Different Governments. — In *In re Willis*, 83 Fed. Rep. 148, the petitioner had been imprisoned in a New York state penitentiary for an offense against the United States. His sentence was commuted under Rev. Stat. U. S., § 5544, providing that such prisoners should be entitled to the same rule of credits as other prisoners in the same penitentiary, and New York Laws 1886, c. 21, providing that where the governor commuted a sentence he should annex a condition that if the prisoner were again sentenced to the penitentiary he should serve out the remainder of his first term in addition to the second. The petitioner was afterwards sentenced to the penitentiary a second time, but claimed that he was not liable to serve out the remainder of his first term because the second offense was against a state and not a federal law. It was held that this fact did not relieve him from such liability.

Conviction as an "Habitual Criminal." — A prior conviction and sentence to three years' imprisonment as a "common and notorious thief," under the *Massachusetts* statutes, will warrant the additional punishment provided for one who is a second time convicted and

sentenced to imprisonment for a "term of years," though no one of the three larcenies of which the person was convicted at one term of court, in order to warrant the former sentence, was of itself punishable by imprisonment for more than one year. *Ex p. White*, 14 Pick. (Mass.) 90. See also *Ex p. Stevens*, 14 Pick. (Mass.) 94; *Plumbly v. Com.*, 2 Met. (Mass.) 413.

1. Enumerated Offenses. — Under the *Illinois* Act of June 23, 1883 (1 Starr & Curtis Annot. Stat. 1896, p. 1360, par. 473), providing that "whenever any person, having been convicted of either of the crimes of burglary, grand larceny, horse stealing, robbery, forgery, or counterfeiting, shall thereafter be convicted of any one of such crimes committed after such first conviction," the punishment shall be greater than it would be in case of a first offense, it is not necessary that the second conviction should be for the same crime as the first; it is sufficient if it be for any one of the crimes enumerated. *Kelly v. People*, 115 Ill. 583, 56 Am. Rep. 184.

2. "Similar Offense." — Under a statute providing that the court shall have power to mitigate a sentence, on the culprit's showing "that he has not before been convicted of a similar offense," a previous conviction for an offense against the law which has been a second time violated is a "similar offense," though at the time of such previous conviction the penalty was different. *Com. v. Marchand*, 155 Mass. 8.

3. Offenses Not of Same Nature. — In *Long v. State*, 36 Tex. 6, it was held that under a statute providing that "if it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense or of one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offense in ordinary cases," a previous conviction of murder in the second degree did not authorize such increased punishment for an assault with intent to commit murder. The court considered that the two offenses were not of the same nature, as the assault was a felony less than capital, while the murder was a capital offense.

In *Scot v. Turner*, 1 Root (Conn.) 163, decided in 1790, it was held that under a statute for regulating taverns and suppressing unlicensed houses, which imposed a penalty of six pounds for a second offense against its provision, the second conviction must be for the same kind of offense as the first in order to subject the offender to such penalty; and that a former conviction for selling liquors did not subject a person to such penalty, upon being afterwards convicted for selling victuals, hay, etc.

by the fact that it was a second or subsequent offense.³

Imprisonment for a "Term of Years." — Under a *Massachusetts* statute providing for increased punishment in case a person convicted of crime had been before sentenced to confinement at hard labor for any "term of years," it has been repeatedly held that to authorize the increased punishment a sentence of imprisonment for at least two years must have been pronounced.² It is not sufficient that the former offense was such that the court might have sentenced the offender to imprisonment for two years or more.³

g. REVERSAL. — When a first conviction is reversed, a sentence to cumulative punishment on a second conviction pending the appeal falls with it.⁴

1. Prior Offense Must Be of Itself Sufficient to Warrant Cumulation. — The Code of *Virginia*, § 3905, provides that "when any person is convicted of an offense and sentenced to confinement therefor in the penitentiary, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he had been before sentenced in the United States to a like punishment, he shall be sentenced to be confined five years in addition to the time to which he is or would be otherwise sentenced."

Section 3906 provides that where "any such convict shall have been twice before sentenced in the United States to confinement in the penitentiary, he shall be sentenced to be confined in the penitentiary for life."

A person who is convicted of petit larceny, after having been twice convicted and sentenced to confinement in the penitentiary in the United States for offenses of a like character, cannot be sentenced to imprisonment for life under § 3906, for the words "such convict," as used in that section, "refer to a person who has been twice before indicted, convicted, and sentenced to confinement in the penitentiary in the United States for offenses which are penitentiary offenses in themselves when committed, and not made so because of repeated convictions and sentences for offenses which would otherwise be misdemeanors." *Stover v. Com.*, 92 Va. 780.

In this case the court, *per Buchanan, J.*, said: "This construction of these sections of the code seems to be not only the natural and proper one from their language and history, but it avoids bringing them in conflict with the next section (3907) of the code. That section provides that 'when any person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury or justice before whom he is tried, found, that he has been before sentenced in the United States for the like offense, he shall be confined in jail not less than thirty days nor more than one year; and for a third or any subsequent offense he shall be confined in the penitentiary not less than one nor more than two years.' If it be held, as was done by the trial court, that a party who has been convicted and sentenced to confinement in the penitentiary twice before for petit larceny can, upon a third conviction for the same offense, be sentenced to the penitentiary for life, that portion of section 3907 which provides that 'for a third or any subsequent offense he shall be confined in the penitentiary not less than one year nor more than two years' is rendered inoperative after he has been

convicted and sentenced to the penitentiary twice for petit larceny; for then his punishment would no longer be controlled by section 3907, but by section 3906. By holding that sections 3905 and 3906 of the code do not apply to convictions for petit larceny and sentences to the penitentiary therefor, but that such cases are governed by section 3907, the different provisions of these statutes are reconciled, and they are made consistent and harmonious. And thus a result is reached which one of the cardinal rules of construction makes it the duty of courts to accomplish, if possible, in construing it."

2. "Term of Years" Means at Least Two. — *Ex p. Seymour*, 14 Pick. (Mass.) 40; *Ex p. Dick*, 14 Pick. (Mass.) 86; *Ex p. White*, 14 Pick. (Mass.) 90; *Ex p. Stevens*, 14 Pick. (Mass.) 94.

Life Sentence — Pardon. — A person who has been sentenced for life, but afterwards discharged on being pardoned, after being imprisoned for several years, is subject to such increased punishment on a second conviction, for his previous sentence was for a term of years within the meaning of the statute. *Com. v. Evans*, 16 Pick. (Mass.) 448.

3. Conviction of Offense Punishable by Two Years' Imprisonment Insufficient. — *Ex p. Dick*, 14 Pick. (Mass.) 86. In this case, the court, *per Shaw, C. J.*, said: "Before sentence the criminal nature and character of the offense is to be judged by the degree of punishment which the law denounces against it, but after sentence the criminality of the party will be estimated by the degree of punishment actually inflicted. * * * It would be unreasonable to suppose that the law, after sentence, meant to treat all cases alike in point of aggravation, where courts intrusted with great latitude of discretion, for the very purpose of adapting the degree of punishment to the degree of criminality, have, upon all the circumstances of each case as disclosed on trial, varied in those punishments from twenty days to twenty years. It appears to us that the law meant to avail itself of this obvious distinction; in regard to the crime upon which no sentence has been yet pronounced, it is to be estimated by the length of time for which it is by law punishable, but in regard to the actual guilt of the offender in a particular case upon which he has been tried and punished, it may be best measured by the sentence of a competent court, having all the facts of his case before it, and bound to exercise its judgment with special reference to those facts."

4. Reversal of First Conviction. — *Wilde v. Com.*, 2 Met. (Mass.) 408; *Hopkins v. Com.*, 3

But it has been held that where additional punishment has been imposed on account of several prior convictions, the reversal of one is of no effect, if enough remains unreversed to authorize the sentence.¹

3. Effect of Pardon for Prior Offense. — It seems to be the general rule that the fact that a person has been pardoned for his first offense does not relieve him from liability to cumulative punishment in case he is again convicted of crime, but there are authorities to the contrary.² And the statutes of several states clearly negative the idea that a pardon can have any such effect.³

4. Effect of Cumulation in Prior Punishment. — Where a statute provides an increase of punishment for a second offense, and a still further increase for a third, its application to the third offense is not affected by the fact that the second offense was punished by the increased punishment authorized in such case.⁴

Met. (Mass.) 460; *Hutchinson v. Com.*, 4 Met. (Mass.) 359. See also *White v. Com.*, 79 Va. 611.

Effect of Pendency of Appeal. — In *Kansas* it has been held that, under a statute providing an increased penalty for a person who is convicted a second time of selling liquor without a license, the effect of the first conviction, where the defendant has been sentenced to pay a fine only, may be suspended for all purposes by an appeal. *State v. Volmer*, 6 Kan. 379.

1. Reversal of One of Several Convictions. — Under a statute providing an additional punishment for a person who has been twice before convicted and sentenced to imprisonment in the state prison, and awarding no further punishment in case of more than two prior convictions, a sentence to the additional punishment in the case of a person who has been three times before convicted will not be reversed because one of such previous convictions is reversed; the two other previous convictions which remain in force being sufficient to sustain the additional punishment. *Newton v. Com.*, 8 Met. (Mass.) 535.

2. Pardon Does Not Relieve from Liability to Cumulative Punishment. — *Mount v. Com.*, 2 Duv. (Ky.) 93; *Stewart v. Com.*, 2 Ky. L. Rep. 386; *Evans v. Com.*, 3 Met. (Mass.) 453; *Com. v. Evans*, 16 Pick. (Mass.) 448; *People v. Price*, 53 Hun (N. Y.) 185, *affirmed* 119 N. Y. 650. See also *State v. Volmer*, 6 Kan. 379.

In *Mount v. Com.*, 2 Duv. (Ky.) 93, the court, *per* Robertson, J., said: "The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more. It neither did nor could relieve from any penal consequence resulting from a different offense, committed after the pardon, and never pardoned. The increased punishment prescribed by statute for the subsequent offense was no part of the penal consequences of the first offense, but applied exclusively to the last as aggravated by its repetition of the same crime. The legislature, as required by justice and policy, ought to have provided a severer punishment for repeated than for only one crime; and whether it had done so by duplicating, for a second offense the punishment of the first, or by any other measure of augmentation, cannot be material. In any aspect, the augmented punishment is for the last, and not at all for the first offense; and, of course, a pardon of the first could in no way or degree operate as a par-

don of the last offense or remission of any portion of the punishment denounced for the perpetration of it."

Contrary Doctrine. — In *Virginia* it is held that under a statute providing an increased punishment for a second conviction of a crime punishable by imprisonment in the penitentiary, a pardon for the first offense relieves the person from liability to the additional punishment if he be again convicted. *Edwards v. Com.*, 78 Va. 39, 49 Am. Rep. 377. In this case, the court, *per* Lewis, P., said: "By the pardon in question, therefore, the plaintiff in error was not only relieved of the punishment annexed to the offense for which he had been convicted, but of all penalties and consequences, except political disabilities, growing out of his conviction and sentence. One of those consequences was the liability to which it subjected him to receive the additional punishment prescribed by the statute, in case he should be afterwards sentenced to the penitentiary in this state. And that additional punishment has been imposed in this case, not by reason of the sentence for the second offense alone, but in consequence of that sentence and the sentence in the former case. Both causes must exist together to produce the effect contemplated by the statute; in the absence of either, no case is made for the imposition of the additional punishment the statute prescribes. But as the first offense was in legal contemplation blotted out, and its consequence removed, by the pardon of the governor, it must be regarded, for the purposes of this case, as though it had never been committed."

In *Com. v. Morrow*, 9 Phila. (Pa.) 583, the court, *per* Paxson, J., said that it was questionable whether a person who had been convicted of an offense and afterwards pardoned could be legally sentenced to the penalty provided by law in case of a second conviction, and added: "Without, however, deciding this point, it is sufficient to say that it would seem to be a harsh administration of the law to visit the prisoner with any of the consequences of an offense for which he has received a full and free pardon from the governor."

3. Statutes Showing Legislative Intention that Pardon Shall Not Relieve from Such Liability. — See *State v. Manecke*, (Mo. 1897) 41 S. W. Rep. 223; *State v. Austin*, 113 Mo. 538; *Stevens v. People*, 1 Hill (N. Y.) 261.

4. Cumulation for Second Offense Does Not Prevent Cumulation for Third. — *Plumbly v. Com.*

CUMULATIVE PUNISHMENT—CUMULATIVE SENTENCE.

5. Joint Prosecution. — In *Maine*, where two persons are jointly prosecuted for a violation of the liquor laws, and a previous conviction is alleged, it is not necessary that a previous conviction of the offense jointly committed should be established, but proof of separate convictions for distinct offenses is sufficient, or the matter in aggravation may be established as to one defendant and not as to the other.¹

6. Habitual Offender. — In several states there are provisions that a person convicted at the same term of court of three or more offenses, usually misdemeanors, shall be deemed an "habitual offender," or, in the case of larcenies, a "common and notorious thief," and shall receive a designated punishment as such.²

In *Massachusetts* it is held that in order to warrant such punishment, all the convictions must be for the offense described, and it is not authorized where one of the three convictions is for a more serious offense, though it necessarily includes the lesser.³

CUMULATIVE REMEDY. (See also the title *STATUTES*; and see *ENCYC. OF PLEADING AND PRACTICE*, title *ELECTION OF REMEDIES*, vol. 7, p. 360.) — A cumulative remedy is a remedy created by statute, in addition to one which still remains in force; and when a statute gives a new remedy and contains no negative, express or implied, of the old remedy, the new one provided is cumulative, and the party may elect between the two.⁴

CUMULATIVE SENTENCE. — See the titles *CUMULATIVE PUNISHMENT*, *ante*; *SENTENCES*.

2 Met. (Mass.) 413; *Com. v. Hughes*, 133 Mass. 496.

In the case first cited, the court, *per Shaw*, C. J., said: "The fact that he has been twice before sentenced and committed to the state prison and discharged, is not the less true because he had before been truly informed against as having been once before so sentenced and discharged. On such third conviction and sentence, he is precisely within the words, and we think the spirit and intent, of the statute, which was to enhance the punishment in proportion as the convict proves himself incorrigible by former punishment."

In the second case above, the court, *per Morton*, C. J., said: "The object of the statute is to prevent the repeated commission of similar offenses by imposing severer penalties for each successive violation of law, and thus to save persons from becoming old and hardened offenders."

1. Joint Prosecution. — *State v. Dolan*, 69 Me. 573.

2. Common and Notorious Thief. — See *Com. v. Tuck*, 20 Pick. (Mass.) 356; *Haggett v. Com.*, 3 Met. (Mass.) 457.

Under the *Iowa* statutes, a person who has been before convicted of larceny is liable, on being convicted of another larceny, to be sentenced as a common and notorious thief. (See *Code Iowa* 1897, § 4846.) This section does not define a distinct crime and provide for the punishment of common and notorious thieves as such, but provides only for their punishment upon a proper indictment for larceny. *State v. Riley*, 28 Iowa 547.

Common Utterer of Counterfeit Bills. — See *Jacquins v. Com.*, 9 Cush. (Mass.) 279.

3. Conviction of Higher Offense. — A general verdict of guilty on an indictment for house-breaking and larceny cannot be considered as one of the three convictions of larceny at the same term of court which are necessary to render a person liable to be sentenced as a "common and notorious thief" under the *Massachusetts* statute (*Pub. Stat. Mass.*, c. 203, § 24). *Com. v. Hope*, 22 Pick. (Mass.) 1. See also *Kite v. Com.*, 11 Met. (Mass.) 581.

In order to authorize a sentence as a common utterer of counterfeit coin, under *Rev. Stat. Mass.*, c. 127, § 17 (*Pub. Stat.*, c. 204, § 16), the three convictions at the same term of court must be for the offense described by the preceding section, of having in possession a number of pieces, not less than ten, of counterfeit coin, with intent to alter or pass the same. Such a sentence is not authorized where there were two convictions of that offense, and one conviction of the greater offense described by an earlier section (*Pub. Stat. Mass.*, c. 204, § 14), of having in possession any number of pieces of such coin, more than ten, with a like intent. *Murray v. Com.*, 13 Met. (Mass.) 514.

4. Chicago, etc., R. Co. v. Chicago, 148 Ill. 144.

When Not Cumulative. — In *Cottrell v. Manlove*, (Kan. 1897) 49 Pac. Rep. 520, it is said: "The remedies afforded by these two sections cannot be called *cumulative*, and considered equally open to creditors. One relates to the exigency of corporate insolvency; the other to that of corporate dissolution. Under one the proceeding lies because the corporation is bankrupt, though not necessarily dissolved; under the other, because it is dissolved, though not necessarily bankrupt."

CUMULATIVE VOTING.

BY JOSEPH WALKER MAGRATH.

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CROSS-REFERENCES.

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I. DEFINITION. — The cumulative system of voting is that by which, when two or more persons are to be elected to the same office, a voter is allowed one vote for each vacancy to be filled, and is permitted to distribute such votes as he pleases among the candidates, or to cast them all for one candidate.¹

II. IN ELECTION OF OFFICERS OF PRIVATE CORPORATIONS — 1. **When Authorized** — a. **IN GENERAL.** — In several states cumulative voting has been authorized in the election of directors, managers, or similar officers of private corporations,² the use of this system being almost exclusively confined to such elections.³

Must Be Expressly Authorized. — The right to cumulate votes did not exist at

1. Object of System — Minority Representation. — In *Maynard v. Board of Canvassers*, 84 Mich. 228, the court, *per* Champlin, C. J., said: "There has been in the latter half of the present century a growing desire to secure to minorities a proportionate representation in legislative and corporate bodies, and from time to time schemes have been advocated by those who have desired to bring about what they claim as a reform in existing modes of election to secure to the minority a just and proportionate representation. These schemes may all be reduced to four well-recognized classes, viz.: * * * 2. The 'cumulative,' which requires three or more to be elected, and permits the elector to cast as many votes as there are persons to be elected, and to distribute such votes among the candidates as the elector may choose."

2. Constitutional Provision Self-enforcing. —

The provision of the *Pennsylvania* Constitution authorizing cumulative voting in elections for directors or managers of corporations did not require any legislative action to give it effect. A company incorporated after the adoption of such constitution is necessarily subject to such provisions, and the absolute right to vote according to the cumulative method is vested in the stockholders. *Pierce v. Com.*, 104 Pa. St. 150.

3. Restricted to Private Corporations. — The provision of the *Pennsylvania* Constitution in reference to cumulative voting applies only to private corporations, in which term railroad companies are included. *Pierce v. Com.*, 104 Pa. St. 150. See also *Com. v. Filer*, 30 Pittsb. Leg. J. (Pa.) 286.

The same is true of the provisions in most other states where cumulative voting is permitted.

common law,¹ nor does it now exist in any case unless conferred by express constitutional or statutory provision.²

b. EFFECT UPON PRE-EXISTING CORPORATION. — A constitutional provision authorizing cumulative voting does not apply to a corporation existing before the adoption of such provision, and whose charter is not subject to alteration, amendment or repeal by the legislature,³ unless the corporation voluntarily accepts such provision.⁴ It is otherwise, however, with a corpora-

1. Not a Common-law Right. — The cumulative system of voting is founded upon the right of stockholders to cast one vote for each share of stock held by them, whereas at common law each stockholder was entitled to but one vote, regardless of the number of shares he might hold. See *Procter Coal Co. v. Finley*, 98 Ky. 405.

2. Right Must Be Expressly Granted. — See *Morawetz Priv. Corp.*, § 476.

Section 3245, Rev. Stat. *Ohio* (Bates' Anno. Stat. 1897, § 3245), providing that in the election of directors of corporations "each share shall entitle the owner to as many votes as there are directors to be elected, and a plurality of votes shall be necessary for a choice," does not confer upon the stockholders the right of cumulative voting. *State v. Stockley*, 45 Ohio St. 304, 19 Am. & Eng. Corp. Cas. 143; *State v. Holloway*, 1 Ohio Cir. Ct. Rep. 157, followed in *State v. Fosdick*, 1 Ohio Cir. Ct. Rep. 265.

In the case first cited, the court, *per Williams, J.*, said: "The precise claim of the relators is, that inasmuch as the section imposes no restriction upon the method of voting, the stockholder may cast the votes to which his shares of stock entitle him, in any mode he chooses. They say, 'We can see nothing in the language of the statute except a direct authority to cast the votes; and this authority is without limitation as to how they shall be divided among the directors to be elected. The stockholder may therefore cast them as he will.' If this position be sound, then it would in no instance need any statutory authority to confer the right of cumulative voting; but the right would exist, whatever number of votes each share might entitle the owner to cast, unless prohibited. Such we apprehend is not the rule. On the contrary, in the absence of express authority, the right cannot be maintained, nor its exercise permitted."

Cumulation Authorized by Statute. — In *Maynard v. Board of Canvassers*, 84 Mich. 228, Chief Justice Champlin said: "It is significant that all the states which have authorized such [cumulative] voting have submitted it to the people for their adoption as a part of the fundamental law." This remark, following almost immediately after a review of the various state constitutions which have authorized such voting, is somewhat misleading; for in *Kansas* cumulative voting at the election of directors or trustees of corporations was expressly authorized by the Laws of 1876, c. 61, § 1, as amended by the Laws of 1881, c. 47, § 1 (Gen. Stat. Kan. 1897, c. 66, § 279). There is no constitutional provision on the subject in *Kansas*, yet in *Horton v. Wilder*, 48 Kan. 222, a corporate election at which this method of voting was used was before the court and no

question was raised as to the propriety of cumulative voting.

As to the effect of legislative provisions for cumulative voting in the election of public officers, see *infra*, this title, *In Election of Public Officers*.

3. Provisions Do Not Affect Pre-existing Corporations with Unalterable Charters. — *State v. Greer*, 78 Mo. 188, reversing 9 Mo. App. 219; *Hays v. Com.*, 82 Pa. St. 518; *Dick v. Lehigh Valley R. Co.*, 4 Pa. Dist. Rep. 56. See also *Baker's Appeal*, 109 Pa. St. 461.

In such case it makes no difference whether or not the value of the stock would be impaired by the adoption of the cumulative system of voting. *State v. Greer*, 78 Mo. 188, reversing 9 Mo. App. 219.

4. Acceptance of Provision. — *Hays v. Com.*, 82 Pa. St. 518; *Dick v. Lehigh Valley R. Co.*, 4 Pa. Dist. Rep. 56. See the title CORPORATIONS (PRIVATE), vol. 7, p. 620.

How Accepted. — The directors of a Pennsylvania corporation, incorporated before the constitution of 1874 went into effect, have no power to accept for the corporation the provision of that constitution authorizing cumulative voting. Such provision can only be accepted by the stockholders at a meeting called for that purpose, and must be so accepted by a majority in interest, not merely in number. *Baker's Appeal*, 109 Pa. St. 461.

Circumstances Not Amounting to Acceptance. — Section 2 of art. 16 of the *Pennsylvania Constitution* (1874) provided that no corporation existing at the time of the adoption of the constitution should receive the benefit of any future legislation except upon condition of thereafter holding its charter subject to such constitution. Section 4 of art. 16 provided for cumulative voting in the election of directors. The charter of a corporation granted prior to this constitution provided that no salaried officer should be eligible to the position of director. The act of May 2, 1891 (Brightly's *Purd. Dig.*, p. 415, § 51), authorized salaried officers of private business corporations to act as directors. The corporation in question elected as directors two persons who had been salaried officers the previous year, and who were afterwards elected to salaried offices by the directors, on the same day that they were elected directors. It was held that this action of the corporation did not involve an acceptance of the provisions of the constitution of 1874 so as to give a stockholder the right to cumulate his votes. *Com. v. Butterworth*, 160 Pa. St. 55.

The mere fact that a corporation which existed before the adoption of the *Pennsylvania Constitution* of 1874 has departed from its usual manner of holding elections does not bring it within the provisions of that constitution authorizing cumulative voting. *Hunsicker v. Turnpike Road Co.*, 1 Montg. L. Rep. (Pa.) 41.

tion whose charter is subject to amendment.¹

2. Exercise of Right to Cumulate Votes — *a.* NUMBER OF VOTES STOCKHOLDER MAY CAST. — Where cumulative voting is allowed by law, each stockholder is entitled to a number of votes equal to the number of officers to be elected, multiplied by the number of shares of stock which he holds.²

b. STOCKHOLDER CANNOT BE DEPRIVED OF RIGHT. — A stockholder cannot be deprived of the right to cumulate his votes by a resolution of the corporation that the election shall be conducted on a plan which prevents cumulative voting.³ Nor does the fact that he has silently acquiesced in the passage of such a resolution affect his rights, for the right to cumulate his votes remains in him up to the time his votes are cast,⁴ and he is not required to give notice of his intention to cumulate.⁵

c. WHEN FAILURE TO USE CUMULATIVE SYSTEM DOES NOT INVALIDATE ELECTION. — It has been held that a corporate election is not invalid because the cumulative system of voting was not used, when it does not appear that any stockholder claimed the right to cumulate his votes, and consequently no one was denied that right.⁶

d. AT WHAT ELECTIONS VOTES MAY BE CUMULATED. — In *Pennsylvania* the use of the cumulative system is not confined to the regular corporate elections, but stockholders have a right to cumulate their votes at an election ordered by the court to fill vacancies in the board of directors.⁷

III. IN ELECTION OF PUBLIC OFFICERS. — The constitution of *Illinois* authorizes cumulative voting in the election of representatives, three of whom are elected in each senatorial district,⁸ and in that state it is held that the legislature may provide for cumulative voting in the election of any officers whose election is not otherwise provided for by the constitution.⁹ In *Michigan* an

1. Where Charter Subject to Amendment. — Where the charter of a corporation contains a provision for a system of voting in the election of directors, other than the cumulative, but contains a provision expressly making it subject to legislative alteration or amendment, and a state constitution, subsequently adopted, and legislation in pursuance thereof, authorize cumulative voting in the election of directors of all corporations, the cumulative system applies to such company. *Cross v. West Virginia Cent., etc., R. Co.*, 35 W. Va. 174.

2. Number of Votes. — *Hays v. Com.*, 82 Pa. St. 518. See also *Com. v. Lintsman*, 23 Pittsb. Leg. J. (Pa.) 122.

Cumulative Ballot. — In *Com. v. Shoener*, 1 Leg. Chron. (Pa.) 177, marking "two votes" on a ballot was held a sufficient indication of the voter's intention to cast his votes according to the cumulative system.

3. Stockholder Cannot Be Deprived of Right to Cumulate. — *Tomlin v. Farmers', etc., Bank*, 52 Mo. App. 430.

The Constitution of *California* (1879), art. 12, § 12, gives to stockholders in corporations the right to cumulate their votes in all elections for directors or managers, and provides that such officers shall not be elected in any other manner. Therefore it is illegal to elect directors by balloting for one at a time, thus excluding the cumulative method. *Wright v. Central California Colony Water Co.*, 67 Cal. 532. In this case the court, *per* McKee, J., said: "We think the power thus conferred upon a corporate elector can only be exercised according to the constitutional provision by allowing him to cast his ballot singly, cumulatively, or distributively, at one time, for the election of

directors. For if but one director at a time be balloted for, a majority of the stockholders could, by combining, cumulate their votes each time upon a single candidate and elect him; and by thus shaping and controlling the manner of the election, it would be in the power of the majority of the stockholders to virtually cancel the votes of the minority and deprive them of their rights to representation on the board of directors."

4. Acquiescence in Resolution. — *Tomlin v. Farmers', etc., Bank*, 52 Mo. App. 430.

5. Stockholder Need Not Give Notice of Intention to Cumulate. — *Pierce v. Com.*, 104 Pa. St. 150.

6. Election Not Invalid when No Claim to Cumulate Votes Made. — *Schmidt v. Mitchell*, (Ky. 1897) 41 S. W. Rep. 929.

In this case the court said that the Constitution of *Kentucky* did not require, but only permitted, cumulative voting.

7. Special Election. — *Forsyth v. Brown*, 2 Pa. Dist. Rep. 765, 13 Pa. Co. Ct. Rep. 576, 33 W. N. C. (Pa.) 72.

In this case only a part of the required number of directors were elected at the regular meeting, a tie vote having prevented the sitting of the board.

8. Cumulative Voting for Representatives Authorized. — Const. *Illinois* (1870), art. 4, §§ 7 and 8.

9. Illinois Rule as to Statutes Authorizing Cumulative Voting. — *People v. Nelson*, 133 Ill. 565.

The act passed upon in this case provided that in the election of trustees of sanitary districts, "each qualified voter may vote for as many candidates as there are trustees to be elected, or he may distribute his vote among

act of the legislature providing for cumulative voting for representatives, in districts where more than one was to be elected, was held unconstitutional as unlawfully affecting the elective franchise by giving an undue value to the choice of an elector who wished to cumulate his votes upon one candidate.¹

CUPOLA FURNACE. — A cupola furnace is one used for melting pig-iron for the purpose of casting it into useful forms and articles. It constitutes part of the equipment of a foundry. In shape it is generally a hollow cylinder. The iron is melted by substantially the same process as the ore in a blast furnace. The cupola furnace has an iron notch, but no cinder notch, because there is generally so little cinder or slag in pig-iron as to render such an opening unnecessary.²

CURATIVE ACTS. — See the title **STATUTES**.

CURATOR. (See generally the titles **EXECUTORS AND ADMINISTRATORS**; **GUARDIANS, ETC.**) — The committee of the estate of a minor, spendthrift, imbecile, or absent person.³

CURATOR AD HOC. — *Curator ad hoc* is a term of the civil law, meaning a guardian for a special purpose.

CURE. — See note 4.

not less than five-ninths of the candidates to be elected, giving each of the candidates among whom he distributes the same the same number of votes or fractional votes." The court, *per* Bailey, J., said: "We are unable to see how the provisions of said act can be held to be in derogation of any constitutional provision. Section 1, article 7, of the Constitution, provides that every male citizen of the United States over the age of twenty-one years, and possessing the requisite qualifications as to residence, etc., shall be entitled to vote at elections, and section 2 provides that all elections shall be by ballot. We see nothing in these provisions in conflict with a statute which merely gives voters the option to cumulate their votes upon less than the whole number of candidates to be elected, so long as it leaves them free to vote for the whole number if they see fit to do so. If the act had made the cumulation of votes compulsory, a very different question would have been presented. In that case each voter would be deprived of the privilege of voting at the election of a part of the officers to be elected, and to that extent would be excluded from his constitutional right. The case would then be within the principle laid down in *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 833, cited by counsel.

"The point is made that the effect of the sections of the Constitution providing for cumulative voting in the election of representatives (art. 4, §§ 7 and 8), and in the election of directors of private corporations (art. 11, § 3), is to deny to the General Assembly power to authorize cumulative voting for any other purposes, upon the principle that the expression of one thing is the exclusion of another. This could be true only in the event that some provision of the Constitution required elections generally to be by a majority of persons voting, but cannot be true where all the elective officers are named, and it is specifically provided how they shall be elected. In such case the direction that each officer named shall be elected in a prescribed way negatives that he shall be elected in any other way, but the nega-

tion can go no further, because the election to each office can be governed only by the restrictions applicable to that office. There is no provision of the Constitution requiring elections generally to be by a majority of persons voting, but in each article of the Constitution certain officers are named, and as to those there are required to be elections, but as to other officers not named there is no requirement or restriction in this respect."

1. Michigan Statute Permitting Cumulative Voting Held Unconstitutional. — *Maynard v. Board of Canvassers*, 84 Mich. 228.

The act declared unconstitutional in this case will be found in 3 How. Stat. (Mich.), p. 2835, § 258a *et seq.* See the observations of Champlin, C. J., in this case.

2. Vinton v. Hamilton, 104 U. S. 488. This was a patent case.

3. Just. Inst., i. 23; 1 Bl. Com. 460; *Adams's Glossary*.

The term has been adopted in *Missouri* to apply to the guardian of a ward's estate, as distinguished from the guardian of his person. *Duncan v. Crook*, 49 Mo. 116.

4. Cure of Souls. — A mere "licensed preacher" of the Methodist Church is not authorized to perform a marriage ceremony by a statute giving power to do so to "all regular ministers of the gospel, of every denomination, having the *cure* of souls." Whether a "local preacher" is within the act, cannot be said generally. "It is not supposed that the *cure* of souls, as used in the act, implies a necessity that the minister should be the incumbent of a church living, or the pastor of any congregation or congregations in particular. But those terms import that the person is to be something more than a minister or preacher merely, and that he has faculty, according to the constitution of his church, to celebrate matrimony, and, to some extent at least, has the power to administer the Christian sacraments, as acknowledged and held by his church." *State v. Bray*, 13 Ired. L. (35 N. Car.) 289.

Cure — Seamen. — As to the obligation of the

CURED BY VERDICT. (See ENCYC. OF PLEADING AND PRACTICE, title VERDICT.)—"Cured by verdict" means that the court will, after verdict, presume or intend that the particular thing required to sustain it was proved at the trial.¹

CURRENCY—CURRENT. (See also the titles BANKNOTES, vol. 3, p. 771; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 106; CHECKS, vol. 5, p. 1051; COUNTERFEITING, vol. 7, p. 875; LEGAL TENDER; MONEY; PAYMENT; TENDER.)—The term "currency" is commonly used to include whatever passes among the people for money, both coin and banknotes, or other paper money which is issued by authority, and which continually passes as and for coin.² "Current" is defined as running, moving, flowing, passing;

master or owner to give seamen medical treatment, or to *cure* them as the old cases have it, see SEAMEN. And see *The John B. Lyon*, 33 Fed. Rep. 187; *Reed v. Canfield*, 1 Sumn. (U. S.) 202.

Cured Meat.—Where a sale of *cured* meat was made by a broker to a merchant in another city, it was held that the term "*cured* meat" was to be interpreted according to the understanding of the trade in the city where the merchant resided, and not according to that where the seller resided. *Treadwell v. Anglo-American Packing Co.*, 13 Fed. Rep. 22.

Where, in the particular trade of selling and buying bacon and pork sides, the words "fully *cured*" were used as descriptive of the classification of articles sold, in a contest in regard thereto such words should have the meaning attached to them by experts—that is, persons in the trade. *Featherston v. Rounsaville*, 73 Ga. 617. See generally the title USAGES AND CUSTOMS.

1. *Merrick v. Metropolis Bank*, 8 Gill (Md.) 75.

2. *Chicago F. & M. Ins. Co. v. Keiron*, 27 Ill. 501; *Webster v. Pierce*, 35 Ill. 158; *Cockrill v. Kirkpatrick*, 9 Mo. 701.

Other Definitions.—"The word *currency* is defined in Bouvier's Law Dictionary to mean the money which passes, at a fixed value, from hand to hand; money which is authorized by law." *Butler v. Paine*, 8 Minn. 324.

In *Galena Ins. Co. v. Kupfer*, 28 Ill. 332, 81 Am. Dec. 285, it is said: "*Currency* is bank bills, or other paper money, which passes as a circulating medium in the business community, as and for the constitutional coin of the country."

In *Swift v. Whitney*, 20 Ill. 146, it is said: "By the term *currency* is understood bank bills, or other paper money issued by authority, which pass as and for coin."

In *State v. Gasting*, 23 La. Ann. 610, it is said: "*Currency* may be properly defined as something which circulates as a medium of trade. It conveys at the present time the idea of paper money of some sort."

The term *currency*, when applied to the medium of trade, means equally coin, banknotes, or notes issued by the government. *Webster's Dictionary*, followed in *Crocker v. State*, 47 Ala. 57.

Coin and Paper.—In *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 779, it is said: "In fact, almost all civilized countries, including this country, have a mixed circulation of coin and banknotes. These constitute the *currency*

of the country, its money; and the general term *currency* includes both. *Currency* therefore means money—coined money and paper money equally. But it means money only; and the only practical distinction between paper money and coined money, as *currency*, is that coined money must generally be received, paper money may generally be specially refused, in payment of debt; but a payment in either is equally made in money, equally good."

Same—Current Funds.—In *Bull v. Kasson Bank*, 123 U. S. 105, it was held that a bank check for the payment of "five hundred dollars in *current* funds," was payable in whatever was *current* as money, whether in the form of notes or coin. In the same case it is said: "Within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term '*current* funds' has been used to designate any of these, all being *current* and declared by positive enactment to be legal tender. It was intended to cover whatever was receivable and *current* by law as money, whether in the form of notes or coin."

Specie Distinguished from Currency. (See *infra*, *Depreciated Paper Included*.)—In *Trebilcock v. Wilson*, 12 Wall. (U. S.) 695, the court said: "But here the terms '*in specie*' are merely descriptive of the kind of dollars in which the note is payable, there being different kinds in circulation, recognized by law. They mean that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States. They have acquired this meaning by general usage among traders, merchants, and bankers, and are the opposite of the terms '*in currency*,' which are used when it is desired to make a note payable in paper money. These latter terms, '*in currency*,' mean that the designated number of dollars is payable in an equal number of notes which are *current* in the community as dollars." See also *Swift v. Whitney*, 20 Ill. 146; *State v. Gasting*, 23 La. Ann. 610.

In *Williams v. Arnis*, 30 Tex. 49, it was held that where a note was payable in *current* funds, *current* funds did not mean specie, but the representative of it.

Equivalent to Money. (See also the titles BILLS OF EXCHANGE AND PROMISSORY NOTES,

present in its course, as a current month or year.¹

Depreciated Paper Not Currency. — It has been held that a promise to pay in currency, current funds, notes, etc., cannot be performed by a tender of depreciated paper.²

vol. 4, p. 106; MONEY.) — The terms *currency*, *current funds*, etc., have been held equivalent to money in a number of cases. *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 779; *Butler v. Paine*, 8 Minn. 329; *Mitchell v. Hewitt*, 5 Smed. & M. (Miss.) 366; *Cockerill v. Kirkpatrick*, 9 Mo. 697.

Current Funds Equivalent to Current Money. — A paper directed the payment to bearer of a certain sum in *current funds*. The court said: "The words '*current funds*,' as used in the paper before us, mean nothing more or less than *current money*, and so construed the instrument was negotiable." *Laird v. State*, 61 Md. 311.

Currency Distinguished from Money. (See *infra*, *Depreciated Paper Included*.) — In *Griswold v. Hepburn*, 2 Duv. (Ky.) 33, the court said: "*Currency* is not necessarily money. Whatever circulates conventionally on its own credit as a medium of exchange, whether it be bank-notes, bills of exchange, or government securities, being thus practically *current*, is properly *currency*. But such *currency*, merely spontaneous, is not money, which is the legal medium of exchange, and the only true standard of value."

Same — Current Funds of the City of New York. — This phrase does not mean money. *Lacy v. Holbrook*, 4 Ala. 90.

1. Current Funds. — *State v. Bartley*, 39 Neb. 360, in which case it was held that the *current funds* of the state meant all the money belonging to the state, in the possession or under the control of the state treasurer.

Currency Means Current Money. — *Dugan v. Campbell*, 1 Ohio 115. Compare *M'Chord v. Ford*, 3 T. B. Mon. (Ky.) 166.

Currency and Current Banknotes Equivalent. — *Coffin v. Hill*, 1 Heisk. (Tenn.) 388. See also *Osgood v. McConnell*, 32 Ill. 77.

Current Banknotes. (See generally the title BANKNOTES, vol. 3, p. 771.) — *Current banknotes* are such as are convertible into specie at the counter of the bank that issued them, and pass at par in the ordinary transactions of the country. *Pierson v. Wallace*, 7 Ark. 282.

National Banknotes. — In *State v. Gasting*, 23 La. Ann. 609, it was held that notes or bills issued by the national banks of the United States, which are authorized by law to circulate throughout the Union as a medium of trade, are included in the phrase "United States *currency*."

2. Galena Ins. Co. v. Kupfer, 28 Ill. 332; *Marc v. Kupfer*, 34 Ill. 286; *Chicago F. & M. Ins. Co. v. Keiron*, 27 Ill. 501; *Springfield M. & F. Ins. Co. v. Tincher*, 30 Ill. 399; *Osgood v. McConnell*, 32 Ill. 75; *Webster v. Pierce*, 35 Ill. 158; *Wood v. Price*, 46 Ill. 437; *Lawrence v. Schmidt*, 35 Ill. 443; *Phelps v. Town*, 14 Mich. 374; *Hulbert v. Carver*, 37 Barb. (N. Y.) 62.

Current Funds. — Bills drawn for *current funds* are drawn for cash, or paper money equivalent thereto. *Wood v. Price*, 46 Ill. 437.

Same — Depreciated Paper Money. — A check

drawn for "*current funds*" entitles the holder to demand coin or its equivalent. The court said: "Does '*current funds*' mean depreciated bank bills, worth only fifty or sixty cents on the dollar? * * * *Currency* is bank bills or other paper money, which passes as a circulating medium in the business community, as and for the constitutional coin of the country. They are that description of bank bills which supply the place of coin. The term '*funds*,' as employed in commercial transactions, usually signifies money. Then the term '*current funds*' means *current money*; par funds, or money circulating without any discount. This check then called for, and appellant had the right to demand, funds equal in value to the *current* coin of the country; such as is received and paid on debts, in the purchase of property, and in ordinary business transactions, at par and without any discount. This the bank refused to pay, and then the appellant had the right to resort to appellee to recover that sum. The third instruction asserts that the term '*current funds*' may be shown by evidence, to have a local meaning. When a word has a general well-defined signification, it is not competent to change that meaning by evidence." *Galena Ins. Co. v. Kupfer*, 28 Ill. 335.

Current Banknotes. — In *Fleming v. Nall*, 1 Tex. 247, it is said: "Such terms as 'banknotes,' 'good banknotes,' or '*current banknotes*,' when employed in this community, import, in their ordinary acceptation, such bank bills only as are redeemable in gold and silver, or are equivalent thereto in the nearest great commercial mart, viz., the city of New Orleans. This popular signification of the term, when used in this state, could, *ex officio*, be taken notice of by the court." See also *Williams v. Arnis*, 30 Tex. 49.

A promise to pay in *current banknotes* is not satisfied by a tender of the depreciated banknotes. The court said: "*Current banknotes* are such as are convertible into specie at the counter where they were issued, and pass at par in the ordinary transactions of the country. The term '*current bank paper*' has a definite and legal signification. It certainly does not mean notes at a discount of fifty per cent, and such as are bought and sold as merchandise; but that which passes from hand to hand as money. '*Current notes*' means notes considered as cash. *Leiber v. Goodrich*, 5 Cow. (N. Y.) 187." *West v. State*, 7 Ark. 293.

Certificates of Deposit. (See also the title CERTIFICATES OF DEPOSIT, vol. 5, p. 801.) — A certificate of deposit was by its terms payable in *currency*. This was held, *prima facie*, to mean money *current* by law, or paper equivalent in value, circulating in the business community at par. *Phelps v. Town*, 14 Mich. 374.

The word *currency* in a certificate of deposit means money and banknotes issued by lawful authority and in circulation at par with coin, and a certificate of deposit payable to order in

Legal Tender.—And in some cases "currency" has been held to mean legal tender money.¹

Gold or Silver.—Other courts have gone so far as to hold that "currency," under the particular circumstances involved, must be confined to gold and silver coin.²

currency is negotiable. *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 773. The court in that case *criticises* the cases of *Ford v. Mitchell*, 15 Wis. 304; *Platt v. Sauk County Bank*, 17 Wis. 223; *Lindsey v. McClelland*, 18 Wis. 481.

Verdict for Dollars.—In *Baker v. Jordan*, 5 Humph. (Tenn.) 435, it was held that a jury were justified in finding a verdict on a note payable in *current* banknotes for the number of dollars called for in the note, no proof having been introduced as to the value of the *current* notes. The court said: "But here is a covenant to pay so many dollars in *current* Tennessee banknotes, and this covenant is read to the jury. The words '*current* banknotes' mean that which circulates currently as money, and which, in absence of proof to the contrary, is presumed to be of value equal to money. *Prima facie* it is of such value; and if a defendant in such action is not willing it shall be so considered, he may introduce proof to show that it is of less value." See also *Hopson v. Fountain*, 5 Humph. (Tenn.) 140.

Assessment of Damages.—In *Trowbridge v. Seaman*, 21 Ill. 101, it was held that a note payable in *currency* was payable in money, and therefore a clerk might assess damages upon a judgment by default, it not being necessary to call in a jury for that purpose. To the same effect see *Swift v. Whitney*, 20 Ill. 144.

Current Bank Bills—Estoppel.—A certificate of deposit admitted the reception of a certain sum in *current* banknotes, to be paid in like funds. It was held that the promisor was estopped from showing that the funds were not *current*. The court said: "This court has repeatedly held, that *currency* and '*current* bank bills' have a fixed, known significance; that the term *currency* means bank bills, or other paper money, which passes as a circulating medium in the business community, as and for the constitutional coin of the country. *Current* bank bills, it will be perceived, mean precisely the same thing as *currency*." *Osgood v. McConnell*, 32 Ill. 75. See generally the title ESTOPPEL.

1. *Lee v. Biddis*, 1 Dall. (Pa.) 175.

Currency of a State.—Where a note was made payable in the *currency* of the state of Mississippi, it was held that *currency* meant legal tender money. In *Mitchell v. Hewitt*, 5 Smed & M. (Miss.) 366, the court said: "Properly speaking, the term '*currency* of the state of Mississippi' can only mean that which has been declared to be a legal tender, because *currency* implies lawful money. *Wharton v. Morris*, 1 Dall. (Pa.) 125. In a suit for lawful money, paper money, unless shown to be a legal tender, will not be permitted to be brought into court. It does not appear that the notes of the Mississippi Railroad Company are a legal tender, or that, on

the face of the note, the contract refers to such money."

Current Money.—The contract stipulated for payment in *current* money. In construing this contract, the court, in *Bainbridge v. Owen*, 2 J. J. Marsh. (Ky.) 464, said: "It has been decided by this court, that *current* money means tender money, or constitutional coin. Whether this is the necessary and inflexible import of these terms, in all cases and under all circumstances, it would be useless now to inquire. It is certainly their literal and apparent import; and there is no proof, either positive or inferential, which could control or qualify it; such as that at the time and place of the contract they had a different acceptation by the people generally." See also *M'Chord v. Ford*, 3 T. B. Mon. (Ky.) 166.

Current Funds.—In *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, it was held that a note payable in *current* funds, in the absence of all evidence showing that anything else is *current* at the place of payment, must be regarded as payable only in such funds as are *current* by law. The court said: "But in the absence of all evidence that anything else than cash was treated as *current* funds in Chicago, we do not see how the court could assume judicially to know the fact or presume it; until this should be made to appear, the *current* funds in which it was made payable should, we think, be held to be such funds only as were *current* by law. We must therefore treat this draft as a negotiable bill of exchange payable in money."

Greenback currency means United States legal tender notes only, and does not include national banknotes. *Burton v. Brooks*, 25 Ark. 215.

Legal Currency.—In *Fry v. Dudley*, 20 La. Ann. 368, it was held that the words "in *currency*" in a bill of exchange meant legal *currency*; *e. g.*, that the term did not include Confederate notes.

Money.—In the absence of evidence to the contrary, "money" means lawful money. *Coco v. Callihan*, 21 La. Ann. 624.

2. Gold and Silver.—A note or bond payable in "good *current* money of the state" is payable in gold and silver. It is otherwise if merely payable in "the *currency* of this state," or "*current* bank paper of the state," or "*current* notes of the state," while the state has a paper *currency*. *Graham v. Adams*, 5 Ark. 261.

The court, in the case of *Bainbridge v. Owen*, 2 J. J. Marsh. (Ky.) 463, interprets "*current* money" to mean constitutional coin.

Coin.—A note or bond payable in "good *current* money of the state" has been held payable in gold or silver. *Graham v. Adams*, 5 Ark. 261. In that case the court put the question upon the word "good," intimating that without it the words would not mean gold or silver, holding that the words "good

Depreciated Paper Included. — On the other hand, some courts have held that the expression "payable in currency" means payable in paper which circulates in the community as money, although such paper is at a discount as compared with coin.¹

"current money of the state" are distinguishable from "currency of this state," "current bank paper of the state," or "current notes of the state."

Current Money Distinguished from Currency. (See also the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 107.) — In *M'Chord v. Ford*, 3 T. B. Mon. (Ky.) 166, it is said: "But as banknotes are not money, it also follows that this note cannot intend banknotes, but gold or silver. The word *current* preceding the word 'money' cannot change its meaning, because it is equally applicable to that kind of money made current by Act of Congress, which in truth is the only current money of Kentucky. '*Current* money' does not mean the same thing as *currency*." Compare *Dugan v. Campbell*, 1 Ohio 115.

Currency of This State. — In *Cockrill v. Kirkpatrick*, 9 Mo. 697, it was held that a note payable in the "currency of this state" was payable in gold or silver coin, or in the notes of the Bank of Missouri. The court said: "If it be admitted that the note from Denson to Noble was payable 'in the currency of this state,' then we shall not have much difficulty in ascertaining what are the legal rights of the parties. These terms import either, first, gold or silver coin, which is the constitutional currency of the United States, the 'tender money' of the several states of the Union; or, second, the notes of the Bank of the State of Missouri, the issuing of which is authorized by the laws of this state, and cannot by any fair construction be made to mean the notes of the several banks incorporated by the laws of other states, which for the time being may have been in circulation in this state. But if the note was 'payable in the current money of Missouri,' as the obligor subsequently stated, then all necessity for construction is absolutely excluded, for the terms explain themselves, and can only mean 'tender money,' gold or silver coin. And this, too, without invoking the aid of the principle that the language in an obligation is to be taken most strongly against the maker thereof." *Cockrill v. Kirkpatrick*, 9 Mo. 697. Compare *Farwell v. Kennett*, 7 Mo. 597, *infra*, next note.

1. *Miller v. McKinney*, 5 Lea (Tenn.) 96.

Depreciated Paper. — In *Moore v. Gooch*, 6 Heisk. (Tenn.) 104, it was held that bills payable in *current* banknotes were payable in banknotes in circulation, *current* as money at the time they fell due, even though as compared with gold they were greatly depreciated in value.

In *Coffin v. Hill*, 1 Heisk. (Tenn.) 388, it was held that upon a note payable "in the currency of the country, but not in Confederate notes," the recovery would be for the value of such notes as constituted the actual circulation of the country at the maturity of the note though greatly depreciated below par. The court said: "The expression, 'payable in the *currency* of the country,'

means payable in those banknotes which might circulate *currently* as money when the note became due. Banknotes so circulating would be presumed to be of value equal to money. Hence, in this case, if upon the trial, when the plaintiff read his note and closed his case, the defendant had introduced no proof rebutting the presumption that *current* banknotes were equal in value to money, the plaintiff would have been entitled to a verdict in dollars, for the amount of the note. But the defendant introduced such proof without objection." See also *Hopson v. Fountain*, 5 Humph. (Tenn.) 140; *Baker v. Jordan*, 5 Humph. (Tenn.) 485.

In *Farwell v. Kennett*, 7 Mo. 597, it is said: "At the date of this bill, *currency* was not regarded as cash by the community. In framing their notes and bills, the word was adopted with the express view of preventing a demand for cash or specie. The value of *currency* was below the specie standard, and fluctuating, receding from and advancing to the value of specie. The word *currency* was introduced in the sense in which it is understood after we were afflicted with a depreciated *currency*, and to prevent a demand for lawful money. Experience has taught us that there is a wide difference between the *currency* contemplated by law, and the actual *currency*. The parties must have had these considerations in their minds, otherwise they would not have deviated from the usual course of framing such instruments, but would have simply made the bill payable in dollars." Compare *Cockrill v. Kirkpatrick*, 9 Mo. 697.

In *Conwell v. Pumphrey*, 9 Ind. 135, it was held that a note payable in *current* funds was payable in *current* paper funds, though such funds were at a discount with specie.

In *Lackey v. Miller*, Phil. L. (61 N. Car.) 26, it was held that in a promise to pay seventy-one dollars in *current* bank money, "*current* bank money" meant *current* bank bills calling on their face for seventy-one dollars. The court said: "*Currency* means, 'what passes among the people,' and is made by them to answer, in some degree, the purposes of money. The expression 'a depreciated *currency*' was quite common in the years 1864 and 1865, and the idea that nothing could be considered *current* unless it was convertible in United States coin at par was entertained by no one."

Current Distinguished from Convertible. — A mortgage reserved the right to the mortgagor to pay off the indebtedness in *current* paper funds. It was held that under this reservation he was entitled to make payments in treasury notes of Confederate states, notwithstanding their great depreciation. *Stalworth v. Blum*, 41 Ala. 319. In that case it is said: "The adjective *current*, when qualifying money, is not the synonym of 'convertible.' It is employed to describe money which passes from hand to hand, from person to

Different Meaning at Different Times.—The terms “money,” “currency,” and “current money,” have been held to signify different things at different times and places, according to the medium in circulation, and laws on the subject.¹

person, and circulates through the community, and is generally received. Money is *current* which is received as money in the common business transactions, and is the common medium in barter and trade. *Haynes v. Wheat*, 9 Ala. 239; *Aicardi v. Robbins*, in manuscript.”

But in *Lacy v. Holbrook*, 4 Ala. 88, the terms “funds *current* in the city of New York,” were held to mean gold or silver, or something equivalent, and convertible into precious metals.

Depreciated Currency.—In *Carlisle v. Davis*, 7 Ala. 44, the court said: “The note given in evidence in the present case is payable in the common *currency* of Alabama. *Currency* is a word of extensive application. It means, among other uses, a continual passing from hand to hand, and circulation; as, the *currency* of coin, bank bills, bills of credit, etc. As applied to contracts to pay money, it must be understood in the sense in which the parties intended it, if their intention can be ascertained. We can have no difficulty in determining its meaning in the case before us. The laws of this state have provided for the establishment of banks, and the emission of a vast paper circulation as the representative of money. This paper we must know, at the time the note in question was made, was the common *currency*; it was paid and received in all ordinary transactions, though it had depreciated greatly below its par value.”

1. Different Meanings.—*Jones v. Overstreet*, 4 T. B. Mon. (Ky.) 550. In that case the court said: “During the revolutionary war, when paper money was the only circulating medium of the states, *current* money meant paper money; after that was abolished and called in, and gold and silver became the *currency*, then *current* money meant coined money, and not paper. So, in *Chambers v. George*, 5 Litt. (Ky.) 335, it was held that a note payable ‘in the *currency* of this state,’ did not mean gold and silver, because at the date of the note a paper circulating medium was the money in use, and had become the *currency* of the state. But, in *Lampton v. Haggard*, 3 T. B. Mon. (Ky.) 149, a note payable in ‘Kentucky *currency*’ was held to mean gold and silver. These expressions so exactly alike, used at different periods, were construed to mean paper dollars in the former case, and coined dollars in the latter, because of the difference of money used as the general circulating medium at the one time and at the other.”

In the case of *Lampton v. Haggard*, 3 T. B. Mon. (Ky.) 149, where the note sued on was for three hundred and fifty dollars, “Kentucky *currency*,” the court say that although the Bank of Kentucky was then in operation, it paid specie for its notes, and continued to do so for some time after the date of the note; hence the term used could only mean gold or silver.

The expressions *currency* and “*current* banknotes” were held to be synonymous, in

Coffin v. Hill, 1 Heisk. (Tenn.) 388. The court said: “The expression ‘payable in the *currency* of the country’ means payable in those banknotes which might circulate *currently* as money when the note became due.”

Current Lawful Money.—In *Lee v. Biddis*, 1 Dall. (Pa.) 175, it was held that “*current* lawful money” meant such money as was *current* at the time of entering into the contract. See *Wharton v. Morris*, 1 Dall. (Pa.) 125.

Meaning at the Time Note Was Made.—In *Pilmer v. Branch of State Bank*, 16 Iowa 328, it is said: “*Currency* is defined by Wharton (Law Lex. 236) as ‘banknotes or other paper money issued by authority, and which are continually passing as money.’ This view is substantially followed by the Supreme Court of Illinois. *Galena Ins. Co. v. Kupfer*, 28 Ill. 332, when the judge, delivering the opinion, says: ‘*Currency* is bank bills or other paper money which passes as a circulating medium in the business community as and for the constitutional coin of the country. * * * The term “*current* funds” means *current* money, par funds, or money circulating without any discount.’ See also *Lacy v. Holbrook*, 4 Ala. 88. These definitions are too restricted. *Currency* is the circulating medium, and is generally used (and is, indeed, so defined by Worcester, *vice currency*) to indicate the aggregate of coin, bills, notes, etc., in circulation; as, a metallic *currency*; a mixed *currency*; and paper *currency*, etc. See acc. *Chambers v. George*, 5 Litt. (Ky.) 335; *M’Chord v. Ford*, 3 T. B. Mon. (Ky.) 166; *Bainbridge v. Owen*, 2 J. J. Marsh. (Ky.) 463. Aside from extrinsic circumstances or a peculiar and acquired meaning, what then does a note or bill, payable in *currency*, call for? It calls for payment in anything which circulates *current* as money. If gold and silver circulate as money, they are *currency*. If banknotes circulate as money, they are *currency*. Thus *currency* may be composed of either coin or paper or both. What *currency* means in a note or bill, is not very clear without some reference to the circulating medium at the time, or without knowing what meaning is attached to the word generally, by those who use it; or rather, without knowing what specific idea the word is used to express. On questions of mercantile construction, we have frequently to follow the direction of Tindal, C. J. (*Houghton v. Gilbert*, 7 C. & P. 701, 32 E. C. L. 606), to the counsel in the case who was about to cite an authority: ‘You had better lay aside your dictionary and appeal to the knowledge of the jury; for, after all, the dictionary is not authority.’”

Current Banknotes.—In *Pardee v. Fish*, 60 N. Y. 270, it is said: “*Current* banknotes are notes or bills used in general circulation as money, and constituted the general *currency* of the country, recognized by law, at the time and place where payment was to be made and demanded. These notes which were in circulation, when the certificate was given and payment demanded, were almost

Parol Evidence. (See also the titles INTERPRETATION AND CONSTRUCTION; PAROL EVIDENCE.)—Some courts have held the meaning of “currency,” “current,” etc., too plain to admit of parol evidence in explanation.¹ But in other cases parol evidence has been held admissible to show the meaning of the term, as used in the contract under construction.²

Other Construction of the Terms.—In the notes will be found a number of cases in which these terms have received construction.³

entirely of one kind authorized by the government as *currency*. They thus being lawful money of the United States, the court were bound to take judicial notice of that fact.”

1. **Parol Evidence.**—Butler v. Paine, 8 Minn. 329; Marine Bank v. Birney, 28 Ill. 92. Compare Chicago F. & M. Ins. Co. v. Keiron, 27 Ill. 507.

2. Huse v. Hamblin, 29 Iowa 501.

“The word *currency* is far from having a settled, fixed, and precise meaning; and even if it had such a meaning in general, it might acquire in certain localities, or among certain classes, a different signification;” and evidence is admissible to show its peculiar meaning at the time and place of drawing a draft in which the word occurs. Pilmer v. Branch of State Bank, 16 Iowa 323.

In American Emigrant Co. v. Clark, 47 Iowa 672, it was said: “The Circuit Court in instructions to the jury recognized the rule adopted by this court that an instrument in the form of commercial paper, except that it is payable in *currency*, or *current* funds, may be shown to be negotiable by proof that, under customs prevailing at the time and place of its execution, the term used to describe the funds in which it is made payable was understood to mean money, and that such funds circulated as money. Haddock v. Woods, 46 Iowa 433; Rindskoff v. Barrett, 11 Iowa 172, 14 Iowa 101; Pilmer v. Branch of State Bank, 16 Iowa 321; Huse v. Hamblin, 29 Iowa 501.” See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 3, p. 65.

3. **Indictment—Larceny.** (See also the title LARCENY, ENCYC. OF PLEADING AND PRACTICE.)—It has been held that a description of the thing stolen as “national *currency*,” in an indictment for larceny, was sufficient; and further, that the value of national *currency* notes being fixed by law, no proof of their value was necessary. Grant v. State, 55 Ala. 201. See also Du Bois v. State, 50 Ala. 139. Compare, however, Croker v. State, 47 Ala. 57, where the description was, “ten dollars in money of the United States *currency*,” and was held insufficient.

“United States *currency*,” as the subject of larceny, embraces treasury notes and national bank notes. Dull v. Com., 25 Gratt. (Va.) 965; State v. Gasting, 23 La. Ann. 609.

An indictment for larceny charged the property stolen to be worth so many dollars “*current* money.” On writ of error it was objected, “that art. 30, § 98 of the Maryland Code says, the value must be five dollars,” that is, “five dollars in gold and silver,” and not in “*current* money,” which it was urged had no fixed value. It was held that article 32, sections 1 and 2, of the Code of Maryland, defining what is *currency*, expressly recognizes “dollars and cents” as the *currency* of the

state, and the implication of law is that the value was expressed in that *currency*. Gardner v. State, 25 Md. 146.

Variance.—Notes were declared on as payable in United States *currency*, and the proof was that the notes were payable in *currency*. This variance was held immaterial, as the notes were payable in Boston, and the word *currency* was presumed to mean United States *currency*. Souther v. Wallace, 20 Nova Scotia 512.

In an indictment the words, “of the *currency* *current* in this commonwealth,” have been held equivalent to “*current* as money in this commonwealth.” Com. v. Griffiths, 126 Mass. 252.

Counterfeiting.—See the title COUNTERFEITING, vol. 7, p. 875.

Current Wages—Exemption. (See the title EXEMPTIONS FROM EXECUTION.)—In Texas *current* wages for personal services were exempted from garnishment. In Sydnor v. Galveston, (Tex. App. 1890) 15 S. W. Rep. 202, it was held that where a physician was employed to attend smallpox patients, at thirty dollars a day, and was retained for fifty-six days, the money due him was exempt as *current* wages, and the exemption was not lost because the city, upon demand, tendered a part only of the sum, which the physician refused to accept. The court said: “*Current* wages are such compensation for personal services as are to be paid periodically, or from time to time, as the services are rendered; as, where the service are to be paid for by the hour, day, week, month, or year; such as that the compensation therefor is measured by the time of the continuance of the service. Cleburne First Nat. Bank v. Graham, 3 Tex. App. Civ. Cas., § 462 Towsey’s services were of this character, and were within the meaning of the constitution and laws exempting *current* wages for personal service. It is contended further by counsel for appellant that, although the money might once have been *current* wages, it had ceased to be such at the time of the service of the writ of garnishment; that it was past due, and had become accumulated wages voluntarily left in the city treasury by Towsey. We do not think that this position is maintainable under the facts of this case. It is true that the wages were measured by the day, but it does not appear that under the contract Towsey was to be paid daily. On the contrary, it would seem from the evidence that he was to be paid at the termination of his services, because until his services had terminated no appropriation to pay his wages was made by the city, and no demand was therefore made by him. Within a short time after the termination of his services, the city made an appropriation to pay the amount due him, and he at once, at least within a reasonable time, de-

manded of the city the amount appropriated. He was tendered only a portion of the amount, which he declined to receive at first, but afterwards, upon the advice of his lawyer, agreed to accept. He did not leave the money on deposit in the city treasury, or voluntarily consent that it should remain there. On the contrary, he demanded its payment to him, and protested against the retention by the city of any portion of it."

An attorney's fee was held not to come within the phrase "*current* wages for personal services." The court said: "The question is, is an attorney's fee for services rendered as an attorney such '*current* wages for personal services' as comes within the constitutional and statutory exemption? *Current* means running; now passing or present in its progress; and '*wages*' means a compensation given to a hired person for his or her services. Webster's Dict. We think the proper construction to be placed then upon the term '*current* wages,' is that they are such compensation paid for personal services as are to be paid for periodically, or from time to time, as the services are rendered, or the work is performed — progresses. It is where the party hired, by rendering the service, would be entitled to certain periodical payments. It is a service rendered, for which the compensation is measured by the time of its continuance (*Jenks v. Dyer*, 102 Mass. 235; *Somers v. Keliher*, 115 Mass. 165); such compensation as in fact is paid for services where rendered by the hour, day, week, month, or year. In the use of the word *current*, as prefixed to '*wages*,' our constitutional and statutory provisions differ from such exemptions in most of the states. See *Freem. Ex'ns*, § 234; *McLellan v. Young*, 54 Ga. 399; *Flood v. Randall*, 72 Me. 439; *Allen v. Russell*, 78 Ky. 105; *Mineral Point R. Co. v. Barron*, 83 Ill. 365; *South, etc., Alabama R. Co. v. Falkner*, 49 Ala. 115. Signification must be given it, as well as the word '*wages*.' In fact, it limits, restricts, and qualifies the character of the wages for personal services, which it is the spirit and intent and policy of the law to exempt from garnishment. No wages not *current* are so exempt. Can an attorney's fee for legal services rendered or to be rendered in a single case, or in the transaction of a single matter, or in the transaction of any amount of legal business, in any manner be correctly termed *current* wages, where he has not been hired for his services by the day, week, or month, to be paid at the expiration of the time for which he was hired, and not in proportion to the business done? We think not." *Cleburne First Nat. Bank v. Graham*, (Tex. App. 1889) 22 S. W. Rep. 1102.

A sum due a person for services for nursing another during an attack of sickness has been held *current* wages for personal services, within the meaning of an exemption law. *Dempsey v. McKennell*, 2 Tex. Civ. App. 284.

Buildings—Current Expenses Ordinary Expenses.—As used in an agreement that all moneys that came into the hands of the trustees should be applied to a certain purpose, after first paying therefrom all taxes and *current* expenses of the trust, it has been held that the term "*current* expenses" meant

ordinary expenses, and did not include the construction of fireproof buildings and unusual expenditures for protecting the property. *Taylor v. Davis*, 110 U. S. 330.

Same—Current Expenses of a County.—This phrase will not include the erection of buildings. *State v. Marion County*, 21 Kan. 434.

Same—Current Expenses.—A statute created a fund to be exclusively applied to the *current* expenses of the common schools. It was held that the building of new schoolhouses and the purchase of schoolhouse sites did not come within *current* expenses. The court said: "Both the terms '*support*' and '*current* expenses,' when applied to the common schools of this state, mean continuing regular expenditures for the maintenance of the schools. Building a new schoolhouse and purchasing a site, while at times necessary and proper, are unusual and extraordinary expenditures; and the legislature, in consonance with the constitution, has evidently had this in mind." *Sheldon v. Purdy*, 17 Wash. 135.

Current Account. (See generally the title ACCOUNTS, vol. 1, p. 435.)—In *Franklin v. Camp*, 1 N. J. L. 228, it is said: "What, then, is a *current* account? Clearly, every one in which there has not been a balance agreed upon and struck between the parties." And in that case it was held that an account was void, although of long standing, and though the last item in it had been entered more than six years before, where there had been no actual settlement. See generally the title LIMITATION OF ACTIONS.

Continuous Open Current Account.—An account, to be continuous, must be without break or interruption. By the term "*open*," is meant something that is not closed; and the term *current*, as used in the statute, signifies running, passing, a connected series. See Webster's Unabridged Dictionary. Hence a continuous, open, *current* account is an account which is not interrupted or broken, not closed by settlement or otherwise, and is a running, connected series of transactions. *Tucker v. Quimby*, 37 Iowa 19.

Current Note. (See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 1, p. 65.)—In *Hinsdill v. Safford*, 11 Vt. 313, the court said: "In relation to notes overdue, the law merchant is entirely different. When a man buys a note not yet due he is to presume it is unpaid, and it would operate a fraud upon him to permit the maker afterwards to show that he paid any part before it was due. If the note which is offered him is already due, he may well presume it is in whole or in part paid, or that it is so situated that it ought not to be paid, and he buys it at the risk of defense. Hence, in mercantile phrase, a note not due is called *current*, that is, it passes in the market where the maker is known to be good. If the note is overdue it is no longer *current*. The indorsee, it is said in law, takes it subject to all equities; for the maker may make any defense which would discharge him as against the payee, accruing before notice of indorsement."

Current Year. (See also TIME, COMPUTATION OF.)—In *Mutual Ben. L. Ins. Co. v. Bales*, 92 Pa. St. 356, it is said: "In the absence of anything appearing to the contrary, the *current* year was the year 1876; it expired on the 31st

CURRICLE. — See note 1.

CURSING. — See note 2.

of December, 1876. Bouvier defines it as 'a term used to express present time; the *current* month is the present month.' Webster says, 'now passing; present in its course; as, the *current* month or year.' "

Pulsatory Current. — In Telephone Cases, 126 U. S. 531, it is said: "The invention, as described, 'consists in the employment of a vibratory or undulatory *current* of electricity, in contradistinction to a merely intermittent or pulsatory current, and of a method of, and apparatus for, producing electrical undulations upon the line wire.' A pulsatory *current* is described as one 'caused by sudden or instantaneous changes of intensity,' and an electrical undulation as the result of 'gradual changes of intensity exactly analogous to the changes in the density of air occasioned by simple pendulous vibrations.' "

1. **Insurance.** (See generally the title MARINE INSURANCE.) — It appeared in evidence that the plaintiff had made a written application to the defendants for insurance "on merchandise" to be laden on board the brig Margaret, on a voyage to New Orleans; that he did not specify the merchandise to be shipped, nor was he required by the company so to do. Upon

this application, an insurance was effected at three per cent. Under the policy the plaintiff claimed the value of a *curricie*, which, by the perils of the seas, had sustained damages beyond fifty per cent., and had been sold, after survey, for the benefit of the concerned. It also appeared in evidence that three per cent. was the common sea risk on goods, wares, and merchandise, and that carriages and household furniture could not, at that time, have been insured under from twelve to twenty per cent., on account of the increased risk from the nature of the subject, and that such insurances always contained an express exemption from partial losses. It was held that there was no concealment to vitiate the policy. *Duplanty v. Commercial Ins. Co.*, Anth. (N. Y.) 114.

2. **Cursing.** — Where the charge, in addition to quarreling, is for *cursing*, and the words of the accused as repeated by one witness for the prosecution were free from profanity, and the only other witness repeats them as including the word "damn, or something to that effect," the alleged *cursing* is not proved. *Carr v. Conyers*, 84 Ga. 287, 28 Am. & Eng. Corp. Cas. 138. See the title BLASPHEMY AND PROFANITY, vol. 4, p. 580.

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BY ALEXANDER STRONACH.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ALIENS*, vol. 2, p. 64; *CONVERSION AND RECONVERSION*, vol. 7, p. 463; *DIVORCE*; *DOWER*; *ESTATES*; *EXECUTIONS*; *HOMESTEAD*; *LIMITATION OF ACTIONS*; *MARRIAGE*; *MARRIAGE SETTLEMENTS*; *REMAINDERS AND EXECUTORY INTERESTS*; *SEPARATE PROPERTY OF MARRIED WOMEN*; *WASTE*.

I. DEFINITION. — Tenancy by the curtesy is an estate for life, accruing to the husband on the death of the wife, in the estate of inheritance of which she was seized in possession, in fee simple or fee tail, during coverture, provided he has had by her lawful issue capable of inheriting the estate, born alive, before her death.¹

1. Definition. — *Buckworth v. Thirkell*, 3 B. & P. 652, note a; *De Hart v. Dean*, 2 MacArthur (D. C.) 60; *McDaniel v. Grace*, 15 Ark. 465; *Ryan v. Freeman*, 36 Miss. 176; *Redus v. Hayden*, 43 Miss. 614; *Billings v. Baker*, 28 Barb. (N. Y.) 344; *McMasters v. Negley*, 152 Pa. St. 303. See also *Heath v. White*, 5 Conn. 228.

Tenancy by the curtesy is a life estate in the surviving husband of a deceased wife, and to authorize its assertion there must be a marriage, seizin by the wife during the coverture of an estate of inheritance, and birth of a living child, offspring of the marriage, capable of inheriting. *Carrington v. Richardson*, 79 Ala. 104.

Tenancy by the curtesy is an estate for life created by the law, and it occurs where a man marries a woman who is seized at any time during coverture of an estate of inheritance, and has issue born alive who might by possibility inherit the same estate as heir to his wife. *Day v. Cochran*, 24 Miss. 261.

Littleton's Definition. — When a man taketh

a wife seized in fee simple or in fee tail general, or seized as heir in tail especial, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies the husband shall hold the land during his life. Litt., § 35. See to the same effect *Pain's Case*, 8 Coke 34.

Blackstone's Definition. — Where a man marries a woman seized of an estate of inheritance — that is, of lands and tenements in fee simple or fee tail — and has by her issue born alive which was capable of inheriting her estate, in this case he shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England. 2 Black. Com. 126. Quoted in *Hunter v. Whitworth*, 9 Ala. 965; *Redus v. Hayden*, 43 Miss. 614; *Gillespie v. Worford*, 2 Coldw. (Tenn.) 632; *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740.

Kent's Definition. — Tenancy by the curtesy is an estate for life created by the act of the law. When a man marries a woman, seized, at any time during the coverture, of an estate of inheritance, in severalty, in coparcenary,

II. ORIGIN AND HISTORY — 1. In General. — There has been much discussion as to the origin both of the name and of the estate. A recognized authority says: "The origin of the name is doubtful. It appears to be connected with *curia*, and to have reference either to the attendance of the husband as tenant of the lands at the lord's court, or to mean simply that under the circumstances mentioned the husband is acknowledged by the courts of England, the equivalent Latin expression being *tenens per legem Angliæ*."¹ Littleton says an estate by curtesy of England is so called because it "is used in no other realm but in England only;"² but this statement seems to be erroneous, as this estate is said to have existed with modifications in Scotland,³ Ireland,⁴ Normandy,⁵ and Germany.⁶

In the United States it was adopted as part of the common law, and still exists in all those states whose laws are based upon that system, except as it is modified by statute.⁷

2. Gavelkind. — Lord Coke derives the word "gavelkind" from "gave all kind."⁸ It was a special custom of the county of Kent, England,⁹ whereby, among other things, a husband was tenant by curtesy of a moiety¹⁰ of his deceased wife's lands, while he remained a widower, whether there was issue born alive or not.¹¹

III. GRADATIONS AND REQUISITES — 1. Gradations. — At common law, curtesy has two gradations, curtesy initiate and curtesy consummate.¹²

or in common, and hath issue by her born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life, by the curtesy of England, and it is immaterial whether the issue be living at the time of the seizin or at the death of the wife, or whether it was born before or after the seizin. 4 Kent's Com. 28. Quoted in *Ryan v. Freeman*, 36 Miss. 175; *Forbes v. Sweezy*, 8 Neb. 520.

Curtsey in Wife's Whole Estate. — If a man marries a widow who had issue, and afterwards has a son by her, would he be tenant by the curtesy of all her estate, or of a part only, including the interest of his son, and thus become a tenant in common with the other children? He would have curtesy in the whole; and on this ground, that this is the established law relative to this estate. *Heath v. White*, 5 Conn. 228.

1. Origin Doubtful. — *Digby's History of Law of Real Property* (Oxford 1884) 142; 2 Minor's Inst. 113.

Not of Feudal Origin. — It is generally agreed by the writers on the subject that this estate is not of feudal origin. *Craig. Jus Feud.*, lib. 2; *Wright on Ten.* 194; 2 Black. Com. 126; 4 Kent's Com. 28.

Time of Introduction. — It is said to have been introduced into England in the time of Henry I. *Mirrour*, c. 1, § 3; 2 Black. Com. 126; 4 Kent's Com. 28.

Reason for the Estate. — In *Billings v. Baker*, 28 Barb. (N. Y.) 343, it is said: "One of the reasons for the introduction of this estate into the English system was that the husband, being the natural guardian of his child, was entitled to the profits of the land in order to maintain the child; but a more prominent and important idea of the system was the reason that then existed in England in regard to all estates in land under the feudal law, to wit, that the husband, having become dignified by having an interest in lands, was bound to do

homage to his superior lord, and the interest being once vested in him, it was the policy of the feudal system not to suffer it to determine during the life of the husband, as otherwise the lord might lose the homage that was his due from the land."

2. Littleton's Derivation. — *Litt. Ten.* (19th ed., § 35). See also 2 Black. Com. 126; 4 Kent's Com. 28; 2 Minor's Inst. 113.

3. Scotland. — *Hale's History Com. Law* 180; *Erskine's Inst.* 380; 2 Black. Com. 126; 4 Kent's Com. 28; 2 Min. Inst. 113.

Variation in Scotland. — In Scotland an estate by curtesy differs from the same estate in England, in that the wife must have been seized of the estate as an heir and not have acquired it by purchase, though it is admitted that there is no good reason for the distinction. 1 *Bell's Com.* (5th ed.) 610.

4. Ireland. — 4 Kent's Com. 28; 2 Minor's Inst. 113.

5. Normandy. — 2 Black. Com. 126; 4 Kent's Com. 28. See also *Coustumier*, c. 119, § 5.

6. Germany. — 2 Black. Com. 126; 4 Kent's Com. 28; 2 Minor's Inst. 113.

7. See *infra*, this title, *Abrogation and Modification by Statute*.

8. Co. Litt. 140a. "For this custom giveth to all the sons alike."

9. Williams on Real Property 129.

10. Williams on Real Property 129, note (r). Different proportions, and even the whole estate, may be assigned by special custom.

11. All the sons of a tenant in gavelkind lands take equally, or their heirs, male and female, by representation. The wife of such tenant is dowerable of one-half the lands. The husband of such tenant has curtesy, whether issue be born or not, but only of one-half while without issue. Such lands do not escheat except for treason or want of heirs. *Bouv. Law Dict.*; *Bac. Abr.*, tit. *Gavelkind*; 1 *Co. Litt.* (19th ed.) 30a, note 1.

12. Two Gradations in Curtesy. — See 2 Black.

2. Requisites — *a.* IN GENERAL — (1) *Curtesy Initiate*. — The requisites to curtesy initiate are marriage, seizin, and birth of issue.¹

(2) *Curtesy Consummate*. — In addition to these, the death of the wife in the lifetime of the husband must occur before the husband becomes tenant by the curtesy consummate.²

b. MARRIAGE. — There must be a lawful marriage to entitle the husband to curtesy;³ but a voidable marriage will support the title of the husband as tenant by the curtesy unless it is actually annulled during the lifetime of the wife.⁴

Proof of Marriage. — The marriage of the husband and wife may be proved by facts and circumstances, such as cohabitation as man and wife lawfully married to each other, proclaiming and representing themselves uniformly to be so,

Com. 250; 4 Kent's Com. 29; 2 Minor's Inst. 132; Jones v. Davies, 7 H. & N. 507; Porch v. Fries, 18 N. J. Eq. 204. And see *infra*, notes 1 and 2.

1. Curtesy Initiate — *Alabama*. — Boykin v. Rain, 28 Ala. 332, 65 Am. Dec. 349; Baker v. Prewitt, 64 Ala. 551.

Illinois. — Cole v. Van Riper, 44 Ill. 58; Bozarth v. Largent, 128 Ill. 95; Jackson v. Jackson, 144 Ill. 274, 36 Am. St. Rep. 427. See also Indianapolis, etc., R. Co. v. McLaughlin, 77 Ill. 275.

Maryland. — Hoffman v. Rice, 38 Md. 284, 35 Md. 344.

Mississippi. — Stewart v. Ross, 50 Miss. 776.

New Hampshire. — Foster v. Marshall, 22 N. H. 491.

New Jersey. — Porch v. Fries, 18 N. J. Eq. 204.

New York. — Matter of Winne, 2 Lans. (N. Y.) 21, reversing 1 Lans. (N. Y.) 508; Schermerhorn v. Miller, 2 Cow. (N. Y.) 439.

North Carolina. — Childers v. Bumgarner, 8 Jones L. (53 N. Car.) 297; Wilson v. Arentz, 70 N. Car. 670.

Pennsylvania. — Rouse Estate v. Directors of Poor, 169 Pa. St. 116; Young v. Lynch, 6 Pa. Dist. Rep. 348.

Rhode Island. — Burgess v. Muldoon, 18 R. I. 607, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 958.

South Carolina. — Withers v. Jenkins, 14 S. Car. 597.

Vermont. — Mattocks v. Stearns, 9 Vt. 326.

Virginia. — Breeding v. Davis, 77 Va. 639, 46 Am. Rep. 740.

2. Curtesy Consummate — *England*. — Jones v. Davies, 7 H. & N. 507.

Canada. — Reed v. Brown, 7 New Bruns. 168; McGregor v. McGregor, 27 Grant's Ch. (U. C.) 470.

United States. — Stoddard v. Gibbs, 1 Sumn. (U. S.) 263.

Alabama. — Hunter v. Whitworth, 9 Ala. 965.

Arkansas. — McDaniel v. Grace, 15 Ark. 465.

Connecticut. — Watson v. Watson, 13 Conn. 83; Wheeler v. Hotchkiss, 10 Conn. 225; Todd v. Oviatt, 58 Conn. 174.

District of Columbia. — Rhodes v. Robie, 9 App. Cas. (D. C.) 305; Smith v. Smith, 21 D. C. 289.

Illinois. — Wolf v. Wolf, 67 Ill. 55; Monroe v. Van Meter, 100 Ill. 347; Bozarth v. Largent, 128 Ill. 95; McNeer v. McNeer, 142 Ill. 388; Jackson v. Jackson, 144 Ill. 274, 36 Am. St. Rep. 427.

Kentucky. — Oldham v. Henderson, 5 Dana (Ky.) 254.

Maine. — See Witham v. Perkins, 2 Me. 400.

Michigan. — Hathon v. Lyon, 2 Mich. 94; Tong v. Marvin, 15 Mich. 60.

Mississippi. — Day v. Cochran, 24 Miss. 261; Ryan v. Freeman, 36 Miss. 175; Malone v. McLaurin, 40 Miss. 161, 90 Am. Dec. 320; Stewart v. Ross, 50 Miss. 776; Taylor v. Smith, 54 Miss. 50.

Nebraska. — Forbes v. Sweesy, 8 Neb. 520.

New Hampshire. — Foster v. Marshall, 22 N. H. 491.

New Jersey. — Porch v. Fries, 18 N. J. Eq. 204.

New York. — Jackson v. Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433; Coit v. Grey, 25 Hun (N. Y.) 444. See also Matter of Winne, 2 Lans. (N. Y.) 21, reversing 1 Lans. (N. Y.) 508.

North Carolina. — Wilson v. Arentz, 70 N. Car. 670.

Rhode Island. — Burgess v. Muldoon, 18 R. I. 607, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 958.

South Carolina. — Withers v. Jenkins, 14 S. Car. 597.

Tennessee. — Templeton v. Twitty, 88 Tenn. 595; Gillespie v. Worford, 2 Coldw. (Tenn.) 632; Guion v. Anderson, 8 Humph. (Tenn.) 298.

Virginia. — Breeding v. Davis, 77 Va. 639, 46 Am. Rep. 740; Muse v. Friedenwald, 77 Va. 57; Carpenter v. Garrett, 75 Va. 129; Porter v. Porter, 27 Gratt. (Va.) 599.

West Virginia. — Winkler v. Winkler, 18 W. Va. 455.

3. Marriage Necessary. — Smoot v. Lecatt, 1 Stew. (Ala.) 590; Heath v. White, 5 Conn. 228; Wheeler v. Hotchkiss, 10 Conn. 226; Mattocks v. Stearns, 9 Vt. 326. And see *supra*, this section, *Requisites* — *In General*.

4. Voidable Marriage Sufficient. — 1 Washb. on Real Property, 129, citing 2 Burns Eccl. Law, 501.

Marriage with Deceased Wife's Sister. — In *In re Murray Canal*, 6 Ont. Rep. 685, it was held that a marriage with a deceased wife's sister was not *ipso facto* void, but was esteemed valid for all civil purposes unless annulled during the lifetime of the parties, and was therefore sufficiently valid to support the title of the husband as tenant by the curtesy of the real estate of his deceased wife, and that it was not necessary to entitle to tenancy by the curtesy that the marriage should have been canonical.

and visiting and being received, recognized and entertained among their relatives, friends and acquaintances as such.¹

c. SEIZIN OF THE WIFE — (1) *In General*. — It is well settled that the husband cannot be tenant by the curtesy except of lands of which his wife was seized during the coverture.² Some disparity, however, exists in the definition or application given by different courts to the word "seizin."

(2) *What Seizin Sufficient* — (a) *Actual Seizin*. — The rule as to seizin at the common law was this: The seizin of the wife must be an actual seizin or possession of the lands; not a bare right to possess, which is seizin in law, but an actual possession which is seizin in deed.³

1. *Doe v. Collins*, 2 Houst. (Del.) 128. See also the titles DIVORCE; EVIDENCE; MARRIAGE.

2. *Seizin Necessary*. — *Bogy v. Roberts*, 48 Ark. 17, 3 Am. St. Rep. 211; *Baker v. Oakwood*, 49 Hun (N. Y.) 416, affirmed in 123 N. Y. 16; *Den v. Demarest*, 21 N. J. L. 525, reversed on another point in 22 N. J. L. 599; *Wigle v. Merrick*, 8 U. C. C. P. 307. And see *supra*, this section, *Requisites — In General*.

Pennsylvania Statute. — The necessity for the seizin of the wife during coverture is not done away with by the Pennsylvania Act of April 8, 1833. *Young v. Lynch*, 6 Pa. Dist. Rep. 348.

3. *Actual Seizin Necessary at Common Law*. — 2 Blackst. 127.

England. — *Doe v. Rivers*, 7 T. R. 272.

United States. — *Mercer v. Selden*, 1 How. (U. S.) 37.

Arkansas. — *McDaniel v. Grace*, 15 Ark. 465; *Luttrell v. Reynolds*, 63 Ark. 254.

Kentucky. — *Adams v. Logan*, 6 T. B. Mon. (Ky.) 175; *Carr v. Givens*, 9 Bush (Ky.) 679, 15 Am. Rep. 747; *Orr v. Hollidays*, 9 B. Mon. (Ky.) 59; *Neely v. Butler*, 10 B. Mon. (Ky.) 48; *Welch v. Chandler*, 13 B. Mon. (Ky.) 420, *distinguishing* *Vanarsdall v. Fauntleroy*, 7 B. Mon. (Ky.) 401.

New York. — *Gibbs v. Esty*, 22 Hun (N. Y.) 266, *distinguishing* *Adair v. Lott*, 3 Hill (N. Y.) 182.

North Carolina. — *Nixon v. Williams*, 95 N. Car. 103.

Virginia. — *Carpenter v. Garrett*, 75 Va. 129.

West Virginia. — *Fulton v. Johnson*, 24 W. Va. 95.

See also *Ferguson v. Tweedy*, 43 N. Y. 543; *Sears v. McBride*, 70 N. Car. 152; *Murdock v. Reed*, 1 Disney (Ohio) 274; *Stoolfoos v. Jenkins*, 8 S. & R. (Pa.) 167; *Steinmetz's Estate*, 3 Pa. Dist. Rep. 440.

Distinction Between Seizin in Fact and Seizin in Law. — "Seizin in fact or in deed, as Lord Coke calls it, or actual seizin, means possession of the freehold by the *pedis positio* of one's self or one's tenant or agent, or by construction of law, as in case of a commonwealth's grant, a conveyance under the statute of uses, or doubtless of grants or devise, where there is no actual adverse occupancy. Seizin in law is a right to the possession of the freehold, when there is no adverse occupancy thereof, such as exists in the heir after descent of lands upon him before actual entry by himself or his tenant. 2 Minor's Inst. 121." *Carpenter v. Garrett*, 75 Va. 129.

Possession of Mortgagee Sufficient. — A, seized in fee of a freehold estate, mortgages it and afterwards intermarries with B, A dies, and

the mortgage is not redeemed during the coverture; this is notwithstanding such a seizin in the wife as entitles the husband to be tenant by the curtesy of the mortgaged premises, for in this court the land is considered only as a pledge or security for the money, and does not alter the possession of the mortgagor. *Casborne v. Scarfe*, 1 Atk. 603.

Person Seized for Wife's Use. — "It is required of the husband to take actual possession of his wife's land as a condition precedent to his right of curtesy therein, for the purpose of strengthening her title to it, and to protect it from intrusion and hostile possession which might, by its continuance, endanger her title. This being the reason for the rule, whenever its equivalent is complied with, then the rule is complied with. For instance, if the guardian of the wife holds the possession of her land at the time of her death, then the reason of the rule is complied with, and the husband is entitled to curtesy in the land. And if a joint tenant with the wife holds the friendly possession of the land at the time of her death, here his possession is her possession, and the reason of the rule is complied with. So, if a trustee of the wife holds the possession of the land for the wife at the time of her death, here also the reason of the rule is complied with, and the husband is entitled to curtesy. Indeed, if any person at the death of the wife is seized of her land for her use, the reason of the rule is complied with, and the husband is entitled to curtesy." *Yankey v. Sweeney*, 85 Ky. 55.

Possession of Vendee Sufficient. — "If the husband were to lease the lands of the wife, and possession was taken by the tenant, it would be virtually the possession of the husband, and sufficient, so far as seizin was necessary, to enable him to hold as tenant by the curtesy. If an entry be made upon the lands of the wife, either by the husband himself or by any other person under him and by his authority, the same effect is produced, and his right to hold as tenant by the curtesy is consummated. Where a sale is made by the husband, and his immediate or remote vendee takes possession of the land under the purchase, it is done by the authority of the husband, it perfects his title as tenant by the curtesy, and the vendee has a right to the land during the lifetime of the husband." *Vanarsdall v. Fauntleroy*, 7 B. Mon. (Ky.) 401. See also *Vrooman v. Shepherd*, 14 Barb. (N. Y.) 441.

Letters Patent Constitute Actual Seizin. — Where a married woman claims under letters patent from the crown, her husband need not have entered upon the land in order to entitle

Possession by Cotenant in Common or Coparcener. — The possession of one tenant in common or one parcener is the possession of all, and entitles the husband of a cotenant in common or of a coparcener to curtesy.¹

Estates in Reversion or Remainder — After an Estate of Freehold. — The husband cannot be tenant by the curtesy of a reversion or remainder expectant upon an estate of freehold, unless the particular estate be determined or ended during the coverture.²

him to tenancy by the curtesy, the letters patent, *suo vigore*, constituting seizin in fact. *Weaver v. Burgess*, 22 U. C. C. P. 104.

Guardian's Possession Sufficient. — The possession of lands of a married woman by her guardian is such a seizin as will entitle the husband to curtesy. *Phillips v. Ditto*, 2 Duv. (Ky.) 540.

Under the Kentucky Statute (Gen. Stat., c. 52, art. 4, § 1), giving curtesy, to entitle the husband to curtesy in the wife's land, it is not necessary that she should in person have been in possession of the land at the time of her death. It is sufficient that another was in possession for her use. *Ellis v. Ditley*, 94 Ky. 620.

West Virginia Statute Requires Actual Seizin. — To entitle a husband to curtesy under § 15, c. 65 of the *West Virginia Code*, as amended by § 2, c. 207 of the Acts of 1872-3, his wife must have been seized in fact during her lifetime of the land; and a mere seizin in law by the wife during her life will not entitle her surviving husband to curtesy in her land. *Fulton v. Johnson*, 24 W. Va. 95.

By virtue of a decree of confirmation of a judicial sale of vacant and unoccupied lots or lands, the purchaser has, by construction of law, a possession which amounts to such seizin in fact as will entitle the husband of such purchaser to curtesy in such lots or land. *Seim v. O'Grady*, 42 W. Va. 77.

1. Cotenant or Coparcener. — *Rhodes v. Robie*, 9 App. Cas. (D. C.) 305; *Carr v. Givens*, 9 Bush (Ky.) 679, 15 Am. Rep. 747; *Buckley v. Buckley*, 11 Barb. (N. Y.) 43; *Childers v. Bumgarner*, 8 Jones L. (53 N. Car.) 297.

Illustration. — Where the wife was entitled to an undivided third part of the premises as the heir of her brother, but was kept out of the possession during the continuance of the coverture by the other tenant in common who claimed possession for the brother, of that third of the estate, upon the supposition that he was still living, it was held a good constructive seizin of the husband during coverture to entitle him to a life interest in that part of the estate as tenant by the curtesy. *Sterling v. Penlington*, 2 Eq. Cas. Abr. 730.

2. No Curtesy in Reversion or Remainder After Estate of Freehold — *United States*. — *Stoddard v. Gibbs*, 1 Sumn. (U. S.) 263.

Alabama. — *Planters' Bank v. Davis*, 31 Ala. 626; *Baker v. Flournoy*, 58 Ala. 650.

Connecticut. — *Todd v. Oviatt*, 58 Conn. 174, *distinguishing* *Bush v. Bradley*, 4 Day (Conn.) 298, and *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 961.

Kentucky. — *Stewart v. Barclay*, 2 Bush (Ky.) 550; *Mackey v. Proctor*, 12 B. Mon. (Ky.) 433.

Massachusetts. — *Webster v. Ellsworth*, 147 Mass. 602; *Shores v. Carley*, 8 Allen (Mass.) 425.

Mississippi. — *Malone v. McLaurin*, 40 Miss. 162, 90 Am. Dec. 320; *Redus v. Hayden*, 43 Miss. 614; *Stewart v. Ross*, 50 Miss. 776.

New Hampshire. — *Orford v. Benton*, 36 N. H. 395.

New York. — *Ferguson v. Tweedy*, 43 N. Y. 543, *affirming* 56 Barb. (N. Y.) 168; *Taylor v. Gould*, 10 Barb. (N. Y.) 388; *Trolan v. Rogers*, 79 Hun (N. Y.) 507.

Ohio. — *Watkins v. Thornton*, 11 Ohio St. 367.

North Carolina. — *Gentry v. Wagstaff*, 3 Dev. L. (14 N. Car.) 270.

Pennsylvania. — *Williams v. Baker*, 71 Pa. St. 476; *Young v. Lynch*, 6 Pa. Dist. Rep. 348; *Hitner v. Ege*, 23 Pa. St. 305.

Tennessee. — *Reed v. Reed*, 3 Head (Tenn.) 491, 75 Am. Dec. 777.

See also *Doe v. Rivers*, 7 T. R. 272. But see *McKee v. Cottle*, 6 Mo. App. 416.

Applicable to Equitable Estates. — There can be no tenancy by the curtesy of a remainder or reversion vested in the wife if the particular estate continue till the death of the wife. This doctrine applies as well to equitable as to legal estates; and therefore a mere naked seizin of the freehold by the wife, as trustee, will not support tenancy by the curtesy, though she has the beneficial interest in the reversion. *Chew v. Southwark*, 5 Rawle (Pa.) 160.

Remainder After Dower. — Where the estate descends to a daughter who is a *feme covert*, and who dies in the lifetime of the mother to whom dower in the premises is subsequently assigned, the husband of such daughter will not be entitled to an estate by the curtesy in the third of the premises which is thus assigned to the widow of his wife's father for dower, even after the termination of the life estate of such widow in that third of the premises. *Matter of Cregier*, 1 Barb. Ch. (N. Y.) 600, 45 Am. Dec. 416. *Compare* *McKee v. Cottle*, 6 Mo. App. 416.

Curtesy when Particular Estate Determines During Coverture. — Where a remainder in fee, after a life estate, is limited to several as tenants in common, one of them a married woman, and the precedent estate is terminated during the coverture, the husband's right of curtesy will attach on the death of the wife. *Rhodes v. Robie*, 9 App. Cas. (D. C.) 305.

The testator gave to his children all his real and personal property to be divided equally when the youngest came to the age of twenty-one; to his wife, all the rents and profits of lands and interest of money to maintain herself and educate and maintain his children as long as she remained his widow, but if she married again she was to have twenty-five pounds per annum, and the moneys, rents, etc., were to be applied for the benefit of his children, and the property was to be divided among them when the youngest came of age.

After a Term for Years. — A term for years does not exclude the actual seizin of the husband and wife whether they receive rent or not, since the possession of the termor is that of the reversioner, and therefore in such a case the husband is entitled to curtesy.¹

Not Required when Impossible. — Actual seizin is not required when there is no possible means of obtaining such seizin,² as in the case of an advowson, or a rent,³ or when entry is prevented by force.⁴

(b) **Constructive Seizin.** — The strict common-law doctrine requiring actual seizin has been frequently departed from by the courts, and seizin in law or constructive seizin has been held sufficient to entitle the husband to curtesy.⁵ Some of these decisions would seem to limit this modification to cases where the land is not held adversely;⁶ while others hold that though the land be

The testator left several children, one of whom was married and died, leaving her husband and two sons surviving her. The widow of the testator married again before the death of the daughter. It was contended that the possession of the married daughter to the time of her death was not such an estate in possession as would entitle her husband to a tenancy by the curtesy, but this contention was not sustained, as the freehold estate of the testator's widow ended before the death of the daughter, and it was held that the husband of the daughter was tenant by the curtesy of her share. *Jones v. Dawson*, 8 Ont. Pr. Rep. 481.

No Curtesy Initiate in a Remainder. — Where the wife was tenant in fee in remainder only till after the husband's bankruptcy and discharge, it was held that the husband, though there had been issue of the marriage, had not at the time of his bankruptcy any such contingent interest in the estate as tenant by the curtesy as would pass to his assignee. *Gibbins v. Eyden*, L. R. 7 Eq. 371.

1. After Term for Years. — *Per Ruffin*, C. J., in *Carter v. Williams*, 8 Ired. Eq. (43 N. Car.) 177; *Todd v. Oviatt*, 58 Conn. 174; *Powell v. Bossom*, 18 B. Mon. (Ky.) 179; *Redus v. Hayden*, 43 Miss. 614; *Ferguson v. Tweedy*, 43 N. Y. 543; *Lowry v. Steele*, 4 Ohio 170. See also *Green v. Liter*, 8 Cranch (U. S.) 229; *Vanarsdall v. Fauntleroy*, 7 B. Mon. (Ky.) 401; *Day v. Cochran*, 24 Miss. 261; *Weir v. Tate*, 4 Ired. Eq. (39 N. Car.) 264.

Illustrations. — Lands on which there were leases for years existing, and a rent incurred, descended on a wife as tenant in tail general who survived three months after the rent day incurred; though she made no entry nor received any rent during her life, yet this was such a possession in the wife as made the husband tenant by the curtesy. *De Grey v. Richardson*, 3 Atk. 469.

Where real estate was devised in fee to a woman, who afterwards married, but it was directed in the will that the possession should be retained by A., a third person, and the rents and profits received by him until a certain debt was paid, it was held that the interest of this possessor could not be regarded as of a higher character than a term or chattel interest, that the possession of a termor is the seizin of him who hath the inheritance, and that in such a case, the wife having had issue born during the marriage, the husband is entitled to be tenant by the curtesy. *Robertson v.*

Stevens, 1 Ired. Eq. (36 N. Car.) 247. See also *Manning's Case*, 8 Coke 96.

Where the wife of the plaintiff, now dead, was entitled to the land in dispute as heir at law, and her husband rented it as tenant of the ancestor's widow, but the wife lived on the land, it was held that she had such seizin as entitled her husband to an estate by the curtesy. *Nixon v. Williams*, 95 N. Car. 103.

2. Where Seizin Impossible. — In *Eager v. Furnivall*, 17 Ch. Div. 115, a testator died in 1875, having by his will dated in 1872 devised a freehold estate to his daughter (the plaintiff's wife), her heirs and assigns, for her separate use. The daughter died in 1874, in the lifetime of the testator, leaving an only child who was her heiress at law. It was held that the plaintiff was entitled for his life to the property devised by the testator, as tenant by the curtesy. The court said: "There is no possible means by which the husband could have obtained seizin, *et impotentia excusat legem*; consequently, the seizin is not required."

3. Actual Seizin of Incorporeal Hereditaments Unnecessary. — "The general rule of law is, that although a man shall not be tenant by the curtesy, without actual seizin, yet of a rent or of an advowson, if the wife dies before the rent day or before the avoidance, he shall be tenant by the curtesy." *Shelley's Case*, 1 Coke 97. See also *Finche's Case*, 6 Coke 68; *Barr v. Galloway*, 1 McLean (U. S.) 476; *Mercer v. Selden*, 1 How. (U. S.) 37.

4. Mercer v. Selden, 1 How. (U. S.) 37.

5. Constructive Seizin Sufficient. — *De Hart v. Dean*, 2 MacArthur (D. C.) 60; *Todd v. Oviatt*, 58 Conn. 174; *Mettler v. Miller*, 129 Ill. 630; *Wass v. Bucknam*, 38 Me. 356; *Redus v. Hayden*, 43 Miss. 614; *McKee v. Cottle*, 6 Mo. App. 416; *Gillespie v. Worford*, 2 Coldw. (Tenn.) 632.

A Recovery in Ejectment by the husband and wife, of lands belonging to the wife, gives to the husband such a constructive seizin of the lands as to entitle him to a life estate therein as tenant by the curtesy initiate. *Ellsworth v. Cook*, 8 Paige (N. Y.) 643.

After a Descent Cast, no entry or actual possession is necessary in order to entitle the husband to curtesy. *Reaume v. Chambers*, 22 Mo. 36; *Harvey v. Wickham*, 23 Mo. 112; *Stephens v. Hume*, 25 Mo. 349.

6. De Hart v. Dean, 2 MacArthur (D. C.) 60; *Day v. Cochran*, 24 Miss. 261; *Rabb v. Griffin*, 26 Miss. 579; *Redus v. Hayden*, 43 Miss. 614.

held adversely during coverture by another, the husband may have tenancy by the curtesy.¹

Wild and Uncultivated Lands. — The husband may be tenant by the curtesy of wild and uncultivated lands not held adversely by another, of which the wife has only the legal seizin.²

Seizin by Deed. — The delivery of a deed where there is no adverse possession of the land has been generally regarded as a sufficient seizin to entitle the husband to curtesy on the ground that the possession follows the title.³

(c) **Equitable Seizin.** — The receipt of the rents and profits of the land by the wife during coverture is considered as such seizin of an equitable estate as will entitle the husband to curtesy.⁴

(d) **Beneficial Seizin.** — A mere naked seizin of the freehold by the wife as trustee will not entitle the husband to curtesy.⁵

(e) **Sole Seizin — Joint Tenancy.** — At common law, the husband of a woman seized as a joint tenant was not entitled to curtesy because of the doctrine of survivorship.⁶ But in a jurisdiction where the right of survivorship has been abolished, there is curtesy in a joint estate.⁷

Tenancy in Common. — The husband is entitled to curtesy in his wife's interest in land of which she was one of the tenants in common.⁸

1. *Bush v. Bradley*, 4 Day (Conn.) 298; *Todd v. Oviatt*, 58 Conn. 174; *Borland v. Marshall*, 2 Ohio St. 308; *Mitchell v. Ryan*, 3 Ohio St. 377; *Merritt v. Horne*, 5 Ohio St. 307, 67 Am. Dec. 298. But see *Murdock v. Reed*, 1 Disney (Ohio) 274.

Right to Present Possession. — In *Pennsylvania* a surviving husband is entitled to curtesy of land of his deceased wife of which he had only a potential seizin during her life. Actual possession by the wife or by the husband in her right is not necessary. If she had possession by a tenant for years, or if she had a right to present possession, it is sufficient. The effect is equivalent to that of actual seizin. *Buchanan v. Duncan*, 40 Pa. St. 82. To the same effect are *Stoolfoos v. Jenkins*, 8 S. & R. (Pa.) 175; *Chew v. Southwark*, 5 Rawle (Pa.) 160.

2. Actual Seizin of Wild and Uncultivated Lands Unnecessary. — *Mercer v. Selden*, 1 How. (U. S.) 37; *Barr v. Galloway*, 1 McLean, (U. S.) 476; *Davis v. Mason*, 1 Pet. (U. S.) 507; *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76; *McDaniel v. Grace*, 15 Ark. 465; *Luttrell v. Reynolds*, 63 Ark. 254; *Jackson v. Sellick*, 8 Johns. (N. Y.) 262; *Ferguson v. Tweedy*, 43 N. Y. 543; *Pierce v. Wanett*, 10 Ired. L. (32 N. Car.) 446; *McCorry v. King*, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; *Guion v. Anderson*, 8 Humph. (Tenn.) 298. See also *Todd v. Oviatt*, 58 Conn. 174; *Mettler v. Miller*, 129 Ill. 630; *Malone v. McLaurin*, 40 Miss. 161, 90 Am. Dec. 320; *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433. But see *Vanarsdall v. Fauntleroy*, 7 B. Mon. (Ky.) 401; *Neely v. Butler*, 10 B. Mon. (Ky.) 48.

3. Sufficient Seizin Given by Deed. — *Adair v. Lott*, 3 Hill (N. Y.) 182; *Withers v. Jenkins*, 14 S. Car. 597. See also *Todd v. Oviatt*, 58 Conn. 174; *Ferguson v. Tweedy*, 43 N. Y. 543.

In *Jackson v. Johnson*, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433, the court said: "Now, in all the cases in which an actual seizin of the wife has been held necessary, it will be found that she claimed either as heir or devisee and not by virtue of a deed or conveyance to which effect is given by the statute of uses."

"In this state, and perhaps now in nearly all the states, livery of seizin, with its attendant ceremonies of breaking a twig, or turning a sod, is unknown. Freehold estates are transferred by patent, by deed, or by descent cast, without other or further ceremony. In tracing title by inheritance, as successive descents are cast, proof of entry is never deemed necessary to a recovery, or as in any wise affecting the course of descents. A fee simple owner is seized of all his lands, which are not in the actual *pedis possessio* of an adversary. A deed of conveyance of a freehold estate, of itself, operates to create a seizin of the land in the donee or grantee, unless in adverse possession of another." *Redus v. Hayden*, 43 Miss. 614.

4. Equitable Seizin. — *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyrer*, 14 Sim. 125; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238; *Cushing v. Blake*, 30 N. J. Eq. 689; *Withers v. Jenkins*, 14 S. Car. 597. See also *Pitt v. Jackson*, 2 Bro. C. C. 51. But see *Hearle v. Greenbank*, 3 Atk. 695; *Moore v. Webster*, L. R. 3 Eq. 267.

5. McKee v. Jones, 6 Pa. St. 425; *Chew v. Southwark*, 5 Rawle (Pa.) 160.

6. Joint Tenancy. — 2 Min. Inst. 23; 1 Washb. on Real Property 135; *Carr v. Givens*, 9 Bush (Ky.) 679, 15 Am. Rep. 747.

7. 2 Min. Inst. 23.

8. Tenancy in Common. — *Daniel v. Bratton*, 1 Dana (Ky.) 210.

"Seizin of the wife is one of the essential requisites. Seizin was formerly understood to be a corporeal investiture by actual livery of seizin. How this was effected it is not now necessary to explain, as it passed away after written muniments of title came to be used. The delivery of a deed, where there is no adverse possession or claimant, has been generally regarded as a sufficient seizin, on the ground that the possession follows the title. *Green v. Lister*, 8 Cranch (U. S.) 229. This has been considered sufficient as to legal estates to authorize the attaching of the husband's curtesy. And as to equitable estates,

d. BIRTH OF ISSUE — (1) *Common Law* — (a) **Must Be Born Alive.** — In order for the husband to be entitled to an estate as tenant by the curtesy according to the rules of the common law, there must be issue born,¹ and such issue must be born alive.²

(b) **Must Be Born During Wife's Life.** — The issue must also be born alive in the lifetime of the mother, and so the delivery of the child by the Cæsarean operation, after the death of the mother, is not sufficient.³

(c) **Must Be Capable of Inheriting.** — Such issue must also be capable of inheriting the mother's estate.⁴

(2) *Statutes* — **Issue Not Necessary.** — In some jurisdictions statutes have been enacted which dispense with the necessity of the birth of issue as one of the requisites to curtesy.⁵

Proviso. — Such statutes sometimes contain a proviso discharging the estate of the deceased wife from curtesy if she leaves issue by a former marriage to whom the estate might descend.⁶

e. DEATH OF THE WIFE. — As has been before stated, the husband who,

he receipt of the rents and profits by the *cestui que trust* has been held to constitute an equitable seizin for the same purpose." *Withers v. Jenkins*, 14 S. Car. 597.

1. See *supra*, this section, *Requisites* — *In General*.

2. **Birth of Living Issue.** — 2 Black. Com. 248; 1 Co. Litt. 29 *b*; *Pain's Case*, 8 Coke 34; *Grimball v. Patton*, 70 Ala. 626; *Nicrosi v. Phillippi*, 91 Ala. 299; *Thomas v. Hughes*, (Ky. 1894) 25 S. W. Rep. 501; *Matter of Winne*, 1 Lans. (N. Y.) 513; *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35; *Winkler v. Winkler*, 18 W. Va. 455. See also *Marable v. Jordan*, 5 Humph. (Tenn.) 417.

Need Not Be Heard to Cry. — Some have had a notion that the issue must be heard to cry, but that is a mistake. Crying, indeed, is the strongest evidence of its being born alive, but it is not the only evidence. 2 Black. Com. 248; *Pain's Case*, 8 Coke 34.

Independent Existence. — The child's life must in fact be distinct from and independent of the mother. It must have an independent existence of its own, manifested by an independent circulation within its own body after birth. *Doe v. Killen*, 5 Houst. (Del.) 14.

Attempt to Breathe. — If, as all know, breathing by a child first born is a true sign of life, an effort to breathe or a gasping or struggling to get a full inspiration is equally convincing that life is not yet extinct, just as a cry of pain, though ever so feeble, shows as conclusively that death, however near, has not yet actually come as would the voice of a Stentor. *Goff v. Anderson*, 91 Ky. 303.

3. **Must Be Born During Wife's Life.** — 2 Black. Com. 248; 1 Co. Litt. 29 *b*; *Pain's Case*, 8 Coke 34; *Matter of Winne*, 1 Lans. (N. Y.) 508; *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35.

4. **Must Be Capable of Inheriting.** — 2 Black. Com. 249; Co. Litt. 40 *a*; *Ryan v. Freeman*, 36 Miss. 175; *Haywood v. Moore*, 2 Humph. (Tenn.) 584. See also *Day v. Cochran*, 24 Miss. 261; *Templeton v. Twitty*, 88 Tenn. 595; *Wigle v. Merrick*, 8 U. C. C. P. 307.

Estate in Tail Male and Issue a Daughter Only. — If a woman be tenant in tail male and have only a daughter born, the husband is not thereby entitled to be tenant by the curtesy, because such issue female can never inherit

the estate in tail male. *Pain's Case*, 8 Coke 34; Co. Litt. 29 *b*; 2 Black. Com. 249.

Children Taking Estate by Purchase. — Where a testator limited the estate over after the death of her niece to her children in fee, and then contingently over to certain other devisees so that the children would take no part of the realty by inheritance from their mother, but would hold under the will as purchasers *per formam doni*, it was held that the husband could possess no title as tenant by the curtesy. *Janney v. Sprigg*, 7 Gill (Md.) 197, 48 Am. Dec. 557.

Actual Inheritance Unnecessary. — The law is unquestionable that the actual inheritance of the issue is not of moment, but his capacity to inherit. His capacity is not affected by the fact that others have an equal capacity. *Heath v. White*, 5 Conn. 228.

5. *Statutes* — **Issue Unnecessary** — *United States*. — *Elliott v. Teal*, 5 Sawy. (U. S.) 249 (*Oregon* statute).

Nebraska. — *Forbes v. Sweesy*, 8 Neb. 520.

Ohio. — *Denny v. McCabe*, 35 Ohio St. 576; *Hershizer v. Florence*, 39 Ohio St. 516; *Bruner v. Briggs*, 39 Ohio St. 478; *Leggett v. McClelland*, 39 Ohio St. 624; *Tilden v. Barker*, 40 Ohio St. 411; *Murdock v. Reed*, 1 Disney (Ohio) 274.

Pennsylvania. — *Lancaster County Bank v. Stauffer*, 10 Pa. St. 398; *Clarke's Appeal*, 79 Pa. St. 376; *Teacle's Estate*, 132 Pa. St. 533; *McMasters v. Negley*, 152 Pa. St. 303; *Rouse Estate v. Directors of Poor*, 169 Pa. St. 116.

Wisconsin. — *Kingsley v. Smith*, 14 Wis. 360.

See also the codes and statutes of the several states.

West Virginia — **Issue Necessary.** — The Code of West Virginia, 1868, c. 65, § 15, amended by Act 1872, 1873, c. 207, § 2, does not dispense with the necessity of the birth of issue. *Winkler v. Winkler*, 18 W. Va. 455.

6. **Effect of Issue by Former Marriage.** — Gen. Stat. Nebraska, § 280; Rev. Stat. Ohio, § 4176; *Hathon v. Lyon*, 2 Mich. 94; *Forbes v. Sweesy*, 8 Neb. 520; *Denny v. McCabe*, 35 Ohio St. 576; *Bruner v. Briggs*, 39 Ohio St. 478; *Tilden v. Barker*, 40 Ohio St. 411; *Kingsley v. Smith*, 14 Wis. 360. See also the codes and statutes of the several states.

after the birth of issue, has been tenant by the curtesy initiate, upon the death of the wife becomes tenant by the curtesy consummate.¹

f. CONCURRENCE OF REQUISITES UNNECESSARY—(1) *Seizin and Birth of Issue*.—Seizin and birth of issue need not be concurrent. It is immaterial at what period during coverture the wife becomes seized, whether before the birth of issue or thereafter; nor is it material whether the issue be living or dead at the time of the seizin.²

(2) *Marriage and Birth of Issue*.—And in a jurisdiction where, by statute, a child born before the marriage of its father and mother becomes legitimate by their subsequent marriage, it was held that upon the death of the wife without issue born after the marriage the husband became tenant by the curtesy.³

IV. NATURE AND INCIDENTS—1. **Curtesy Initiate**—*a. IN GENERAL*.—A tenant by the curtesy initiate is seized of a freehold estate in his own right, and the interest of the wife is a mere reversionary interest, depending upon the life estate of the husband.⁴

1. See *supra*, this section, *Requisites—In General—Curtesy Consummate*.

2. **Seizin and Birth of Issue Need Not Concur**.—1 Co. Litt. 30 *a*; Hunter *v.* Whitworth, 9 Ala. 965; Heath *v.* White, 5 Conn. 228; Comer *v.* Chamberlain, 6 Allen (Mass.) 166; Jackson *v.* Johnson, 5 Cow. (N. Y.) 74, 15 Am. Dec. 433.

Illustration.—During the coverture two children were born, both of whom died before their mother acquired any land, and for this reason it was contended that because the wife's seizin did not commence until after the death of her children there was no right of curtesy in her husband. The court said: "All the authorities of which we have any knowledge are contrary to this contention. Whether seizin arose before or after the death of the child is an unimportant circumstance. If there was a child which by possibility might have inherited the land from the mother—a child to whom the land would have descended had it survived the mother—that is all that is required as to issue, and the father takes an estate for life as tenant by the curtesy." Templeton *v.* Twitty, 88 Tenn. 595, *distinguishing* Haywood *v.* Moore, 2 Humph. (Tenn.) 584.

3. Hunter *v.* Whitworth, 9 Ala. 965.

4. **Curtesy Initiate—Freehold Estate**.—Sill *v.* White, 62 Conn. 430; Melvin *v.* Merrimack River Locks, etc., 16 Pick. (Mass.) 137; Stewart *v.* Ross, 50 Miss. 776; Ro Bards *v.* Murphy, 64 Mo. App. 90; Foster *v.* Marshall, 22 N. H. 491; Williams *v.* Lanier, Busb. L. (44 N. Car.) 30; Rouse Estate *v.* Directors of Poor, 169 Pa. St. 116; Breeding *v.* Davis, 77 Va. 639, 46 Am. Rep. 740. But see Jones *v.* Davies, 7 H. & N. 507.

Statement of Doctrine.—"The nature of the estate, whatever now may be its value, is the same as declared by Gibson, C. J., in Lancaster County Bank *v.* Stauffer, 10 Pa. St. 398: 'The husband, indeed, becomes seized of a freehold by the marriage, but it is the wife's freehold, not his, inasmuch that both must do homage for it. * * * But after issue born, he has a freehold in his own right * * * and the wife cannot forfeit it for treason. * * * He is then said to be tenant by the curtesy initiate, though the new character of the interest is not consummated by anything less than his wife's death. As then the defendant had an independent estate in his

wife's land, which might have been aliened by his separate act, it was bound as an inchoate one by the judgment against him for his separate debt. Were it necessary to decide whether our statute, which dispenses with the birth of issue as a constituent of curtesy consummate, does not dispense with it also as a constituent of curtesy initiate, there would be little difficulty in maintaining that it does.'" Rouse Estate *v.* Directors of Poor, 169 Pa. St. 116.

The interest of the husband as a tenant by the curtesy initiate was a legal estate, and was both salable and assignable. It was a freehold during the lives of himself and wife, with a freehold in remainder to himself for life as a tenant by the curtesy consummate, and a remainder to the wife and her heirs in fee. Mettler *v.* Miller, 129 Ill. 630, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 962.

Qualifies for Voting.—In *Rhode Island*, where a real-property qualification for voting is required, this is sufficiently met by a right to curtesy initiate. *In re* Voting Laws, 12 R. I. 586.

Qualifies for Jury Duty.—In *North Carolina*, where a talesman may be challenged if he is not a freeholder, this ground of challenge does not exist if such talesman is tenant by the curtesy initiate. State *v.* Mills, 91 N. Car. 593.

No Merger of Term for Years and Curtesy Initiate.—In Jones *v.* Davies, 7 H. & N. 507, it was held that if a husband is possessed of a term of years and the owner of the reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the two estates in different rights, without having acquired the freehold by his own act, and consequently there is no merger. Wightman, J., in the opinion delivered by him, said: "During the life of the wife, he [the husband] is only what is called 'tenant by the curtesy initiate,' and as such is respected in law for some purposes, which are enumerated by Lord Coke, but he is not tenant by the curtesy 'consummate,' so as to give him a separate and independent estate of freehold until the death of the wife; and we are not aware of any authority for holding that, until the death of the wife, the tenancy by the curtesy 'initiate' would be such an estate of freehold in the husband,

b. VESTED ESTATE.—Curtesy initiate is a vested estate for the life of the husband,¹ subject to be defeated by the remote contingency of an absolute divorce,² and it is not within the power of the legislature to destroy such estate or deprive the husband of it.³

c. LIABLE FOR DEBTS.—Like all other certain and vested estates, it is subject to be attached and sold under execution.⁴

separate from and independent of the estate in fee of which he and his wife were seized, in right of the wife, as would merge the term."

1. Is a Vested Estate.—*Hitz v. National Metropolitan Bank*, 111 U. S. 722; *Shortall v. Hinckley*, 31 Ill. 219; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427; *Stewart v. Ross*, 50 Miss. 776; *Taylor v. Smith*, 54 Miss. 50; *Denny v. McCabe*, 35 Ohio St. 576; *Gillespie v. Worford*, 2 Coldw. (Tenn.) 632.

The birth of issue capable of inheriting enlarges the title of the husband into a life estate which initiates from that moment and becomes a vested estate capable of being alienated or subjected to his debts. There is not a feature of contingency about it. It begins or becomes initiate on the birth of issue and continues so long as the husband lives. It is well settled in the law that from the time this life estate vests it becomes inseparable from the inheritance, and cannot be restrained or prevented by the act of the wife or any other person. *Stewart v. Ross*, 50 Miss. 776.

Massachusetts—Not Vested.—An estate by the curtesy is a freehold estate, but since the passage of the Massachusetts Married Women's Act, when the right of curtesy is in the separate real property of a married woman, it is not a vested estate until it becomes consummate. *Hayden v. Peirce*, 165 Mass. 359; *Stables v. Brown*, 13 Allen (Mass.) 64. See also *Silsby v. Bullock*, 10 Allen (Mass.) 94.

New York—Simply a Status.—Since the acts allowing married women to sell and devise their lands, a husband's right as tenant by the curtesy initiate, as to lands acquired since the passage of those acts, consists simply of a status, which is never a vested right and is not separately alienable during coverture, but may be modified or annulled at any time before it becomes consummate by the death of the wife. *Albany County Sav. Bank v. McCarty*, 149 N. Y. 71; *Thurber v. Townsend*, 22 N. Y. 517.

Pennsylvania—Not Vested.—In *Sharpless v. West Chester*, 1 Grant's Cas. (Pa.) 257, it was held that although the interest of the husband in the lands of his wife as tenant by the curtesy was protected by the Pennsylvania statute of April 11, 1848, it was not a vested interest until the death of the wife.

Statute Not Retroactive.—This statute was not retroactive. *Mellinger v. Bausman*, 45 Pa. St. 529.

Virginia—A Bare Possibility.—Since the enactment of April 4, 1877, the husband has only a modified tenancy by the curtesy, dependent upon a contingency, and no estate vests in the husband during the life of the wife. This is rather a shadowy estate. It is an interest which may possibly ripen into something tangible in the uncertain future. Previous to the act it could be sold on execution against the husband. Now the wife has the sole control of her real estate during her

life, and the husband has no interest until her death. This estate at best is now a bare possibility, dependent on his surviving his wife. *Breeding v. Davis*, 77 Va. 639, 46 Am. Rep. 740.

2. Hoffman v. Rice, 38 Md. 284; *Mattocks v. Stearns*, 9 Vt. 326. See also *Oldham v. Henderson*, 5 Dana (Ky.) 254.

3. Legislature Cannot Destroy.—*Rose v. Sanderson*, 38 Ill. 247; *McNeer v. McNeer*, 142 Ill. 388; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427. See also *Hitz v. National Metropolitan Bank*, 111 U. S. 722, reversing *National Metropolitan Bank v. Hitz*, 1 Mackey (D. C.) 111; *Denny v. McCabe*, 35 Ohio St. 576. *Quare* in *Plumb v. Sawyer*, 21 Conn. 351.

Power of the Legislature Before Estate Vests.—The legislature has the same power by statute to cut off this right initiate before it becomes vested by the birth of issue that it possesses to change or abrogate any other principle of the common law. *Monroe v. Van Meter*, 100 Ill. 347; *McNeer v. McNeer*, 142 Ill. 388; *Hathon v. Lyon*, 2 Mich. 94. See also *Hitz v. National Metropolitan Bank*, 111 U. S. 722, reversing *National Metropolitan Bank v. Hitz*, 1 Mackey (D. C.) 111.

4. Subject to Claims of Creditors—Connecticut.—*Plumb v. Sawyer*, 21 Conn. 351.

Illinois.—*Shortall v. Hinckley*, 31 Ill. 219; *Cole v. Van Riper*, 44 Ill. 58; *Lang v. Hitchcock*, 99 Ill. 550; *Gay v. Gay*, 123 Ill. 221; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427.

Maryland.—*Hoffman v. Rice*, 38 Md. 284.

Mississippi.—*Day v. Cochran*, 24 Miss. 261; *Stewart v. Ross*, 50 Miss. 776; *Taylor v. Smith*, 54 Miss. 50.

New York.—*Schermerhorn v. Miller*, 2 Cow. (N. Y.) 439; *Sleight v. Read*, 18 Barb. (N. Y.) 159. See also *Van Duzer v. Van Duzer*, 6 Paige (N. Y.) 366, 31 Am. Dec. 257.

Ohio.—*Canby v. Porter*, 12 Ohio 79.

Pennsylvania.—*Rouse Estate v. Directors of Poor*, 169 Pa. St. 116; *Burd v. Dansdale*, 2 Binn. (Pa.) 80.

Vermont.—*Mattocks v. Stearns*, 9 Vt. 326.

See also *Mechanics Bank v. Williams*, 17 Pick. (Mass.) 438.

When the real estate of the wife in which the husband has a life estate as tenant by the curtesy initiate is sold under a decree in partition, the creditors of the husband may, by a creditor's bill, reach his interest in the fund produced by the sale, to the extent of his legal interest in the estate sold. *Ellsworth v. Cook*, 8 Paige (N. Y.) 643.

Maryland—Execution Suspended During Wife's Life.—The Maryland Code of 1841, c. 161, does not destroy the tenancy by the curtesy, but suspends the right of execution during the life of the wife, leaving the judgment lien perfect on the life estate of the husband, to be enforced after the death of the wife. *Logan v.*

d. MAY BE CONVEYED. — It may be conveyed by the husband,¹ but a conveyance to, or for the benefit of, the wife, executed in fraud of creditors, is invalid.²

e. RIGHT OF ACTION. — The holder of an estate by the curtesy initiate has the right of possession during his life and may commence suit to recover possession in the same manner that other tenants for life recover possession of their estates.³ He can sue alone for damages for trespass,⁴ but for an injury done to the inheritance the wife must join in the suit.⁵ A tenancy by the curtesy initiate is a sufficient estate in lands upon which to base a partition suit.⁶

2. Curtesy Consummate — *a. IN GENERAL.* — An estate by the curtesy consummate partakes more of the character of an estate acquired by descent than of one acquired by purchase. Immediately upon the death of the wife, the estate vests in the husband, and, like the heir, he cannot, by refusing to take it, cause it to remain in the wife, nor can he by a disclaimer transfer it to others.⁷

McGill, 8 Md. 461. And article 45 of the Code of Maryland has the same effect. *Rice v. Hoffman*, 35 Md. 344; *Hoffman v. Rice*, 38 Md. 284.

Massachusetts — Not Subject to Execution. — Under the General Statutes of Massachusetts, c. 108, § 1, the estate of a tenant by curtesy initiate is not liable to be levied upon by his creditors. *Staples v. Brown*, 13 Allen (Mass.) 64. See also *Silsby v. Bullock*, 10 Allen (Mass.) 94.

Before the passage of that act the estate of a tenant by curtesy initiate was liable to be levied upon by his creditors. *Staples v. Brown*, 13 Allen (Mass.) 64. See also *Mechanics' Bank v. Williams*, 17 Pick. (Mass.) 438; *Gardner v. Hooper*, 3 Gray (Mass.) 398.

Pennsylvania — Not Subject to Execution. — Since the passage of the Married Women's Act of Pennsylvania, the wife's estate in land cannot be taken in execution for the debts of her husband on account of his interest as tenant by the curtesy, and it is clear that he has no power to convey or alienate it during coverture. *Williams v. Baker*, 71 Pa. St. 476.

1. May Be Conveyed — *United States.* — *Hitz v. National Metropolitan Bank*, 111 U. S. 722.

Alabama. — *Boykin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349.

Connecticut. — *Plumb v. Sawyer*, 21 Conn. 351.

Illinois. — *Shortall v. Hinckley*, 31 Ill. 219; *Jacobs v. Rice*, 33 Ill. 370; *Mettler v. Miller*, 129 Ill. 630, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 962; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427.

Maryland. — *Central Bank v. Copeland*, 18 Md. 305.

Massachusetts. — *Gardner v. Hooper*, 3 Gray (Mass.) 398; *Melvin v. Merrimack River Locks, etc.*, 16 Pick. (Mass.) 137.

Mississippi. — *Stewart v. Ross*, 50 Miss. 776. *New Hampshire.* — *Foster v. Marshall*, 22 N. H. 491.

North Carolina. — *Jones v. Carter*, 73 N. Car. 148.

Pennsylvania. — *Rouse Estate v. Directors of Poor*, 169 Pa. St. 116.

Rhode Island. — *Briggs v. Titus*, 13 R. I. 136. See also *Martin v. Pepall*, 6 R. I. 92.

Tennessee. — *Gillespie v. Worford*, 2 Coldw. (Tenn.) 632.

See also *Edmunds v. Leavell*, (Ky. 1887) 3 S. W. Rep. 134.

Passes by Assignment. — Land was devised in trust to pay the income to the widow of the testator during her life, and after her decease to convey the remainder to such of his children or their issue as should survive her. It was held that the husband of a daughter of the testator, after issue born alive, had an equitable tenancy by the curtesy which would pass by an assignment of his property under the insolvent law during the life of the testator's widow. *Gardner v. Hooper*, 3 Gray (Mass.) 398.

North Carolina Statute. — Since the North Carolina Act of 1848 a husband as tenant by the curtesy initiate is not empowered by law to dispose of his life estate in the lands of his wife, yet still, as he is entitled to the rents and profits of the same, during the coverture, until such time as the wife objects to such claims by him by reason of her complete ownership, he can dispose thereof. *Jones v. Carter*, 73 N. Car. 148.

2. Gay v. Gay, 123 Ill. 221; *Wickes v. Clarke*, 8 Paige (N. Y.) 161. See also the title FRAUDULENT SALES AND CONVEYANCES.

In North Carolina, since the Act of 1848, a husband, though in debt or subject to a duty or liability, has the right to surrender his estate as tenant by the curtesy initiate and let it merge into the reversion of his wife, who, with the assent of her husband, may sell the same and receive the whole of the purchase money. *Teague v. Downs*, 69 N. Car. 280.

3. Right to Recover Possession. — *Shortall v. Hinckley*, 31 Ill. 219; *Jacobs v. Rice*, 33 Ill. 370; *Wilson v. Arentz*, 70 N. Car. 670.

In *Walker v. Long*, 109 N. Car. 510, it is said: "It may be conceded that the tenant by the curtesy initiate could have sued alone for, and recovered possession of, the lands, and the rents and profits, in this state, before the adoption of the present constitution."

4. Damages for Trespass. — *Shortall v. Hinckley*, 31 Ill. 219; *Ro Bards v. Murphy*, 64 Mo. App. 90; *Wilson v. Arentz*, 70 N. Car. 670.

5. Injury to the Inheritance. — *Williams v. Lanier*, Busb. L. (44 N. Car.) 30; *Wilson v. Arentz*, 70 N. Car. 670.

6. Partition. — *Riker v. Darke*, 4 Edw. Ch. (N. Y.) 668.

7. Curtesy Consummate. — *Watson v. Watson*, 13 Conn. 83. See also *Withers v. Jenkins*, 14 S. Car. 597; *Reed v. Brown*, 7 New Bruns. 168.

It is not a mere charge or incumbrance, but it is a legal estate in the land.¹

b. LIABLE FOR DEBTS.—Like the interest of the tenant by the curtesy initiate, the interest of the tenant by the curtesy consummate is liable for his debts.²

c. MAY BE CONVEYED.—The tenant by the curtesy consummate may convey his interest by deed or mortgage.³

d. LIABILITY FOR WASTE.—The tenant by the curtesy consummate is liable for waste.⁴

V. ESTATES TO WHICH INCIDENT — 1. **Estates of Inheritance.**—Curtesy is incident to estates of inheritance in realty, and to no other estates.⁵

Distinguished from Dower.—“There is a radical difference between a right of dower and an estate by the curtesy. The latter takes effect as a freehold estate immediately on the death of the wife; on the other hand, dower is not in any sense an estate until assigned.” 2 Minor’s Inst. 157, *quoted in* Malone v. Conn, 95 Ky. 93.

Distinguished from Marital Right.—“Although the tenancy by the curtesy is ordinarily, to appearance, a mere prolongation of the tenancy by the marital right, enabling the husband to hold for his own life what otherwise would terminate with the life of the wife, yet the tenancy by the marital right attaches to some estates to which the tenancy by the curtesy cannot attach, though there should be issue of the marriage, as, for example, estates for life—even estates *pur autre vie*. And to other estates it cannot attach, in which there may be curtesy, as, for example, estates held for the separate use of the wife. In such estates, under some circumstances, there may be curtesy; but it is of their very essence not to be subject to the marital right.” Porter v. Porter, 27 Gratt. (Va.) 599.

Arkansas—Curtesy Yields to Homestead.—In Thompson v. King, 54 Ark. 9, it was held that the husband’s right to curtesy must yield to the superior right of homestead guaranteed to the minor children by the Constitution of Arkansas.

1. *Adair v. Lott*, 3 Hill (N. Y.) 182; *Mack v. Roch*, 13 Daly (N. Y.) 103.

2. **Liable for Debts.**—*Stanley v. Bonham*, 52 Ark. 354; *Watson v. Watson*, 13 Conn. 83; *Bozarth v. Largent*, 128 Ill. 95; *Roberts v. Whiting*, 16 Mass. 186; *Deming v. Miles*, 35 Neb. 739, 37 Am. St. Rep. 464; *McCaskill v. McCormac*, 99 N. Car. 548. See also *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708.

Connecticut—Exempt During Life of Children.—Under Gen. Stat. Connecticut, § 1165, the interest of the tenant by the curtesy cannot be taken upon attachment or execution against him during the life of any of the children, except for certain classes of debts. *Sill v. White*, 62 Conn. 430.

Ohio—Cannot Sell for Debt During Wife’s Life.—The Ohio statute of February 28, 1846, “in relation to the interest of husbands in the estate of their wives,” forbids the sale, during the life of the wife, of the curtesy of the husband to satisfy a mechanic’s lien as against him. *Spinning v. Blackburn*, 13 Ohio St. 131.

Virginia—Subject to Liens Acquired During Coverture.—An estate by the curtesy consummate exists in the husband in the wife’s lands unaliened by her during her lifetime, though

devised by her will. Such estate is subject to the liens of the husband’s creditors acquired during the coverture, in preference to the general liens of her creditors upon her real estate. Acts 1876-7, pp. 333-4; Acts 1877-8, p. 248. *Browne v. Bockover*, 84 Va. 424.

3. **May Be Conveyed.**—*Bozarth v. Largent*, 128 Ill. 95; *Deming v. Miles*, 35 Neb. 739, 37 Am. St. Rep. 464. See also *Lineberger v. Newkirk*, 179 Pa. St. 117.

4. **Waste.**—*McLeod v. Dial*, 63 Ark. 10; *Porch v. Fries*, 18 N. J. Eq. 204. And see the title WASTE.

Right of Estovers.—The right of the tenant by the curtesy is that of reasonable estovers, which is confined strictly to wood and timber sufficient for the supply of the estate, and it must be actually applied, used, and consumed upon the estate or for purposes connected with its proper use, occupancy, and enjoyment. *Armstrong v. Wilson*, 60 Ill. 226.

5. **Curtesy in Estates of Inheritance Only—England.**—*Morgan v. Morgan*, 5 Madd. 408; *Cooper v. Macdonald*, 7 Ch. Div. 288; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Stead v. Platt*, 18 Beav. 50.

Kentucky.—*Payne v. Payne*, 11 B. Mon. (Ky.) 138.

Missouri.—*Burris v. Page*, 12 Mo. 359; *Phillips v. La Forge*, 89 Mo. 72; *Tremmel v. Kleiboldt*, 6 Mo. App. 549; *Spencer v. O’Neil*, 100 Mo. 49.

New Jersey.—*Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238.

Pennsylvania.—*Rank v. Rank*, 120 Pa. St. 191.

Rhode Island.—*Tillinghast v. Coggeshall*, 7 R. I. 383; *Holden v. Wells*, 18 R. I. 802.

Virginia.—*Muse v. Friedenwald*, 77 Va. 57. See also *Houghton v. Hapgood*, 13 Pick. (Mass.) 154.

In *Littleton’s Treatise on Tenures*, § 52, it is laid down that “in every case where a man taketh a wife seized of such an estate of tenements, etc., as the issue, which he hath by his wife, may by possibility inherit the same tenements of such an estate as the wife hath, as heir to the wife; in this case, after the decease of the wife, he shall have the same tenements by the curtesy of England, but otherwise not.” Cited in *Northcut v. Whipp*, 12 B. Mon. (Ky.) 65.

Illustrations.—In *Sumner v. Partridge*, 2 Atk. 47, there was a devise to A. and her heirs, and if she died before her husband, he to have twenty pounds a year for life, remainder to go to her children. The wife died before the husband, and it was held that he was not entitled to curtesy. It was said: “A tenancy by the

2. Determinable Estates.—The question of curtesy in determinable estates has been the subject of considerable discussion by the courts and has become deeply involved in abstruse and subtle distinctions. The rule which is laid down by a well-recognized authority, and which seems to be the general result deducible from the decisions upon the subject, is as follows: "If, therefore, the estate of the wife be an estate of inheritance, determinable by a limitation which operates to defeat her estate at common law, the right of curtesy, it would seem, is gone; but if the limitation over be by the way of springing use or executory devise which takes effect at her decease, thereby defeating or determining her original estate before its natural expiration, and substituting a new one in its place, which could not be done at common law, the seizin and estate which she had of the fee simple or tail will give the husband curtesy."¹

curtesy must arise out of the inheritance, which must vest in the wife, and there must be a possibility of its descending upon the children; now they take here by virtue of the remainder over, not by descent from the mother, and there is no difference between making an estate of inheritance to cease in the wife the moment she dies, and to arise in the children, and a joint tenancy."

In *Barker v. Barker*, 2 Sim. 251, there was a devise to A. and her heirs, but if she died leaving issue, then to such issue and their heirs. A. died leaving issue. It was held that her husband was not entitled to curtesy. The vice-chancellor said: "It is clear, therefore, that the estate which the wife had is determined by her dying, leaving issue, by which the children take as purchasers by force of the gift. Therefore, the wife had not such an estate as could descend to her children, they taking as purchasers. The consequence is that the husband is not entitled to be tenant by the curtesy." *Following* *Sumner v. Partridge*, 2 Atk. 47, *distinguishing* *Buckworth v. Thirkell*, 3 B. & P. 652, note a.

Under a conveyance of land to a married woman, to have and to hold to her for her sole and separate use, and to the children upon her body begotten by her then husband, the wife does not take a fee in the land, but only a separate life estate, and on her death the entire estate passes by the terms of the deed to her children, and the husband is, therefore, not entitled to an estate as tenant by the curtesy. *Beecher v. Hicks*, 7 Lea (Tenn.) 207. To the same effect is *Stovall v. Austin*, 16 Lea (Tenn.) 700.

A surviving husband takes nothing by the curtesy in land held in trust for the benefit of his wife during her life, and at her death then in trust for her issue, and for such as shall arrive at twenty-one years of age, etc. The wife had only the use of this estate during life. *Churchill v. Reamer*, 8 Bush (Ky.) 256.

An estate settled on a *feme covert* for life, with a power of appointment at her death in fee, does not give her such an estate as will entitle the husband to curtesy if she fails to appoint. *Graves v. Trueblood*, 96 N. Car. 495.

S. by will directed his trustees to convey a full fourth part of all his freehold lands, etc., to the use of his daughter P. for life, and so as she alone, or such person as she should appoint, should take and receive the rents and profits thereof, and so as her husband was not to intermeddle therewith, and from and after her

decease, in trust for the heirs of the body of the said P. forever. This being an executory trust, the wife took an estate for life only, and the husband was therefore not entitled to be tenant by the curtesy. *Roberts v. Dixwell*, 1 Atk. 607.

Curtesy in a Rent Charge.—The husband may, under a concurrence of certain circumstances, become tenant by the curtesy of a rent charge. *Chew v. Southwark*, 5 Rawle (Pa.) 160.

No Curtesy in a Pre-emption Right.—In *McDaniel v. Grace*, 15 Ark. 465, it was held that there was no curtesy in the wife's pre-emption right in United States public land. The court said: "There is no such estate in land known to the common law as a pre-emption right. It is a creature of statutes passed by Congress to encourage the settlement of the public lands. It is a preference right to purchase land of the government, arising where the settler has complied with all the conditions prescribed by law to entitle him to such preference."

Vermont Statute—No Curtesy in a Fee-tail Estate.—In *Giddings v. Cox*, 31 Vt. 607, it was held that, under the Vermont Act of 1823, the husband did not become tenant by the curtesy of the land of his deceased wife held by her in fee tail. *Followed* in *Haynes v. Bourn*, 42 Vt. 686.

Ohio Statute—Permanent Leaseholds.—In *Murdock v. Reed*, 1 Disney (Ohio) 274, it was decided that under the Ohio statute (Swan's Stat. 324, § 20), surviving husbands were entitled to curtesy in permanent leasehold estates renewable forever.

Tennessee Statute—Leaseholds.—The husband is not given curtesy in his wife's leaseholds by the Code of Tennessee (M. & Y.), §§ 3343, 3351. *Lewis v. Glass*, 92 Tenn. 147.

1. Curtesy in Determinable Estates.—1 Washb. on Real Property 135. To the same effect are *Norcutt v. Whipp*, 12 B. Mon. (Ky.) 65; *Hatfield v. Sneden*, 54 N. Y. 280, *reversing* 42 Barb. (N. Y.) 615, *disapproving* *Weller v. Weller*, 28 Barb. (N. Y.) 588; *Buchanan v. Sheffer*, 2 Yeates (Pa.) 374; *Thornton v. Krepps*, 37 Pa. St. 391; *Wright v. Herron*, 5 Rich. Eq. (S. Car.) 441; *Withers v. Jenkins*, 14 S. Car. 597; *Odum v. Beverly*, 32 S. Car. 107; *Jones v. Hughes*, 27 Gratt. (Va.) 560. See also 4 Kent's Com. 32; *Moody v. King*, 2 Bing. 447, 9 E. C. L. 475; *Mason v. Johnson*, 47 Md. 347; *Evans v. Evans*, 9 Pa. St. 190.

Illustrations.—In *Buckworth v. Thirkell*, 3 B. & P. 652, note a, there was a devise to trustees and their heirs to receive the rents

3. Equitable Estates — a. IN GENERAL. — Curtesy is incident to equitable estates of inheritance as well as to legal estates of the same quality.¹

and profits of a certain estate and apply them for the maintenance of M. until she arrived at the age of twenty-one years, or until she married; and on her arriving at such age or marrying, to the use of M., her heirs and assigns; but in case said M. should die before the age of twenty-one years, and without leaving issue, remainder over. M. married, and had a child, which died, and then M. died before she arrived at the age of twenty-one years. The question was whether M.'s husband was entitled to be tenant by the curtesy, and it was held that he was so entitled. Lord Mansfield, in the opinion delivered by him, said: "It is contended that this is a conditional limitation. It is not so, but a contingent limitation; all the cases cited go upon the distinction of their being conditions and not limitations. During the life of the wife she continued seized of a fee simple, to which her issue might by possibility inherit. I am of opinion that the defendant is entitled to be tenant by the curtesy."

Where the wife owned an estate in fee, subject to be defeated in the event of her death leaving no issue then living, the surviving husband is entitled to curtesy if there was issue born of the marriage, although there was no issue alive at the time of the wife's death. *Webb v. First Baptist Church*, 90 Ky. 117.

In *Buchanan v. Sheffer*, 2 Yeates (Pa.) 374, there was a devise of real estate to a daughter, her heirs and assigns forever, but if she should die without issue, the executor to sell the lands and, after the decease of the widow, divide the proceeds equally among the testator's nephews. The daughter married and had issue, which died. It was held that the husband surviving her was tenant by the curtesy.

Land was devised by the testator to his daughter S. E. The will contained a clause providing as follows: "It is also my will, and I do hereby direct, that if either of my children or grandchildren shall die before attaining the age of twenty-five (25) years, without leaving any children, the share or portion of such child or grandchild shall revert and become part of my residuary estate, and be divided as hereinbefore provided for the residue of my estate." S. E., the daughter, was married and died intestate under the age of twenty-five years, and without issue. It was held that her husband was not entitled to hold the land as tenant by the curtesy. The court said: "We have then a case where by the terms of limitation, if the estate created by it is determined, it comes back with its seizin to him who had the original seizin by himself or his heirs. While the distinction may be exceedingly refined, we can perceive that there is a difference between such case and one where the seizin is never reserved by the original owner, but passes upon the first expiration of one estate to another." *McMasters v. Negley*, 152 Pa. St. 303, *distinguishing* *Thornton v. Krepps*, 37 Pa. St. 391.

A. devised land to three children, the general words of the will vesting them with a fee simple title, the following clause being added: "If either of these three * * * should die

without lawful heirs of their body, the estate shall fall to the other two; if two should die, their estate shall fall to the one; if the one should die without heirs, the estate shall be divided equally" between the heirs of C. and J. Two died without issue; the survivor, a girl, married and had one child born alive, which soon thereafter died, being followed by the mother. It was held that the husband was entitled to an estate by the curtesy in the land so descended. The court said: "The question then is whether the husband can be tenant by the curtesy where the estate of the wife was a conditional or determinable fee, as in the present case, and where the condition has happened upon which the limitation over in favor of other parties takes effect. This is a question of authority, and we understand them to hold, so far as we have opportunity to examine them, that in such case tenancy by the curtesy is allowed." *Crumley v. Deake*, 8 Baxt. (Tenn.) 361.

An estate was devised to the testator's two daughters, after the marriage or death of their mother, but if they died under age and without issue, to the children of the testator's sister, except the child who should be heir to her husband. One of the daughters died while an infant, in the lifetime of her mother. It was held that the other daughter was heir to the deceased infant, as it was a vested remainder in the daughter, and that if, upon the death of the mother, the surviving daughter married and had issue which died immediately, and then she died without other issue, her husband was tenant by the curtesy of all the lands, determinable fees being subject to dower and curtesy. *Taliaferro v. Burwell*, 4 Call (Va.) 321.

Estate Tail After Death of Issue. — As the defendant's wife took an estate tail, then, in the real estate described in the plaintiff's declaration, such an estate being one of inheritance, curtesy is clearly one of the incidents thereof. And it is well settled in respect to estates tail that though the issue in tail fail, by the death of the child or children in the lifetime of the wife, whereby her estate at her death is at an end, yet the husband takes curtesy, the same being a right incident to such an estate. *Holden v. Wells*, 18 R. I. 802; *Pain's Case*, 8 Coke 34; *Hay v. Mayer*, 8 Watts (Pa.) 203, 34 Am. Dec. 453.

1. Curtesy — Equitable Estate — United States. — *Davis v. Mason*, 1 Pet. (U. S.) 503; *Robison v. Codman*, 1 Sumn. (U. S.) 121.

Kentucky. — *Churchill v. Reamer*, 8 Bush (Ky.) 256; *Payne v. Payne*, 11 B. Mon. (Ky.) 138.

Maryland. — *Rawlings v. Adams*, 7 Md. 26; *Dugan v. Gittings*, 3 Gill (Md.) 138, 43 Am. Dec. 306.

Missouri. — *Alexander v. Warrance*, 17 Mo. 228; *Baker v. Nall*, 59 Mo. 268.

New Jersey. — *Cushing v. Blake*, 30 N. J. Eq. 689.

North Carolina. — *Thompson v. Thompson*, 1 Jones L. (46 N. Car.) 430; *Sentill v. Robeson*, 2 Jones Eq. (55 N. Car.) 510; *Hunt v. Satterwhite*, 85 N. Car. 73.

Oregon. — *Gilmore v. Burch*, 7 Oregon 374, 33 Am. Rep. 710.

b. EQUITY OF REDEMPTION. — The husband may be tenant by the curtesy of an equity of redemption.¹

c. MONEY. — It has been decided that the husband has a right to curtesy in money which was given to be laid out in the purchase of land to be settled on the wife in tail, though the wife die before such land has been purchased;² and the husband is entitled to curtesy in money obtained from the sale of his deceased wife's land.³

4. Wife's Separate Estate. — It is also well settled that the husband may be tenant by the curtesy of his wife's separate real estate.⁴

Pennsylvania. — Dubs v. Dubs, 31 Pa. St. 149.

Tennessee. — Templeton v. Twitty, 88 Tenn. 596.

See also Williams v. Wray, 2 Vern. 680; Chaplin v. Chaplin, 3 P. Wms. 229; Taylor v. Smith, 54 Miss. 50. And see *infra*, this section, *Wife's Separate Estate*.

Statement of Doctrine. — At law the husband is entitled to the curtesy whenever the wife, during the coverture, is seized of an estate of inheritance and has issue by the husband capable of that inheritance. Equity follows the law in the quality of estates, and it is to be stated generally that a husband will become tenant by the curtesy wherever the wife, during the coverture, is in possession of an equitable estate of inheritance and has issue by the husband capable of that inheritance. There is no doubt here that the wife had an equitable estate of inheritance, notwithstanding the rents and profits were to be paid to her separate use for life. Morgan v. Morgan, 5 Madd. 408.

Illustration. — A *feme sole*, in contemplation of marriage, granted a term of seventy-five years of her real estate to a trustee in trust for her own use during the contemplated coverture. The marriage took effect, and she had issue, but died before her husband. It was held that he was entitled to curtesy. Lowry v. Steele, 4 Ohio 170.

1. Equity of Redemption. — Hart v. Chase, 46 Conn. 213; Robinson v. Lakenan, 28 Mo. App. 135. See also Davis v. Mason, 1 Pet. (U. S.) 503. And see the title EQUITY OF REDEMPTION.

2. Money to Be Invested. — Sweetapple v. Bindon, 2 Vern. 536; Otway v. Hudson, 2 Vern. 583; Cunningham v. Moody, 1 Ves. 174. See also Davis v. Mason, 1 Pet. (U. S.) 503; Cushing v. Blake, 30 N. J. Eq. 689; Thompson v. Thompson, 1 Jones L. (46 N. Car.) 430.

Illustration. — Where money is given to be laid out in land for a place of retirement for the testator's sister, to be forever entailed on her issue, the husband of one of the daughters of such sister is entitled as tenant by the curtesy to one-third. Dodson v. Hay, 3 Bro. C. C. 405.

3. Proceeds of Sale. — Follett v. Tyrer, 14 Sim. 125; Rice v. Hoffman, 35 Md. 344; Houghton v. Hapgood, 13 Pick. (Mass.) 154; Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; Matter of Camp, 126 N. Y. 377, affirming 91 Hun (N. Y.) 204; Forbes v. Smith, 5 Ired. Eq. (40 N. Car.) 369, 49 Am. Dec. 432; Clepper v. Livergood, 5 Watts (Pa.) 113.

Interest on Proceeds. — Where lands subject to curtesy are sold by commissioners in such

manner as to pass title free of the curtesy, the interest of the proceeds will belong to the tenant by curtesy during life. Jacques v. Ennis, 25 N. J. Eq. 402.

4. Curtesy in Wife's Separate Estate — *England.* — Morgan v. Morgan, 5 Madd. 408; Roberts v. Dixwell, 1 Atk. 607; Cooper v. Macdonald, 7 Ch. Div. 288; Follett v. Tyrer, 14 Sim. 125.

District of Columbia. — De Hart v. Dean, 2 MacArthur (D. C.) 60.

Indiana. — Luntz v. Greve, 102 Ind. 173.

Kentucky. — Churchill v. Reamer, 8 Bush (Ky.) 256.

Missouri. — McTigue v. McTigue, 116 Mo. 139, citing 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 965.

New Jersey. — Cushing v. Blake, 30 N. J. Eq. 689; Mullany v. Mullany, 4 N. J. Eq. 16, 31 Am. Dec. 238.

Ohio. — Hall v. Hall, 32 Ohio St. 184.

Pennsylvania. — Johnson v. Fritz, 44 Pa. St. 449; Shalters v. Ladd, 141 Pa. St. 349.

South Carolina. — Withers v. Jenkins, 14 S. Car. 597.

Tennessee. — Baker v. Heiskell, 1 Coldw. (Tenn.) 641; Carter v. Dale, 3 Lea (Tenn.) 710, 31 Am. Rep. 660, overruling Bottoms v. Corley, 5 Heisk. (Tenn.) 6; Frazer v. Hightower, 12 Heisk. (Tenn.) 94.

See also Combs v. Chamberlain, 6 Allen (Mass.) 166; Archer v. Urquhart, 23 Ont. Rep. 214. And see the title SEPARATE PROPERTY OF MARRIED WOMEN.

Where a *feme covert*, with the consent of her husband, mortgaged her separate real estate to secure money borrowed upon the joint note of herself and husband to improve the land, and upon the death of the wife the land is sold upon the petition of the surviving husband and the heir of the wife, the curtesy interest should not be charged with the debt, but the debt should first be paid out of the entire proceeds and the curtesy interest ascertained and paid from the surplus. *In re Freeman*, 116 N. Car. 199.

In Appleton v. Rowley, L. R. 8 Eq. 139, there was a devise of freehold to trustees upon trust, to stand possessed thereof, unto and to the use of A. K., a married woman, her heirs and assigns forever, for her separate use. A. K. died, leaving a child. It was held that her husband was entitled to the property by the curtesy. The court said: "I think, from a review of all the cases and upon the sound principles of law, that wherever a wife is seized of an estate in fee simple or fee tail in possession, whether legal or equitable, the husband cannot be excluded from the curtesy. He will, therefore, in this case, be entitled to this estate for life by the curtesy." *Approving Fol-*

Curtsey Excluded. — The husband may, however, be deprived of his curtesy if the intention so to do is plainly manifest in the instrument creating such estate. But to defeat the presumed operation of the law, it must clearly appear that the intent of the grantor was to deprive the husband of his rights.¹ No matter how rigid the exclusion of the husband's marital rights may be during the life of the wife, through the terms of the trust for her separate use, yet if at her death the trust terminates and the estate vests in her heirs, the husband's estate by the curtesy becomes consummate.²

Husband the Grantor. — It has been said that if a separate estate is created by gift, conveyance, or settlement by the husband to or for his wife whether directly or through a trustee, the estate by the curtesy of the husband is pre-

lett *v. Tyrer*, 14 Sim. 125, and *disapproving* *Moore v. Webster*, L. R. 3 Eq. 267.

West Virginia Statute. — A statute has been enacted in West Virginia providing that the husband shall be entitled to curtesy in the separate real estate of his wife. Code of W. Va. (1868), c. 65, § 15; *Winkler v. Winkler*, 18 W. Va. 455.

1. Curtsey May Be Excluded by Express Words — *England*. — *Bennet v. Davis*, 2 P. Wms. 316; *Morgan v. Morgan*, 5 Madd. 408.

Alabama. — *Grimball v. Patton*, 70 Ala. 626.

Illinois. — *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239; *Monroe v. Van Meter*, 100 Ill. 347.

Missouri. — *Tremmel v. Kleiboldt*, 75 Mo. 255, *affirming* 6 Mo. App. 549; *McTigue v. McTigue*, 116 Mo. 138, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 965.

Nebraska. — *McCulloch v. Valentine*, 24 Neb. 215; *Deming v. Miles*, 35 Neb. 739, 37 Am. St. Rep. 464.

Pennsylvania. — *Stokes v. McKibbin*, 13 Pa. St. 267; *Rigler v. Cloud*, 14 Pa. St. 361; *Yarnall's Appeal*, 70 Pa. St. 335; *Rank v. Rank*, 120 Pa. St. 191; *Shalters v. Ladd*, 141 Pa. St. 349; *Cochran v. O'Hern*, 4 W. & S. (Pa.) 95, 39 Am. Rep. 60.

Rhode Island. — *Nightingale v. Hidden*, 7 R. I. 115; *Tillinghast v. Coggeshall*, 7 R. I. 383.

South Carolina. — *Withers v. Jenkins*, 14 S. Car. 597.

Virginia. — *Chapman v. Price*, 83 Va. 392.

See also *Neelly v. Lancaster*, 47 Ark. 175, 58 Am. Rep. 752; *Stovall v. Austin*, 16 Lea (Tenn.) 700. And see the title SEPARATE PROPERTY OF MARRIED WOMEN.

Intent Must Be Certain. — Although no particular form of words is necessary to create an estate to the sole and separate use of a woman as against her present or future husband, yet such language must be used in the instrument limiting the use as clearly and unequivocally expresses the intent to exclude his marital rights, and does not leave that intent a matter of doubt and speculation. *Nightingale v. Hidden*, 7 R. I. 115.

Illustrations. — Under *Wisconsin* Rev. Stat. 1858, c. 95, land was conveyed to a married woman "to have and to hold * * * to her sole and separate use, free from the interference or control of her said husband or any husband, and her heirs and assigns, to her and their only proper use and benefit forever." It was held that upon the death of the grantee her husband did not become tenant by the curtesy in the premises. *Haight v. Hall*, 74 Wis. 152, 17 Am. St. Rep. 122.

A deed from a husband to a trustee for his wife contained these words: "To the use and benefit of M. R. (wife of the said H. R.), and her heirs forever, so that the same shall not be subject in any wise to the future control, debts, or liabilities of her present or any future husband." It was held that after her death her husband was not entitled to curtesy. *Rigler v. Cloud*, 14 Pa. St. 361.

For "the purpose of promoting the interest of E. E. separate and apart from that of her husband," a certain tract of land was conveyed to a trustee for E. E., "her heirs and assigns forever, and for her and their sole and separate use and benefit, with full power in said trustee, together with E. E. or her heirs consenting and joining with said trustee, to sell and convey in fee simple, the whole * * * of said property, * * * the proceeds thereof to be paid to E. E. for her sole and separate use, to be used and disposed of as she may think proper, either by will, deed, or otherwise." It was held that her husband surviving her was entitled to curtesy. *Ege v. Medlar*, 82 Pa. St. 86.

Power of Disposal Granted the Wife. — The husband cannot be tenant by the curtesy of real estate conveyed to the wife for her sole and separate use and with the power of disposal, when the wife has disposed of it by a will duly executed and attested. *Pool v. Blakie*, 53 Ill. 495. To the same effect is *Hutchings v. Commercial Bank*, 91 Va. 68. See also *Stewart v. Ross*, 50 Miss. 776. See *infra*, this title, *How Defeated — By Wife's Disposition*.

Common-law Rule. — It is well understood that at common law it was not competent, in a grant to a woman of an estate of inheritance, to exclude her husband from his right of curtesy. *Mildmay's Case*, 6 Coke 41; *Carter v. Dale*, 3 Lea (Tenn.) 710, 31 Am. Rep. 660; *Chapman v. Price*, 83 Va. 392.

2. *Frey v. Allen*, 9 App. Cas. (D. C.) 400; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238; *Cushing v. Blake*, 30 N. J. Eq. 689.

The Reservation of Rents and Profits to the sole and separate use of the wife does not amount to an expression of intention to deprive the husband of his curtesy. *Morgan v. Morgan*, 5 Madd. 408, *disapproving* *Hearle v. Greenbank*, 3 Atk. 715; *Luntz v. Greve*, 102 Ind. 173; *Cushing v. Blake*, 30 N. J. Eq. 689; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Carter v. Dale*, 3 Lea (Tenn.) 710, 31 Am. Rep. 660. See also *Stewart v. Ross*, 50 Miss. 776. But see *Hearle v. Greenbank*, 3 Atk. 695; *Moore v. Webster*, L. R. 3 Eq. 267; *Bottoms v. Corley*, 5 Heisk.

sumptively excluded.¹ But according to the weight of authority, the general rule applies when the husband grants the separate estate to his wife.²

VI. How DEFEATED—1. By Divorce—*a. DIVORCE A VINCULO MATRIMONII*—(1) *General Rule.*—The general rule is that the husband's right of curtesy in the wife's land is barred by a decree of divorce *a vinculo matrimonii*.³

(2) *Statutes.*—In some jurisdictions the question of the husband's curtesy in case of such absolute divorce has been regulated by statute.⁴

b. DIVORCE A MENSA ET THORO.—The husband is not debarred of his curtesy by a decree of divorce *a mensa et thoro*⁵ unless there is a statute to that effect.⁶

(Tenn.) 6, *overruled* in *Carter v. Dale*, 3 Lea (Tenn.) 710, 31 Am. Rep. 660.

1. **When Husband the Grantor.**—*Irvine v. Greever*, 32 Gratt. (Va.) 419; *Dugger v. Dugger*, 84 Va. 130. See also *Sayers v. Wall*, 26 Gratt. (Va.) 354, 21 Am. Rep. 303.

2. *Ogden v. Ogden*, 60 Ark. 70, 46 Am. St. Rep. 151, *citing* 4 AM. AND ENG. ENCYC. OF LAW (1st ed.) 965; *Tremmel v. Kleiboldt*, 75 Mo. 255, *affirming* 6 Mo. App. 549; *Soltan v. Soltan*, 93 Mo. 307; *Deming v. Miles*, 35 Neb. 739, 37 Am. St. Rep. 464, *distinguishing* *McCulloch v. Valentine*, 24 Neb. 215; *Robie v. Chapman*, 59 N. H. 41; *Rigler v. Cloud*, 14 Pa. St. 361. *Quære* in *Carrington v. Richardson*, 79 Ala. 101.

3. **Curtesy Barred by Absolute Divorce.**—*Barrett v. Failing*, 111 U. S. 523; *Hays v. Sanderson*, 7 Bush (Ky.) 489; *Burgess v. Muldoon*, 18 R. I. 607; *Gould v. Webster*, 1 Tyler (Vt.) 409; *Cralle v. Cralle*, 79 Va. 182; *Porter v. Porter*, 27 Gratt. (Va.) 599. See also *Watson v. Watson*, 10 Conn. 88; *Oldham v. Henderson*, 5 Dana (Ky.) 254; *Clark v. Slaughter*, 38 Miss. 64; *Gould v. Crow*, 57 Mo. 200; *Arrington v. Arrington*, 102 N. Car. 491; *Mattocks v. Stearns*, 9 Vt. 326. *Quære* in *Oldham v. Henderson*, 5 Dana (Ky.) 254. But see *Gillespie v. Worford*, 2 Coldw. (Tenn.) 632. And see the title *DIVORCE*.

Statement of the Rule.—Though the husband, by the birth of living issue, capable of inheriting the wife's estate, becomes tenant by the curtesy initiate, yet the death of the wife is essential to make such tenancy consummate; and the effect of a divorce *a vinculo matrimonii*, in such case, is to terminate the right of the husband and restore that of the wife. *Wheeler v. Hotchkiss*, 10 Conn. 225.

Mortgagee's Rights Barred.—A decree of divorce *a vinculo*, in favor of the wife, defeats and determines all the rights and interest of her husband in and to her lands, and of others claiming under a mortgage executed by him, and restores her rights precisely as her husband's death would have restored them. *Bovkin v. Rain*, 28 Ala. 332, 65 Am. Dec. 349.

Rights of Creditor Derived Through the Husband Barred.—A special act of the legislature divorcing the husband and wife from the bonds of matrimony, and restoring to the wife all her lands, puts an end to any marital rights of the husband not already become absolutely his, including his right to the wife's lands as tenant by the curtesy initiate, and puts an end equally to any rights derived through him by a creditor in respect to such marital rights. *Townsend v. Griffin*, 4 Harr. (Del.) 440.

4. **Statutes—Illinois.**—Under Revised Stat-

utes of Illinois, c. 34, § 12, when the coverture is terminated by a divorce *a vinculo matrimonii*, granted for the misconduct of the husband, he loses all interest in the real estate of his wife. *Howey v. Goings*, 13 Ill. 95, 54 Am. Dec. 427. See also *Emmert v. Hays*, 89 Ill. 11.

In *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239, it was held that under the Illinois statute (Rev. Stat. 1845, c. 34, § 12) an absolute divorce obtained by a husband from his wife did not take away the husband's right to be tenant by the curtesy initiate.

Massachusetts.—It is provided by the Mass. Gen. Stat., c. 107, § 40, that on the dissolution of a marriage for any cause except adultery on the part of the wife, the wife shall be entitled to the immediate possession of all her real estate in like manner as if her husband were dead, and therefore, after a divorce has been obtained the husband has no right or interest as tenant by the curtesy initiate in the lands of the wife. *Dunham v. Dunham*, 128 Mass. 34; *Moran v. Somes*, 154 Mass. 200.

Missouri.—By the Rev. Stat. Mo., § 2182, it is provided that "in all cases of divorce from the bonds of matrimony, the guilty party shall forfeit all rights and claims under and by virtue of the marriage." *Schuster v. Schuster*, 93 Mo. 438.

New York.—Under the statute of New York (2 Rev. Stat. 146, § 46), the wife to whom a divorce has been granted because of the adultery of her husband is entitled to her real estate discharged of the husband's life interest therein as tenant by the curtesy initiate. *Renwick v. Renwick*, 10 Paige (N. Y.) 420.

North Carolina.—"When a marriage shall be dissolved *a vinculo*, the parties respectively shall thereby lose all his or her right to an estate by the curtesy, or dower, and all right to any year's provisions or distributive share in the personal property of the other, and all right to administer on the estate of the other, and every right and estate in the real or personal estate of the other party which, by settlement before or after marriage, was settled upon such party in consideration of the marriage only." Code of North Carolina (1883), § 1843. See *Arrington v. Arrington*, 102 N. Car. 491.

And see the codes and statutes of the several states.

5. **Divorce a Mensa.**—*Smoot v. Lecatt*, 1 Stew. (Ala.) 590; *Rochon v. Lecatt*, 2 Stew. (Ala.) 429; *Clark v. Clark*, 6 W. & S. (Pa.) 85. See also *Ellison v. Mobile*, 53 Ala. 558. And see the title *DIVORCE*.

6. **North Carolina Statute.**—"Every man who hath married, or shall marry, a woman, and by her have issue born alive, shall, after

2. By Contract.—By an agreement made between the husband and wife, either before or after marriage, the right of the husband to curtesy may be defeated.¹ To have this effect, the intention to deprive the husband of his marital right must be clear.²

3. By Joinder in Wife's Conveyance.—The husband loses his right to curtesy by joining in a conveyance of his wife's realty, executed by her.³

4. By Instrument Creating Wife's Estate.—As has been said already, the husband may be deprived of his tenancy by the curtesy, by the terms of the instrument creating the wife's estate, when the intention to do so is plainly manifest.⁴

her death, he surviving, be entitled to an estate as tenant by the curtesy during his life, in all the lands, tenements, and hereditaments whereof his said wife was beneficially seized in deed during the coverture, wherein the said issue was capable of inheriting, whether the said seizin was of a legal or of an equitable estate; except that when the wife shall have obtained a divorce *a mensa et thoro*, and shall not be living with her husband at her death * * * he shall not be tenant by the curtesy of her lands, tenements, and hereditaments." Code of North Carolina, (1883), vol. 1, § 1838.

And see the statutory enactments of the several states.

1. Curtesy Defeated by Agreement.—Williams v. Claiborne, 7 Smed. & M. (Miss.) 488; Hooks v. Lee, 7 Ired. Eq. (42 N. Car.) 83. And see the title MARRIAGE SETTLEMENTS.

Statement of Rule.—The rights of the husband to the property of his intended wife may be intercepted by his agreement to that effect; and where, by express contract, for which the marriage is a sufficient consideration, he agrees to surrender his right to the enjoyment of the property during the coverture and his right to take as survivor, there remains nothing to which his marital rights can attach during the coverture or after the death of the wife. In such case the wife is to all intents to be regarded as a *feme sole* in respect to such property, and there would seem to be no necessity for any limitation over to her next of kin in the event of a failure to appoint during her lifetime. Charles v. Charles, 8 Gratt. (Va.) 486, 56 Am. Dec. 155.

2. Intention Must Be Clear.—Smoot v. Lecatt, 1 Stew. (Ala.) 590, discussed in Carrington v. Richardson, 79 Ala. 101; Rochon v. Lecatt, 2 Stew. (Ala.) 429; Jones v. Brown, 1 Md. Ch. 191; Hooks v. Lee, 7 Ired. Eq. (42 N. Car.) 83.

Partial Exclusion of Husband.—The reservation by the wife of the rents and profits of her estate to her sole and separate use during her life, by a deed of the wife's estate executed by the husband and wife after marriage, for the purpose of directing how in the contemplated events the estate should go, does not amount to an expression of an intent on her part to exclude her husband from curtesy therein at her death. The exclusion of the husband might, if the intent to exclude him had been expressed, have been total, but as in this case the exclusion was partial only during her life, the court can have no authority to restrain him from the enjoyment of his general right by the curtesy in the equitable estate in fee of his wife. Tillinghast v. Coggeshall, 7 R. I. 383.

Question for the Jury.—A marriage settle-

ment which provides that the wife's property and its proceeds shall "never" be subject to the control nor the contracts of the husband seems to intend his exclusion after the death of the wife, as well as during her life; but it may be submitted to a jury, to be considered in the light of the circumstances which surrounded the parties at the time of the marriage. Mason v. Deese, 30 Ga. 308.

3. Defeated by Joining in Wife's Conveyance.—Meacham v. Bunting, 156 Ill. 586, 47 Am. St. Rep. 239; Stewart v. Ross, 50 Miss. 776; Haines v. Ellis, 24 Pa. St. 253; Campbell v. McBee, 92 Va. 68. See also Houck v. Ritter, 76 Pa. St. 280; Shippen's Appeal, 80 Pa. St. 391.

Joinder in a Mortgage.—The signing by the husband of the mortgage by his wife on her separate land bars his right to claim an estate by the curtesy as against the mortgagee and his assigns. Hayden v. Peirce, 165 Mass. 359.

Joinder in a Will.—The joinder of the husband in a will of lands executed by his wife in Pennsylvania, when her power of disposition is unqualified, can mean nothing else but that he consents and agrees to the disposition therein contained, and if it is an immediate disposition, it must mean a release of his curtesy or it means nothing. McBride's Estate, 81 Pa. St. 305.

Defective Conveyance.—In Houck v. Ritter, 76 Pa. St. 280, distinguishing Johnson v. Fritz, 44 Pa. St. 449, it was held that when the husband did not give his consent in the manner and form required by the statute to a deed made by his wife for real estate which she owned, and when the husband did not join in said deed, he could recover the land as tenant by the curtesy after the death of the wife.

Conveyance Defective as to Wife Binding as to the Husband.—A conveyance under a power of attorney by husband and wife, of all the right, title, and interest of the husband and wife in land, will pass the estate by curtesy of the husband, and the children of the wife cannot sue for the land after the death of the wife in the husband's lifetime, however defective the conveyance was as to their mother. Jackson v. Hodges, 2 Tenn. Ch. 276. See also Boykin v. Rain, 28 Ala. 332, 65 Am. Dec. 349; Central Bank v. Copeland, 18 Md. 305.

Land Purchased with Proceeds of Sale of Wife's Land.—Where a husband and wife convey the land of the wife, and the husband agrees to invest the proceeds in land for the use of the children of the wife by a former husband, the husband has no curtesy in the land thus purchased. Carpenter v. Davis, 72 Ill. 14.

4. See supra, this title, *Estates to Which Incident—Wife's Separate Estate*.

5. By Wife's Disposition. — When, under a statute or by the terms of the instrument creating the wife's estate, she has the power of disposition, the husband will lose his curtesy if she exercise this power.¹

6. By Divestiture of Wife's Title. — When the title of the wife is divested during her life by a paramount title, the husband loses his curtesy.²

7. By Alienation in Fee. — The common-law doctrine that an estate by the curtesy, or other life estate, could be forfeited by the alienation in fee of the tenant for life, applied only to alienations by feoffment and did not apply to the conveyance of land by a deed of bargain and sale.³ This doctrine of for-

1. Disposition by Wife. — *Cooper v. Macdonald*, 7 Ch. Div. 300; *Neely v. Lancaster*, 47 Ark. 175, 58 Am. Rep. 752; *Hampton v. Cook*, (Ark. 1897) 42 S. W. Rep. 535; *Pool v. Blakie*, 53 Ill. 495; *Chapman v. Price*, 83 Va. 392; *Hutchings v. Commercial Bank*, 91 Va. 68; *Kiracofe v. Kiracofe*, 93 Va. 591; *Wylie v. Frampton*, 17 Ont. Rep. 515. See also *Stewart v. Ross*, 50 Miss. 776; *Mack v. Roch*, 13 Daly (N. Y.) 103; *Browne v. Bockover*, 84 Va. 424. And see *infra*, this title, *Abrogation and Modification by Statute*.

Statutes — *Maryland*. — Curtesy as it was at the common law no longer exists in Maryland, by reason of the 45th article of the code, which provides that the wife shall hold her property for her separate use with power of devising the same as fully as if she were a *feme sole*, and that in the event that she dies intestate the husband shall be entitled to a life estate in her lands. *Mason v. Johnson*, 47 Md. 347.

Massachusetts. — Under the Gen. Stat. Mass., c. 108, § 9, if the husband assents in writing to a will executed by his wife of her separate estate, unless such assent is qualified or limited the will is valid and effectual to pass all her real and personal estate to the extent to which the devises and bequests therein contained dispose of the property, and the will may be effectual to cut off the husband's right to hold the real estate of his wife after her death, during his own life, as tenant by the curtesy. *Silsby v. Bullock*, 10 Allen (Mass.) 94.

New York. — A woman who was married and had issue prior to the passage of the Married Women's Act (c. 200, Laws of 1848, amended by c. 375, Laws of 1849), subsequently to the passage of this act acquired certain real estate. It was held that such marriage and birth of issue did not vest in her husband a right to a tenancy by the curtesy in such real estate which the wife could not defeat by a subsequent will. *Matter of Mitchell*, 61 Hun (N. Y.) 372. See also *Sleight v. Read*, 18 Barb. (N. Y.) 159.

Pennsylvania. — Under the statutes of Pennsylvania the husband is entitled to his curtesy in the real estate of inheritance of his deceased wife when he elects to take it against her last will. But if the wife dispose of her estate by will, he must elect to take either under the will or under the law; he cannot take under both. *Clarke's Appeal*, 79 Pa. St. 376, citing *Dickinson v. Dickinson*, 61 Pa. St. 405; *Rouse Estate v. Directors of Poor*, 169 Pa. St. 116.

The meaning of the Pennsylvania Act of June 3, 1887, is that thereafter a married woman may execute her will in the same manner as if she were single. But this act does

not enable a married woman to dispose of her entire estate by will, wholly ignoring any interest of her husband therein, including his right as tenant by the curtesy. *Teacle's Estate*, 132 Pa. St. 533.

West Virginia. — Under § 16, c. 65, of the Code of West Virginia, the husband who has not, by agreement with his wife, accepted an estate in lieu of his curtesy will be entitled, without renouncing the will, in like manner to take both under the will and the law; that is, he may in such case take under the will without impairing his marital right to curtesy. *Cunningham v. Cunningham*, 30 W. Va. 599; *Beirne v. Beirne*, 33 W. Va. 663.

Wisconsin. — In *Oatman v. Goodrich*, 15 Wis. 589, it was decided that under the statute of Wisconsin tenancy by the curtesy was subjected entirely to the will of the wife, and that if she conveyed or devised the land all possibility of tenancy was gone.

2. Co. Litt. 241 a. See also *Collins v. Large*, (Pa. 1885) 1 Cent. Rep. 634.

3. Common-law Doctrine of Forfeiture. — 4 Kent's Com. 34; *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76; *Robinson v. Miller*, 1 B. Mon. (Ky.) 88; *Koltenbrock v. Cracraft*, 36 Ohio St. 584.

Applicable Only to Feoffments with Livery of Seizin. — "But it is claimed that by this conveyance by Dudley of the fee, when he only had a freehold for life, subject to the contingency of his wife surviving him, and by putting Broadwell in possession, he forfeited his estate, and that the possession by Broadwell was a disseizin, and worked a forfeiture of his particular estate, so that a right of entry at once vested in the wife, or if this was not so it vested in the heirs at her death. Such was the law of England in feudal times, where a tenant for life made a feoffment. This was based upon the feudal notion that by so doing he had renounced the feudal connection between him and his lord, and the estate in remainder or reversion having been divested by the wrongful transfer to a stranger by livery of seizin, the remainderman or reversioner might at once enter. But this rule only applied to feoffments with livery of seizin which amounted to a disseizin of the estate in remainder or reversion; but this rule did not pertain where the conveyance was by bargain and sale, or any form of deed under the statute of uses which was not accomplished by actual transfer of possession. Though the deed was in form a fee, it did not convey any more than the grantor had to part with. As this did not disturb the seizin of the reversioner or remainderman, it did not work a forfeiture." *Koltenbrock v. Cracraft*, 36 Ohio St. 584.

feiture is not now generally recognized, the effect of an attempted fee-simple conveyance by a tenant by the curtesy being to convey the interest of such tenant and nothing more.¹

8. By Alienage of the Husband. — At the common law the husband, if an alien, would not be entitled to curtesy, but this common-law doctrine has been greatly modified by statute.²

9. By Attainder — *a.* **ATTAINDER OF THE HUSBAND.** — If the husband is attainted of felony or treason he cannot be tenant by the curtesy; ³ and it has been held that the wife's estate is discharged from curtesy by the attainder of the husband for treason committed in her lifetime and after issue born, but that in such case the estate of the husband in the lands of the wife as tenant by the curtesy initiate is not forfeited to the commonwealth.⁴

b. **ATTAINDER OF THE WIFE.** — Curtesy is defeated by the attainder of the wife before the birth of issue;⁵ but after the birth of issue, the husband's curtesy cannot be defeated by the attainder of the wife.⁶

10. By Statute of Limitations. — Curtesy. initiate or consummate, may be barred by the statute of limitations.⁷

11. By Sale to Pay Wife's Debts. — It has been decided under statutes enacted in some jurisdictions that the right of the husband as tenant by the curtesy is subject to be defeated in whole or in part by the sale of so much of the wife's real estate as may be required to pay such of her debts and expenses of administration as cannot be discharged from her personal estate.⁸

VII. ABRIGATION AND MODIFICATION BY STATUTE — **1. Abrogation.** — As the result of statutory enactments, curtesy has been abrogated in some jurisdictions.⁹

1. Conveys Only Life Estate. — *Meraman v. Caldwell*, 8 B. Mon. (Ky.) 32, 46 Am. Dec. 537; *Flagg v. Bean*, 25 N. H. 49; *Grout v. Townsend*, 2 Hill (N. Y.) 554, *affirmed* in 2 Den. (N. Y.) 336; *Carpenter v. Denoon*, 29 Ohio St. 398; *M'Kee v. Pfout*, 3 Dall. (Pa.) 487; *Reagle v. Reagle*, 179 Pa. St. 80; *Arnold v. Bunnell*, 42 W. Va. 473. But see *French v. Rollins*, 21 Me. 372.

2. See the title **ALIENS**, vol. 2, p. 75.

3. 3 Bac. Abr. 6. See also 4 Black. Com. 381; *Martin v. Pepall*, 6 R. I. 92.

4. *Pemberton v. Hicks*, 3 Dall. (Pa.) 479, 4 Dall. (Pa.) 168, 1 Binn. (Pa.) 1.

5. 1 Hale's P. C. 359. See also *Gillespie v. Worford*, 2 Coldw. (Tenn.) 632.

6. 1 Hale's P. C. 359. See also *Martin v. Pepall*, 6 R. I. 92; *Rouse Estate v. Directors of Poor*, 169 Pa. St. 116; *Porter v. Porter*, 27 Gratt. (Va.) 599.

7. Statutory Bar. — *Jacobs v. Rice*, 33 Ill. 370; *Kibbie v. Williams*, 58 Ill. 30; *Neal v. Robertson*, 2 Dana (Ky.) 86; *Thomas v. Hughes*, (Ky. 1894) 25 S. W. Rep. 591; *Childers v. Bumgarner*, 8 Jones L. (53 N. Car.) 297; *Guion v. Anderson*, 8 Humph. (Tenn.) 298; *Owens v. Dunn*, 85 Tenn. 131; *Weisinger v. Murphy*, 2 Head (Tenn.) 674. See also *Doe v. Plumtre*, 3 B. & Ald. 474, 5 E. C. L. 348; *Watson v. Watson*, 10 Conn. 77; *Thompson v. Green*, 4 Ohio St. 216. And see the title **LIMITATION OF ACTIONS**.

Statement of the Rule. — "He [the husband] then, having a separate estate from that of his wife, in the premises, with a present right of possession, and being at liberty to sue and recover the possession in his own right for his own use, without the assent of the wife, no reason is perceived why his title may not be barred by the statute of limitations. It has

never been questioned that a term of years, or life estate, might not be as effectually barred as a fee simple or other estate. And no reason is perceived why the husband's life estate in the lands of his wife should form an exception to the general rule." *Shortall v. Hinckley*, 31 Ill. 227.

Under the Present Constitution of North Carolina, a tenant by the curtesy initiate has not such an estate in the lands of his wife as will put in operation the statute of limitations against either the husband or wife in favor of one claiming title by adverse possession. *Jones v. Coffey*, 109 N. Car. 515.

8. *Stewart v. Ross*, 50 Miss. 776; *Arrowsmith v. Arrowsmith*, 8 Hun (N. Y.) 606; *Bennett v. Camp*, 54 Vt. 36.

9. Abrogated by Statute. — *Todd v. Oviatt*, 58 Conn. 174; *Monroe v. Van Meter*, 100 Ill. 347; *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427. And see the statutory enactments of the several states.

In *Illinois* it is provided by statute that "the estate of curtesy is hereby abolished, and the surviving husband or wife shall be endowed of the third part of all the lands whereof the deceased husband or wife was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form." 2 Starr & Curtis Annot. Stat. Ill. (1896), c. 41, § 1. See *Jackson v. Jackson*, 144 Ill. 274, 36 Am. St. Rep. 427.

Before the passage of this act the common-law doctrine as to curtesy had been greatly modified in *Illinois* by a prior statute. Ill. Married Women's Act of 1861. And see *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Noble v. McFarland*, 51 Ill. 226; *Armstrong v.*

2. Modification. — In many jurisdictions statutes have been enacted for the protection of the property of married women. These statutes, while not alike in all particulars, generally exclude the husband from any interest in or control of his wife's real estate during her life, and give to her alone the power of disposition by deed and sometimes by will, but leave to him the right of curtesy in so much of her real property as remains at her death undisposed of and unbequeathed.¹

Effect of Statutes upon Curtesy Initiate. — It has been held in some jurisdictions that the effect of the statutes enacted therein is to abolish entirely curtesy initiate;² while in other jurisdictions it has been held that this estate, though not entirely destroyed, is not a vested estate,³ but is simply a status,⁴ or a bare possibility dependent upon the husband's surviving the wife.⁵

CURTILAGE. (See also APPURTENANT, vol. 2, p. 529; DWELLING-HOUSE; HOUSE; MESSUAGE; and the title WILLS. As to burglary see generally the title BURGLARY, vol. 5, p. 62. As to arson see generally the title ARSON, vol. 2, p. 929.) — The curtilage is a court-yard adjoining a house or messuage,

Wilson, 60 Ill. 226; Lucas v. Lucas, 103 Ill. 121; Bozarth v. Largent, 128 Ill. 95; McNeer v. McNeer, 142 Ill. 388.

It has been decided that since the *South Carolina* Act of 1791 the husband is not entitled in that state to curtesy in the fee simple estate of his wife, but he may be entitled to curtesy in a fee conditional. Gray v. Givens, 2 Hill Eq. (S. Car.) 511; Withers v. Jenkins, 14 S. Car. 597; Gaffney v. Peeler, 21 S. Car. 55; Frost v. Frost, 21 S. Car. 501. See *supra*, this article, *Estates to Which Incident—Determinable Estates*.

In Winkler v. Winkler, 18 W. Va. 455, it was said that under chapter 65, Code of 1868 of *West Virginia*, the interest of the husband in his wife's real estate was reduced to a life estate in one-third of the realty of which the wife died seized.

1. Effect of Married Women's Acts—England. — Hope v. Hope, (1892) 2 Ch. 336.

Arkansas. — Neelly v. Lancaster, 47 Ark. 175, 58 Am. Rep. 752; Hampton v. Cook, (Ark. 1897) 42 S. W. Rep. 535.

Michigan. — White v. Zane, 10 Mich. 333.

New Jersey. — Johnson v. Cummins, 16 N. J. Eq. 97; Porch v. Fries, 18 N. J. Eq. 204; Cushing v. Blake, 30 N. J. Eq. 689. See also Ross v. Adams, 28 N. J. L. 160; Naylor v. Field, 29 N. J. L. 292.

New York. — Matter of Winne, 2 Lans. (N. Y.) 21, reversing 1 Lans. (N. Y.) 508, *disapproving*; Billings v. Baker, 15 How. Pr. (N. Y. Supreme Ct.) 525, 28 Barb. (N. Y.) 343; Beamish v. Hoyt, 2 Robt. (N. Y.) 307; Young v. Langbein, 7 Hun (N. Y.) 151; Arrowsmith v. Arrowsmith, 8 Hun (N. Y.) 606; Leach v. Leach, 21 Hun (N. Y.) 381; Matter of Mitchell, 61 Hun (N. Y.) 372; Mack v. Roch, 13 Daly (N. Y.) 103; Clark v. Clark, 24 Barb. (N. Y.) 581; Hurd v. Cass, 9 Barb. (N. Y.) 366; Lansing v. Gulick, 26 How. Pr. (N. Y. Supreme Ct.) 250; Jaycox v. Collins, 26 How. Pr. (N. Y. Supreme Ct.) 406; Hatfield v. Sneden, 54 N. Y. 280; Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361.

North Carolina. — Long v. Graeber, 64 N. Car. 431; McCaskill v. McCormac, 99 N. Car. 548. See also Houston v. Brown, 7 Jones L. (52 N. Car.) 162.

Pennsylvania. — Thornton v. Krepps, 37 Pa. St. 391.

Virginia. — Breeding v. Davis, 77 Va. 639, 46 Am. Rep. 740.

Wisconsin. — Kingsley v. Smith, 14 Wis. 360; Oatman v. Goodrich, 15 Wis. 589.

And see generally the codes and statutes of the several states. See also the title SEPARATE PROPERTY OF MARRIED WOMEN.

Alabama—Money, the Proceeds of Wife's Realty. — At common law the husband acquired by the marriage a life estate in the wife's lands, as tenant by the curtesy, after issue born, and this was subject to the payment of his debts; and if the land was sold by them and thus converted into personalty, the money became his absolutely when collected. But where such a sale and conversion of the wife's lands has been made since the passage of the several statutes securing to married women their separate estates, the money becomes a part of the wife's statutory separate estate, although the lands were acquired by her during the marriage and before the passage of those laws. Brevard v. Jones, 50 Ala. 221.

2. Abrogation of Curtesy Initiate. — Tong v. Marvin, 15 Mich. 60; Porch v. Fries, 18 N. J. Eq. 204; Walker v. Long, 109 N. Car. 510; Hershizer v. Florence, 39 Ohio St. 516. See also Hill v. Chambers, 30 Mich. 422; Brown v. Clark, 44 Mich. 309. See the statutes of the several states.

Mississippi. — The estate by the curtesy initiate was not abolished in Mississippi until the adoption of the Code of 1880. Hill v. Nash, 73 Miss. 849. But by previous legislation it has been converted from a vested into a contingent estate. Stewart v. Ross, 50 Miss. 776.

3. Staples v. Brown, 13 Allen (Mass.) 64; Hayden v. Peirce, 165 Mass. 359; Sharpless v. West Chester, 1 Grant's Cas. (Pa.) 257.

4. Thurber v. Townsend, 22 N. Y. 517; Albany County Sav. Bank v. McCarty, 149 N. Y. 71.

5. Breeding v. Davis, 77 Va. 639, 46 Am. Rep. 740.

The *Virginia* Act of 1876-77 does not destroy curtesy initiate, but adds another contingency — alienation by the wife in her lifetime. Browne v. Bockover, 84 Va. 424.

or any piece of ground lying near and used with the house, and necessary for its convenient occupation.¹

1. *People v. Gedney*, 10 Hun (N. Y.) 154; *Doe v. Collins*, 2 T. R. 502.

Curtilage has been defined to be the fence or inclosure of a piece of land around a dwelling-house, usually including the buildings occupied in connection therewith. *Com. v. Barney*, 10 Cush. (Mass.) 480; *Com. v. Certain Intoxicating Liquors*, 140 Mass. 287.

Curtilage usually includes the yard, garden, or field which is near to and used in connection with the dwelling. *Ivey v. State*, 61 Ala. 58; *Cook v. State*, 83 Ala. 62.

Curtilage has been defined as a little garden, yard, field, or piece of void ground, lying near and belonging to the messuage and houses adjoining to the dwelling-house, and the close upon which the dwelling-house is built at most. *Shepherd's Touchstone*, quoted in *Ogden v. Jennings*, 66 Barb. (N. Y.) 306, affirmed 62 N. Y. 526.

In *People v. Taylor*, 2 Mich. 251, it is said: "Jacob in his Law Dictionary says: '*Curtilage* is a courtyard, backside, or piece of ground lying near and belonging to a dwelling-house; and though it is said to be a yard or garden belonging to a house, it seems to differ from a garden, for we find *cum quando gardino et curtillagio*.' The definition given in *Shepherd's Touchstone*, p. 84, *Cunningham's Law Dictionary*, and *Webster's*, *Johnson's*, and *Walker's Dictionaries*, is substantially the same. Mr. Bouvier in his Law Dictionary defines it to be 'a space of ground within a common inclosure, belonging to a dwelling-house.' Mr. Chitty in his General Practice, 175, speaks of its having been defined as is stated by Jacob. * * * Mr. Chitty in remarking upon the various definitions that have been given to this word says: 'In its most comprehensive and proper legal signification it includes all that space of ground and buildings thereon, which is usually inclosed within the general fence, immediately surrounding a principal messuage, out-buildings and yard, closely adjoining to a dwelling-house; but it may be large enough for cattle to be *levant and couchant* therein.'"

Size of Curtilage. — In *Edwards v. Derrickson*, 28 N. J. L. 44, it is said: "There are no dimensions known to the lien claimant, or to any one else, for either a lot or a *curtilage*, any more than there is for a farm or tract; either may be a very small thing, and either may be a large one. One of the definitions of *curtilage* is, a field next to and belonging to a messuage; a field being as uncertain in its size as any other portion of land. It is in one place called 'the world.' A *curtilage* seems to connect itself with buildings or messuages, and means the grounds which properly appertain to them, whether they be inclosed within one hundred feet square in a city, or whether they are inclosed within the court, grounds, or park attached to and appertaining to a country seat, whether the contents be two acres, ten acres, or one hundred acres. The question is not so much the size of the *curtilage*, as whether it is, and always has been, considered, treated, and known as one entire parcel, lying together, sold together, surveyed together, occupied together

by its different owners, its metes and bounds known to all, and always recognized and treated as connecting itself immediately with a farming establishment, a manufacturing establishment, a pleasure or other establishment." And on appeal affirming the court below it is said: "A *curtilage* is a piece of ground within the common inclosure belonging to a dwelling-house, and enjoyed with it, for its more convenient occupation. But it does not hence follow, if the landowner on whose estate there is a lien claim has only an outside fence around a farm of one hundred acres, that the whole ground inclosed is, *ex vi termini*, a *curtilage* within the intent of the statute. Undoubtedly the lot or *curtilage*, claimed to be bound in this case by the lien, should have been limited to so much land as is necessary for the convenient and beneficial enjoyment of the mill on which the work was done. Seeing that the idea of a *curtilage* may be expanded or contracted by the character and location of the erection standing upon it, and by the nature and extent of the business to be done there, it is highly probable that mechanics and materialmen may honestly differ about the amount of land which can fairly be held by the lien." *Derrickson v. Edwards*, 29 N. J. L. 474.

Fence. — In *Pond v. People*, 8 Mich. 150, it was held that a building thirty-six feet distant from the house of a fisherman, and used for drying nets, was within the *curtilage*, though not inclosed by a common fence.

In *State v. Shaw*, 31 Me. 523, it was said that the *curtilage* of a dwelling-house is a space necessary and convenient, and habitually used for family purposes, for the carrying on of domestic employments. It includes the garden, if there be one. It need not be separated from the other lands by fences.

Land which is convenient to the occupation of a house, though not inclosed, is a *curtilage* so as to be a part of the house, under an act which provides that no one shall be compelled to sell or convey a part only of any house or building, if he shall be willing to sell or convey the whole. *Marson v. London, etc., R. Co.*, L. R. 6 Eq. 101. See also *Grosvenor v. Hampstead Junction R. Co.*, 1 De G. & J. 446.

Same — Mechanics' Liens. (See generally the title **MECHANICS' LIENS**). — A lien claim filed described the property as the Phoenix Mill, together with the lot and *curtilage* whereon the same stood, which was designated as "all that tract of land known as the Phoenix Mill property," and was described by metes and bounds. The number of acres was not stated in the lien, but appeared by the evidence to be about fifty-three; there were, besides the mill, two dwelling-houses on the tract, which were usually occupied by persons employed about the mill; with one house were inclosed seven or eight acres of land; the residue of the land was uninclosed and was chiefly open, broken, back land; for thirty years the whole had been known and conveyed as one property. It was held that the whole tract was properly included in the lot and *curtilage* whereon the building

was erected, and was liable to the lien. *Edwards v. Derrickson*, 28 N. J. L. 39.

Same—Insulting Language. (See generally the title *BLASPHEMY AND PROFANITY*, vol. 4, p. 580.)—A statute forbade the use of vulgar or insulting language upon the *curtilage* of another. In construing this statute the court said: "Whatever may have been the signification of the word *curtilage*, as employed at common law in reference to burglary, we cannot doubt that in this statute it includes the yard, or garden, or field, which is near to and used in connection with the dwelling. It is not necessary either should be surrounded by an inclosure. It is the propinquity to the dwelling, and the use in connection with it for family purposes, which the statute regards, and not the fact of its inclosure. *Bishop's Stat. Crimes*, § 286; *State v. Shaw*, 31 Me. 523." *Ivey v. State*, 61 Ala. 61.

Same—Arson. (See also the title *ARSON*, vol. 2, p. 929.)—A statute provided that it should be arson to set fire to any barn, stable, shop, or office, within the *curtilage* of any dwelling-house. In defining the word *curtilage* as used in this statute, the court in *Washington v. State*, 82 Ala. 31, said: "The barn was situated with the front end in the rear yard of the dwelling, constituting a part of the inclosure of the yard, the rear part extending into another inclosure. *Curtilage*, as used in the statute, certainly includes the yard or space of ground near to the dwelling-house, contained in the same inclosure, and used in connection with it by the household. On the evidence in this case, the barn opening into the yard immediately surrounding the dwelling, and forming a part of the inclosure, must be regarded, in legal contemplation, as one of the cluster of buildings appurtenant to and used for domestic purposes in connection with the dwelling, and as within the *curtilage*. *Fisher v. State*, 43 Ala. 17; *Pitcher v. People*, 16 Mich. 142; *State v. Whit*, 4 Jones L. (49 N. Car.) 349."

Land under Tide Water.—In *Coddington v. Beebe*, 31 N. J. L. 485, it was held that the word *curtilage* did not include a lot of land under tide water. The court said: "The word *curtilage* originally signified the land with the castle and out-houses, inclosed often with high stone walls, and where the old barons sometimes held their court in the open air, and which word we have corrupted into 'court-yard.' But nothing could be more foreign to all ideas of a *curtilage* than a lot of land under tide waters; nor could anything be more foreign to the meaning of the term 'lot,' as used in the statute, than a piece of ground under tide waters. It might become either a lot or a *curtilage* when reclaimed and raised above the water and made fast land, but until then it could only be known as water and not land at all."

Fence—Contra.—But in *People v. Parker*, 4 Johns. (N. Y.) 424, a store twenty feet from a dwelling-house, but not connected with it by any fence or inclosure, was held not to be within the *curtilage*. The court seemed to base its decision upon the fact that there was no fence inclosing the dwelling-house and store. Citing *Rex v. Garland*, 1 Leach C. C. 144, and distinguishing it from *Rex v. Gibson*, 1 Leach C. C. 357.

Fence—Burglary.—So, in *State v. Hecox*, 83 Mo. 531, it was held that *curtilage* as used in the statute in relation to burglary meant an inclosed space immediately surrounding the dwelling-house and contained in the same inclosure. The court said: "The question, therefore, still remains in the application of our statute, what is to be understood by the *curtilage*? Tomlin and Jacob, in their law dictionaries, do not allow the elements of inclosure to enter into the definition, but in *Bouvier's Law Dictionary* the definition given is, 'the inclosed space immediately surrounding a dwelling-house, contained within the same inclosure;' so, also, 'a yard, court-yard, or piece of ground, lying near to a dwelling-house, and inclosed within the same fence.' *Burrill's Law Dict.*; *Webster's Dict.* It is in this sense the word is used in our statute. See also *Com. v. Barney*, 10 Cush. (Mass.) 480; *People v. Parker*, 4 Johns. (N. Y.) 424; *People v. Gedney*, 10 Hun (N. Y.) 151."

Warrant. (See the titles *INTOXICATING LIQUORS*; *SEARCHES AND SEIZURES*; *WARRANTS*.)—And in *Com. v. Certain Intoxicating Liquors*, 140 Mass. 287, it was held that a warrant to search a building "and the outbuildings within the *curtilage* thereof," did not authorize the search of another building not in the same inclosure with the one specifically mentioned in the warrant, but separated from it by a narrow passageway, the top of which was covered by rough boards, each building and the passageway having a separate entrance from the street.

One Inclosure.—It has been held that a *curtilage* is not necessarily one inclosure, but that it may include more than one yard near the dwelling-house. *People v. Taylor*, 2 Mich. 252.

In *Reg. v. Gilbert*, 1 C. & K. 84, 47 E. C. L. 84, the barn was situated in an inclosure which was surrounded by a general fence, but the yard in which the barn stood was separated from the yard immediately about the house by a stone wall; and it was held that the barn was within the *curtilage*.

Independent Use.—A store and cellar underneath a building, leased and occupied separately from other tenements, used as dwellings, in the same building, and having a distinct entrance, the lessee residing in another part of the city, was held not to be within the *curtilage* of the dwelling. *People v. Nolan*, 22 Mich. 229.

A building on the same lot with an inn, at a distance of forty-five rods from it, used for the sale of liquor by the innkeeper, with a passageway between them, was held not within the *curtilage* of the inn. *Com. v. Estabrook*, 10 Pick. (Mass.) 293. Compare *Goff v. Fowler*, 3 Pick. (Mass.) 300. In the latter case a store two or three rods from the house, adjoining a shed used for the accommodation of travelers, a chamber of the store being sometimes used as a dining-room, was held within the *curtilage*.

Barn.—In *People v. Taylor*, 2 Mich. 251, a barn standing eighty feet from a dwelling-house, in a yard or lane with which there was a communication from the house by a pair of bars, was held to be within the *curtilage*. The court said: "The barn is alleged in the indictment

CURVE. — See note 1.

CUSPIDOR. — See note 2.

CUSTODIA LEGIS. (See CUSTODY OF THE LAW.) — The custody of the law.

CUSTODIAN. — A custodian, in the ordinary sense of the word, is one whose duty it is to watch and guard, and account for, that which is committed to his custody.³

CUSTODY. (See generally the titles PRISONS; SHERIFFS.) — By custody of persons is sometimes meant the care, charge, or control of them, as of infants; or it may mean their imprisonment, as of criminals.⁴ Custody of property

ment to have been within the *curtilage* of the house. Does the proof support this allegation? This will depend upon the true meaning of the word *curtilage*. It is perhaps unfortunate that this term, which is found in the English statutes, and which is descriptive of the common arrangement of dwellings, and the yards surrounding them, in England, should have been perpetuated in our statutes. It is not strictly applicable to the common disposition of inclosures and buildings constituting the homestead of the inhabitants of this country, and particularly of farmers. In England, the dwellings and out-houses of all kinds are usually surrounded by a fence or stone wall, inclosing a small piece of land embracing the yards and out-buildings near the house, constituting what is called the court. This wall is so constructed as to add greatly to the security of the property within it; but as such precautionary arrangements have not been considered necessary in this country, they have not been adopted. Hence the difficulty in this case of giving a correct interpretation to the statute, and of judging whether the barn as described by the witness was within what was understood by the legislature as the *curtilage* of the house." See also *Pitcher v. People*, 16 Mich. 147.

But in *Curkendall v. People*, 36 Mich. 309, it was held that a barn situated fifteen rods from the dwelling-house, with a public highway passing between them, and a yard between the barn and the highway, was not within the *curtilage*.

1. **Curved Line.** — Where the general course of a railroad track is *curved*, it is "a *curved line*," although a short piece taken alone is straight; and the laying of such a piece is in compliance with an enactment that four companies should join in the construction of the track between two points "extending by a *curved line*." *Worcester v. Railroad Com'rs*, 113 Mass. 161.

2. **Patent.** — The fact that one patent is granted for a *cuspidor*, and the other for a spittoon, is of no importance, as the difference is merely of form, and the form itself is old. *Ingersoll v. Turner*, 7 Fed. Rep. 859, 12 Off. Pat. Gaz. 189. See generally the title PATENTS.

3. *State v. Taylor*, 7 S. Dak. 533, where it was held that a state treasurer was by virtue of his office the *custodian* of the revenues belonging to the state, within a statute against embezzlement. See also the title EMBEZZLEMENT.

4. *Smith v. Com.*, 59 Pa. St. 320.

Custody — Committed. (See also COMMIT, vol. 6, p. 229.) — A sentence provided that a

defendant should "be put in *custody* until this sentence is complied with." The court said: "Now, clearly, this is a sentence to imprisonment until the defendant shall comply with the sentence, or be discharged in due course of law. It is admitted, if the language had been, 'committed until sentence is complied with,' it would mean imprisonment. But what greater force has the word 'committed'? It seems to me it is not so great as *custody*. Committed to what? Undoubtedly to *custody*; and this is the common form of sentence: 'and that you be committed to the *custody* of the sheriff until this sentence be complied with.' *Custody* here means strict *custody* — *arcta custodia*. A discharge from prison under such a commitment makes the keeper of the prison liable. *Schuykill County v. Reifsnyder*, 46 Pa. St. 446. And he cannot justify, even under a discharge by the county commissioners. *Schwamblé v. Sheriff*, 22 Pa. St. 10." *Smith v. Com.*, 59 Pa. St. 324.

Escape. (See also the title ESCAPE.) — A statute provided for the punishment of any person who should by force or menace, or bodily harm, or by other unlawful means, set any one at liberty who was in *custody*. It was contended that the statute did not cover the case of a rescue from a jail or other prison, but that it was applicable only to the rescue of prisoners, accomplished by personal violence to an officer. The court held that one who was in jail was in *custody* within the meaning of the statute. *Hillian v. State*, 50 Ark. 523.

Custody — Bail. (See generally the titles BAIL IN CIVIL CASES, vol. 3, p. 587; BAIL AND RECOGNIZANCE, vol. 3, p. 651.) — When the accused is out on bail it has been held that he is not in *custody*. *Turner v. Wilson*, 49 Ind. 581. But in *Levy v. Arnsthall*, 10 Gratt. (Va.) 648, it was held that the word *custody* in a statute authorizing the plaintiff or his attorney to discharge a defendant from *custody*, applied to a defendant in *custody* of his bail, as well as to a defendant in jail. The court said: "The word *custody* in English statutes has been construed to embrace the *custody* of the bail. The statute 5 Geo. II., c. 30, § 5, is an instance of this. That statute enacts that a bankrupt in coming to surrender shall be free from all arrests or imprisonment of any of his creditors, and after his actual surrender for forty-two days, etc., provided he was not in *custody* at the time of his surrender. A defendant in *custody* under the common-law right of his bail has been held to be in *custody* in the meaning of that statute. *Petersdorff on Bail*, pp. 91, 406, 10 Law Libr. 50, 226."

Custody and Control of Infants. (See also the titles BASTARDY, vol. 3, p. 885; DIVORCE;

means such a relation towards it as would constitute possession if the person having custody had it on his own account.¹

GUARDIAN AND WARD; HABEAS CORPUS; PARENT AND CHILD. And see **CONTROL**, vol. 7, p. 457.)—In *Condon v. Vollum*, 57 L. T. 154, the terms "*custody* or *control*," as applied to infants, were held large enough to include religious education.

Same. (See also the titles **LOST PAPERS; SECONDARY EVIDENCE.**)—An affidavit that a certain deed had been in existence, and was not now in the plaintiff's possession, power, or control, but was believed by him to have been destroyed by fire, was held a sufficient compliance with a rule of court requiring an affidavit that the paper was not in the *custody* of the party before the admission of secondary evidence as to its contents. The court said: "These affidavits come fully up to the 50th common-law rule of practice, except that the word 'control' is substituted for the word *custody*. In *Ratteree v. Nelson*, 10 Ga. 439, this court decided that a party had substantially complied with this rule, who swore, after stating his belief of the loss or destruction of the original, 'that it was not in his *custody*, power, or control.' In that case 'control' was substituted for 'possession,' in this for *custody*. Therefore, strict literal compliance is not required. A party who swears that a paper is neither in his possession nor his control, certainly swears substantially that it is not in his *custody*. I cannot conceive of *custody* in the absence of both possession and control." *Roe v. Doe*, 32 Ga. 49.

Custody and Tuition — Guardianship. (See also the title **GUARDIAN AND WARD.**)—Since the passage of chapter 175 of the *New York Laws* of 1893, amending the Revised Statutes relating to the rights of parents to dispose of the *custody*, etc., of their children, a testamentary guardian can be appointed only under the will of a surviving parent. No reference is made in the act to the rights of such guardians to dispose of their wards' estates. It was held, notwithstanding such omission, that the words "*custody* and *tuition*," employed in the statute, include guardianship of the estate as well as of the person. *Matter of Zwickert*, 5 Misc. Rep. (N. Y. Surrogate Ct.) 272.

1. *Stephen's Cr. Dig.*, art. 281, 311.

Charge and Custody.—In *State v. Clark*, 86 Me. 195, a complaint charging a defendant with having the *custody* and control of a horse, without further particulars, was held sufficient under a statute which provided a penalty for the cruel treatment of a horse by any person having the charge or *custody* thereof. The court said: "The words 'charge' and *custody* are frequently used as synonymous. The lexicographers give them as synonyms. They are placed in the statute, however, disjunctively, and in such cases need not be conjunctively averred, and cannot be disjunctively averred. The statute word *custody*, therefore, in the complaint, sufficiently charges the defendant's control of the horse." See generally the title **CRUELTY TO ANIMALS**, *ante*.

Jury Wheel. (See the title **JURY AND JURY TRIAL.**)—A *Pennsylvania* statute enacted "that the said jury wheel, locked as now re-

quired by law, shall remain in the *custody* of the jury commissioners, and the keys thereof in the *custody* of the sheriff of the said county." It was held that a jury wheel was in the *custody* of the jury commissioners within the requirement of this statute, where said commissioners, having no separate office, kept it in a corner, used for no other purpose, of the county commissioners' safe, in the *custody* of one who was clerk for both boards. The court said: "It does not attempt to define the precise meaning intended by the use of the word *custody*, either as respects the wheel or the key; and of this portion of the enactment it was said in the case last cited (*Rolland v. Com.*, 82 Pa. St. 306): 'We must give this section a reasonable interpretation. It does not designate where the wheel shall be kept, and provides no place in which the jury commissioners may deposit it.' It was therefore held in that case that the depositing of the wheel in the vault in the county commissioners' office, in a locked chest, in the *custody* of the county commissioners' clerk, who was also the sworn clerk of the jury commissioners, was a sufficient compliance with the statute relating to the *custody* of the wheel. In the later case of *Curley v. Com.*, 84 Pa. St. 152, there being no office provided for the jury commissioners, nor place of safety for the *custody* of the wheel, they arranged for its *custody* in the vault of the county treasurer, upon condition that no one but a jury commissioner should enter the vault for the wheel. The sheriff kept the key, and it was held that the *custody* of the wheel was sufficient. In this last case the key to the vault was in the possession of the county treasurer, and, of course, he had access thereto. His only restraint by the jury commissioners against taking the wheel from the vault or allowing persons other than these commissioners to enter it for that purpose was his agreement with the jury commissioners not to do so, and the legal penalties attaching to his interference with the wheel. So, in the present case, the jury commissioners were without an office or place of their own, under the control of no one else, in which to keep the wheel; and it was kept in the place designated and set apart for it in the county commissioners' safe. So far as shown, no one but the jury commissioners ever took it out of that place or put it back there, or were authorized by them to interfere with it in any way; and, while the clerk of the county commissioners had access to the safe, he was, at the same time, the clerk of the jury commissioners, and his access to the safe and use of it for the purposes of the business of the county commissioners no more interfered with the legal *custody* of the wheel in the jury commissioners than did the entrance of the treasurer into his own vault on business pertaining to his office, in the case of *Curley v. Com.*, 84 Pa. St. 152. That the word *custody* mentioned in the statute does not necessarily imply a constant keeping under lock and key, is shown in the above case of *Rolland v. Com.*, 82 Pa. St. 306, where the keeping of the key by the sheriff in an unlocked drawer of his

CUSTODY OF THE LAW. (See also the titles ATTACHMENT, vol. 3, p. 181; CONTEMPT, vol. 7, p. 25; EXECUTIONS; EXEMPTIONS (FROM EXECUTION); JURISDICTION; PRIVATE INTERNATIONAL LAW; RECEIVERS; REPLEVIN; SHERIFFS; UNITED STATES COURTS. As to payment of money into court, see the title PAYMENT.)—Whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court and under its control for the time being; and no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises.¹ When property is taken lawfully by virtue of legal process it is in the custody of law; not otherwise.²

CUSTOM.—See the titles COMMON LAW, vol. 6, p. 268; PRESCRIPTIONS; USAGES AND CUSTOMS.

CUSTOM WORK.—See note 3.

CUSTOMARILY.—See HABITUALLY.

desk, to which his son and others going into the room had access, by reason of the desk not being locked all the time, was nevertheless held to be a compliance with the law, although a careless keeping of the key." Com. v. Valsalka, 181 Pa. St. 17.

Custody—Embezzlement. (See also the title EMBEZZLEMENT.)—In *People v. Burr*, 41 How. Pr. (N. Y. Ct. Sess.) 293, it was held that a tradesman to whom raw materials were given to be converted by him into manufactured articles, was not guilty of embezzlement by reason of a subsequent wrongful conversion of the article. The court said: "Now, by the term '*custody*' of property 'as contradistinguished from legal possession, I understand to be meant that charge to keep and care for the owner, subject to his order and direction, without any interest or right therein adverse to him, which every servant possesses with regard to the goods of his master confided to his mere care, which *custody* may be terminated or prolonged according to the will and pleasure of the master. But where the owner of personal property delivers it to another for any purpose, intending not only to part with the *custody* but with the absolute right or control of the property for any length of time, he parts not only with such *custody* but with the legal possession as well; for the actual possession of the property with a cessation of the rights of ownership for a period, however short, transforms such actual possession which under other circumstances might create but a mere *custody*, into a legal possession in the person having it, and that this is so it seems to me there can be no doubt, for if the manual possession is gone from the owner, and the right of ownership and control is ever so temporarily suspended, where can the legal possession be, if not in the person having the manual possession and the right to hold it as against every one?"

Money intrusted to a solicitor for investment is not intrusted for "safe *custody*" within the meaning of a larceny act. Reg. v. Newman, 8 Q. B. Div. 706. See generally the title LARCENY.

1. *Buck v. Colbath*, 3 Wall. (U. S.) 334; *Taylor v. Carryl*, 20 How. (U. S.) 583; *Hagan v. Lucas*, 10 Pet. (U. S.) 400.

Tax Sale—United States Taxes.—A tax sale made to collect taxes, levied by the United States, is valid, even though the lands were *in custodia legis* under process of a state court. *Keely v. Sanders*, 99 U. S. 441. See generally the titles REVENUE LAWS; TAX SALES; UNITED STATES COURTS.

2. *Gilman v. Williams*, 7 Wis. 334, where it is further said: "It would be easy to define, were it necessary, what is meant in the books and in legal parlance as 'the *custody* of the law.' But until recently I have never heard it claimed that a deputy marshal or sheriff, armed with an execution against one particular person, could make a foray into a neighborhood or communal town and indiscriminately seize upon the property of the inhabitants, and justify his seizure and retention of the same by virtue of the cant phrase that they were 'in the *custody* of the law,' that he had the right to seize them because they were going into 'the *custody* of the law,' that his *custody* is 'the *custody* of the law.'"

3. **Custom Work.**—A contract provided that the plaintiff was to operate his mill as a steam flour mill, doing *custom work*. The court said: "The mill which plaintiff was to operate was a roller mill. It is undisputed that the words *custom work*, when used with reference to such a mill, have a meaning different from that which attaches to them as applied to the old-fashioned gristmill. One of the witnesses who was sworn on this point said that a custom mill is a mill that takes in farmers' grain, and grinds it, for a certain amount of toll. A roller mill gives the farmer back the equivalent of the flour from his own grain. The small old-fashioned mill grinds the farmer's grain. The large mill, even if it is a stone mill, exchanges. The meaning of *custom work*, as applied to a roller mill, is that the farmer gets a certain amount of flour, bran, and shorts, for a given number of bushels of wheat. A roller mill gives the equivalent, instead of the flour from the identical grain. A roller mill gives the equivalent instead of the flour from the same grain, because there are too many machines for the different products of grain." *Hutchinson v. Cleary*, 3 N. Dak. 270. See generally the title MILLS.

CUSTOMARY. (See also **USUAL**.)—See note 1.

CUSTOMARY DISPATCH.—See the title **DEMURRAGE**.

CUSTOMER.—A buyer; a purchaser; one who frequents any place of sale for the sake of purchasing or ordering goods.²

CUSTOMHOUSE BROKERS. (See the titles **AGENCY**, vol. 1, p. 930; **BROKERS**, vol. 4, p. 957.)—A customhouse broker is a person authorized to act for parties, at their option, in the entrance or clearance of ships and the transactions of general business.³

CUSTOMS DUTIES.—See the title **REVENUE LAWS**.

CUT. (See generally the title **ASSAULT AND BATTERY**, vol. 2, p. 952; and see **ENCYC. OF PLEADING AND PRACTICE**, title **ASSAULT**, vol. 2, p. 835; and see **STAB**.)—The word "cut" imports a wound with an instrument having an edge.⁴

1. **Usual and Customary.**—"Usual and *customary*" clearly imports something more than casual or exceptional cases. *Carter v. Philadelphia Coal Co.*, 77 Pa. St. 290. See generally the title **USAGES AND CUSTOMS**.

Customary at Port of Lading.—See *Rodocanachi v. Milburn*, 56 L. T. 594. And see generally the titles **BILLS OF LADING**, vol. 4, p. 507; **CONTRACTS OF AFFREIGHTMENT AND CHARTERPARTIES**, vol. 7, p. 156.

2. Webster's Dict.

Mercantile Agency. (See also the title **MERCANTILE AGENCY**.)—A mercantile agency agreed to supply the plaintiff with information as to the standing and credit of his *customers* in the communities wherein they respectively resided. In construing the word *customer* the court said: "It was argued by Mr. M. C. Cameron that the contract of the defendants is only to furnish information to their subscribers or *customers*, and that Wilson, at the time the information was given, was not a *customer* of the plaintiff. But we must give to the word *customers* a reasonable interpretation, and one as nearly as possible in accordance with the expressed intention of the parties. The information would be required as much in the case of an intending *customer* as an actual *customer*. Indeed, it would be more requisite in the case of an intending than an actual *customer*. For these reasons we think the word *customers*, as used in the notice in front of the book furnished to each subscriber, means intending or actual *customers*." *McLean v. Dun*, 39 U. C. Q. B. 562.

3. Bouvier's Law Dict.

4. **Cut and Stab Distinguished.**—*State v. Patza*, 3 La. Ann. 514: "*Stab* imports a wound made with a pointed instrument."

An indictment for "striking and *cutting*" is not supported by evidence of stabbing. *Rex v. M'Dermot*, 1 R. & R. 356.

Cut and Stab.—But in an indictment for malicious stabbing under section 4608 of the *Tennessee Code*, the words "*cut*, penetrate, and wound," were held to describe the offense with quite as much accuracy and certainty as if the word "*stab*" had been used. The court said: "The question, then, arises, are the words '*cut*, penetrate, and wound,' as used in the indictment, equivalent to the word '*stab*' used in the statute? In the case of *Jarnigan v. State*, 10 Yerg. (Tenn.) 531, the indictment contained the word '*stab*,' and that the wound was inflicted with a knife. It was

objected that it was insufficient, because that word did not describe the injury inflicted by the term *cut* or 'wound,' so as to show that the skin was broken or penetrated by the weapon. But the court said: 'The word "*stab*," by its own proper force and meaning, imports a breaking and penetration of the skin as distinctly as would the word *cut*.' This case recognizes the word *cut* as equivalent to the word '*stab*' in such a case. But in the present indictment the words '*cut* and penetrate' are used, and as the wound is charged to have been with a knife, they describe the offense with quite as much accuracy and certainty as if the word '*stab*' had been used." *Starks v. State*, 7 Baxt. (Tenn.) 65.

Instrument Not Intended for Cutting.—Where a cutting is inflicted by an instrument capable of *cutting*, the case is within the statute though the instrument is not intended for *cutting* nor ordinarily used to cut. *Rex v. Hayward*, 1 R. & R. 78.

Hammer.—A striking over the face with the sharp or claw part of a hammer, was held to be a sufficient *cutting* within the statute. *Rex v. Atkinson*, R. & R. C. C. 104.

Maim—Cut. (See also the title **MAIM**.)—A statute provided for the punishment of any one who *cuts* or slits or mutilates the nose or lip of another. It was held that this statute did not apply to an injury received in a brawl where no weapons were used. The court said: "Again, the word *cut* was used in the same construction in said Coventry Act, and in English statutes upon the subject passed subsequently, as it is used in said section of the code, and had received a legal construction long prior to the adoption of the section by the legislature of this state. It meant a wound made with a sharp instrument. Bishop, in his work on Statutory Crimes (2d ed.), § 315, says: 'Where the words "*cut* or *stab*" are used as in the before-mentioned English statutes, they relate only to such wounds as are made by an instrument capable of stabbing or *cutting*; stabbing being properly a wounding with a pointed instrument, and *cutting* being a wounding with an instrument having a sharp edge. And if the indictment be for *cutting*, evidence of a stab will not support the charge; for, as the statute uses the words in the alternate, "*stab* or *cut*," so as to distinguish them, the distinction must be attended to in the indictment.' Yet *cutting* or stabbing need not have been the purpose for which the

CUT GLASS.—See note 1.

CUT OFF.—See note 2.

CUTLERY. (See also the title **REVENUE LAWS.**)—"Cutlery" is defined as including all cutting tools made of steel, such as knives, forks, shears, razors, scissors, etc.³

CUTTING TIMBER. (See also the titles **LOGS AND LUMBER**; **TIMBER**; **TREES.**)—See note 4.

CWT. (See generally the titles **ABBREVIATIONS**, vol. 1, p. 97; **WEIGHTS AND MEASURES.**)—"Cwt." is the abbreviation of "hundredweight."⁵

CYCLONE INSURANCE. (See generally the title **INSURANCE.**)—Companies have been formed in some states to insure against cyclones, and a cyclone has been defined as a rotatory storm or whirlwind of extended circuit.⁶

CY-PRES.—(See also the titles **CHARITIES**, vol. 5, p. 893; **PERPETUITIES**;

instrument was manufactured. For example, a blow from the sharp claw of a hammer, or the sharpened point of an iron crow, may inflict a *cut*; but not from the blunt end of a hammer, or from a square iron bar, producing a contused or lacerated gash, or from the scabbard of a sword, or from the handle of a windlass." *State v. Cody*, 18 Oregon 506.

Same—Biting.—Biting off the end of a person's nose or finger-joint does not come within the offense of "stabbing, cutting, or wounding." *Rex v. Harris*, 7 C. & P. 446, 32 E. C. L. 578.

But see *State v. Mairs*, 1 N. J. L. 522, where it is said: "The substance of the crime charged upon the defendants is the wilfully and deliberately *cutting* off the nose; and whether this is effected by one instrument or another is perfectly immaterial. I think I may go farther, and say, if the party deliberately and with the intention of biting off the nose of another, watches his opportunity, and effects his purpose, the nose may be said to be *cut off*, and the jury would be bound to find so. It is not necessary to prove it to have been done with a knife, as laid in the indictment."

1. **Revenue Law.** (See generally the title **REVENUE LAWS.**)—For the meaning of *cut glass* in a revenue statute see *Binns v. Lawrence*, 12 How. (U. S.) 9.

2. **Cut Off—Railroads.**—A railroad company required by its charter to extend wharves or docks *cut off* by its road, was held not bound to extend a wharf within a deep bay, to which it furnished access by means of a draw. The court said: "The bays were crossed, but not *cut off*, within the meaning of the act; that is to say, they were not *cut off* from the navigable communication with the river channel. Drawbridges were directed, to keep that communication open and to prevent their being *cut off*. If the bays were not *cut off*, the wharves within them were not, for the same communication was open to them. But wharves not within the bays or inlets were *cut off* wherever the railroad should pass between them and the channel, because drawbridges were not directed in those cases; and therefore it was that the company was directed to extend or improve them, for the purpose of keeping open the communication between them and the channel." *Tillotson v. Hudson River R. Co.*, 9 N. Y. 581, *affirming* 15 Barb. (N. Y.) 410.

3. *Simmons Hardware Co. v. Lancaster*, 31

Fed. Rep. 445. See also *Cross v. Seeberger*, 30 Fed. Rep. 427. These were custom cases.

4. **Cutting Timber.**—In *Keeton v. Audsley*, 19 Mo. 363, it is said: "The word *timber*, in common parlance, is applied to standing trees, and to wood proper for buildings, utensils, furniture, ships, etc. Yet, in law, *timber* means certain trees useful for building, or the like. Taking the word in its popular sense, when it is used in connection with the word *cut*, it is understood usually to apply to standing trees. When we say, one *cut timber* on another's land, the ordinary understanding of the language is, that trees were *cut down*."

In *U. S. v. Stone*, 49 Fed. Rep. 848, it was held that a count charging the *cutting* and removing of *timber* did not allege two offenses.

As to the offense of *cutting timber* on public lands of the United States, see the title **PUBLIC LANDS**.

Cut Down.—*Cutting down* a tree, though it is not thereby totally destroyed, is sufficient to bring the case within a statute prohibiting "*cutting down* or otherwise destroying" trees. *Rex v. Taylor*, 1 R. & R. 373.

5. *Helm v. Bryant*, 11 B. Mon. (Ky.) 64.

6. **Cyclone Insurance.**—Webster's Dict., *quoted* in *Queen Ins. Co. v. Hudnut Co.*, 8 Ind. App. 26. In that case, to a complaint on an insurance policy, alleging loss of insured property by a tornado, *cyclone*, or hurricane, the defendant answered that the loss was caused by a very high wind forcing a boat against the property. The court held the answer insufficient, and said: "It is alleged in the complaint that the property insured was destroyed by a *cyclone* or hurricane. The assurers deny that the loss was occasioned by a tornado, *cyclone*, or hurricane, but that it was caused by a very high wind forcing the boat against it. Is this not a confession that a tornado, *cyclone*, or hurricane caused the injury? The words 'tornado' and 'hurricane' are synonymous, and mean a violent storm, distinguished by the vehemence of the wind and its sudden changes; while the definition of a *cyclone* is, 'a rotatory storm or whirlwind of extended circuit.' Webster's Unabridged Dictionary. It is evident, therefore, that a hurricane is a very high wind. That the hurricane itself, coming in contact with the building, did not alone cause the damage, is not material; but if it caused another body to come in contact and do the damage, the hurricane would be the direct and controlling cause."

WILLS.)—Where a person has expressed a general intention and also a particular mode in which he wishes it carried out, but the intention cannot be carried out in that particular mode, the court before whom the matter comes will in certain cases direct the intention to be carried out *cy-pres*, that is, as nearly as possible in the mode desired. Thus if a testator shows an intention that part of his property should be devoted to charitable purposes, but he either does not effectually indicate the particular manner in which he wishes it applied, or indicates a mode of application which is or subsequently becomes impracticable, the court will execute the trust *cy-pres*, by applying the property to charitable purposes similar to those (if any) mentioned by the testator. So where an executory trust, if carried literally into effect, would be void for illegality, as where it would infringe the rule against perpetuities, the court, in order to carry the testator's intention into effect as far as possible, or, as it is termed, *cy-pres*, will direct a settlement to be made as strictly as the law permits.¹

D. — See note 2.

DAGUERREOTYPIST. — See note 3.

DAILY NEWSPAPER. (See generally the titles NEWSPAPERS; NOTICE; TIME, COMPUTATION OF.) — See note 4.

DAMAGE. — "Damage" is used in jurisprudence in its vernacular sense of injury; but it is to be distinguished from "damages" which mean pecuniary recompense for an injury.⁵

1. Sweet's Law Dict., p. 238.

2. **Abbreviation.** (See generally the title ABBREVIATIONS, vol. I, p. 97. For the use of D. as an abbreviation of "deed," see Converse v. Wead, 142 Ill. 132.)

3. In *Barnes v. Ingalls*, 39 Ala. 201, it is said. "The ambrotypist or *daguerreotypist*, whatever title he may give himself, is rather an artisan than an artist. His labor is more manual than mental. He works more by rule, than under the inspiration of genius. The process by which he accomplishes his undertaking is mainly mechanical; and success in his vocation demands, not creative power, but dexterity, contrivance, and the skilful application of fixed rules."

4. **Daily Newspaper.** — In *Tribune Pub. Co. v. Duluth*, 45 Minn. 27, it was held that a newspaper printed and published six days consecutively each week, one of which was Sunday, was a *daily newspaper*. The court said: "In our opinion the action of the city council was authorized. The statute (Laws 1889, c. 47) provides that for such purposes a newspaper which is published six days in each week shall be held to be a *daily newspaper*. A newspaper need only be published six consecutive days in each week to be a *daily newspaper* according to the commonly received acceptance of that term, whether Sunday or Monday be the day omitted; and the statute we have referred to must undoubtedly receive that construction, and was intended to include newspapers so published." So in *Richardson v. Tobin*, 45 Cal. 30, it was held that a newspaper which is published six days in each week is a *daily newspaper*. The court said: "From the allegations of the answer it is to be inferred that, according to its usual course of business, the Chronicle was issued every day of the week except Monday. If this be so, it was a *daily newspaper* in the sense of the statute, which employs the term *daily newspaper*

in contradistinction to the term 'weekly,' 'semi-weekly,' or 'tri-weekly' newspapers. The term was used and is to be understood in its usual popular sense; and in this sense it is clear that a paper which, according to its usual custom, is published every day of the week except one, is a *daily* paper. Otherwise, a paper which is published every day except Sunday would not be a *daily* paper. The term, in its popular sense, does not admit of this construction."

5. Abbott's Law Dict.

Loss and Damage. (See also *Loss*.) — In *Fay v. Parker*, 53 N. H. 342, it is said: "A synonym of *damage* (when applied to a person sustaining an injury) is 'loss.' Loss is the generic term. *Damage* is a species of loss. Loss signifies the act of losing, or the thing lost. *Damage*—in French, *dommage*; Latin *damnum*, from *demo*, to take away—signifies the thing taken away, the lost thing, which a party is entitled to have restored to him so that he may be made whole again. *Damage*, we remarked, is derived from *demo*, to take away; and therefore it is not derived from *punio*, to punish. When used to signify the money which a plaintiff ought to recover, *damage* is never, or in any sense, synonymous with nor collateral to the terms example, fine, penalty, punishment, revenge, discipline, or chastisement. Loss or *damage* sustained—the thing taken away—may be supplied by compensation; but the loss, *damage*, or thing taken away cannot be supplied or restored by the vindictive punishment of him who has occasioned the loss or *damage*."

Indemnity Contracts — Guaranty. — As to the meaning of *damage* in contracts to shield another from damage, costs, expenses, etc., see the titles *GUARANTY; INDEMNITY CONTRACTS*.

Eminent Domain. — As to the *damage* for which compensation is required, see the title *EMINENT DOMAIN*.

DAMAGE FEASANT. (See also the title ANIMALS, vol. 2, p. 354; DISTRESS; ESTRAYS; IMPOUNDING; and see LEVANT AND COUCHANT.)—The term “damage feasant” means “doing damage,” and is applied to animals of a stranger wandering on another man’s ground, and “doing him damage,” *e. g.*, by treading down his grass, eating his crops, etc.

Damage in the Sense of Injury.—Within the rule that the *damages* occasioned by a collision between two vessels are to be divided between them, by *damage* is meant the injury directly and necessarily resulting from the collision. *Memphis, etc., R. Co. v. H. C. Yaeger Transp. Co., 10 Fed. Rep. 395.* See generally the title NAVIGATION.

Injuries to the Person — English Statute.—An English statute gave the High Court of Admiralty jurisdiction over “any claim for *damage* done by any ship.” It was held that the term *damage* in this provision did not include injuries to the person, or still less claims by surviving relatives for loss of life. *Smith v. Brown, L. R. 6 Q. B. 729; James v. London, etc., R. Co. L. R. 7 Exch. 187; Simpson v. Blues, L. R. 7 C. P. 290.*

In *Smith v. Brown, L. R. 6 Q. B. 729*, Cockburn, C. J., said: “Neither in common parlance nor in legal phraseology is the word *damage* used as applicable to injuries done to the person, but solely as applicable to mischief done to property. We speak indeed of *damages* as compensation for injury done to the person, but the term *damage* is not employed interchangeably with the term ‘injury,’ with reference to mischief wrongfully occasioned to the person.” And to the same effect see *Seward v. Vera Cruz, L. R. 10 App. 59*, which established the rule that a claim for loss of life under Lord Campbell’s Act was not a claim for *damages*. Although this case in the House of Lords finally settles the question, authority was not wanting to the contrary that *damage* included personal injuries. *The Sylph, L. R.*

2 Adm. & Eccl. 24; The Guldfaxe, L. R. 2 Adm. & Eccl. 325; The Beta, 38 L. J. Adm. 50, L. R. 2 P. C. 447; The Explorer, L. R. 3 Adm. & Eccl. 289; The Franconia, 2 Prob. Div. 8, 163; The Alina, 5 Exch. Div. 227; Stroud’s Law Dict. 177. And where the context shows that *damage* means personal injury, the term will be so construed; thus a ticket containing a provision respecting *damage* to luggage, and another clause dealing with passengers personally, contained the expression ‘loss or *damage*,’ and it was held that injury to life or limb was within the phrase. *Haigh v. Royal Mail Steam Packet Co., 52 L. J. Q. B. 395, 640.*

Malicious Mischief.—Taking away a part of a stocking-frame so that it will not work is *damaging* it within an act making it felony to break, destroy, or *damage* such frames. *R. v. Tracy, R. & R. 452.* See generally the title MALICIOUS MISCHIEF.

Abutters.—See generally the titles ABUTTING OWNERS, vol. 1, p. 224; EMINENT DOMAIN; SPECIAL ASSESSMENTS; STREETS AND SIDEWALKS.

A non-adjacent property-holder is not entitled to *damages* under an act providing for compensation “when property is *damaged* by the vacation or closing of any street,” where by the vacation egress and ingress is not affected, and the *damages* suffered consist of mere inconvenience common to the general public. Nor is such vacation a taking or *damaging* within a constitutional provision that private property shall not be taken or *damaged* for public use without just compensation. *East St. Louis v. O’Flynn, 119 Ill. 200.*

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For a treatment of the subject in special connections, see such titles in this work as the following: *ASSAULT AND BATTERY*, vol. 2, p. 952; *CARRIERS OF GOODS*, vol. 5, p. 154; *CARRIERS OF LIVE STOCK*, vol. 5, p. 427; *CARRIERS OF PASSENGERS*, vol. 5, p. 474; *CIVIL DAMAGE ACTS*, vol. 6, p. 36; *CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES*, vol. 7, p. 156; *COVENANTS*, *ante*, p. 43; *CRIMINAL CONVERSATION*, *ante*, p. 260; *DEATH BY WRONGFUL ACT*, *post*; *EMINENT DOMAIN*; *EXCHANGE AND RE-EXCHANGE*; *FIRES*; *LANDLORD AND TENANT*; *LIBEL AND SLANDER*; *SALES*; *TRESPASS*; *TELEGRAPHS AND TELEPHONES*; *WARRANTY*; *WATERS AND WATERCOURSES*; *WORKING CONTRACTS*.

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I. DEFINITION AND TERMINOLOGY — 1. In General. — The term "damages" has been defined as "the value in money of what is lost or withheld; the estimated money equivalent for detriment or injury sustained; that which is given or adjudged to repair a loss."¹

Other Definitions, however, are met with in text-books and opinions of courts, from which it seems that the term has been indifferently used to describe "the injury or loss for which compensation is sought,"² or "a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another,"³ or again, "a sum of money assessed by a jury, on finding for the plaintiff or successful party in an action, as a compensation for the injury done him by the opposite party."⁴ Thus it appears that the term "damages" has no very precise meaning, or rather, that it is a term which may be used in several different senses: for instance, to denote the original loss or injury; the amount which the injured party is entitled to recover; or, finally, the amount actually assessed by a jury or other proper tribunal as compensation for injuries received.⁵ The fact that the word has different significations, however, gives rise to no

1. Cent. Dict., title Damage.

Some Statutory Definitions. — Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called "damages." Civil Code Cal., § 3281; Civil Code Dak., § 1940.

The Word "Damages" in Ancient Signification — Included Costs of Suit. — In the ancient usage, the word "damages" was employed in two significations. According to Coke, its proper and general sense included the costs of the suit, while its strict or relative sense was exclusive of costs. The latter meaning has

alone survived. Black's L. Dict., title Damages.

2. Bouv. L. Dict., title Damages.

3. Black's L. Dict., title Damages.

Indemnity Recoverable for Injuries. — The indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, through the act or default of another. Bouv. L. Dict., title Damages.

4. See 2 Bl. Com. 438; Co. Litt. 257a; 2 Tidd Pr. 869, 870; Black's L. Dict., title Damages.

5. See foregoing definitions.

confusion in the consideration of the subject, as the context never fails to make clear the particular meaning intended.

2. Damages as a Species of Property. — Blackstone refers to "damages" as a "species of property that is acquired and lost by suit and judgment at law."¹

Judgment for Damages Does Not Confer but Defines a Right. — But while it is true that the injured party has unquestionably a vague indeterminate right to some damages the instant the injury is received, the verdict of the jurors and the judgment of the court thereupon do not in such case so properly vest a new title in him, as fix and ascertain the old one; they rather define than give the right.²

3. Compensatory and Exemplary (Punitive and Vindictive) Damages. — Damages may be classed as either compensatory or vindictive: the former, when they are such as measure the actual loss, and are allowed as amends therefor; the latter, when they exceed the loss sustained, and are given as a kind of punishment to the defendant, with a view of preventing similar wrongs in future. Vindictive damages are also called "exemplary" or "punitive."³

4. Nominal and Substantial Damages. — Damages may be further classed as either nominal or substantial; the former being a trifling sum, and awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained;⁴ while the latter are, as the term indicates, considerable in amount, and awarded as compensation for the injury actually suffered.⁵

5. Liquidated and Unliquidated Damages. — Another division of damages is into liquidated and unliquidated; the former being applicable when the amount thereof has been ascertained by the judgment in the action or by the specific agreement of the parties; while the latter denote such damages as are not yet reduced to a certainty in respect to amount, nothing more being established than the plaintiff's right to recover.⁶

6. Direct and Consequential, Proximate and Remote Damages. — Again, damages are either direct or consequential. The former are such as result from an act without the intervention of any intermediate controlling or self-efficient cause; the latter are such as are not produced without the concurrence of some other event attributable to the same origin or cause.⁷

Proximate Damages are those that are the ordinary and natural results of the defendant's act; such as are usual, and might, therefore, have been expected.⁸

Remote Damages are such as are the result of accident or an unusual combination of circumstances which could not be reasonably anticipated and over which the party sought to be charged had no control.⁹

7. General and Special Damages. — **General Damages** are those which necessarily and by implication of law result from the act or default complained of.¹⁰

1. 2 Black. Com. 438

2. 2 Black. Com. 438.

3. Anderson's Law Dict.; Sweet's Law Dict., title Damages. See also the title EXEMPLARY DAMAGES.

Compensatory Damages. — Those allowed as a recompense for the injury actually received. Bouv. L. Dict., title Damages.

4. Bouv. L. Dict., title Damages.

Nominal Damages. — A trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained. Bouv. L. Dict., title Damages.

5. Anderson's L. Dict., title Damages.

6. Black's L. Dict., title Damages. See also the title LIQUIDATED DAMAGES.

7. Anderson's L. Dict., title Damages.

Consequential Damages. — Those which, though directly, are not immediately consequential

upon the act or default complained of. Bouv. L. Dict., title Damages.

8. Toulmin, J., in *Haile v. Texas*, etc., R. Co., 23 U. S. App. 80; Martin, J., in *Mitchell v. Rochester R. Co.*, 151 N. Y. 107.

For a further and full discussion of proximate damages, together with a discussion of the proper and accurate signification of the term "proximate" in this connection, see *infra*, this title, *Natural and Proximate Cause and Consequence*.

9. Toulmin, J., in *Haile v. Texas*, etc., R. Co., 23 U. S. App. 80. See also *infra*, this title, *Natural and Proximate Cause and Consequence*.

10. Bouv. L. Dict., title Damages; Black's L. Dict., title Damages; Wallace v. Ah Sam, 71 Cal. 197, 60 Am. Rep. 534; Bristol Mfg. Co. v. Gridley, 28 Conn. 201; Lindley v. Dempsey, 45 Ind. 246; Vanderslice v. Newton, 4 N. Y. 130.

In Actions for the Breach of Contracts. — General damages, in actions for the breach of contracts, are the loss which naturally flows from and is presumed from the contract and its breach.¹

In Actions of Tort. — The same general distinction as indicated between general and special damages applies in actions for damages for the commission of a tort.²

Illustration — Damages for the Wrongful Levy of Attachment. — Damages resulting from injury to the credit and business standing of a merchant, and from the injury to his business, are recoverable as general damages for maliciously suing out a writ of attachment and causing the same to be levied on his stock of goods, such damages being, in law, the natural, proximate, and necessary consequences of the defendant's acts.³

General Damages Presumed, but No Implication as to Amount. — But though there may be an implication of law as to general damages, the amount is left to be determined from the proof.⁴

Special Damages, as contradistinguished from general damages, have been defined as those which are the natural but not the necessary result of the act complained of.⁵

Special Damages in Actions for the Breach of Contracts. — Special damages, in actions for the breach of contracts, is such further loss, in addition to that which flows from and is presumed from the contract and its breach, as is occasioned by the breach of the contract, and proximately caused thereby, or as in the ordinary course of things would be likely to result therefrom.⁶

In Actions of Tort. — With reference to special damages it has been said that "these are either superadded to general damages, arising from an act injurious in itself, as when some particular loss arises from the uttering of slanderous words, actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as when the

Statutory Definition. — General damages are such as the law presumes to flow from any tortious act, and may be recovered without proof of any amount. Special damages are such as actually flowed from the act, and must be proved in order to be recovered. Code Ga. 1882, § 3070.

1. *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534; *Lindley v. Dempsey*, 45 Ind. 246.

Breach of Contract of Lease — Injury to Business. — In an action for refusing to let a lessee into possession, the plaintiff gave evidence of injury to his wife's business as a milliner, without having averred it specially, but the court held it admissible under the general allegation of damage as going to show that "the plaintiff had sustained inconvenience." *Ward v. Smith*, 11 Price 10.

Breach of Contract Not to Set Up Rival Business. — Loss of profits from competition in a business wrongfully established by the defendant, are not, ordinarily, regarded as special damages. *Masterson v. Short*, 33 How. Pr. (N. Y. Super. Ct.) 481.

2. *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59.

Personal Injuries — Expenses of Nursing and Medical Treatment. — "When an injury is received of such extent and character as must disable one from labor, and require nursing and medical treatment, the loss from inability to labor and the expense of medical treatment are the necessary and uniform consequences of such an injury. They are not special damages in the sense of that term as

it is used in the law of pleading and evidence. They are not caused by any incidental fact or by the peculiar situation and circumstances of the party, but are the natural and uniform effects of the injury itself." *Perley, C. J.*, in *Hopkins v. Atlantic, etc.*, R. Co., 36 N. H. 9, 72 Am. Dec. 287.

The Future Effect of Personal Injuries is not special damages which must be alleged in the declaration, but general damages, naturally and necessarily resulting from the injuries. *Bradbury v. Benton*, 69 Me. 104.

3. *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59.

4. Amount of Damages to Be Determined by the Jury. — With reference to general damages, *McKinstry, J.*, in *Mitchell v. Clark*, 71 Cal. 163, 60 Am. Rep. 529, said: "These damages the law implies will proceed from the act, although the amount may often be in the reasonable discretion of the jury."

5. *Swayne, J.*, in *Roberts v. Graham*, 6 Wall. (U.S.) 578. And see *Smith v. Sherman*, 4 Cush. (Mass.) 408; *Bristol Mfg. Co. v. Gridley*, 28 Conn. 201.

6. Special Damages Within Contemplation of Contracting Parties. — *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534. "This last we term special damages," said *Searles, Com'r*, in this case, "and it is awarded upon the theory that the parties who contracted with a full knowledge of the facts, circumstances, and objects of the agreement may well be supposed to have had in contemplation all the proximate and natural results flowing from its breach."

words become actionable only by reason of special damage ensuing." ¹

General and Special Damages Practically a Question of Pleading. — The subject of general and special damages as contradistinguished is principally a question of pleading, the general rule being that where special damages are not claimed, a party can only recover such damages as are not only the natural and proximate result, but also the necessary result of the act complained of. ²

8. "Damage" and "Injury." — In the language of most jurists and text-book writers the words "damage" and "injury" with their plural forms are in many instances used synonymously. Generally speaking, there may be no reason for making a distinction, but sometimes it is expedient. In the latter cases, the word "injury" in this treatise will be used to express the act producing the "damage;" the former word the cause, the latter the effect. Where the context would not otherwise indicate clearly what is intended, the terms as distinguished will be employed. Where, however, discrimination is not necessary for this reason, it will not be made, as no useful purpose would thereby be subserved. ³

II. GENERAL PRINCIPLES — Right to Satisfaction as Given by the Law of Nature. — According to Blackstone, the primary right to a satisfaction for injuries is given by the law of nature, and a suit is only the means of ascertaining and recovering that satisfaction. ⁴

The Difficulty of Formulating General Rules. — Owing to the ever-occurring differences in the circumstances and special conditions of parties, it has been found difficult, if not impossible, to lay down general and definite rules applicable even to all the cases of a single class. From a misconstruction of terms and expressions, not sufficiently guarded for general use, but perhaps adapted to the case at hand, the applications of rules commonly recognized have been as various as the cases. ⁵

1. Compensation the Cardinal Rule — a. THE RULE STATED. — The fundamental principle of the law of damages is that the person injured in his person or property rights shall receive compensation therefor. ⁶

1. Bouv. Law Dict., title Damages.

2. Joynes, J., in *Peshine v. Shepperson*, 17 Gratt. (Va.) 472, 94 Am. Dec. 468. See for a full discussion of the subject, as a question of pleading, the title DAMAGES, ENCYC. OF PL. AND PR., vol. 5, p. 700.

3. **Distinction between "Damages" and "Injury."** — In *North Vernon v. Voegler*, 103 Ind. 314, the court said: "There is a material distinction between damages and injury. Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word 'injury' denotes the illegal act. The term 'damages' means the sum recoverable as amends for the wrong. The words are sometimes used as synonymous terms, but they are in strictness words of widely different meaning. There is more than a mere verbal difference in their meaning, for they describe essentially different things. The law has always recognized a difference between the things described, for it is often declared that no action will lie because the act is *damnum absque injuria*."

4. 2 Black. Com. 438.

5. Clifton, J., in *Brigham v. Carlisle*, 78 Ala. 247, 56 Am. Rep. 28.

Difficulty Not in Stating but in Applying the Rule. — In the case of *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292, the court said: "The difficulty is not in stating the rule of

damages, but in determining whether in the particular case the damages claimed are within the rule."

6. General Rule — Compensation the Fundamental Principle — England. — *Ferrer v. Beale*, 1 Ld. Raym. 692; *Robinson v. Harman*, 1 Exch. 850; *Shepherd v. Johnson*, 2 East 211.

United States. — *Dexter v. Spear*, 4 Mason (U. S.) 115; *Walker v. Smith*, 1 Wash. (U. S.) 152; *Milwaukee, etc., R. Co. v. Arms*, 91 U. S. 489; *U. S. v. Smith*, 94 U. S. 214.

Alabama. — *Pugh v. M'Rae*, 2 Ala. 393.

Arkansas. — *Goodbar v. Lindsley*, 51 Ark. 380, 14 Am. St. Rep. 54; *Jacobson v. Poindexter*, 42 Ark. 97.

California. — *Stockton, etc., Gravel Road Co. v. Stockton, etc., R. Co.*, 53 Cal. 11.

Connecticut. — *Ackley v. Chester*, 5 Day (Conn.) 221; *Clark v. Smith*, 10 Conn. 1, 25 Am. Dec. 47, 9 Conn. 380; *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552.

Illinois. — *Jones v. People*, 19 Ill. App. 309; *Toledo, etc., R. Co. v. Arnold*, 43 Ill. 418; *Warner v. Ostrander*, 44 Ill. 356; *Aldrich v. Goodell*, 75 Ill. 452; *Brewster v. Van Liew*, 119 Ill. 554, 59 Am. Rep. 823.

Indiana. — *Shelbyville Lateral Branch R. Co. v. Lewark*, 4 Ind. 471.

Kentucky. — *Ormsby v. Johnson*, 1 B. Mon. (Ky.) 80; *Com. v. Lightfoot*, 7 B. Mon. (Ky.) 298; *Arnold v. Com.*, 8 B. Mon. (Ky.) 109; *Murray v. Pate*, 6 Dana (Ky.) 335; *Potts v. Com.*, 4 J. J. Marsh. (Ky.) 202, 20 Am. Dec.

Damages for Breach of Contract. — In applying the general rule as stated to the breach of contracts, it has been said that a party sustaining loss thereby "is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed;"¹ or, that the amount should be what "would have been received if the contract had been kept."² Pursuant to this principle, where there has been a contract to compensate a party for services by a conveyance of land, the measure of damages for a breach is rather the value of the land than of the services, the consideration paid.³ And the same doctrine in its application to personalty has resulted

213; *Com. v. Bradley*, 4 J. J. Marsh. (Ky.) 209; *Taylor v. Com.*, 3 Bibb (Ky.) 356.

Louisiana. — *Marshall v. Simpson*, 13 La. Ann. 437; *Means v. Hyde*, 19 La. Ann. 479.

Maine. — *Hodsdon v. Wilkins*, 7 Me. 113, 20 Am. Dec. 347.

Maryland. — *Strasburger v. Barber*, 38 Md. 103; *Baltimore Bldg. Assoc. No. 2 v. Grant*, 41 Md. 560.

Massachusetts. — *Rockwood v. Allen*, 7 Mass. 254; *Noble v. Ames Mfg. Co.*, 112 Mass. 492; *Parker v. Simonds*, 8 Met. (Mass.) 205; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306; *Danforth v. Pratt*, 9 Cush. (Mass.) 318; *Swift v. Barnes*, 16 Pick. (Mass.) 194.

Michigan. — *Allison v. Chandler*, 11 Mich. 542; *Northrup v. McGill*, 27 Mich. 234.

Missouri. — *Peltz v. Eichele*, 62 Mo. 171; *Huse, etc., Ice, etc., Co. v. Heinze*, 102 Mo. 245.

Nebraska. — *McMurtry v. Blake*, 45 Neb. 213.

Nevada. — *Buckley v. Buckley*, 12 Nev. 423.

New York. — *Griffin v. Colver*, 16 N. Y. 494, 69 Am. Dec. 718; *Baker v. Drake*, 53 N. Y. 216, 13 Am. Rep. 507; *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614; *Baker v. Freeman*, 9 Wend. (N. Y.) 36, 24 Am. Dec. 117; *Clark v. Miller*, 47 Barb. (N. Y.) 38; *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442. And see *Deeves v. Richardson, etc., Co.*, 59 N. Y. Super. Ct. 423.

Pennsylvania. — *Bussy v. Donaldson*, 4 Dall. (Pa.) 206; *Hamner v. Griffith*, 1 Grant's Cas. (Pa.) 193; *Com. v. Allen*, 30 Pa. St. 49; *Morrison v. Robinson*, 31 Pa. St. 456; *Barnett v. Reed*, 51 Pa. St. 190, 88 Am. Dec. 574; *Stauffer v. Miller Soap Co.*, 151 Pa. St. 330.

South Carolina. — *Whiting v. Hammond*, 2 Mill (S. Car.) 151.

Texas. — *Rodgers v. Ferguson*, 36 Tex. 544; *Neill v. Watson*, 39 Tex. 375.

Vermont. — *Hamilton v. Marsh*, 2 Tyler (Vt.) 403; *Gray v. Stevens*, 28 Vt. 1, 65 Am. Dec. 216; *Hurlburt v. Green*, 41 Vt. 490.

Wisconsin. — *Page v. Sumpter*, 53 Wis. 652.

Compensation the Basic Principle. — The principle of compensation for the loss or injury sustained is that which lies at the basis of the whole question of damages in most actions at common law, whether of contract or tort. *Christiancy, J.*, in *Allison v. Chandler*, 11 Mich. 548.

The Cardinal Rule Undoubtedly Is, that the one party shall recover all the damages which have been occasioned by the breach of contract by the other. *Leonard v. New York, etc., Electro Magnetic Tel. Co.*, 41 N. Y. 566, 1 Am. Rep. 446.

"Just Compensation" for Injuries to Property — Loss in Dollars and Cents. — Just compensation, said the court, in *Chicago, etc., R. Co. v. Cicero*, 157 Ill. 56, is the loss sustained in dollars and cents, and the fact of the loss must be shown, together with its amount, not necessarily with precision and accuracy, but approximately.

Where Suit Brought in Foreign Country. — Where a plaintiff who has sustained damages brings his suit in another country, he should recover such a sum in the currency of the latter country as will approximate most nearly to that to which he is entitled in the country where the injury occurred. *Cramer v. Allen*, 5 Blatchf. (U. S.) 248.

Undertaking to Pay in Property — Damages in Money. — In an action upon a contract to pay in tobacco the jury may give damages in money. *Laidlaw v. State*, 2 Har. & G. (Md.) 277.

Compensation for Actual, Not Merely Possible Losses. — Damages for injury to property are given as a compensation for something the owner has lost previous to the commencement of his action, and not for what he might have lost if he had devoted the property to a purpose which he never contemplated. *Tenney, C. J.*, in *Worcester v. Great Falls Mfg. Co.*, 41 Me. 159.

Award of Damages by Arbitrators. — In the case of *Remeles v. Hall*, 31 Vt. 582, 76 Am. Dec. 140, it was held that in awarding damages, arbitrators, in a submission to arbitration, "confessedly have more extended powers in this respect than a court of law, and more like the power of a court of chancery; they may award that payment be made at a future day, and, as we think, by instalments, and may clog its payment by requiring the performance of conditions by the other party before any payment at all be made."

1. *Robinson v. Harman*, 1 Exch. 855.

2. *Alder v. Keighley*, 15 M. & W. 117.

Compensation According to General Rules of Law. — Where there are no express stipulations in a contract to vary the liability of the contracting parties for a breach from that established by the general rules of law, the latter, of course, will be the measure of liability. *Per Isbell, J.*, in *Cannon v. Folsom*, 2 Iowa 101.

3. *Jack v. McKee*, 9 Pa. St. 235; *Bash v. Bash*, 9 Pa. St. 260; *Malaun v. Ammon*, 1 Grant's Cas. (Pa.) 123.

Where Contract to Convey Land Vague and Indefinite. — Where a decedent promised to give the plaintiff an indefinite portion of his estate in return for the rendition of certain services, the measure of damages for breach of the contract against the representatives of the dece-

in the announcement of the rule that the value of a commodity for which one person is responsible to another is its value to the latter, and not to the person sought to be charged.¹ But as will be seen hereafter, the rights of both parties are to be considered in the assessment of damages, a consideration which introduces not a few exceptions to the principle just stated.

b. **RULE THE SAME IN TORT AS IN CONTRACT.** — Whether in contract or in tort, the primary consideration is the same — compensation for the damages suffered.²

c. **INDEMNITY, AMENDS, OR REPARATION.** — Where the damages suffered are not such as are susceptible of estimate by a pecuniary standard, it has been said that the word "compensation" is both inappropriate and misleading, the proper term in such cases being "indemnity," "amends," or "reparation."³

d. **RIGHTS OF BOTH PARTIES CONSIDERED — PARTY CAUSING THE INJURY, AS WELL AS PARTY INJURED.** — The statement that the fundamental principle of the law of damages is complete compensation to the party injured seems to ignore, in terms at least, just consideration of the rights of the party sought to be held responsible for the damages suffered. It has been declared, however, that the rules of law respecting the recovery of damages must be applied with reference to the just rights of both parties, — not merely what it might be right for an injured party to receive to afford compensation for his injury, but also what it is just to compel the other party to pay.⁴ It is not true, however, that the law seeks to divide rather than satisfy the loss.⁵

Reciprocal Violations of Law. — Where there have been reciprocal trespasses

dent is the value of the services rendered, and not of the proportion of the decedent's estate alleged to have been promised. *Graham v. Graham*, 34 Pa. St. 475. The court said, in this case, that to regard such a promise as an enforceable contract would result in nothing less than the establishment of a parol will.

1. *Maysville v. Shultz*, 3 Dana (Ky.) 10. And see *Barnes v. Brown*, 130 N. Y. 372.

2. "The Primary Purpose of awarding damages is, actual compensation to the party injured, whether by a tort or by breach of a contract." *Clopton, J., in Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28. See also cases cited in foregoing notes, and especially *infra*, this title, *Measure of Damages and Elements of Recovery*.

The General and Simplest Rule. — "The general and simplest rule of damages is that the injured party is entitled to compensation for the loss sustained." *Montgomery, J., in Fell v. Newberry*, 106 Mich. 542.

General Rule as to Evidence Admissible. — "In general," said *Agnew, J., in Seely v. Alden*, 61 Pa. St. 302, 100 Am. Dec. 642, "the rule for the measure of damages in cases of tort may be said to be that which aims at actual compensation for the injury; and whatever ascertains this is proper evidence to be submitted to the jury."

3. **Compensation Versus Indemnity, Amends, or Reparation.** — In the case of *Peshine v. Shep-erson*, 17 Gratt. (Va.) 472, 94 Am. Dec. 468, *Joynes, J.*, delivering the opinion of the court, said with reference to the measure of damages: "When the trespass is committed without fraud, malice, oppression, or other special aggravation, the object of the law, it is generally said, is to give compensation for the injury suffered, and damages are restricted to that object. Where the loss is merely pecuniary, and admits of definite estimate, it

is proper enough to speak of compensation, which implies the notion of equivalents. But that word becomes inappropriate where the injury is not merely pecuniary, and does not admit of definite estimate. The use of this word has, I apprehend, been productive of no little confusion in discussions relating to this branch of the law. It would be more appropriate to say that the object of the law is to give amends or reparation. The injury done depends upon the rights that are violated, and the extent of the violation, and the amends or reparation in damages must be measured accordingly." See also *Riely, J., in Burruss v. Hines*, 94 Va. 413.

4. *Allen, J., in Spade v. Lynn, etc., R. Co.*, 168 Mass. 285.

Breach of Alternative Contract. — For the breach of a covenant in the alternative to pay one of two sums of money, one in paper, the other in specie, the measure of damages for the breach is to be determined with reference to the value of the less valuable of the two sums with interest. *White v. Green*, 3 T. B. Mon. (Ky.) 155. And see *Hixon v. Hixon*, 7 Humph. (Tenn.) 33.

In the case of *Essex Co. v. Pacific Mills*, 14 Allen (Mass.) 398, the court said "that in estimating damages when there are different kinds of currency in use, equivalent in law but differing in public estimation and purchasing power in the market, they should be computed in that which is most common; most easily procured; by which the debtor can most conveniently and cheaply * * * satisfy the judgment." And see *Pope v. Campbell*, Hard. (Ky.) 34.

5. **Statement that Law Seeks to Satisfy Rather than Divide the Loss.** — *Selden, J., in Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, said: "It is an error to suppose that the law does not aim at complete compensation for the in-

resulting in damages to each party, it has been held that neither will be permitted to recover against the other.¹

Damages for Failure to Do Illegal Act. — No one can be held liable in damages for not doing an act in itself illegal.²

Loss of Profits in Illegal Business. — Loss of profits may not be considered as an element of damages, where the business from which they would have resulted was or would have been conducted in violation of law.³

Where Plaintiff Has Participated in Act Complained of. — There can be no recovery in damages against a municipal corporation for the alleged illegal acts of its officers, if, with knowledge of the illegality of such acts, the plaintiff himself assisted in their performance.⁴ And where an action for damages was brought by a plaintiff against a defendant for a diversion of the water of a stream, which it appeared the defendant could not have used but for the plaintiff's having dammed up the stream, whereby the water overflowed the defendant's land, it was held that only nominal damages were recoverable.⁵

Inability of Party to Perform Contract No Defense to an Action for Its Breach. — The fact that a defendant undertook absolutely to perform a thing which would necessarily require the concurrence of others, will, nevertheless, upon nonperformance render him liable in damages, though his failure to perform be due to the nonconcurrence of the other parties. Thus damages may be recovered for breach of an agreement by one of several partners to admit a stranger into the firm, the agreement having been entered into without the knowledge of his associates.⁶

Party Should Sustain Loss Who Has Undertaken the Risk of It. — Where, if an event happen, it must unavoidably cause loss and damage to one or the other of two contracting parties, the party who has contracted that such an event should not happen, although he cannot specifically perform that contract because the event may happen through the act of God or inevitable necessity, should yet stand to that risk and make good all the loss which shall occur in consequence of the happening of the event contemplated.⁷

c. VARIOUS METHODS OF COMPUTING DAMAGES. — A party is not confined to a single mode of measuring or estimating his damages. Where the case admits of it he may resort to different means of arriving at the result, to be judged of by the jury, under proper instructions.⁸ No one method need be

jury sustained, but seeks rather to divide than satisfy the loss." And see *Stearns v. Cook*, 28 Ill. App. 511.

In the case of *Allison v. Chandler*, 11 Mich. 549, the court said: "We concur entirely with the court of appeals in New York, in *Griffin v. Colver*, 16 N. Y. 492, 69 Am. Dec. 718, in repudiating the doctrine adopted by Mr. Sedgwick from Domat (Sedg. on Dam. 3, 37, 38, etc.), that 'the law aims not at the satisfaction but the division of the loss.' Such, it is true, is often the result of an action, but never the object of the law. The law may, and often does, fail of doing complete justice, from the imperfection of its means of ascertaining truth, and tracing and apportioning effects to their various causes; but it is not liable to the reproach of doing positive injustice by design."

1. *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199. And see *The Cordelia*, 5 Nova Scotia 772.

2. *Smith, C. J.*, in *Anders v. Ellis*, 87 N. Car. 207.

3. *Libbey, J.*, in *Holmes v. Halde*, 74 Me. 28, 43 Am. Rep. 567. And see *Boulard v. Calhoun*, 13 La. Ann. 445, where it was held

that testimony going to show that the business carried on by the plaintiff consisted chiefly in illegal traffic was admissible to rebut a claim for exemplary damages.

4. *Owens v. Milwaukee*, 47 Wis. 461.

5. *Shotwell v. Dodge*, 8 Wash. 337.

6. *M'Neill v. Reid*, 9 Bing. 68, 23 E. C. L. 265.

7. *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 441.

8. *Rogers v. Bemus*, 69 Pa. St. 432. And see *McDonald v. Dodge County*, 41 Neb. 905.

Several Methods of Estimating Damages. — In the case of *Seely v. Alden*, 61 Pa. St. 302, 100 Am. Dec. 642, which seems to have been an action for damages on account of the lodgment of tanbark in the plaintiff's mill pond, *Agnew, J.*, delivering the opinion of the Appellate Court, said with reference to the trial in the court below: "We think the court erred * * * in refusing to admit both methods of computing the permanent damages; to wit, that which measures the damages by the different values of the land with and without the deposit, and that which measures them by the cost of removing the deposit. It is often difficult for a court to determine the

adopted to the exclusion of others. Where there is more than one mode of estimating the amount, either one or all may be resorted to, as under the necessities and circumstances of the particular case may best serve to accomplish the fundamental object — that of awarding the injured party compensation for his loss.¹ Where in a case there are different modes of measuring the damages depending on circumstances, the proper course is, it has been said, to hear all the evidence and then to instruct the jury as the circumstances require.² When, however, it is shown that one method of estimating the damages is more definite and certain than others, the former should be adopted.³

2. Requisites to the Recovery of Damages — a. GENERALLY. — In order that there may be a recovery in damages there must be (1) a wrongful act, (2) loss resulting, (3) adequate proof of both — which last essential is but the broad general rule requiring a plaintiff to make out his case. "It is a fundamental principle," it has been said, "applicable alike to breaches of contract and to torts, that in order to found a right of action there must be a wrongful act done, and a loss resulting from that wrongful act; the wrongful act must be the act of the defendant, and the injury suffered by the plaintiff must be the natural and not merely a remote consequence of the defendant's act. The wrong done and the injury sustained must bear to each other the relation of cause and effect; and the damages, whether they arise from withholding a legal right or the breach of a legal duty, to be recoverable, must be the natural and proximate consequence of the act complained of."⁴

As a Corollary to the third requirement above stated it has been held that where two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether without the concurrence of both it would have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had, because it cannot be judicially determined that the damages would have resulted without such concurrence, so that the consequences cannot be attributed to that cause for which the defendant is responsible.⁵

Plaintiff Must Show Damage, and Extent of It. — In order to recover damages the plaintiff must not only show that he has sustained damage, but also show with reasonable certainty the extent of it.⁶ Damages to be recoverable, therefore, must be susceptible of reasonably accurate computation.⁷ Thus it has been held that loss sustained by a mercantile firm from the seizure of their property under a void execution, resulting in loss of profits in their business subsequent to the release of the property from the seizure, is not susceptible of computation

true measure until all the evidence is in. It may turn out that the cost of removing the deposit in a certain case would be less than the difference in the value of the land, and then the cost of removal would be the proper measure of the damages; or it may be that the cost of removal would be much greater than the injury by the deposit, when the true measure would be the difference in value merely."

1. Knowles v. Leggett, 7 Colo. App. 265; Colorado Consol. Land, etc., Co. v. Hartman, 5 Colo. App. 150; Consolidated Home Supply Ditch, etc., Co. v. Hamlin, 6 Colo. App. 341.

2. Agnew, J., in Seely v. Alden, 61 Pa. St. 302, 100 Am. Dec. 642.

3. Selden, J., in Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718.

Damages Should Be Certain in Their Nature and Source. — In an action for damages for breach of a contract, the measure of recovery is limited to such damages as may be fairly supposed to have entered into the contemplation of the contracting parties; such as might nat-

urally be expected to flow from a violation of the contract; such as are certain, both in their nature and in respect to the cause from which they proceed. Cassidy v. LeFevre, 45 N. Y. 562; Colrick v. Swinburne, 105 N. Y. 507.

For certainty of damages, see *infra*, this title, *Uncertain, Contingent, and Speculative Damages*.

4. Warwick v. Hutchinson, 45 N. J. L. 61.

5. Shaw, C. J., in Marble v. Worcester, 4 Gray (Mass.) 395. And see York v. Canada Atlantic Steamship Co., 22 Can. Sup. Ct. Rep. 167.

6. Riely, J., in Burruss v. Hines, 94 Va. 413; Hair v. Barnes, 26 Ill. App. 580.

Right of Recovery — Extent of Loss. — One seeking a recovery in damages must show by proof both his right to recover and the measure or extent of the loss by the injury for which he demands compensation. Dickinson, J., in Fairchild v. Rogers, 32 Minn. 269.

7. Selden v. Cashman, 20 Cal. 56, 51 Am. Dec. 93. See *infra*, this title, *Uncertain, Contingent, and Speculative Damages*.

with that reasonable degree of certainty required, and hence evidence concerning such loss as an element of damages is properly excluded.¹

b. NECESSITY FOR LEGAL INJURY. — One cannot in all cases look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear without redress.² The rule is that damages to be recoverable must be the result of some act which in the eyes of the law is deemed an injury.³

No Redress for Unavoidable Accidents. — The law, it has been said, gives no redress for unavoidable accidents.⁴ Under some circumstances, however, it seems there may be a liability in damages for permitting the continuance of conditions, themselves the result of unavoidable accident.⁵

How the Nature of an Act May Be Affected by the Motives of Its Commission. — It has been intimated in this connection that, under certain circumstances, an act which if innocently done would not constitute an injury in law, if maliciously or negligently committed and damages result, might afford ground for a recovery in damages.⁶

Damages for the Proper Exercise of a Legal Right. — In contemplation of law no injury can result from the proper exercise of a legal right, and so there can be no recovery though there be incidental damage to another.⁷

Damages for the Improper Exercise of Legal Right. — But in the improper exercise of a legal right, that is, the exercise of a legal right in a negligent or unskilful manner, a party will be liable in damages for resultant injury.⁸

Where Lawful Act May Naturally Result in Injury. — If a voluntary act, though lawful in itself, may naturally result in injury to another or the violation of his legal rights, the actor must at his peril see to it that such injury or violation does not follow, or he must expect to respond in damages therefor; and this is true regardless of the motive or the degree of care with which the act is performed.⁹

1. *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93.

2. *Bononi v. Backhouse*, El. Bl. & El. 622, 96 E. C. L. 622; *Smith v. Thackerah*, L. R. 1 C. P. 564.

3. **There Must Be Legal Injury — England.** — *Bononi v. Backhouse*, El. Bl. & El. 622, 96 E. C. L. 622; *Smith v. Thackerah*, L. R. 1 C. P. 564.

Canada. — *Robert v. Les Curé et Marguilliers*, etc., 9 Quebec L. R. Super. Ct. 489.

Louisiana. — *Koelmel v. New Orleans*, etc., R. Co., 27 La. Ann. 442; *Barbin v. Police Jury*, 15 La. Ann. 559.

Maryland. — *Baltimore*, etc., R. Co. *v. Reaney*, 42 Md. 119; *Shafer v. Wilson*, 44 Md. 268.

Missouri. — *Porter v. North Missouri R. Co.*, 33 Mo. 128.

New Jersey. — *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49.

New York. — *Lasala v. Holbrook*, 4 Paige (N. Y.) 169, 25 Am. Dec. 524.

Pennsylvania. — *New York*, etc., R. Co. *v. Young*, 33 Pa. St. 180.

Vermont. — *Hatch v. Vermont Cent. R. Co.*, 28 Vt. 142.

Thus where a mortgagee gratuitously promised the mortgagor not to foreclose a mortgage under a power of sale contained therein except under certain conditions, but was afterwards induced by the falsehood of the defendants to assign the mortgage, whereby there was a foreclosure in violation of the conditions formerly agreed upon between the mortgagor and mortgagee, it was held that the mortgagor could not recover against the defendants

for their fraud and falsehood, for the reason that the promise of the mortgagee was without consideration and not enforceable therefor against either him or an assignee. *Randall v. Hazelton*, 12 Allen (Mass.) 412.

4. *McGrew v. Stone*, 53 Pa. St. 436. And see *Wabash*, etc., R. Co. *v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193; *Vedder v. Hildreth*, 2 Wis. 427.

5. *Morrison v. Thurman*, 17 B. Mon. (Ky.) 249, 66 Am. Dec. 153.

6. **The Question of Motive.** — See *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445. See also title DAMNUM ABSQUE INJURIA, *post*. In the case of *Chatfield v. Wilson*, 28 Vt. 49, however, it is said that an act legal in itself and which violates no legal right, cannot be made actionable on account of the motives which induce it. See also *Bradford Corp. v. Pickles*, (1895) A. C. 587; *Allen v. Flood*, (1898) A. C. 1; *Perrault v. Gauthier*, 28 Can. Sup. Ct. Rep. 241.

7. *Randall v. Hazelton*, 12 Allen (Mass.) 412; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Clark v. Foot*, 8 Johns. (N. Y.) 421; *Panton v. Holland*, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; *Platt v. Johnson*, 15 Johns. (N. Y.) 213, 8 Am. Dec. 233; *Uline v. New York Cent.*, etc., R. Co., 101 N. Y. 98, 53 Am. Rep. 123, note.

8. *Woodworth, J.*, in *Panton v. Holland*, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369.

9. *Helm, J.*, in *Golden Boulder*, etc., R. Co. *v. Eagles*, 9 Colo. 544. *Citing Rylands v. Fletcher*, L. R. 3 H. L. 330; *Phinizy v. Augusta*, 47 Ga. 260; *Cooper v. Randall*, 53 Ill.

Damages for the Legitimate Use of One's Own Property. — Though there may be consequential damages to others from the proper, legitimate use of one's own property, no such act constitutes that legal injury of which the resulting damage is recoverable.¹

Damages for the Proper Performance of Public Duties. — No action can be maintained for injuries resulting to individuals from acts done by persons in the execution of public duties, where the performance of such duties is with due skill and caution and within the limits of the authority conferred.²

Damages for the Proper Abatement of a Nuisance. — A house on fire, as well as those buildings in its immediate vicinity which serve to communicate the flames, is a nuisance, properly abatable by an individual whose person or property is endangered. A person, therefore, who tears down or destroys the house of another in such an emergency is not liable in damages to the owner of the property destroyed, where the necessity for the action taken is made to appear. And goods in a house so destroyed are equally liable to the necessities of the occasion with the house in which they are contained.³

24; *Scott v. Bay*, 3 Md. 431; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184; *Tremain v. Cohoes Co.*, 2 N. Y. 163; *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258.

1. *Smith v. Thackerah*, L. R. 1 C. P. 564, 35 L. J. C. P. 276, 12 Jur. N. S. 545, 14 L. T. N. S. 761, 14 W. R. 832; *Wabash, etc., Canal v. Spears*, 16 Ind. 441. And see *Lynn v. Adams*, 2 Ind. 143; *New Albany, etc., R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60; *Hamilton County v. Mighels*, 7 Ohio St. 100.

Mining Operations — Cutting Off Water Supply. — Thus the owner of land through which a subterranean current of water flows cannot maintain an action against a neighboring landowner who, in conducting mining operations on his own premises in a usual and proper manner, cuts off the supply of water from the land of the first-mentioned owner. *Acton v. Blundell*, 12 M. & W. 324.

Natural Use of Stream — Pollution and Increasing Volume of Water. — One operating a coal mine in the ordinary and usual manner may, upon his own lands, drain or pump the water which percolates into his mine into a stream which forms the natural drainage of the basin in which the mine is situated, although the quantity of the water may thereby be increased and its quality so affected as to render it wholly unfit for domestic purposes by the lower riparian owners. *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445. See the title **WATERS AND WATER-COURSES**.

Diversion of Subterranean Current by Digging Well. — And though the digging of a well or the making of excavations on one's own premises diverts, diminishes, or renders unfit for use a supply of water furnished by an underground stream to an adjacent proprietor, such act is, nevertheless, not a legal injury as to the person injured.

England. — *New River Co. v. Johnson*, 2 El. & El. 435, 105 E. C. L. 435; *Chasemore v. Richards*, 2 H. & N. 168; *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710, 113 E. C. L. 710; *Hodgkinson v. Ennor*, 4 B. & S. 229, 116 E. C. L. 229; *Dickinson v. Grand Junction*

Canal Co., 7 Exch. 282; *Broadbent v. Ramsbotham*, 11 Exch. 602.

Connecticut. — *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Brown v. Illius*, 25 Conn. 593.

Maine. — *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419.

Massachusetts. — *Parker v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 107, 50 Am. Dec. 709; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117.

Nevada. — *Mosier v. Caldwell*, 7 Nev. 363.

New York. — *Ellis v. Duncan*, 21 Barb. (N. Y.) 230; *Delhi v. Youmans*, 50 Barb. (N. Y.) 316.

Ohio. — *Frazier v. Brown*, 12 Ohio St. 294.

Pennsylvania. — *Wheatley v. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. St. 518, 84 Am. Dec. 511; *Lybe's Appeal*, 106 Pa. St. 626, 51 Am. Rep. 542.

Vermont. — *Chatfield v. Wilson*, 28 Vt. 49; *Clark v. Conroe*, 38 Vt. 469.

Excavations on One's Own Premises. — An excavation made upon one's own premises with due care and upon proper notice to an adjoining proprietor is, as to the latter, not an injury in law, though it cause danger or damage to the buildings on the latter's premises. *Wyatt v. Harrison*, 3 B. & Ad. 871, 23 E. C. L. 205; *Winn v. Abeles*, 35 Kan. 91, 57 Am. Rep. 138; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *McGuire v. Grant*, 25 N. J. L. 356, 67 Am. Dec. 49; *Panton v. Holland*, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169, 25 Am. Dec. 524; *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279.

2. *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. L. 148.

Grading of Streets — Inconvenience of Ingress and Egress. — Damage resulting from the proper grading of streets and highways, so far as it consists in merely rendering the passage to and from property adjoining more inconvenient or expensive, falls within this class. *Protzman v. Indianapolis, etc., R. Co.*, 9 Ind. 467, 68 Am. Dec. 650; *Lafayette v. Spencer*, 14 Ind. 399; *Wabash, etc., Canal v. Spears*, 16 Ind. 441. And see *Macy v. Indianapolis*, 17 Ind. 270; *New Albany, etc., R. Co. v. Higman*, 17 Ind. 594.

3. *Surocco v. Geary*, 3 Cal. 70, 58 Am. Dec.

c. NECESSITY FOR RESULTANT DAMAGE — (1) *In General.* — It may be stated as an obvious general rule that in order that there may be a recovery, some damage must be shown to have resulted from the act complained of. But, as will be seen hereafter, whenever injury is done to a legal right, actual, perceptible damage is not indispensable to the maintenance of an action. It is sufficient to show the violation of the right, when the law will presume damage.¹ The law considers the infringement of the rights of a party an injury for which damages must be given, because upon no other principle could one's rights be protected. Every infringement of them may, to some extent, endanger the right itself; in some cases, indeed, a continuance of the infringement would, in time, deprive the party altogether of his right.²

(2) *Injuria Sine Damno.* — Where damages are the gist of an action and none are shown, there can be no recovery, the situation being described as *injuria sine damno*.³

(3) *Legal Presumption of Damage.* — For every violation, invasion, or infringement of a legal right the law implies damage;⁴ when substantial dam-

385. And see *American Print Works v. Lawrence*, 23 N. J. L. 9; *Russell v. New York*, 2 Den. (N. Y.) 461; *Field v. Des Moines*, 39 Iowa 575, 18 Am. Rep. 46.

1. *Embrey v. Owen*, 6 Exch. 353; *Whipple v. Cumberland Mfg. Co.*, 2 Story (U. S.) 661; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35; *Fitch v. Fitch*, 35 N. Y. Super. Ct. 302; *Hood v. Palm*, 8 Pa. St. 239; *Seat v. Moreland*, 7 Humph. (Tenn.) 575; *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75.

2. *Hinman, J.*, in *Nicholson v. New York*, etc., R. Co., 22 Conn. 74, 56 Am. Dec. 390.

3. *Injuria Sine Damno* — *United States*. — *Pollard v. Lyon*, 91 U. S. 225.

Indiana. — *North Vernon v. Voegler*, 103 Ind. 314.

Kansas. — *Stark v. Chitwood*, 5 Kan. 141.

Missouri. — *Birch v. Benton*, 26 Mo. 153; *Speaker v. McKenzie*, 26 Mo. 255.

New York. — *Kendall v. Stone*, 5 N. Y. 14; *Dung v. Parker*, 52 N. Y. 494; *Commercial Bank v. Ten Eyck*, 48 N. Y. 305; *McGee v. Roen*, 4 Abb. Pr. (N. Y. Super. Ct.) 8; *Franklin v. Smith*, 21 Wend. (N. Y.) 624; *Ford v. Smith*, 1 Wend. (N. Y.) 48; *Badeau v. Mead*, 14 Barb. (N. Y.) 328; *Kimball v. Connolly*, 3 Keyes (N. Y.) 57; *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104; *Allen v. Addington*, 7 Wend. (N. Y.) 9; *Millard v. Jenkins*, 9 Wend. (N. Y.) 298; *Butler v. Kent*, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219; *Dayton v. Parke*, 142 N. Y. 301.

Pennsylvania. — *Mayer v. Walter*, 64 Pa. St. 283.

Defective Certificate of Acknowledgment to Worthless Mortgage. — Where, through the negligence of a notary public, the certificate of acknowledgment to a chattel mortgage was invalid, it was held, nevertheless, that he was not liable in damages to the mortgagee, the property intended to be conveyed being shown to be wholly valueless. *McAllister v. Clement*, 75 Cal. 182.

4. **Presumption of Damage** — *England*. — *Ashby v. White*, 2 Ld. Raym. 938, 1 Smith's L. Cas., 8th Am. ed., *264, 1 Salk. 19, 6 Mod. 45; *Baker v. Green*, 2 Bing. 317, 9 E. C. L. 419; *Embrey v. Owen*, 6 Exch. 353, 20 L. J. Exch. 212, 15 Jur. 633; *Nichol v. Bestwick*, 28 L. J. Exch. 4; *Johnson v.*

Stear, 15 C. B. N. S. 330, 109 E. C. L. 330, 33 L. J. C. P. 130, 9 L. T. N. S. 804, 12 W. R. 347; *Tolton v. Canadian Pac. R. Co.*, 22 Ont. Rep. 204; *McLeod v. Boulton*, 3 U. C. Q. B. 84; *Doe v. Ausman*, H. T. 6 Vict.; *Warren v. Deslippe*, 33 U. C. Q. B. 59; *Guest v. Macpherson*, 3 Leg. N. 84; *Hiort v. London*, etc., R. Co., 4 Exch. Div. 188, 48 L. J. Exch. Div. 545, 40 L. T. N. S. 674, 27 W. R. 778; *Marzetti v. Williams*, 1 B. & Ad. 415, 20 E. C. L. 412; *Warre v. Calvert*, 7 Ad. & El. 143, 34 E. C. L. 58; *Northam v. Hurley*, 1 El. & Bl. 665, 72 E. C. L. 665; *River Medway Nav. Co. v. Romney*, 9 C. B. N. S. 575, 99 E. C. L. 575; *Bealey v. Shaw*, 6 East 208; *Fray v. Voules*, 1 El. & El. 839, 102 E. C. L. 839; *Patrick v. Greenway*, cited in 1 Saund. 346^h, note; *Sampson v. Hoddinott*, 1 C. B. N. S. 590, 87 E. C. L. 590; *Fay v. Prentice*, 1 C. B. 828, 50 E. C. L. 828.

United States. — *Whipple v. Cumberland Mfg. Co.*, 2 Story (U. S.) 661; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189.

Alabama. — *Bagby v. Harris*, 9 Ala. 173; *Adams v. Robinson*, 65 Ala. 586; *Drum v. Harrison*, 83 Ala. 384.

Arkansas. — *Barlow v. Lowder*, 35 Ark. 492.

California. — *Browner v. Davis*, 15 Cal. 9; *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567; *Empire Gold Min. Co. v. Bonanza Gold Min. Co.*, 67 Cal. 406; *Hancock v. Hubbell*, 71 Cal. 537.

Connecticut. — *Chapman v. Thames Mfg. Co.*, 13 Conn. 269, 33 Am. Dec. 401.

Georgia. — *Green v. Weaver*, 63 Ga. 302; *Kenny v. Collier*, 79 Ga. 743; *Addington v. Western*, etc., R. Co., 93 Ga. 566.

Illinois. — *Aurora v. Hillman*, 60 Ill. 61; *McConnel v. Kibbe*, 33 Ill. 175, 85 Am. Dec. 265; *Burnap v. Wight*, 14 Ill. 301; *Brant v. Gallup*, 111 Ill. 487, 53 Am. Rep. 638; *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35; *Plumbleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 109.

Indiana. — *Reed v. Hamilton*, 18 Ind. 476; *Stevens v. McClure*, 56 Ind. 384.

Iowa. — *Plummer v. Harbut*, 5 Iowa 308.

Maine. — *Hathorne v. Stinson*, 12 Me. 183, 28 Am. Dec. 167; *Jewett v. Whitney*, 43 Me. 242; *Munroe v. Sickney*, 48 Me. 462.

Massachusetts. — *Selfridge v. Lithgow*, 2 Mass. 374; *McAneany v. Jewett*, 10 Allen

age is not shown it implies the smallest amount of it, but still an amount sufficient to the maintenance of an action.¹

Actions for Damages under Statutes. — Wherever a right of action for damages is given by statute, damages will be presumed, though none are proved, where the cause of action is shown to exist.²

Where a Sheriff Neglected to Return an Execution it was held that, though there were no actual damages proved, there was, nevertheless, a neglect of duty from which the law would presume damages.³

(Mass.) 151; *Cook v. Hull*, 3 Pick. (Mass.) 269, 15 Am. Dec. 208; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 246; *Stowell v. Lincoln*, 11 Gray (Mass.) 434; *Pollard v. Porter*, 3 Gray (Mass.) 312; *Pond v. Merrifield*, 12 Cush. (Mass.) 181; *Newcomb v. Wallace*, 112 Mass. 25; *Smith v. Whiting*, 100 Mass. 122.

Minnesota. — *Vogel v. Osborne*, 34 Minn. 454; *Cowley v. Davidson*, 10 Minn. 392.

Missouri. — *Fulkerson v. Eads*, 19 Mo. App. 620; *Dulaney v. St. Louis Sugar Refining Co.*, 42 Mo. App. 659; *Mize v. Glenn*, 38 Mo. App. 98; *Weber v. Squier*, 51 Mo. App. 601; *Jones v. Hannovan*, 55 Mo. 462.

Nebraska. — *Carver v. Taylor*, 35 Neb. 429. *New Hampshire.* — *Bassett v. Salisbury Mfg. Co.*, 28 N. H. 438; *Smith v. Jefts*, 44 N. H. 482; *Blodgett v. Stone*, 60 N. H. 167.

New York. — *Fitch v. Fitch*, 35 N. Y. Super. Ct. 302; *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242; *Dixon v. Clow*, 24 Wend. (N. Y.) 188; *Alfaro v. Davidson*, 40 N. Y. Super. Ct. 87; *Devendorf v. Wert*, 42 Barb. (N. Y.) 227; *Chamberlain v. Parker*, 45 N. Y. 569; *Derleth v. Degraaf*, 51 N. Y. Super. Ct. 369; *Pierce v. Hosmer*, 66 Barb. (N. Y.) 345; *Baker v. Manhattan R. Co.*, 118 N. Y. 533; *Quin v. Moore*, 15 N. Y. 432; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 28 Am. St. Rep. 575.

North Carolina. — *Bond v. Hilton*, 2 Jones L. (47 N. Car.) 149; *Ledbetter v. Morris*, 3 Jones L. (48 N. Car.) 543; *Kimel v. Kimel*, 4 Jones L. (49 N. Car.) 121; *White v. Griffin*, 4 Jones L. (49 N. Car.) 139; *Clinton v. Mercer*, 3 Murph. (7 N. Car.) 119.

Ohio. — *Coe v. Peacock*, 14 Ohio St. 187.

Pennsylvania. — *Williams v. Esling*, 4 Pa. St. 486, 45 Am. Dec. 710; *Ripka v. Sergeant*, 7 W. & S. (Pa.) 9, 42 Am. Dec. 214; *Delaware, etc., Canal Co. v. Torrey*, 33 Pa. St. 143; *Graver v. Sholl*, 42 Pa. St. 58; *Hood v. Palm*, 8 Pa. St. 239; *Kirkham v. Sharp*, 1 Whart. (Pa.) 333, 29 Am. Dec. 57.

Tennessee. — *Seat v. Moreland*, 7 Humph. (Tenn.) 575.

Texas. — *Carter v. Wallace*, 2 Tex. 206; *Hope v. Alley*, 9 Tex. 394; *Champion v. Vincent*, 20 Tex. 811.

Vermont. — *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75; *Fullam v. Stearns*, 30 Vt. 443.

Washington. — *Hadlan v. Ott*, 2 Wash. Ter. 165.

Wisconsin. — *Murphy v. Fond du Lac*, 23 Wis. 365, 99 Am. Dec. 181.

And see *Conroy v. Flint*, 5 Cal. 327; *Flint v. Clark*, 13 Conn. 361; *Indianapolis, etc., R. Co. v. Birney*, 71 Ill. 391.

Every Injury Implies a Damage. — In *Ashby v. White*, 2 Ld. Raym. 955, Lord Holt declared that "every injury imports a damage, though it does not cost the party one farthing."

In the case of *Clifton v. Hooper*, 6 Q. B. 468, 51 E. C. L. 468, which was an action for not executing a *ca. sa.*, the jury found the defendant in default, but that the plaintiff had sustained no damage, and judgment was given for the plaintiff for nominal damages. Lord Denman, in that case, said: "When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount. There is no authority to the contrary."

Wrongful Distress by Landlord — Nominal Damages. — The case of *Taylor v. Henniker*, 12 Ad. & El. 488, 40 E. C. L. 105, was an action for damages brought by a tenant against his landlord for illegally distraining for more rent than was due. It appeared that the proceeds of the sale were insufficient to satisfy the rent actually in arrear, but the jury found a verdict for the plaintiff for one shilling. A motion was made on the part of the defendant for a nonsuit, which was denied. Denman, C. J., said: "There was a wrongful act of the defendant, and though, by reason of the value of the goods taken falling short of the actual rent due, no real damage was sustained, yet there was a legal damage and cause of action for which the plaintiff was entitled to a verdict."

Waiver of Right to Damages. — Damages, in the dissolution of an injunction, should not be awarded to a defendant who has waived his right to them, although a statute peremptorily directs a decree for damages on the dissolution of an injunction. *Mitcherson v. Dozier*, 7 J. J. Marsh. (Ky.) 53, 22 Am. Dec. 116. The statute only directs a decree for damages, said the court in this case, "because the defendant is entitled to them. But surely he can release or waive such a right as well as any other; and when he does so, the chancellor should not, against his will, force him to take damages."

1. *Gibson, C. J.*, in *Hood v. Palm*, 8 Pa. St. 237.

2. *Quin v. Moore*, 15 N. Y. 433; *McIntyre v. New York Cent. R. Co.*, 43 Barb. (N. Y.) 532; *Ihl v. Forty-second St., etc., R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450; *Whitemore v. Cutter*, 1 Gall. (U. S.) 429; *Lafin v. Willard*, 16 Pick. (Mass.) 64, 26 Am. Dec. 629.

Where the Law Gives an Action for a Particular Act. — In *Whitemore v. Cutter*, 1 Gall. (U. S.) 429, Mr. Justice Story said: "We are, however, of opinion that where the law gives an action for a particular act, the doing of that act imports of itself a damage to the party. Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage."

3. *Lafin v. Willard*, 16 Pick. (Mass.) 64, 26 Am. Dec. 629.

In Every Contract Implying a Duty to Be Performed, the neglect of that duty gives in law a cause of action to the opposite party; and where the law gives an action, it presumes damages for the violated right.¹

Wrongful Refusal to Pay Check. — In an action against a banker for refusing to pay a check when the drawer had funds subject to check on deposit, it was held that damages would be presumed though no actual loss was shown.²

But Unnecessarily Causing a Check to Be Protested is not a wrong from which damage is presumed to result to the drawer.³

Action for Conspiracy to Defame. — And it has been held in an action on the case for a conspiracy to defame by circulating false statements that the defendant had defrauded a third person, that the law would presume damage though the alleged injurious language was not in itself actionable.⁴

Presumption of Damage though Actual Benefit Be Proved. — It has even been held that where the technical violation of a legal right is shown, the law will presume damage though the proof shows that the plaintiff actually derived benefit from the act of the defendant.⁵

(4) **Nominal Damages.** — As has been before stated, nominal damages are such as are awarded not as compensation for any injury, but merely in recognition of the plaintiff's right and its technical infraction by the defendant.⁶

Proof of Substantial Damages — Where Contract Itself Furnishes Measure. — To entitle a plaintiff, in an action for the breach of a contract, to recover more than nominal damages for its breach, there must always be evidence that actual loss or injury has been sustained, unless the contract itself furnishes a guide to the measurement of the damages.⁷

(a) **Nominal Damages as Presumed by Law.** — The damages presumed by law for the violation of a right, in the absence of all proof of damage, to which reference has been made in a preceding paragraph, are in amount only nominal.⁸

1. *Bond v. Hilton*, 2 Jones L. (47 N. Car.) 149.

2. *Marzetti v. Williams*, 1 B. & Ad. 415, 20 E. C. L. 412.

3. *Wittich v. Pensacola First Nat. Bank*, 20 Fla. 843, 51 Am. Rep. 631.

4. *Hood v. Palm*, 8 Pa. St. 239.

5. *Jewett v. Whitney*, 43 Me. 242.

6. See *supra*, this title, *Definition and Terminology — Nominal and Substantial Damages.*

Nominal Damages by Way of Declaration or Recognition of Plaintiff's Rights. — Wherever there is a breach of an agreement or the invasion of a right, the law infers some damage, and if no evidence is given of any particular amount of loss, it gives nominal damages by way of declaring the right, upon the maxim *ubi jus ibi remedium*. *Bond v. Hilton*, 2 Jones L. (47 N. Car.) 149.

7. *Adams Express Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382.

The Presumption of Law, it has been said, where there has been no fraud, is against the demand of the plaintiff. *Clunnes v. Pezzey*, 1 Campb. 8; *Lawton v. Sweeney*, 8 Jur. 964.

8. **Nominal Damages — Presumption — England.** — *Marzetti v. Williams*, 1 B. & Ad. 415, 20 E. C. L. 412; *Ashby v. White*, 1 Salk. 19; *Griffiths v. Perry*, 1 El. & El. 680, 102 E. C. L. 680, 28 L. J. Q. B. 204, 5 Jur. N. S. 1076; *Wood v. Waud*, 3 Exch. 748; *Kelly v. Sherlock*, L. R. 1 Q. B. 686; *McQuarrie v. Fargo*, 21 U. C. C. P. 478.

United States. — *U. S. v. Young*, 44 Fed. Rep. 165; *Dow v. Humbert*, 91 U. S. 294; *U. S. v. Patrick*, 73 Fed. Rep. 800; *Troy Laundry*

Machinery Co. v. Dolph, 138 U. S. 617; *Whittemore v. Cutter*, 1 Gall. (U. S.) 429; *Hemingway Mfg. Co. v. Council Bluffs Canning Co.*, 62 Fed. Rep. 897.

Alabama. — *Treadwell v. Tillis*, 108 Ala. 262; *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72.

Connecticut. — *Flint v. Clark*, 13 Conn. 361.

Georgia. — *Henry v. Central R., etc., Co.*, 89 Ga. 815; *Grier v. Ward*, 23 Ga. 145.

Illinois. — *Kurrus v. Seibert*, 11 Ill. App. 319; *Terre Haute, etc., R. Co. v. Vanatta*, 21 Ill. 188, 74 Am. Dec. 96; *Olmstead v. Burke*, 25 Ill. 86; *Wallis v. Keeney*, 88 Ill. 370.

Indiana. — *Small v. Reeves*, 14 Ind. 163; *Hacker v. Blake*, 17 Ind. 97; *Holman v. Creagmiles*, 14 Ind. 177; *Overhiser v. McCollister*, 10 Ind. 41; *Freese v. Crary*, 29 Ind. 524; *Coffin v. State*, 144 Ind. 578; *Rosenbaum v. McThomas*, 34 Ind. 331; *Lowe v. Turpie*, 147 Ind. 652; *Browning v. Simons*, 17 Ind. App. 45; *Black v. Coan*, 48 Ind. 385.

Iowa. — *Plummer v. Harbut*, 5 Iowa 308; *Nosler v. Hunt*, 18 Iowa 212; *Carl v. Granger Coal Co.*, 69 Iowa 519.

Maine. — *Copeland v. Copeland*, 30 Me. 446; *Stowell v. Bennett*, 34 Me. 422; *Jewett v. Whitney*, 43 Me. 242.

Massachusetts. — *Pond v. Merrifield*, 12 Cush. (Mass.) 181; *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 246; *Stowell v. Lincoln*, 11 Gray (Mass.) 434; *Cook v. Hull*, 3 Pick. (Mass.) 269, 15 Am. Dec. 208; *Tufts v. Bennett*, 163 Mass. 398; *Hagan v. Riley*, 13 Gray (Mass.) 515; *Prescott v. True-man*, 4 Mass. 627, 3 Am. Dec. 246; *Wyman v.*

Actions for the Breach of Contract. — Thus in an action for a breach of a contract the plaintiff may recover only nominal damages, unless there be proof of actual substantial damage.¹

Contract for the Sale and Delivery of Goods. — The measure of damages for breach of a contract for the sale and delivery of goods being the difference between the contract price and the market price at the time and place for delivery fixed by the contract, if the goods are purchased at their regular market price, and there is no fluctuation in the market price of such goods before the time stipulated, a plaintiff will be entitled only to nominal damages.²

But though **No Pecuniary Loss Be Proved**, there may be a recovery of substantial damages where the injuries are of such a character that compensation therefor rests within the sound discretion of the jury.³

Ballard, 12 Mass. 304; Harlow v. Thomas, 15 Pick. (Mass.) 66; Tufts v. Adams, 8 Pick. (Mass.) 547; McDonnell v. Cambridge R. Co., 151 Mass. 159; Rich v. Bell, 16 Mass. 294; Todd v. Keene, 167 Mass. 157; Noble v. Hand, 163 Mass. 289.

Michigan. — Dye v. Mann, 10 Mich. 291; Detroit Gas Co. v. Moreton Truck, etc., Co., (Mich. 1897) 69 N. W. Rep. 659.

Mississippi. — Whitehead v. Ducker, 11 Smed. & M. (Miss.) 98; Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332.

Missouri. — Collier v. Gamble, 10 Mo. 467; Mosely v. Hunter, 15 Mo. 322; Biglow v. Carney, 18 Mo. App. 534; Gibson v. Whip Pub. Co., 28 Mo. App. 450; Breen v. Fairbank, 35 Mo. App. 212; Allen v. Davis, 53 Mo. App. 15.

Nebraska. — Jewett v. Wilmot, (Neb. 1897) 71 N. W. Rep. 775.

New Hampshire. — Andrews v. Davison, 17 N. H. 413, 43 Am. Dec. 606; Osgood v. Osgood, 39 N. H. 209; French v. Bent, 43 N. H. 448.

New Jersey. — New Jersey School, etc., Furniture Co. v. Board of Education, 58 N. J. L. 646.

New York. — Quin v. Moore, 15 N. Y. 433; McIntyre v. New York Cent. R. Co., 43 Barb. (N. Y.) 532; Ihl v. Forty-second St., etc., R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Cantor v. Tattersalls, 13 Misc. Rep. (N. Y. C. Pl.) 17; Terwilliger v. Wands, 17 N. Y. 54; Deyo v. Van Valkenburgh, 5 Hill (N. Y.) 242; Swan v. Saddlemire, 8 Wend. (N. Y.) 676; Barnes v. Brown, 130 N. Y. 372; Horton v. Bauer, 129 N. Y. 148; Roome v. Jennings, 3 Misc. Rep. (N. Y. Super. Ct.) 413; Curtis v. Ritzman, 7 Misc. Rep. (N. Y. City Ct.) 254; Conger v. Weaver, 20 N. Y. 140; Horton v. Childs, 37 N. Y. St. Rep. 637.

North Carolina. — Wilson v. Forbes, 2 Dev. L. (13 N. Car.) 30; Cowan v. Silliman, 4 Dev. L. (15 N. Car.) 46; Anders v. Ellis, 87 N. Car. 207; Creech v. Creech, 98 N. Car. 155.

Pennsylvania. — Wilson v. Whitaker, 49 Pa. St. 114.

Tennessee. — Lay v. Bayless, 4 Coldw. (Tenn.) 246; State v. Ward, 9 Heisk. (Tenn.) 100.

Texas. — Hamilton v. Ward, 4 Tex. 356; Smith v. Huizar, 25 Tex. Supp. 205; Moore v. Anderson, 30 Tex. 224; Laredo v. Russell, 56 Tex. 398.

Vermont. — Richardson v. Dorr, 5 Vt. 9, Kidder v. Barker, 18 Vt. 454; Pratt v. Batels, 28 Vt. 685; Fullam v. Stearns, 30 Vt. 443.

Washington. — American Bldg., etc., Assoc. v. Hart, 2 Wash. 594; Shotwell v. Dodge, 8 Wash. 337.

Wisconsin. — Noonan v. Ilsley, 22 Wis. 27; Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68.

And see McElwee v. Bridgeport Land, etc., Co., 54 Fed. Rep. 627; Marks v. Loomer, 4 Ill. App. 198; Black v. Coan, 48 Ind. 385; Frazier v. Clark, 88 Ky. 260; Toomey v. Delaware, etc., R. Co., 2 Misc. Rep. (N. Y. Super. Ct.) 82.

Verdict for One Mill Damages. — It has been held that no judgment can be pronounced on a verdict for one mill damages. Such a verdict, it was said, is a nullity, there being "no such currency as the sum given." Brown v. Smith, 3 Cal. (N. Y.) 81.

But in the case of Frazier v. Lomax, 1 Cranch (C. C.) 328, the court instructed the jury on the assessment of damages on a writ of inquiry, where no evidence of damages was given, that they might and ought to find the smallest possible sum due, which was "one mill, being the smallest money of account known in the United States." There was verdict accordingly.

1. Breach of Contract. — Todd v. Keene, 167 Mass. 157; Detroit Gas Co. v. Moreton Truck, etc., Co., (Mich. 1897) 69 N. W. Rep. 659; Lowe v. Turpie, 147 Ind. 652; U. S. v. Patrick, 73 Fed. Rep. 800.

2. Coffin v. State, 144 Ind. 578; Rosenbaum v. McThomas, 34 Ind. 331.

3. Scott v. Williams, 1 Dev. L. (12 N. Car.) 376; Creech v. Creech, 98 N. Car. 155; Wampach v. St. Paul, etc., R. Co., 22 Minn. 34; Burkett v. Lanata, 15 La. Ann. 337. And see Smith v. Brown, 164 Mass. 584.

Injuries to Health. — In the case of alleged injuries to the health, there may be a recovery of substantial damages though no actual pecuniary damages are shown. Creech v. Creech, 98 N. Car. 155.

Action for Assault and Battery and False Imprisonment. — In Scott v. Williams, 1 Dev. L. (12 N. Car.) 376, which was an action brought by the plaintiff for an assault and battery and false imprisonment, the object of the suit being to ascertain whether the plaintiff in that action, who was held in slavery by the defendant, was not in truth free, the court held that under the circumstances of the case the jury might give more than nominal damages, though there appears to have been no proof of actual damages.

Damages for Failure to Enter Satisfaction of a

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Nominal Damages Irrespective of Proof of Damage. — Nominal damages may be recovered though no damages are proved, and, indeed, though the proof shows that no damages at all were sustained.¹

Breach of Contract of Employment. — Although the measure of damages for breach of a contract for refusing to permit the plaintiff to perform certain work which the defendant had undertaken to pay him for is the difference between the contract price and the cost of performance to the plaintiff, and though it appears that the cost of performance to the plaintiff would have equaled or exceeded the contract price, it has been held, nevertheless, that a verdict for nominal damages will be proper.²

Nominal Damages by Riparian Proprietor though No Actual Damages Suffered. — It has also been held that there may be a recovery in nominal damages for the pollution and unreasonable diminution of the water in a stream, although the defendant's acts did not, either as to the supply or the character of the water, render it less available and useful for the plaintiff's uses.³

(b) **Nominal Damages where Substantial Damages Shown, but Extent Not Proven.** — It has been held that nominal damages are the proper measure of recovery where,

Judgment. — In an action for damages for not entering satisfaction of a judgment under a statute prescribing no specific measure of damages, but limiting them to half of the debt, the court declined to limit the jury to nominal damages, though there was no evidence of special damage. This was held not to have been error, and a verdict for six hundred dollars was sustained, the appellate court observing that "we have no means of measuring the vexation and inconvenience which the defendant's neglect of a plain duty occasioned the plaintiff, and therefore we cannot say that the damages were excessive." *Allen v. Conrad*, 51 Pa. St. 487. And see *Henry v. Sims*, 1 Whart. (Pa.) 187.

Conspiracy to Set Up Satisfied Judgment. — In an action against the parties to a satisfied judgment, for combining to set it up as unsatisfied and to sell the plaintiff's land thereunder, though the execution was void, it was said that proof of actual damage was unnecessary, it being sufficient that the acts of the defendants exposed the plaintiff to the probability of inconvenience, trouble, or expense. *Swan v. Saddlemire*, 8 Wend. (N. Y.) 676. See also *Hunt v. Dowman*, Cro. Jac. 478.

1. *England.* — *Hiort v. London*, etc., R. Co., 4 Exch. Div. 188, 48 L. J. Exch. Div. 545, 40 L. T. N. S. 674, 27 W. R. 778; *Ashby v. White*, 1 Salk. 19; *Kelly v. Sherlock*, L. R. 1 Q. B. 686.

United States. — *Whittemore v. Cutter*, 1 Gall. (U. S.) 429.

Georgia. — *Green v. Weaver*, 63 Ga. 302.

Illinois. — Stock Quotation Tel. Co. v. Board of Trade, 44 Ill. App. 358.

Indiana. — *Browning v. Simons*, 17 Ind. App. 45; *Cory v. Silcox*, 6 Ind. 39.

Massachusetts. — *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 246; *Cook v. Hull*, 3 Pick. (Mass.) 269, 15 Am. Dec. 208; *Stowell v. Lincoln*, 11 Gray (Mass.) 434.

Mississippi. — *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *Chapman v. Copeland*, 55 Miss. 476.

Missouri. — *Weber v. Squier*, 51 Mo. App. 601; *Middleton v. Moore*, 36 Mo. App. 627.

New Hampshire. — *Blodgett v. Stone*, 60 N. H. 167.

New Jersey. — *New Jersey School, etc., Furniture Co. v. Board of Education*, 58 N. J. L. 646.

New York. — *Prendegast v. New York Cent., etc., R. Co.*, 58 N. Y. 653; *Ihl v. Forty-second St., etc., R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450; *McIntyre v. New York Cent. R. Co.*, 43 Barb. (N. Y.) 532.

North Carolina. — *Brumble v. Brown*, 73 N. Car. 476; *Ledbetter v. Morris*, 3 Jones L. (48 N. Car.) 543; *Wright v. Stowe*, 4 Jones L. (49 N. Car.) 516; *Little v. Stanback*, 63 N. Car. 285.

Pennsylvania. — *Funk v. Voneida*, 11 S. & R. (Pa.) 109, 14 Am. Dec. 617; *Pastorius v. Fisher*, 1 Rawle (Pa.) 27.

Tennessee. — *Turner v. Carter*, 1 Head (Tenn.) 520.

Vermont. — *Fullam v. Stearns*, 30 Vt. 443; *Kidder v. Barker*, 18 Vt. 454.

Damages for Exclusion of Vote — Election of Candidate. — If a person has a right to vote at an election and he is refused this right, he may have his action even though the person for whom he proposed to vote should be elected. *Ashby v. White*, 2 Ld. Raym. 938.

2. *Jewett v. Wilmot*, (Neb. 1897) 71 N. W. Rep. 775.

3. *England.* — *Wood v. Waud*, 3 Exch. 748; *Embrey v. Owen*, 6 Exch. 353; *Northam v. Hurley*, 1 El. & Bl. 665, 72 E. C. L. 665; *Stockport Waterworks Co. v. Potter*, 7 H. & N. 160.

Canada. — *Mitchell v. Barry*, 26 U. C. Q. B. 476.

Alabama. — *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453.

Connecticut. — *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391.

Maine. — *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Munroe v. Stickney*, 48 Me. 462.

Massachusetts. — *Newhall v. Ireson*, 8 Cush. (Mass.) 595.

New Hampshire. — *Tillotson v. Smith*, 32 N. H. 90, 60 Am. Dec. 355.

New York. — *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 28 Am. St. Rep. 575. And see *Clinton v. Myers*, 46 N. Y. 511.

Vermont. — *Tuthill v. Scott*, 43 Vt. 525.

though a violation of a right is shown, substantial damages claimed, and some actual loss proven, yet the damages are not susceptible of reasonable certainty of proof as to their extent.¹

Same Rule Differently Expressed — Damages for Breach of Contract. — In actions for the breach of a contract, in order to enable the plaintiff to recover more than nominal damages the actual loss sustained must be shown by competent evidence and with reasonable certainty.²

Thus in an Action Against a Physician for Malpractice, where it is impossible to distinguish between the consequences of his lack of professional skill and those of the malady which he essayed to treat, only nominal damages can be given.³

Contract to Convey Good Will of Business. — Where, in an action for damages for

1. **When Extent of Substantial Damages Not Proven — England.** — *Feize v. Thompson*, 1 Taunt. 121.

United States. — *Watts v. Weston*, 62 Fed. Rep. 136.

Colorado. — *Patrick v. Colorado Smelting Co.*, 20 Colo. 268.

Georgia. — *Greensboro v. McGibbony*, 93 Ga. 672.

Illinois. — *Hair v. Barnes*, 26 Ill. App. 580; *Peoria, etc., Union R. Co. v. Peoria, etc., R. Co.*, 105 Ill. 110; *Chicago, etc., R. Co. v. Cicero*, 157 Ill. 56; *Wilcuss v. Kling*, 87 Ill. 107.

Louisiana. — *Judice v. Southern Pac. Co.*, 47 La. Ann. 255; *Scott v. Moll*, 45 La. Ann. 1401.

Missouri. — *Barrie v. Seidel*, 30 Mo. App. 559; *Sheedy v. Union Press Brick Works*, 25 Mo. App. 527; *Owen v. O'Reilly*, 20 Mo. 603; *Brown v. Emerson*, 18 Mo. 103; *M'Cutchin v. Batterton*, 1 Mo. 342.

New York. — *Leeds v. Metropolitan Gas-light Co.*, 90 N. Y. 26; *Seitz v. Dry Dock, etc., R. Co.*, 16 Daly (N. Y.) 264.

Pennsylvania. — *Smith v. Loag*, 132 Pa. St. 301.

South Dakota. — *Hudson v. Archer*, (S. Dak. 1896) 68 N. W. Rep. 541.

And see *Scott v. Moll*, 45 La. Ann. 1401; *Gifford v. Weber*, 38 Mo. App. 595.

Some Damages Shown — Extent of Loss Uncertain. — Although it is shown that a plaintiff has suffered damages, unless it is possible from the nature of the case to establish the extent of the injury with reasonable certainty, only nominal damages are recoverable. *Washburn v. Hubbard*, 6 Lans. (N. Y.) 11; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415.

Damages Altogether Uncertain in Amount. — Where there has been a breach of contract, but the damages are altogether uncertain in amount, nominal damages are recoverable. See *Supreme Lodge, etc., v. Knight*, 117 Ind. 489.

Negligent Wetting of Wool. — Certain imported wool being negligently wetted, it was necessary to remove it from the original packages. Soon thereafter an Act of Congress was passed under the provisions of which, but for the opening of the packages, the plaintiff could have obtained a rebate upon the duty collected. The loss of this duty was held not to have been recoverable as a consequence of the negligence in wetting the wool. *Stone v. Codman*, 15 Pick. (Mass.) 297. But, it was said in this case, if the market value of the wool in the original packages was greater by reason

of its being entitled to debenture under existing laws, or greater by reason of a general expectation that such a law would be passed, the loss would be recoverable.

Amount of Damages Not Ascertainable with Reasonable Certainty — Where Contract Furnishes Measure of Damages. — To entitle a plaintiff in an action founded on a contract to recover more than nominal damages for its breach there must always be evidence that an actual, substantial loss or injury has been sustained, unless the contract itself furnishes a guide to the measurement of damages; and even where there is some such proof, but the amount is uncertain, courts have sometimes directed the jury to allow the smallest sum which would satisfy the proof. *Strong, J.*, in *Adams Express Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382. And see *Lawton v. Sweeney*, 8 Jur. 964; *Clunnes v. Pezzey*, 1 Campb. 8.

Breach of Contract to Purchase Slave — Contract as Furnishing Measure of Damages. — The case of *Anders v. Ellis*, 87 N. Car. 207, was an action for damages for breach of a contract entered into in 1860, in which the party covenanted to buy, within four years from the date of the contract, a slave to be worth not less than nine hundred dollars, to be held in trust for another. No proof was offered on the question of damages other than that contained in the covenant. Under such circumstances, an instruction to the jury that they should give only nominal damages was held proper, the words, "to be worth not less than nine hundred dollars," being used as descriptive of the property, and not the sum to be laid out in its purchase, nor evidence of the damage suffered by reason of the breach of the covenant.

In an Action for Damages to a Boat, which had necessitated repairs, and where, at the time of the repairs, improvements were made, but only the gross amount of the expenditures, including both repairs and improvements, was in evidence, it was held that the plaintiff was not necessarily restricted to nominal damages because the evidence failed to distinguish between expenditures for repairs and improvements — the defendant being liable for the former but not the latter. *Mark v. Hudson River Bridge Co.*, 103 N. Y. 28.

2. *American Bldg., etc., Assoc. v. Hart*, 2 Wash. 594. And see *Howe Mach. Co. v. Bryson*, 44 Iowa 159, 24 Am. Rep. 735; *Houston, etc., R. Co. v. Hill*, 63 Tex. 381, 51 Am. Rep. 642; *Roberts v. Minneapolis Threshing Mach. Co.*, 8 S. Dak. 579.

3. *Becker v. Janinski*, 27 Abb. N. Cas. (N. Y. C. Pl.) 45.

breach of contract to convey the good will of the defendant's business, the plaintiff, though establishing the breach, fails to show substantial damages or offer in evidence data from which substantial damages may be computed, he can recover only nominal damages.¹

Damages for Personal Injuries — Loss of Time. — Where loss of time is claimed as an item of damages from personal injury occasioned by negligence, if the plaintiff fails to prove the value of the time lost, or facts on which an estimate of such value can be founded, only nominal damages for that item can be given.²

(c) **Damages Resulting from Peculiar Situation of Party Injured.** — Where it is shown that the only substantial damages flowing from a breach of contract resulted from the peculiar situation of the party injured, unknown to the party sought to be charged at the time the contract was entered into, only nominal damages are recoverable.³ And where the only substantial damages which ensued were such as the complaining party might have prevented by the exercise of reasonable effort, it was held that only nominal damages were recoverable.⁴

d. **APPLICATION OF MAXIM, DE MINIMIS NON CURAT LEX.** — Some courts, on account of what has been characterized as the "impolicy of holding out inducement to frivolous or vindictive legislation," have refused to sanction the doctrine of nominal damages for technical injuries where no establishment or preservation of right is involved.⁵

Technical Trespass to Realty. — Thus in a suit brought by the owner of a house against a lessee for having had a doorway made and a door put in without permission, the premises not having been in any way impaired thereby, the court refused to allow nominal damages and remitted the case to the jury to say whether the plaintiff's reversionary interest had, in point of fact, been substantially prejudiced.⁶

Technical Trespass to Personalty. — The same rule was applied in an action for damages for a technical trespass to personal property, where it was said that where no unlawful intent is shown, and all actual damage expressly disproved, the maxim *de minimis non curat lex* is applicable, a recovery of even nominal damages not being warranted.⁷

Where the Maxim "De Minimis" Has Been Applied to take away a right of recovery,

1. Taylor v. Howard, 110 Ala. 468.

2. Georgia. — Greensboro v. McGibbony, 93 Ga. 672.

Missouri. — Owen v. O'Reilly, 20 Mo. 603.

New York. — Niendorff v. Manhattan R. Co., 4 N. Y. App. Div. 46; Staal v. Grand St., etc., R. Co., 107 N. Y. 625, 11 N. Y. St. Rep. 352; Leeds v. Metropolitan Gas-light Co., 90 N. Y. 26. And see Seitz v. Dry Dock, etc., R. Co., 16 Daly (N. Y.) 264; Feeney v. Long Island R. Co., 116 N. Y. 375; Baker v. Manhattan R. Co., 118 N. Y. 533.

3. Smith v. Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

4. Colt v. Owens, 90 N. Y. 368.

Damages Resulting from Lack of Effort of Injured Party to Protect Himself. — In an action for damages for the breach of a contract to buy and carry certain shares for the plaintiff until ordered to sell, a sale without authority constituting the breach, it was held that there could be a recovery only of nominal damages, it appearing that the plaintiff could have replaced the shares, within a reasonable time after the sale, for the selling price or less. Colt v. Owens, 90 N. Y. 368. And see Gooden v. Moses, 99 Ala. 230.

5. Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75; Bennett, J., in Fullam v. Stearns, 30 Vt.

443. See the title DE MINIMIS NON CURAT LEX, *post*.

Recovery of Nominal Damages Not Approved in Certain Cases. — "The English courts," it was said in Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75, "have recently gone far towards breaking up the whole system of giving verdicts when no actual injury has been done, unless there be some right in question which it was important to the plaintiff to establish."

In Broom's Legal Maxims it is said that "there are some injuries of so small and little consideration in the law that no action will lie for them."

Limitations of Rule. — In the case of Seneca Road Co. v. Auburn, etc., R. Co., 5 Hill (N. Y.) 175, it was said that the maxim *de minimis* was never applied to a positive and wrongful invasion of another's property. "And," observed Bennett, J., in Fullam v. Stearns, 30 Vt. 443, in the same connection, "I apprehend it may at least be safe to say it should never in such cases be applied to cut off a recovery where the positive and wrongful act causes damages which can be fairly valued."

6. Young v. Spencer, 10 B. & C. 145, 21 E. C. L. 47.

7. Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75.

it generally has reference to the injury, and not to the resulting damage.¹

c. NOMINAL DAMAGES AGAINST PUBLIC OFFICERS FOR BREACHES OF OFFICIAL DUTY. — The General Rule in the United States seems to be that there may be a recovery in nominal damages against sheriffs or other public officers for breaches of their official duty as to individuals, though no actual damages result.²

Neglect of Sheriff to Return Execution. — Thus, where there had been a neglect of a sheriff to return an execution according to law, though no actual damages were shown, it was held that there had been a neglect of duty from which nominal damages would be presumed.³

But in an Action Against a Notary Public for damages for official misconduct, where the evidence failed to make out substantial damages, although the misconduct was proved, the court held the maxim *de minimis non curat lex* to be applicable, disallowing the plaintiff's contention that he was at all events entitled to nominal damages.⁴

And Where an Action Was Brought Against a Sheriff who had attached certain hay and grain, for having made use of a pitchfork belonging to the debtor in removing the attached property, the implement having been left, after the removal of the property, where it had been found, and having been in no way injured by the use, it was held that the officer was not liable in nominal damages.⁵

In England the general rule on this subject is contrary to the adjudications of the courts of the United States.⁶ Thus, in an action against a sheriff for an escape, where it appeared that the plaintiff had been neither damaged nor delayed, it was held that a verdict for nominal damages was erroneous.⁷

f. NOMINAL DAMAGES FOR TRESPASS TO PROPERTY. — For every trespass to property, whether real or personal, there may be a recovery of nominal damages though no substantial damages be shown.⁸

1. Bennett, J., in *Fullam v. Stearns*, 30 Vt. 443.

2. **Breach of Official Duty** — *Connecticut*. — Williams, C. J., in *Palmer v. Gallup*, 16 Conn. 555.

Georgia. — *Crawford v. Andrews*, 6 Ga. 244.
Iowa. — *Plummer v. Harbut*, 5 Iowa 308.
Massachusetts. — *Laffin v. Willard*, 16 Pick. (Mass.) 64, 26 Am. Dec. 629; *Selfridge v. Lithgow*, 2 Mass. 374.

Missouri. — *Allen v. Davis*, 53 Mo. App. 15.
New York. — *Patterson v. Westervelt*, 17 Wend. (N. Y.) 543; *Russell v. Turner*, 7 Johns. (N. Y.) 189, 5 Am. Dec. 254.

Oregon. — *Moore v. Floyd*, 4 Oregon 101.
Texas. — See *Hamilton v. Ward*, 4 Tex. 356.
Vermont. — *Kidder v. Barker*, 18 Vt. 454.

Wrongful Levy — Offer to Return Goods — Substantial Damages. — In an action against a constable for trespass for wrongfully levying upon and carrying away the goods of the plaintiff, it was made to appear that shortly after the levy and asportation the constable offered to return the goods uninjured, but it was held, nevertheless, that the plaintiff was not restricted to the recovery of nominal damages. *Kelly v. McDonald*, 39 Ark. 387. In this case the court said that "where a trespass has been committed and goods carried away, the injured party is not obliged to accept an offer to compensate, or receive the goods upon restoration proposed, but may stand by his legal rights."

3. *Laffin v. Willard*, 16 Pick. (Mass.) 64, 26 Am. Dec. 629.

4. **Action Against Notary Public under Statute.** — In the case of *McAllister v. Clement*, 75 Cal.

182, which was an action for damages against a notary public for official misconduct, it was held that no damages at all were recoverable unless there had been some actual damages sustained. In this case the court said: "The code declares that 'for the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for all the damages sustained.' Pol. Code, § 801. But it is clear that no action will lie to recover damages if no damages have been sustained. * * * It is urged, however, that the plaintiff was at least entitled to recover nominal damages. But why should he have nominal damages if he suffered no actual damage? The code does not seem to justify this contention."

Where, however, a debt was lost by reason of the negligence of a notary public in taking the acknowledgment of the mortgage security, it was held that there might be a recovery thereof, with interest. *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714.

5. *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75.

6. *Stimson v. Farnham*, L. R. 7 Q. B. 175; *Williams v. Mostyn*, 4 M. & W. 145. And see *O'Connor v. Hamilton*, 4 U. C. Q. B. 243.

7. *Williams v. Mostyn*, 4 M. & W. 145. And see *O'Connor v. Hamilton*, 4 U. C. Q. B. 243.

8. **Trespass** — *England*. — *Patrick v. Greenway*, cited in 1 Saund. 346b, note.

Iowa. — *Plummer v. Harbut*, 5 Iowa 308.
Massachusetts. — *McAneany v. Jewett*, 10 Allen (Mass.) 151.

New York. — *Dixon v. Clow*, 24 Wend. (N.

Trespass upon Realty. — Proof of actual pecuniary damages is not necessary to entitle one to nominal damages for an invasion of his right to the possession of real estate.¹

Nominal Damages in Trespass to Try Title. — The title to lands is not infrequently adjudicated by means of actions for damages for trespass. In such cases nominal damages are sufficient to establish the plaintiff's title, and such damages will be awarded even if the act occasions no other damage than putting at hazard rights which, if they were acquiesced in, would be lost by the lapse of time.²

In an Action for Damages for the Detention of Personal Property, where the jury found a verdict for the plaintiff but awarded no damages for the detention, it was held proper for the court to give judgment for nominal damages.³

g. NOMINAL DAMAGES THOUGH ACT COMPLAINED OF HAS RESULTED IN PLAINTIFF'S BENEFIT. — The rule as to the presumption of damage from the technical violation of a right merely has been carried to the extreme of permitting a recovery of nominal damages though, so far from causing actual damage to the plaintiff, the defendant's act has in fact resulted beneficially to him.⁴

Delay in Delivery of Telegram. — Where by an unreasonable delay in delivery of a message by a telegraph company, the market value of the property ordered to be purchased was less on the day when the message was received than on the day when it would have been received had it been promptly delivered, the company was held liable in nominal damages to the sender of the message, although the latter was actually saved the difference between the market price when the message should have been delivered and the price when it was actually delivered to the person to whom sent.⁵

Breach of Contract of Sale of Land. — And where the vendor in a contract for the sale of land refuses to convey, the measure of damages in such case being the difference between the value of the land and the contract price, it was held that the vendee might recover nominal damages, though it was shown that the value of the land was less than the price agreed to be paid.⁶

But There Can Be No Recovery of Substantial Damages under such circumstances. Thus in an action of trespass for damages for placing dirt on the plaintiff's lot, it was admitted that the plaintiff was entitled to recover nominal damages,

Y.) 188; *Pierce v. Hosmer*, 66 Barb. (N. Y.) 345.

North Carolina. — *White v. Griffin*, 4 Jones L. (49 N. Car.) 139.

Ohio. — *Coe v. Peacock*, 14 Ohio St. 187.

Texas. — *Carter v. Wallace*, 2 Tex. 206.

1. *Hill v. Forkner*, 76 Ind. 117.

"**When One Encroaches upon the Inheritance of Another,**" said the court in *Hathorne v. Stinson*, 12 Me. 183, 28 Am. Dec. 167, "the law gives a right of action, and even if no actual damages are proved the action will be sustained and nominal damages recovered; because unless this could be done, the encroachments acquiesced in might ripen into a legal right, and the trespasser, by a continuance of his encroachments, acquire a perfect title." See also *Jewett v. Whitney*, 43 Me. 242; *White v. Griffin*, 4 Jones L. (49 N. Car.) 139; *Murphy v. Fond du Lac*, 23 Wis. 365, 99 Am. Dec. 181; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558.

2. *Bassett v. Salisbury Mfg. Co.*, 28 N. H. 438; *Devendorf v. Wert*, 42 Barb. (N. Y.) 227; *Thomas v. Brackney*, 17 Barb. (N. Y.) 654; *Carhart v. Auburn Gas Light Co.*, 22 Barb. (N. Y.) 297; *Honsee v. Hammond*, 39 Barb. (N.

Y.) 89; *O'Riley v. McChesney*, 3 Lans. (N. Y.) 278; *Delaware, etc., Canal Co. v. Torrey*, 33 Pa. St. 143.

3. *Von Schoening v. Buchanan*, 14 Abb. Pr. (N. Y. Super. Ct.) 468.

4. **Benefit to Plaintiff.** — *Excelsior Needle Co. v. Smith*, 61 Conn. 56; *Jewett v. Whitney*, 43 Me. 242; *Carver v. Taylor*, 35 Neb. 429; *Murphy v. Fond du Lac*, 23 Wis. 365, 99 Am. Dec. 181; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558.

Actions for Substantial Damages. — It has been held, however, in actions for substantial damages, that if a plaintiff has received certain benefits from the same act which caused the damage complained of, the value of the benefits resulting may be deducted from the amount of the losses sustained. *Hicks v. Drew*, 117 Cal. 305. And see *Chicago South Branch Dock Co. v. Dunlap*, 32 Ill. 207; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171; *Kimel v. Kimel*, 4 Jones L. (49 N. Car.) 121; *Koch v. Sackman-Phillips Invest. Co.*, 9 Wash. 405. See also *infra*, *Mitigation of Damages*.

5. *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558.

6. *Carver v. Taylor*, 35 Neb. 429.

though the act of the defendant improved the value of the lot. But the plaintiff could not, it was held, recover, under the circumstances, the amount which it would cost to remove the earth.¹

h. REVERSAL OF JUDGMENT FOR FAILURE TO ASSESS NOMINAL DAMAGES. — It has been said that the failure to assess nominal damages was not in general an error which affected the substantial rights of the parties,² and that, therefore, a judgment would not be reversed for failure alone to give nominal damages.³ Where, however, nominal damages will go to establish some question of permanent right, there will be a reversal of the judgment or a new trial awarded for an erroneous failure to give nominal damages,⁴ and likewise if a judgment for nominal damages will entitle a plaintiff to his costs.⁵

What Amount of Damages Will Carry Costs is a question the jury should not consider in determining upon their verdict.⁶

i. NECESSITY FOR CONCURRENCE OF INJURY AND DAMAGE. — As has already been seen, in order that there may be a recovery by a plaintiff for a violation or invasion of his rights, there must be a coincidence or concurrence of injury and damage. In this connection it is said that "in every valid cause of action two elements must be present, — the injury and the damages. The one is the legal wrong which is to be redressed; the other, the scale or measure of the recovery. As there may be damages without an injury, so there may be an injury without damages."⁷ There must be a *damnum* and an *injuria*,

1. *Murphy v. Fond du Lac*, 23 Wis. 365, 99 Am. Dec. 181. The court said in this case that the owner could not recover the cost of removing the dirt as damages for a trespass, and at the same time leave it on the lot and enjoy the benefit of it.

2. *Coffin v. State*, 144 Ind. 578. See also *Patton v. Hamilton*, 12 Ind. 256; *Hacker v. Blake*, 17 Ind. 97; *Black v. Coan*, 48 Ind. 385; *Mahoney v. Robbins*, 49 Ind. 146; *Wimberg v. Schwegeman*, 97 Ind. 528.

3. **Failure to Assess Nominal Damages**—*Canada*. — *Beatty v. Oille*, 12 Can. Sup. Ct. Rep. 706; *Haines v. Dunlap*, 33 New Bruns. 556.

California. — *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454.

Connecticut. — *Ely v. Parsons*, 55 Conn. 83.

Indiana. — *Midland R. Co. v. Holloran*, 14 Ind. App. 392; *Black v. Coan*, 48 Ind. 385; *Wimberg v. Schwegeman*, 97 Ind. 528; *Shipp v. Atkinson*, 8 Ind. App. 505; *Jennings v. Loring*, 5 Ind. 250; *Rhine v. Morris*, 96 Ind. 81; *Platter v. Seymour*, 86 Ind. 323.

Iowa. — *Watson v. Van Meter*, 43 Iowa 76; *Wire v. Foster*, 62 Iowa 114; *Norman v. Winch*, 65 Iowa 263; *Hathaway v. Burlington, etc., R. Co.*, 97 Iowa 747; *Cook v. Chicago, etc., R. Co.*, 83 Iowa 278; *Ellithorpe v. Reidessell*, 88 Iowa 729; *Faulkner v. Closter*, 79 Iowa 15; *Schwartz v. Davis*, 90 Iowa 324; *Ady v. Freeman*, 90 Iowa 402.

Kentucky. — *Robertson v. Gentry*, 2 Bibb (Ky.) 542.

Michigan. — *Haven v. Beidler Mfg. Co.*, 40 Mich. 286; *Mears v. Cornwall*, 73 Mich. 78; *Hickey v. Baird*, 9 Mich. 32.

Minnesota. — *Potter v. Mellen*, 36 Minn. 122; *Harris v. Kerr*, 37 Minn. 537.

New York. — *Ellsler v. Brooks*, 54 N. Y. Super. Ct. 73; *Funk v. Evening Post Pub. Co.*, 76 Hun (N. Y.) 497; *Brantingham v. Fay*, 1 Johns. Cas. (N. Y.) 256.

North Carolina. — *McGee v. Fox*, 107 N. Car. 766.

South Carolina. — *Watson v. Hamilton*, 6 Rich. (S. Car.) 75.

South Dakota. — *Olson v. Huntimer*, 8 S. Dak. 220.

Wisconsin. — *Enos v. Cole*, 53 Wis. 235; *Eaton v. Lyman*, 30 Wis. 41; *Sayles v. Bemis*, 57 Wis. 315; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558; *Benson v. Waukesha*, 74 Wis. 31.

And see *Phillips v. Covell*, 79 Hun (N. Y.) 210; *Moore v. New York El. R. Co.*, 30 Abb. N. Cas. (N. Y. C. Pl.) 306.

4. *McAllister v. Clement*, 75 Cal. 182; *Ely v. Parsons*, 55 Conn. 83; *Merrill v. Dibble*, 12 Ill. App. 85; *Williams v. Brown*, 76 Iowa 643; *Delta Lumber Co. v. Williams*, 73 Mich. 86; *McCauley v. McKeig*, 8 Mont. 389; *Olson v. Huntimer*, 8 S. Dak. 220; *Roberts v. Minneapolis Threshing Mach. Co.*, 8 S. Dak. 579; *Benson v. Waukesha*, 74 Wis. 31.

5. *Watson v. Van Meter*, 43 Iowa 76; *Wire v. Foster*, 62 Iowa 114; *Robertson v. Gentry*, 2 Bibb (Ky.) 542; *Hickey v. Baird*, 9 Mich. 32; *Stevens v. Yale*, (Mich. 1897) 72 N. W. Rep. 5; *Potter v. Mellen*, 36 Minn. 122; *Moore v. New York El. R. Co.*, 30 Abb. N. Cas. (N. Y. C. Pl.) 306, 4 Misc. Rep. (N. Y.) 132; *Enos v. Cole*, 53 Wis. 235; *Sayles v. Bemis*, 57 Wis. 315; *Eaton v. Lyman*, 30 Wis. 41. See also *Cook v. Chicago, etc., R. Co.*, 83 Iowa 278.

6. *Day v. Woodworth*, 13 How. (U. S.) 363.

7. *North Vernon v. Voegler*, 103 Ind. 314.

"If a Man Sustains Damage by the Wrongful Act of Another, he is entitled to a remedy; but to give him that title, two things must concur: damage to himself, and a wrong committed by the other party." *Rex v. Sewers Com'rs*, 8 B. & Co. 355, 15 E. C. L. 237; *Embrey v. Owen*, 6 Exch. 353; *Hodsoll v. Stallebrass*, 11 Ad. & El. 301, 39 E. C. L. 94; *Wittich v. Pensacola First Nat. Bank*, 20 Fla. 843, 15 Am. Rep. 631; *North Vernon v. Voegler*, 103 Ind. 314; *Williams v. Eslin*, 4 Pa. St. 486, 45 Am. Dec. 710; *Fullam v. Stearns*, 30 Vt. 443. And see *Elk-*

it was said in another case; ¹ the damages are not the sole cause of action. ²

III. NATURAL AND PROXIMATE CAUSE AND CONSEQUENCE — 1. General Statement — Remote Consequences. — The rule is general that a person is not to be held responsible in damages for the remote consequences of his act, or indeed for any but those which are proximate or natural. ³

hart v. Ritter, 66 Ind. 136; *Whitney v. Clarendon*, 18 Vt. 252; *Weisenberg v. Appleton*, 26 Wis. 56.

1. See *Wightman, J.*, in *Lumley v. Gye*, 2 El. & Bl. 216, 75 E. C. L. 216.

2. *Hodsoll v. Stallebrass*, 11 Ad. & El. 301, 39 E. C. L. 94.

3. **Natural and Proximate Cause and Consequence — England.** — *Ashley v. Harrison*, 1 Esp. N. P. 48; *Archer v. Williams*, 2 C. & K. 26, 61 E. C. L. 26; *Walker v. Goe*, 3 H. & M. 395; *Collins v. Cave*, 4 H. & N. 225; *Williams v. Reynolds*, 6 B. & S. 495, 118 E. C. L. 495; *Vicars v. Wilcocks*, 8 East 1; *Hadley v. Baxendale*, 9 Exch. 341; *Walker v. Moore*, 10 B. & C. 416, 21 E. C. L. 100; *Hoey v. Felton*, 11 C. B. N. S. 142, 103 E. C. L. 142; *Alston v. Herring*, 11 Exch. 822, 25 L. J. Exch. 177; *Derry v. Handley*, 16 L. T. N. S. 263; *Jones v. Boyce*, 1 Stark. 493, 2 E. C. L. 189; *Polhill v. Walter*, 3 B. & Ad. 114, 23 E. C. L. 38; *Kendillon v. Maltby*, C. & M. 402, 41 E. C. L. 221; *Knight v. Gibbs*, 1 Ad. & El. 43, 28 E. C. L. 30; *Adams v. Kelly*, R. & M. 157, 21 E. C. L. 403; *Jackson v. Smithson*, 15 M. & W. 563; *Lee v. Riley*, 18 C. B. N. S. 722, 114 E. C. L. 722, 34 L. J. C. P. 212; *Powell v. Salisbury*, 2 Y. & J. 391; *Illidge v. Goodwin*, 5 C. & P. 190, 24 E. C. L. 272; *Leame v. Bray*, 3 East 595; *Dixon v. Bell*, 5 M. & S. 198; *Lynch v. Nurdin*, 1 Q. B. 29, 41 E. C. L. 422; *The Gertor*, 70 L. T. 703; *Atkinson v. Newcastle*, etc., *Waterworks Co.*, L. R. 6 Exch. 404; *Mangan v. Atterton*, L. R. 1 Exch. 239; *Read v. Edwards*, 34 L. J. C. P. 31; *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; *Cox v. Burbridge*, 32 L. J. C. P. 89; *Hudson v. Roberts*, 6 Exch. 697; *Lilley v. Doubleday*, 7 Q. B. Div. 510, 44 L. T. 814; *George v. Skivington*, L. R. 5 Exch. 1; *Romney Marsh v. Trinity House*, L. R. 5 Exch. 204; *Sneesby v. Lancashire*, etc., R. Co., 1 Q. B. Div. 42; *Collins v. Middle Level Com'rs*, L. R. 4 C. P. 279; *The George*, L. R. 3 Adm. & Eccl. 466; *Byrne v. Wilson*, 15 Ir. C. L. 332; *Parkes v. Prescott*, L. R. 4 Exch. 169; *Bateman v. Lyall*, 7 C. B. N. S. 638, 97 E. C. L. 638; *Smith v. London*, etc., R. Co., L. R. 5 C. P. 98; *Vital v. Tetrault*, 4 Montreal L. R. Super Ct. 204; *Scholes v. North London R. Co.*, 21 L. T. N. S. 835; *Sharp v. Powell*, L. R. 7 C. P. 253; *Nicosia v. Vallone*, 37 L. T. N. S. 106; *The Notting Hill*, 9 Prob. Div. 105; *Barber v. Lesiter*, 7 C. B. N. S. 175, 97 E. C. L. 175; *Taylor v. Neri*, 1 Esp. N. P. 386; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. Cas. 281, 29 E. C. L. 336; *Tarleton v. M'Gawley*, Peake N. P. (ed. 1795) 205; *Emblem v. Myers*, 6 H. & N. 54; *Collard v. South Eastern R. Co.*, 7 H. & N. 79; *Williams v. Raggett*, 46 L. J. Ch. Div. 849; *Sikes v. Wild*, 1 B. & S. 587, 101 E. C. L. 587; *Engell v. Fitch*, 9 B. & S. 85; *Sully v. Durantv*, 3 H. & C. 270; *Portman v. Middleton*, 4 C. B. N. S. 322, 93 E. C. L. 322; *Borradale v. Bunton*, 8 Taunt. 535, 4 E. C. L.

202; *Page v. Pavey*, 8 C. & P. 769, 34 E. C. L. 628; *Brown v. Edgington*, 2 M. & G. 279, 40 E. C. L. 371; *Hill v. Balls*, 2 H. & N. 299; *Borries v. Hutchinson*, 18 C. B. N. S. 445, 114 E. C. L. 445; *Winterbottom v. Wright*, 10 M. & W. 109; *Hamilton v. Magill*, 12 L. R. Ir. 186; *Candy v. Midland R. Co.*, 38 L. T. 226; *Jameson v. Midland R. Co.*, 50 L. T. N. S. 426; *Prior v. Wilson*, 2 L. T. N. S. 549; *Alder v. Keighley*, 15 M. & W. 117; *Smith v. Green*, 1 C. P. Div. 92; *Green v. Button*, 2 C. M. & R. 707; *Levy v. Langridge*, 4 M. & W. 337; *Langridge v. Levy*, 2 M. & W. 519; *Burrows v. March Gas*, etc., Co., L. R. 5 Exch. 67; *Halestrap v. Gregory*, (1895) 1 Q. B. 561; *Scott v. Shepherd*, 2 W. Bl. 892; *Mullett v. Mason*, L. R. 1 C. P. 559; *Longmeid v. Holliday*, 6 Exch. 761; *Ward v. Weeks*, 7 Bing. 211, 20 E. C. L. 104; *Skinner v. Shew*, 8 Rep. 455, (1894) 2 Ch. 581; *McMahon v. Field*, 7 Q. B. Div. 595; *Wilson v. Newport Dock Co.*, L. R. 1 Exch. 177; *Welch v. Anderson*, 61 L. J. Q. B. 167; *Fitzgerald v. Leonard*, 32 L. R. Ir. 675; *Hobbs v. London*, etc., R. Co., L. R. 10 Q. B. 111; *Horne v. Midland R. Co.*, L. R. 8 C. P. 131; *M'Collum v. Davis*, 8 U. C. Q. B. 150; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85; *Waters v. Towers*, 8 Exch. 401; *Simpson v. London*, etc., R. Co., 1 Q. B. Div. 274; *Cort v. Ambergate*, etc., R. Co., 17 Q. B. 127, 79 E. C. L. 127; *Die Elbinger Actien-Gesellschaft*, etc., *v. Armstrong*, L. R. 9 Q. B. 473; *Thol v. Henderson*, 8 Q. B. Div. 457; *British Columbia*, etc., *Lumber*, etc., Co. *v. Nettleship*, L. R. 3 C. P. 499; *Wilson v. Dunville*, 6 Ir. L. R. 210; *Skinner v. London Marine Ins. Corp.*, 14 Q. B. Div. 882; *Great Western R. Co. v. Redmayne*, L. R. 1 C. P. 329; *Clare v. Maynard*, 6 Ad. & El. 519, 33 E. C. L. 137; *Woodger v. Great Western R. Co.*, L. R. 2 C. P. 318; *Hawes v. South-Eastern R. Co.*, 54 L. J. Q. B. 174; *Cory v. Thames Ironworks*, etc., Co., L. R. 3 Q. B. 181; *Jones v. Bright*, 5 Bing. 533, 15 E. C. L. 529; *Randall v. Raper*, El. Bl. & El. 84, 96 E. C. L. 84; *Welch v. Anderson*, 61 L. J. Q. B. 167; *Mowbray v. Merryweather*, 65 L. J. Q. B. 50; *Smeed v. Foord*, 1 El. & El. 612, 102 E. C. L. 612; *Flureau v. Thornhill*, 2 W. Bl. 1078; *Bain v. Fothergill*, L. R. 6 Exch. 59; *Glover v. London*, etc., R. Co., L. R. 3 Q. B. 25; *Rigby v. Hewitt*, 5 Exch. 242; *The Steamship Gracie v. The Steamship Argentino*, L. R. 14 App. 519; *Bird v. Holbrook*, 4 Bing. 628, 15 E. C. L. 91; *Clark v. Chambers*, 3 Q. B. Div. 327.

Canada. — *Tobin v. Symonds*, 6 Nova Scotia 141; *Vital v. Tetrault*, 4 Montreal L. R. Super Ct. 204; *Thomson v. Beling*, 1 Quebec L. Rep. 67; *McKelvin v. London*, 22 Ont. Rep. 70; *Loney v. Oliver*, 21 Ont. Rep. 89; *Colton v. Good*, 11 U. C. Q. B. 153; *Stewart v. Sculthorp*, 25 Ont. Rep. 544; *Godard v. Fredericton Boom Co.*, 11 New Bruns. 448.

United States. — *Haile v. Texas*, etc., R. Co.,

Difficulty in Application of Rule. — This rule is well nigh universal in the language in which it is stated, but is of little practical value as expressed in the abstract.

60 Fed. Rep. 557; Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469; Mutual Ins. Co. v. Tweed, 7 Wall. (U. S.) 44; Memphis, etc., R. Co. v. Reeves, 10 Wall. (U. S.) 176; Scheffer v. Washington City, etc., R. Co., 105 U. S. 249; Stokes v. Saltonstall, 13 Pet. (U. S.) 181; Cunningham v. Bell, 5 Mason (U. S.) 161; Pearson v. Duane, 4 Wall. (U. S.) 605; Bowas v. Pioneer Tow Line, 2 Sawy. (U. S.) 30; Bagley v. Cleveland Rolling-Mill Co., 21 Fed. Rep. 159; Hitchcock v. Galveston, 3 Woods (U. S.) 287; Philadelphia, etc., R. Co. v. Howard, 13 How. (U. S.) 344; Pacific Ins. Co. v. Conard, 1 Baldw. (U. S.) 142; McAfee v. Croxford, 13 How. (U. S.) 447; Mann Boudoir Car. Co. v. Dupre, 54 Fed. Rep. 646; The Normania, 62 Fed. Rep. 469; Crane Elevator Co. v. Lippert, 63 Fed. Rep. 942, 24 U. S. App. 176; Hawker's Case, 4 Ct. of Cl. 551; The Ontario, Brown Adm. 480; Florida Cent., etc., R. Co. v. Bucki, 30 U. S. App. 454; McKinney v. Neil, 1 McLean (U. S.) 540.

Alabama. — Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Burton v. Henry, 90 Ala. 281; Bell v. Reynolds, 78 Ala. 511, 56 Am. Rep. 52; Montgomery, etc., R. Co. v. Mallette, 92 Ala. 209; Daughtery v. American Union Tel. Co., 75 Ala. 168, 51 Am. Rep. 435; Collins v. Stephens, 58 Ala. 543; East Tennessee, etc., R. Co. v. Lockhart, 79 Ala. 315; Krebs Mfg. Co. v. Brown, 108 Ala. 508.

Arkansas. — St. Louis, etc., R. Co. v. Neel, 56 Ark. 279; St. Louis, etc., R. Co. v. Heath, 41 Ark. 476.

California. — Survey v. Wells, 5 Cal. 124; Chidester v. Consolidated People's Ditch Co., 53 Cal. 56; Pendleton v. Cline, 85 Cal. 142; Hicks v. Herring, 17 Cal. 569; Mitchell v. Clarke, 71 Cal. 163, 60 Am. Rep. 529; Wallace v. Ah Sam, 71 Cal. 197, 60 Am. Rep. 534; Friend, etc., Lumber Co. v. Miller, 67 Cal. 464; Benson v. Central Pac. R. Co., 98 Cal. 45; Pastene v. Adams, 49 Cal. 87.

Colorado. — Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89; Denver, etc., R. Co. v. DeWitt, 1 Colo. App. 419; Georgetown, etc., R. Co. v. Eagles, 9 Colo. 544; Clifford v. Denver, etc., R. Co., 9 Colo. 333.

Connecticut. — Bristol Mfg. Co. v. Gridley, 28 Conn. 201; Barnum v. Vandusen, 16 Conn. 200; Gregory v. Brooks, 35 Conn. 437, 95 Am. Dec. 278; Jordan v. Patterson, 67 Conn. 473; Connecticut Mut. L. Ins. Co. v. New York, etc., R. Co., 25 Conn. 265, 65 Am. Dec. 571; Cohen v. Norton, 57 Conn. 480; Hubbard v. Rowell, 51 Conn. 423; Ward v. North Haven, 43 Conn. 148; Baldwin v. Greenwoods Turnpike Co., 40 Conn. 238, 16 Am. Rep. 33. And see Wetmore v. Lyman, 2 Root (Conn.) 484.

Delaware. — Benson v. Wilmington, 9 Houst. (Del.) 359.

Florida. — Robinson v. Hyer, 35 Fla. 544; Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356.

Georgia. — Cooper v. Young, 22 Ga. 269, 68 Am. Dec. 502; Salter v. Howard, 43 Ga. 601; Doyle v. Days, 94 Ga. 633; Georgia R. Co. v. Hayden, 71 Ga. 518, 51 Am. Rep. 274; Stewart v. Lanier House Co., 75 Ga. 582; Lewis v. Bracken, 97 Ga. 337; Coweta Falls Mfg. Co. v.

Rogers, 19 Ga. 476, 65 Am. Dec. 602; South-Western R. Co. v. Paulk, 24 Ga. 356; Richmond, etc., R. Co. v. Benson, 86 Ga. 203, 22 Am. St. Rep. 446; Atlanta v. Wilson, 59 Ga. 544, 27 Am. Rep. 396.

Illinois. — Green v. Mann, 11 Ill. 613; Hayes v. Moynihan, 52 Ill. 423; Fent v. Toledo, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13; Herrick v. Gary, 65 Ill. 101; Toledo, etc., R. Co. v. Muthersbaugh, 71 Ill. 572; Phillips v. Dickerson, 85 Ill. 11, 28 Am. Rep. 607; Hewitt v. Walker, 2 Ill. App. 490; Gilmore v. Fries, 34 Ill. App. 137; Illinois Cent. R. Co. v. Heisner, 45 Ill. App. 143; Chicago, etc., R. Co. v. Ward, 16 Ill. 522; Benton v. Fay, 64 Ill. 420; O'Conner v. Nolan, 64 Ill. App. 357; Chicago, etc., R. Co. v. Meech, 163 Ill. 305; Durant v. Rogers, 71 Ill. 124; Johnson v. Drummond, 16 Ill. App. 641; Plummer v. Rigdon, 78 Ill. 222, 20 Am. Rep. 261; Weaver v. Penny, 17 Ill. App. 628; Haven v. Wakefield, 39 Ill. 509; Joliet v. Verley, 35 Ill. 58, 85 Am. Dec. 342; Rockford v. Russell, 9 Ill. App. 229; Mt. Carmel v. Howell, 36 Ill. App. 68; Schroder v. Crawford, 94 Ill. 357, 34 Am. Rep. 236; Shugart v. Egan, 83 Ill. 56, 25 Am. Rep. 359; Smith v. Hays, 23 Ill. App. 244; Weick v. Lander, 75 Ill. 93; Frink v. Potter, 17 Ill. 406; Schmidt v. Mitchell, 84 Ill. 195, 25 Am. Rep. 446; Philpot v. Taylor, 75 Ill. 309, 20 Am. Rep. 241; Lovett v. Chicago, 35 Ill. App. 570; Gray v. Waterman, 40 Ill. 522.

Indiana. — Teagarden v. Hetfield, 11 Ind. 522; Lewis v. Lee, 15 Ind. 499; Louisville, etc., R. Co. v. Sumner, 106 Ind. 55, 55 Am. Rep. 719; Louisville, etc., R. Co. v. Lucas, 119 Ind. 583; Wabash, etc., R. Co. v. Locke, 112 Ind. 404, 2 Am. St. Rep. 193; Dunlap v. Wagner, 85 Ind. 529, 44 Am. Rep. 42; Jeffersonville, etc., R. Co. v. Riley, 39 Ind. 568; Pennsylvania Co. v. Whitlock, 99 Ind. 19, 50 Am. Rep. 71; Shelbyville Lateral Branch R. Co. v. Lewark, 4 Ind. 471; Mulcahey v. Givens, 115 Ind. 286; Coy v. Indianapolis Gas Co., 146 Ind. 655; Fultz v. Wycoff, 25 Ind. 321; Rose v. Wallace, 11 Ind. 112; Page v. Ford, 12 Ind. 46; Cline v. Myers, 64 Ind. 304; Fuller v. Curtis, 100 Ind. 237, 50 Am. Rep. 786; Billman v. Indianapolis, etc., R. Co., 76 Ind. 166, 40 Am. Rep. 230; Binford v. Johnston, 82 Ind. 426, 42 Am. Rep. 508; Terre Haute, etc., R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168; Louisville, etc., R. Co. v. Wood, 113 Ind. 544.

Iowa. — Dubuque Wood, etc., Assoc. v. Dubuque, 30 Iowa 176; Brown v. Allen, 35 Iowa 306; Bosch v. Burlington, etc., R. Co., 44 Iowa 402, 24 Am. Rep. 754; Davis v. Fish, 1 Greene (Iowa) 406, 48 Am. Dec. 387; McCormick, v. Vanatta, 43 Iowa 389; Kramer v. Messner, 101 Iowa 88; Mann v. Taylor, 78 Iowa 355; Griffith v. Burden, 35 Iowa 138; Prosser v. Jones, 41 Iowa 674; Willits v. Chicago, etc., R. Co., 88 Iowa 281; Nye v. Iowa City Alcohol Works, 51 Iowa 129, 33 Am. Rep. 121; Hampton v. Jones, 58 Iowa 317; Chesmore v. Barker, 101 Iowa 578; Foley v. McKeegan, 4 Iowa 1. 66 Am. Dec. 107; Stevens v. Bradley, 89 Iowa 174; Sherrod v. Langdon, 21 Iowa 518; Riech v. Bolch, 68 Iowa 526; Blumenthal v. Stahle, 98 Iowa 722; Cobb v. Illinois Cent. R. Co., 38

While in the enunciation of the principle the authorities agree, yet in the application of it, or, in other words, in determining what is or what is not a

Iowa 601; Mihills Mfg. Co. v. Day, 50 Iowa 250; Byerly v. Anamosa, 79 Iowa 204; Moss v. Burlington, 60 Iowa 438, 46 Am. Rep. 82; Mander-schid v. Dubuque, 25 Iowa 108; West v. Ward, 77 Iowa 323, 14 Am. St. Rep. 284; Knapp v. Sioux City, etc., R. Co., 65 Iowa 91, 54 Am. Rep. 1; Small v. Chicago, etc., R. Co., 55 Iowa 582, Poland v. Earhart, 70 Iowa 285.

Kansas. — St. Joseph, etc., R. Co. v. Chase, 11 Kan. 47; Atchison, etc., R. Co. v. Bales, 16 Kan. 252; Atchison, etc., R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362; Topeka v. Tuttle, 5 Kan. 311; Osage City v. Larkin, 40 Kan. 206, 10 Am. St. Rep. 186; Houser v. Pearce, 13 Kan. 104; Stewart v. Power, 12 Kan. 600; Macy v. Peach, 2 Kan. App. 575; Halstead Lumber Co. v. Sutton, 46 Kan. 192; Johnson v. Mathews, 5 Kan. 118; Union Pac. R. Co. v. Shook, 3 Kan. App. 710.

Kentucky. — Bosworth v. Brand, 1 Dana (Ky.) 377; King v. Shanks, 12 B. Mon. (Ky.) 420; Patch v. Covington, 17 B. Mon. (Ky.) 722, 66 Am. Dec. 186; Smith v. Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126; Shields v. Louisville, etc., R. Co., 97 Ky. 103; Faris v. Lewis, 2 B. Mon. (Ky.) 375; Bluegrass Cordage Co. v. Luthy, 98 Ky. 583; Campbells-ville Lumber Co. v. Bradley, 96 Ky. 494; Stephenson v. Harrison, 3 Litt. (Ky.) 170.

Louisiana. — Myers v. Perry, 1 La. Ann. 372; Goodloe v. Rogers, 9 La. Ann. 273, 61 Am. Dec. 205; Lott v. New Orleans City, etc., R. Co., 37 La. Ann. 337, 55 Am. Rep. 500; Doriocourt v. Lacroix, 29 La. Ann. 286; Weber v. Coussy, 12 La. Ann. 534; Dyson v. Phelps, 14 La. Ann. 733; Kaiser v. New Orleans, 17 La. Ann. 178.

Maine. — Bishop v. Williamson, 11 Me. 495; Grindle v. Eastern Express Co., 67 Me. 317, 24 Am. Rep. 31; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Little v. Boston, etc., R. Co., 66 Me. 239; Bridges v. Stickney, 38 Me. 369; Bartlett v. Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437; True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 156; Miller v. Mariner's Church, 7 Me. 55, 20 Am. Dec. 341; Henderson v. Sevey, 2 Me. 139; Aldrich v. Gorham, 77 Me. 287; Moulton v. Sanford, 51 Me. 127; Spaulding v. Winslow, 74 Me. 534; McPheters v. Moose River Log Driving Co., 78 Me. 329.

Maryland. — Brown v. Werner, 40 Md. 15; Baltimore, etc., R. Co. v. Pumphrey, 59 Md. 390; Baltimore City Pass. R. Co. v. Kemp, 61 Md. 74; Baltimore, etc., R. Co. v. Thompson, 10 Md. 76; Johnson v. Courts, 3 Har. & M. (Md.) 510; U. S. Telegraph Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Jacobs v. Davis, 34 Md. 204; Furstenburg v. Fawcett, 61 Md. 184; Baltimore, etc., Turnpike Co. v. Bate-man, 68 Md. 389, 6 Am. St. Rep. 449; Balti-more, etc., R. Co. v. Reaney, 42 Md. 117; Shafer v. Wilson, 44 Md. 268; Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635.

Massachusetts. — Hayden v. Cabot, 17 Mass. 169; Harrington v. Murphy, 109 Mass. 299; Sibley v. Hoar, 4 Gray (Mass.) 222; Loker v. Damon, 17 Pick. (Mass.) 284; Denny v. New York Cent. R. Co., 13 Gray (Mass.) 481, 74 Am. Dec. 645; Powell v. Deveney, 3 Cush.

(Mass.) 300, 50 Am. Dec. 738; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; Stevens v. Hartwell, 11 Met. (Mass.) 542; Jenks v. Wilbraham, 11 Gray (Mass.) 142; Marble v. Worcester, 4 Gray (Mass.) 395; Davis v. Dud-ley, 4 Allen (Mass.) 557; Flagg v. Hudson, 142 Mass. 280, 56 Am. Rep. 674; Palmer v. Andover, 2 Cush. (Mass.) 600; Lawton v. Fitch-burg R. Co., 8 Cush. (Mass.) 230, 54 Am. Dec. 753; Dyer v. Rich, 1 Met. (Mass.) 180; Wiley v. Athol, 150 Mass. 426; Batchelder v. Sturgis, 3 Cush. (Mass.) 201; Smith v. Flanders, 129 Mass. 322; Hyde v. Mechanical Refrigerating Co., 144 Mass. 432; French v. Vining, 102 Mass. 132, 3 Am. Rep. 440; Somers v. Wright, 115 Mass. 298; Cutting v. Grand Trunk R. Co., 13 Allen (Mass.) 381; Scott v. Boston, etc., Steamship Co., 106 Mass. 468; Hart v. Western R. Corp., 13 Met. (Mass.) 99, 46 Am. Dec. 719; Hill v. Winsor, 118 Mass. 251; Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 277, 12 Am. Rep. 689; Salis-bury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Perley v. Eastern R. Co., 98 Mass. 414, 96 Am. Dec. 645; Davidson v. Nichols, 11 Allen (Mass.) 519; White v. Moseley, 8 Pick. (Mass.) 356; Derry v. Flitner, 118 Mass. 131; Stowe v. Heywood, 7 Allen (Mass.) 118; Smith v. Holcomb, 99 Mass. 552; Hawes v. Knowles, 114 Mass. 518, 19 Am. Rep. 383; Anthony v. Slaid, 11 Met. (Mass.) 290; Allen v. Boston, 159 Mass. 324, 38 Am. St. Rep. 423; Spade v. Lynn, etc., R. Co., 168 Mass. 285; Lund v. Tyngsboro, 11 Cush. (Mass.) 563; Higgins v. Dewey, 107 Mass. 494, 9 Am. Rep. 63; Carter v. Towne, 103 Mass. 507; Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Barnes v. Chapin, 4 Allen (Mass.) 444, 81 Am. Dec. 710; Holly v. Boston Gas Light Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Squire v. Western Union Tel. Co., 98 Mass. 237, 93 Am. Dec. 157; McDonald v. Snelling, 14 Allen (Mass.) 292; 92 Am. Dec. 768; Dickinson v. Boyle, 17 Pick. (Mass.) 78, 28 Am. Dec. 281; Lane v. Atlantic Works, 111 Mass. 136.

Michigan. — Carnegie v. Holt, 99 Mich. 606; Burrell v. New York, etc., Solar Salt Co., 14 Mich. 34; East Saginaw City R. Co. v. Bohn, 27 Mich. 503; Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99; Clark v. Moore, 3 Mich. 55; Hutchings v. Ladd, 16 Mich. 493; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Haskell v. Hunter, 23 Mich. 305; Platt v. Brand, 26 Mich. 173; Wilson v. Wagar, 26 Mich. 452; Chadwick v. Butler, 28 Mich. 349; Cuddy v. Major, 12 Mich. 369; Hickey v. Baird, 9 Mich. 32; Loud v. Camp-bell, 26 Mich. 239; Fell v. Newberry, 106 Mich. 542; Allison v. Chandler, 11 Mich. 549; Wetmore v. Pattison, 45 Mich. 439; McKinnon v. McEwan, 48 Mich. 106, 42 Am. Rep. 458; Hammond v. Hannin, 21 Mich. 374; Welch v. Ware, 32 Mich. 77; Oliver v. Perkins, 92 Mich. 304; Selleck v. Lake Shore, etc., R. Co., 58 Mich. 195; Lewis v. Flint, etc., R. Co., 54 Mich. 55, 52 Am. Rep. 790; Richards v. Johnst-on, 46 Mich. 297; Maywood v. Logan, 78 Mich. 135, 18 Am. St. Rep. 431; McKeller v. Monitor Tp., 78 Mich. 485; Shumway v. Wal-

natural or proximate cause or consequence, many of the cases will, on the facts, be found arrayed in irreconcilable conflict; a condition which has been

worth, etc., *Mfg. Co.*, 98 Mich. 411; *Fuller v. Jackson*, 92 Mich. 197; *Hall v. Cadillac*, (Mich. 1897) 72 N. W. Rep. 33; *John Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156, 30 Am. St. Rep. 403.

Minnesota. — *Griggs v. Fleckenstein*, 14 Minn. 81, 100 Am. Dec. 199; *O'Neill v. Johnson*, 53 Minn. 439, 39 Am. St. Rep. 615; *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, 20 Am. St. Rep. 589; *Paine v. Sherwood*, 19 Minn. 315; *Swinfin v. Lowry*, 37 Minn. 345; *Osborne v. Poket*, 33 Minn. 10; *Fairchild v. Rogers*, 32 Minn. 269; *Frohreich v. Gamm*, 28 Minn. 476; *Nelson v. Chicago, etc., R. Co.*, 30 Minn. 74; *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567; *Schumaker v. St. Paul, etc., R. Co.*, 46 Minn. 39; *Wilson v. Northern Pac. R. Co.*, 26 Minn. 278, 37 Am. Rep. 410; *Smith v. St. Paul, etc., R. Co.*, 30 Minn. 169; *Opsahl v. Judd*, 30 Minn. 126; *Krippner v. Biehl*, 28 Minn. 139; *Purcell v. St. Paul City R. Co.*, 48 Minn. 138.

Mississippi. — *Royston v. Illinois Cent. R. Co.*, 67 Miss. 376; *Louisville, etc., R. Co. v. Dufree*, 69 Miss. 439; *Mississippi, etc., R. Co. v. Archibald*, 67 Miss. 38; *Heirn v. M'Caughan*, 32 Miss. 17, 66 Am. Dec. 588; *Meyer v. King*, 72 Miss. 1; *Barbee v. Reese*, 60 Miss. 906.

Missouri. — *Clark v. Pacific R. Co.*, 39 Mo. 184, 90 Am. Dec. 458; *Ballentine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315; *Pruitt v. Hannibal, etc., R. Co.*, 62 Mo. 542; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7; *Dill v. Crum*, 39 Mo. App. 508; *Carpenter v. McDavitt*, 53 Mo. App. 393; *Shaw v. Missouri, etc., Dairy Co.*, 56 Mo. App. 521; *McAlister v. Chicago, etc., R. Co.*, 74 Mo. 351; *Torney v. Geldmacher*, 75 Mo. 113, 42 Am. Rep. 388; *Clark v. Marshall*, 34 Mo. 429; *State v. Thomas*, 19 Mo. 613; *Hull v. Kansas*, 54 Mo. 598, 14 Am. Rep. 487; *Seckinger v. Philibert, etc., Mfg. Co.*, 129 Mo. 590; *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418; *Dimmitt v. Hannibal, etc., R. Co.*, 40 Mo. App. 654; *Poeppers v. Missouri, etc., R. Co.*, 67 Mo. 715, 29 Am. Rep. 518; *Stillson v. Hannibal, etc., R. Co.*, 67 Mo. 671; *State v. Finn*, 87 Mo. 310; *Brink v. Kansas City, etc., R. Co.*, 17 Mo. App. 177.

Nebraska. — *Uhlig v. Barnum*, 43 Neb. 584; *Bank of Commerce v. Goos*, 39 Neb. 437; *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210; *McClary v. Sioux City, etc., R. Co.*, 3 Neb. 44, 19 Am. Rep. 631.

Nevada. — *McNabb v. Wixom*, 7 Nevada 163.

New Hampshire. — *George v. Fisk*, 32 N. H. 32; *Favor v. Philbrick*, 5 N. H. 358; *Knapp v. U. S., etc., Express Co.*, 55 N. H. 348; *Crawford v. Parsons*, 63 N. H. 438; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *Davis v. Barington*, 30 N. H. 517; *Hurd v. Dunsmore*, 63 N. H. 171; *Winship v. Enfield*, 42 N. H. 197; *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267; *Hooksett v. Concord R. Co.*, 38 N. H. 242; *Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287.

New Jersey. — *Gorden v. Butts*, 2 N. J. L. 314; *Oliphant v. Brearley*, 54 N. J. L. 521;

Dale v. Grant, 34 N. J. L. 142; *Crater v. Binninger*, 33 N. J. L. 517, 97 Am. Dec. 737; *Drake v. Baker*, 34 N. J. L. 358; *Warwick v. Hutchinson*, 45 N. J. L. 61; *Hughes v. McDonough*, 43 N. J. L. 459; *Delaware, etc., R. Co. v. Salmon*, 39 N. J. L. 299, 23 Am. Rep. 214; *Ten Eyck v. Delaware, etc., Canal Co.*, 18 N. J. L. 200; *Cuff v. Newark, etc., R. Co.*, 35 N. J. L. 18, 10 Am. Rep. 205; *Appleby v. State*, 45 N. J. L. 161; *Wiley v. West Jersey R. Co.*, 44 N. J. L. 248.

New York. — *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Hoffnagle v. New York Cent., etc., R. Co.*, 55 N. Y. 608; *Butler v. Manhattan R. Co.*, 143 N. Y. 417, 42 Am. St. Rep. 738; *Engelsdorf v. Site*, 64 Hun (N. Y.) 209; *Compton v. Heissenbuttel*, (C. Pl.) 16 N. Y. Supp. 524, 18 N. Y. Supp. 952; *Roome v. Jennings*, (City Ct.) 29 N. Y. Supp. 685; *Hollenbeck v. Johnson*, 79 Hun (N. Y.) 499; *Jex v. Strauss*, 55 N. Y. Super. Ct. 52; *Hargous v. Ablon*, 3 Den. (N. Y.) 406, 45 Am. Dec. 481, 5 Hill (N. Y.) 472; *Chatterton v. Fox*, 5 Duer (N. Y.) 64; *Lowenstein v. Chappell*, 30 Barb. (N. Y.) 241; *Beach v. Ranney*, 2 Hill (N. Y.) 314; *Lattin v. Davis*, Hill & D. Supp. (N. Y.) 9; *Smith v. Pettie*, 7 Hun (N. Y.) 335; *Moody v. Baker*, 5 Cow. (N. Y.) 351; *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464, 47 Am. Dec. 268; *Deming v. Kemp*, 4 Sandf. (N. Y.) 147; *Bertholf v. O'Reilly*, 8 Hun (N. Y.) 16; *Baldwin v. U. S. Telegraph Co.*, 1 Lans. (N. Y.) 137, 45 N. Y. 744, 6 Am. Rep. 165; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *Olmsted v. Miller*, 1 Wend. (N. Y.) 506; *Eldridge v. Long Island R. Co.*, 1 Sandf. (N. Y.) 89; *Crain v. Petrie*, 6 Hill (N. Y.) 522, 41 Am. Dec. 765; *Aldrich v. Sager*, 9 Hun (N. Y.) 537; *Story v. New York, etc., R. Co.*, 6 N. Y. 90; *Myers v. Malcolm*, 6 Hill (N. Y.) 292, 41 Am. Dec. 744; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Neary v. Bostwick*, 2 Hilt. (N. Y.) 517; *Cram v. Dresser*, 2 Sandf. (N. Y.) 120; *Heaney v. Heeney*, 2 Den. (N. Y.) 625; *Morse v. Swits*, 19 How. Pr. (N. Y. Supreme Ct.) 275; *Albert v. Bleeker St. etc. R. Co.*, 2 Daly (N. Y.) 389; *Keenholts v. Becker*, 3 Den. (N. Y.) 346; *Malony v. Brady*, (C. Pl.) 18 N. Y. Supp. 757, 19 N. Y. Supp. 911; *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756; *Guile v. Swan*, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234; *Williams v. Hill*, 19 Wend. (N. Y.) 305; *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Lawrence v. Wardwel*, 6 Barb. (N. Y.) 423; *Davis v. Talcott*, 14 Barb. (N. Y.) 611; *Wibert v. New York, etc., R. Co.*, 19 Barb. (N. Y.) 48; *Russell v. Giblin*, 16 Daly (N. Y.) 258; *Horne v. Wood*, 16 Barb. (N. Y.) 389; *Walrath v. Redfield*, 11 Barb. (N. Y.) 372; *Sharon v. Mosher*, 17 Barb. (N. Y.) 518; *Hosmer v. True*, 19 Barb. (N. Y.) 106; *Butler v. Kent*, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219; *Twomley v. Central Park, etc., R. Co.*, 60 N. Y. 158, 25 Am. Rep. 162; *Bennett v. Lockwood*, 20 Wend. (N. Y.) 223, 32 Am. Rep. 532; *Parmalee v. Wilks*, 22 Barb. (N. Y.) 539; *Bean v. Wells*, 28 Barb. (N. Y.) 466; *Hastings v. Palmer*, 20 Wend. (N. Y.) 225; *Liman v. Pennsylvania R. Co.*, 4 Misc. Rep. (N. Y. C. Pl.)

regarded by some as the result of the infinite variety of circumstances to which the rule has necessarily been applied. The conflict in the cases, however, is

539; *Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250; *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343; *Conger v. Weaver*, 20 N. Y. 140; *Eschbach v. Hughes*, 7 Misc. Rep. (N. Y. C. Pl.) 172; *Mack v. Patchin*, 29 How. Pr. (Buffalo Super. Ct.) 30; *Mitchell v. Cody*, 6 Misc. Rep. (N. Y. Super. Ct.) 307; *Boyer v. Little Falls*, 5 N. Y. App. Div. 1; *Sheridan v. Brooklyn City, etc.*, R. Co., 36 N. Y. 39; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49; *Buel v. New York Cent. R. Co.*, 31 N. Y. 314; *Radway v. Briggs*, 37 N. Y. 256; *Clark v. Union Ferry Co.*, 35 N. Y. 485, 91 Am. Dec. 66; *Morrison v. Long Island R. Co.*, 3 N. Y. App. Div. 205; *Murdock v. Jones*, 3 N. Y. App. Div. 221; *Milburn v. Belloni*, 39 N. Y. 53, 100 Am. Dec. 403; *Myers v. Burns*, 35 N. Y. 269; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530; *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 214; *Carpenter v. Pennsylvania R. Co.*, 13 N. Y. App. Div. 328; *Weber v. Third Ave. R. Co.*, 12 N. Y. App. Div. 512; *Webb v. Rome, etc.*, R. Co., 49 N. Y. 420, 10 Am. Rep. 389; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Lannen v. Albany Gas-light Co.*, 44 N. Y. 459; *Putnam v. New York Cent., etc.*, R. Co., 47 Hun (N. Y.) 439; *Crandall v. Eldridge*, 46 Hun (N. Y.) 411; *Dillon v. Masterson*, 42 N. Y. Super. Ct. 183; *Messmore v. New York Shot, etc.*, Co., 40 N. Y. 422; *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463; *Leonard v. New York, etc.*, Tel. Co., 41 N. Y. 566, 1 Am. Rep. 446; *Flynn v. Hatton*, 43 How. Pr. (N. Y. C. Pl.) 348; *Cassidy v. Le Fevre*, 45 N. Y. 567; *Ward v. New York Cent. R. Co.*, 47 N. Y. 32, 7 Am. Rep. 405; *Pollett v. Long*, 56 N. Y. 200; *Swain v. Schieffelin*, 58 Hun (N. Y.) 608, 34 N. Y. St. Rep. 888; *Brooklyn v. Brooklyn City R. Co.*, 57 Barb. (N. Y.) 502; *Wulstein v. Mohlman*, 57 N. Y. Super. Ct. 50; *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1; *Sauter v. New York Cent., etc.*, R. Co., 66 N. Y. 50, 23 Am. Rep. 18; *Devlin v. New York*, 63 N. Y. 25; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Eten v. Luyster*, 60 N. Y. 252; *Draper v. Sweet*, 66 Barb. (N. Y.) 145; *Kennedy v. New York*, 73 N. Y. 365, 29 Am. Rep. 169; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386; *Schile v. Brokhahus*, 80 N. Y. 614; *Loftus v. Union Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533; *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 52 Am. Rep. 12; *Hecla Powder Co. v. Sigua Iron Co.*, 91 Hun (N. Y.) 429; *Ehrgott v. New York*, 96 N. Y. 280, 48 Am. Rep. 622; *O'Neill v. New York, etc.*, R. Co., 115 N. Y. 579; *Wakeman v. Wheeler, etc.*, Mfg. Co., 101 N. Y. 209, 54 Am. Rep. 676; *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522.

North Carolina. — *Sledge v. Reid*, 73 N. Car. 440; *Sanderlin v. Shaw*, 6 Jones L. (51 N. Car.) 225; *Alpha Mills v. Watertown Steam Engine Co.*, 116 N. Car. 797; *Bridgers v. Dill*, 97 N. Car. 222; *Jackson v. Hall*, 84 N. Car. 489; *Lewis v. Rountree*, 79 N. Car. 122, 28 Am. Rep. 309; *Welch v. Piercy*, 7 Ired. L. (29

N. Car.) 365; *Hinson v. Smith*, 118 N. Car. 503; *Mace v. Ramsey*, 74 N. Car. 11; *Ashe v. De Rossett*, 5 Jones L. (50 N. Car.) 299, 72 Am. Dec. 552.

North Dakota. — *Chacey v. Fargo*, 5 N. Dak. 173.

Ohio. — *Barnesville First Nat. Bank v. Western Union Tel. Co.*, 30 Ohio St. 555; *Adams v. Young*, 44 Ohio St. 80, 58 Am. Rep. 789; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Dayton v. Pease*, 4 Ohio St. 80; *Rhodes v. Baird*, 16 Ohio St. 573; *Devereux v. Buckley*, 34 Ohio St. 16, 32 Am. Rep. 342; *Trowbridge v. Holcomb*, 4 Ohio St. 38; *Pittsburgh, etc.*, R. Co. v. *Staley*, 41 Ohio St. 118; *Cincinnati v. Evans*, 5 Ohio St. 594.

Pennsylvania. — *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147, 62 Am. Dec. 323; *Adams Express Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382; *Fessler v. Love*, 48 Pa. St. 410; *Pittsburg Coal Co. v. Foster*, 59 Pa. St. 369; *Wolf v. Studebaker*, 65 Pa. St. 463; *Pittsburg, etc.*, Pass. R. Co. v. *Caldwell*, 74 Pa. St. 421; *Scott v. Hunter*, 46 Pa. St. 192, 84 Am. Dec. 542; *Fairbanks v. Kerr*, 70 Pa. St. 86, 10 Am. Rep. 664; *McGrew v. Stone*, 53 Pa. St. 436; *Jones v. Gilmore*, 91 Pa. St. 310; *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695; *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373, 21 Am. Rep. 100; *Pittsburgh City v. Grier*, 22 Pa. St. 54, 60 Am. Dec. 65; *Hoag v. Lake Shore, etc.*, R. Co., 85 Pa. St. 293, 27 Am. Rep. 653; *McKain v. Elkin*, 27 Pittsb. Leg. J. 169; *Neal v. Atlantic Refining Co.*, (Pa. C. Pl.) 4 Pa. Dist. Rep. 49, 16 Pa. Co. Ct. Rep. 241; *Drake v. Kiely*, 93 Pa. St. 492; *Hey v. Philadelphia*, 81 Pa. St. 44, 22 Am. Rep. 733; *Fiegel v. Latour*, 81* Pa. St. 448; *Brown v. Foster*, 51 Pa. St. 165; *Pennypacker v. Jones*, 106 Pa. St. 237; *McConaghy v. Pemberton*, 168 Pa. St. 121; *U. S. Telegraph Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751; *Thompson v. Burgey*, 36 Pa. St. 403; *Stetson v. Croskey*, 52 Pa. St. 230; *McNair v. Compton*, 35 Pa. St. 23; *Billmeyer v. Wagner*, 91 Pa. St. 92; *Allegheny v. Zimmerman*, 95 Pa. St. 287, 40 Am. Rep. 649; *Seely v. Alden*, 61 Pa. St. 302.

Rhode Island. — *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66.

South Carolina. — *Harrison v. Berkley*, 1 Strobb. L. (S. Car.) 525, 47 Am. Dec. 578; *Alston v. Huggins*, 3 Brev. (S. Car.) 185; *Tappan v. Harwood*, 2 Spears L. (S. Car.) 536; *Sitton v. Macdonald*, 25 S. Car. 68, 60 Am. Rep. 484.

Tennessee. — *White v. Conly*, 14 Lea (Tenn.) 51, 52 Am. Rep. 154; *Jackson v. Nashville, etc.*, R. Co., 13 Lea (Tenn.) 491, 49 Am. Rep. 663; *Childress v. Yourie*, Meigs (Tenn.) 561; *State v. Ward*, 9 Heisk. (Tenn.) 100; *Anderson v. Miller*, 96 Tenn. 35; *East Tennessee, etc.*, R. Co. v. *Kelly*, 91 Tenn. 699; *Deming v. Merchants Cotton-press, etc.*, Co., 90 Tenn. 353; *Postal Telegraph-Cable Co. v. Zopf*, 93 Tenn. 374.

Texas. — *Hardin v. Newell*, (Tex. Civ. App. 1897) 40 S. W. Rep. 331; *Gulf, etc.*, R. Co. v. *Hodge*, (Tex. Civ. App. 1897) 39 S. W. Rep. 986; *Gulf, etc.*, R. Co. v. *Southwick*, (Tex. Civ. App. 1895) 30 S. W. Rep. 592; *San An-*

only in part due specifically to the variety of circumstances which arise for the application of the rule. One reason which may be considered is that the question of what is a proximate or natural cause or consequence is frequently, as will be seen hereafter, solely a question of fact for the determination of the jury. Another fruitful source of confusion has arisen out of not always well directed efforts to distinguish, in the matter of cause and consequence, between cases arising in contract and in tort. And to indifference and inexactness in

tonio, etc., *R. Co. v. Gwynn*, 4 Tex. App. Civ. Cas., § 219; Texas, etc., *R. Co. v. Pierce*, 10 Tex. Civ. App. 429; Galveston, etc., *R. Co. v. Ware*, 67 Tex. 635; Westfall *v. Perry*, (Tex. Civ. App. 1893) 23 S. W. Rep. 740; Eames *v. Texas*, etc., *R. Co.*, 63 Tex. 660; Chicago, etc., *R. Co. v. Boyles*, 11 Tex. Civ. App. 522; St. Louis Southwestern *R. Co. v. Thomas*, (Tex. Civ. App. 1894) 27 S. W. Rep. 419; Broussard *v. Sabine*, etc., *R. Co.*, 80 Tex. 329; Steel *v. Metcalf*, 4 Tex. Civ. App. 313; Donahoo *v. Scott*, (Tex. Civ. App. 1895) 30 S. W. Rep. 385; Alderson *v. Gulf*, etc., *R. Co.*, (Tex. Civ. App. 1893) 23 S. W. Rep. 617; Turner *v. Strange*, 56 Tex. 141; Equitable Mortg. Co. *v. Thorn*, (Tex. Civ. App. 1894) 26 S. W. Rep. 276; Watkins *v. Junker*, 4 Tex. Civ. App. 629; Wells *v. Battle*, 5 Tex. Civ. App. 532; Houston, etc., *R. Co. v. Hill*, 63 Tex. 381; Yoakum *v. Dunn*, 1 Tex. Civ. App. 524; Brandon *v. Gulf City Cotton Press*, etc., *Co.*, 51 Tex. 121; Jones *v. George*, 61 Tex. 354, 48 Am. Rep. 280; St. Louis Cattle Co. *v. Gholson*, (Tex. Civ. App. 1895) 30 S. W. Rep. 269; Buffalo Bayou Ship Channel Co. *v. Milby*, 63 Tex. 492, 51 Am. Rep. 668; St. Louis, etc., *R. Co. v. Doyle*, (Tex. Civ. App. 1894) 25 S. W. Rep. 461; Houston, etc., *R. Co. v. Leslie*, 57 Tex. 83.

Vermont. — Piper *v. Kingsbury*, 48 Vt. 480; Luce *v. Hoisington*, 56 Vt. 436; Maynard *v. Maynard*, 49 Vt. 297; Dennis *v. Stoughton*, 55 Vt. 371; Newell *v. Whitcher*, 53 Vt. 589, 38 Am. Rep. 703; Ellis *v. Cleveland*, 55 Vt. 358; St. Johnsbury, etc., *R. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639; Packard *v. Slack*, 32 Vt. 9; Hunt *v. Pownal*, 9 Vt. 411; Hodge *v. Bennington*, 43 Vt. 451; Stevens *v. Dudley*, 56 Vt. 168; Keenan *v. Cavanaugh*, 44 Vt. 268. And see Bovee *v. Danville*, 53 Vt. 190.

Virginia. — Burruss *v. Hines*, 94 Va. 413; Slaughter *v. Denmead*, 88 Va. 1019; Peshine *v. Shepperson*, 17 Gratt. (Va.) 472, 94 Am. Dec. 468.

Washington. — Skagit R., etc., *Co. v. Cole*, 1 Wash. 330.

West Virginia. — James *v. Adams*, 8 W. Va. 568.

Wisconsin. — Vedder *v. Hildreth*, 2 Wis. 427; Brayton *v. Chase*, 3 Wis. 456; Walsh *v. Chicago*, etc., *R. Co.*, 42 Wis. 23, 24 Am. Rep. 376; Buffalo Barb Wire Co. *v. Phillips*, 64 Wis. 338; Driver *v. Western Union R. Co.*, 32 Wis. 569, 14 Am. Rep. 726; Vosburg *v. Putney*, 86 Wis. 278; Stewart *v. Ripon*, 38 Wis. 584; McNamara *v. Clintonville*, 62 Wis. 207, 51 Am. Rep. 722; Jaquish *v. Ithaca*, 36 Wis. 108; Thomas, etc., Mfg. Co. *v. Wabash*, etc., *R. Co.*, 62 Wis. 642, 51 Am. Rep. 725; Kellogg *v. Chicago*, etc., *R. Co.*, 26 Wis. 223, 7 Am. Rep. 69; Hill *v. Chipman*, 59 Wis. 218; Candee *v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; Richardson *v. Chynoweth*, 26 Wis. 656; Flick

v. Wetherbee, 20 Wis. 392; Shepard *v. Milwaukee Gas Light Co.*, 15 Wis. 318, 82 Am. Dec. 679; Brown *v. Chicago*, etc., *R. Co.*, 54 Wis. 342, 41 Am. Rep. 41; Hammer *v. Schoenfelder*, 47 Wis. 455; Olson *v. Chippewa Falls*, 71 Wis. 558; Houfe *v. Fulton*, 29 Wis. 206, 9 Am. Rep. 568; Jackson *v. Bellevieu*, 30 Wis. 250; Kelley *v. Fond du Lac*, 31 Wis. 179; Oliver *v. La Valle*, 36 Wis. 592; Patten *v. Chicago*, etc., *R. Co.*, 32 Wis. 524; Gough *v. Goldsmith*, 44 Wis. 264, 28 Am. Rep. 579; Wieting *v. Millston*, 77 Wis. 523; Woodward *v. Boscobel*, 84 Wis. 226; Knowlton *v. Milwaukee City R. Co.*, 59 Wis. 278; Atkinson *v. Goodrich Transp. Co.*, 60 Wis. 141, 50 Am. Rep. 352; Cobb *v. Smith*, 38 Wis. 21; Harris *v. Cameron*, 81 Wis. 239, 29 Am. St. Rep. 891.

As Was Said by Lord Bacon, "it were infinite for the law to consider the cause of causes, and their impulsion one upon another, therefore it contenteth itself with the immediate cause and judgeth of acts by that, without looking to any further degree." Bac. Max. Reg. 1.

Damages to Be Recoverable Must Flow Naturally, Legally, and Directly. — Walker, P. J., delivering the opinion of the court in Buffalo Bayou Ship Channel Co. *v. Milby*, 63 Tex. 492, 51 Am. Rep. 668, said: "It is elementary that where the damage resulting from the act of another is too remote, or, in other words, flows not naturally, legally, and with sufficient directness from the alleged injury, the plaintiff will not be entitled to recover damages."

Law Regards Only Proximate and Not Remote Causes. — Where a plaintiff's right of recovery depends upon whether or not he accomplished a certain result which has occurred, it has been held that he must show that it followed proximately from his efforts without intervening cause. The case of Earp *v. Cummins*, 54 Pa. St. 394, 93 Am. Dec. 718, was an action of assumpsit brought by a real estate broker to recover commission for the sale of real estate. In this case it appeared in proof that the person who subsequently bought the property had been originally approached by the real estate broker, but after negotiations for a time the prospective purchaser decided not to buy. Some time afterwards, however, the person first mentioned was induced by other persons to reconsider his determination not to buy the property, and did actually purchase it. In this case the court held that in a certain sense it might be true that the purchase was a consequence of the broker's efforts, as but for that the purchaser might never have looked at the property nor entertained a thought of buying it, but that the purchase was finally due to another distinct and separate cause and that therefore the broker could not recover, as the law regards only proximate and not remote causes.

the use of terms may be ascribed not a little of the conflict, often, however, more apparent than real.¹

Practical Distinctions Favored. — Though an inquiry as to what is the proximate cause of an injury, from a legal point of view, often involves, in a sense, metaphysical subtleties and distinctions,² in determining what are and what are not the proximate consequences of an act the law favors practical distinctions rather than those which are merely theoretical.³ In fact, a result may be physically secondary and consequential, and yet in legal contemplation proximate.⁴ In this connection it has been well said that "the law is a practical science, and courts do not indulge refinements and subtleties as to causation that would defeat the claims of natural justice."⁵

2. Impracticability of General Rules. — So impossible is it to lay down any general rules of uniform application in this connection, that it is almost conceded that each case must be decided with reference to its own particular facts,⁶ or, as it was said by one court: "Many cases illustrate, but none define, what is an immediate or what is a remote cause. Indeed, such a cause seems to be incapable of any strict definition which will suit in every case."⁷ To a sound judgment must be left each particular case.⁸

No Recovery for Damages Resulting from Acts of Plaintiff. — The rule that a plaintiff is entitled to recover only such damages as are the natural and direct consequences of the acts of the defendant excludes from consideration all damages resulting from the acts of or want of proper care of the plaintiff.⁹

3. Remote and Speculative Consequences as Lacking the Requisite Certainty. — It has been said that the law will consider only proximate causes for the reason that remote or speculative considerations would not afford a sufficient degree of certainty for judicial action.¹⁰

4. Policy of Rule as to Natural and Proximate Results. — Although in strict

1. Line between Proximate and Remote Damages Exceedingly Uncertain. — Said Holt, J., in *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126: "The line between proximate and remote damages is exceedingly shadowy; so much so, that the one fades away into the other, rendering it often very difficult to determine whether there is such a connection between the wrong alleged and the resulting injury, as to place them in contemplation of law in the relation of cause and effect." And see *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277, 12 Am. Rep. 689.

"The dividing line between proximate and remote damage is sometimes so indistinct as to leave a field of doubtful and disputed ground." Bynum, J., in *Sledge v. Reid*, 73 N. Car. 440.

2. *Elbert, J.*, in *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89.

3. *Chapman, C. J.*, in *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277, 12 Am. Rep. 689.

4. *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89.

5. *Baltimore, etc., R. Co. v. Reaney*, 42 Md. 117.

6. Whether in Contract or in Tort. — Whether, in actions for the breach of contracts, the loss for which damages are claimed is the remote or direct consequence of the breach, depends in each instance on the facts and circumstances of the particular transaction. *Tuck, J.*, in *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635; *Elbert, J.*, in *Pullman Palace Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89.

No General Rules Deducible. — In the case of

Mutual Ins. Co. v. Tweed, 7 Wall. (U. S.) 49, the court said: "We have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and has been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it and often upon the very nicest discriminations."

"It is impossible by any general rule to draw a line between those injurious causes of damage which the law regards as sufficiently proximate, and those which are too remote to be the foundation of an action." *Strong, J.*, in *Scott v. Hunter*, 46 Pa. St. 192, 84 Am. Dec. 542.

7. *Fairbanks v. Kerr*, 70 Pa. St. 86, 10 Am. Rep. 664. See the observations of *Beasley, C. J.*, in *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737.

Rule Easy of Statement but Difficult of Application. — Said *Wilkes, J.*, in *Anderson v. Miller*, 96 Tenn. 35: "The definitions of proximate cause are easily given in general terms, but they are very difficult in practical application to the facts of each particular case."

8. *Wardlaw, J.*, in *Harrison v. Berkley*, 1 Strobb. L. (S. Car.) 547, 47 Am. Dec. 578.

9. *Eten v. Luyster*, 60 N. Y. 252. See also the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368.

10. Remote and Speculative Consequences Too Uncertain for Judicial Action. — *Poilett v. Long*, 56 N. Y. 200.

logic it may be considered that he who is the cause of loss should be answerable for all losses which follow from his causation, yet in the practical workings of society the law finds in this, as in a variety of other matters, that the rule of logic would be impracticable and unjust. As it is impossible to compensate for all injuries, the law, therefore, aims at such a just discrimination as will impose upon the party causing loss the proportion that a proper view of his acts and the attending circumstances would dictate.¹

One Reason for Confusion of Authorities — Lack of Precision in Use of Terms. — It will be observed that there is a great lack of uniformity, especially on this branch of the subject, in the use of terms, both by courts and text-writers.²

The Terms "Natural" and "Proximate." — The term "natural" as applied to the consequences of an act properly implies that they are such as might reasonably have been foreseen, or such as occur according to the ordinary course of events; the term "proximate" indicates nearness, and, in law, requires that there should be no other culpable and efficient agency intervening between the defendant's act and the loss.³ Notwithstanding, however, the differences in meaning, the words "natural" and "proximate" are often used indifferently and interchangeably, although, as will be seen hereafter, it is frequently material to distinguish between them; and the same may be said of the use of various words of similar meaning, such as "probable," "immediate," "direct," and the like. To this, perhaps, as much as to any other one thing, the conflict in the authorities is due. But by bearing in mind the true and accurate meaning of the terms, many cases can be reconciled which otherwise would seem hopelessly opposed.⁴

5. What Is the Natural Cause of a Loss — a. IN GENERAL. — A natural cause is such a cause as, having operated through a natural sequence of events, has produced the particular result. Natural consequences are such as follow according to the usual and ordinary course of things.⁵ Natural consequences

1. Agnew, J., in *Fairbanks v. Kerr*, 70 Pa. St. 86, 10 Am. Rep. 664; *Squire v. Western Union Tel. Co.*, 98 Mass. 237, 93 Am. Dec. 157; *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

Person Not Held Liable for All Consequences of His Acts. — The law does not hold one liable for all the consequences that follow the breach of his contract. If this were so, the liability of the party would be without a limit, for it would continue as far as the consequences of his act could be traced. The law wisely limits liability to the direct and immediate effects of a breach of the contract. Beck, J., in *Prosser v. Jones*, 41 Iowa 674.

Every Event the Result of a Combination of Causes. — "Every incident will, when carefully examined, be found to be the result of combined causes, and to be itself one of various causes which produce other events. Accident or design may disturb the ordinary action of causes, and produce unlooked for results. It is easy to imagine some act of trivial misconduct or slight negligence which shall do no direct harm, but set in motion some second agent, that shall move a third, and so on, until the most disastrous consequences shall ensue. The first wrongdoer, unfortunate rather than seriously blamable, cannot be made answerable for all of these consequences." Wardlaw, J., in *Harrison v. Berkley*, 1 Strobb. L. (S. Car.) 548, 47 Am. Dec. 578. See also *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353, 1 Am. Rep. 431.

2. Various Terms Used. — Wardlaw, J., in

Harrison v. Berkley, 1 Strobb. L. (S. Car.) 547, 47 Am. Dec. 578, said: "It would be vain to attempt to define with precision the terms which have been used on this subject, or to lay down any general rules by which consequences that shall be answered for, and those which are too remote for consideration, may be always distinguished."

3. Dixon, J., in *Wiley v. West Jersey R. Co.*, 44 N. J. L. 248.

4. "Direct" as Synonymous with "Natural and Proximate." — Where the jury in an action for personal injuries were instructed to assess such damages as the plaintiff sustained as the direct result of the negligence, it was held not to have been error, the word "direct" being used synonymously with "natural and proximate." Lovett v. Chicago, 35 Ill. App. 570.

5. See Dixon, J., in *Wiley v. West Jersey R. Co.*, 44 N. J. L. 248.

Such a Succession of Events as Constitutes a Natural Whole. — The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and injury? Mr. Justice Strong in *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469; *Weber v. Third Ave. R. Co.*, 12 N. Y. App. Div. 512.

In the case of *Purcell v. St. Paul City R. Co.*, 48 Minn. 138, the court said: "There may be a succession of intermediate causes.

do not necessarily include all such as upon a calculation of chances would be found likely to occur, or such as extreme prudence might anticipate, but only such as ensue from the original act without any such extraordinary coincidence or conjunction of circumstances as that the usual course of nature should seem to have been departed from.¹

b. PROXIMATE CAUSE AND NATURAL CAUSE CONTRASTED. — The consequences of an act may be proximate or immediate, though not natural, usual, or probable. In the same way, natural consequences are not necessarily proximate or immediate, as where the original cause has operated through a succession of events, the final result being removed from, though a not improbable result of, the primary act. It will be observed, also, that proximate consequences are usually natural consequences, though the converse of the proposition is not so generally true. Indeed, under some circumstances, as will be seen hereafter, proximate consequences are conclusively presumed to be natural consequences — such as might and ought to have been foreseen.²

c. RESPONSIBILITY OF AUTHOR OF ACT FOR CONSEQUENCES BOTH NATURAL AND PROXIMATE. — There has never been doubt that a defendant whose act amounts in law to a legal wrong is responsible in damages for all the loss which is both a natural and proximate consequence of his wrongful act. This rule applies with equal universality whether the act complained of belongs to that class of wrongs known as tort, or amounts to a breach of contract simply.³

d. RULE AS TO RESPONSIBILITY FOR NATURAL AND PROBABLE CONSEQUENCES. — A defendant is responsible for the natural and probable consequences of his acts.⁴

The Rule Is the Same in Contract or in Tort, for the contract is supposed to have been made and broken or the tort committed in contemplation of the injury which would thereby likely result.⁵

Breach of Contract — Natural and Not Accidental Losses Recoverable. — Such damages as are incidental to and caused by a breach of contract, and may be said to flow

each produced by the one preceding, and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result."

1. Wardlaw, J., in *Harrison v. Berkley*, 1 Strobh. L. (S. Car.) 547, 47 Am. Dec. 578.

2. See succeeding subdivisions of this section.

3. *Philpot v. Taylor*, 75 Ill. 309, 20 Am. Rep. 241; *Mace v. Ramsey*, 74 N. Car. 11; *Harrison v. Berkley*, 1 Strobh. L. (S. Car.) 547, 47 Am. Dec. 578; *Peshine v. Shepperson*, 17 Gratt. (Va.) 472, 94 Am. Dec. 468. And see also authorities cited in foregoing notes.

Natural and Proximate Consequences. — Dixon, J., in *Wiley v. West Jersey R. Co.*, 44 N. J. L. 248, said that the "law requires that the damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term 'natural' imports that they are such as might reasonably have been foreseen, such as occur in an ordinary state of things; the term 'proximate' indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss."

Forcible Entry and Detainer — Rents and Profits as Damages. — Where there has been a forcible

entry and unlawful detainer, rents and profits, as damages, may be recovered up to the time of the verdict, the loss of rents and profits being the direct and immediate consequence of the deprivation of possession. *Hicks v. Herring*, 17 Cal. 569.

4. *McPheters v. Moose River Log Driving Co.*, 78 Me. 329; *Shafer v. Wilson*, 44 Md. 268; *Purcell v. St. Paul City R. Co.*, 48 Minn. 138; *Hopkins v. Atlantic*, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287; *Crain v. Petrie*, 6 Hill (N. Y.) 523, 41 Am. Dec. 765; *Boyer v. Little Falls*, 5 N. Y. App. Div. 1; *Bennett v. Lockwood*, 20 Wend. (N. Y.) 223, 32 Am. Dec. 532; *Hinson v. Smith*, 118 N. Car. 503; *McGrew v. Stone*, 53 Pa. St. 436; *Stevens v. Dudley*, 56 Vt. 168; *Vedder v. Hildreth*, 2 Wis. 427.

Relation of Cause and Effect between First Cause and Final Result. — Clopton, J., delivering the opinion of the court in *East Tennessee*, etc., R. Co. v. *Lockhart*, 79 Ala. 315, said: "The relation of cause and effect between the tortious act and the intervening agencies being shown, the same relation between the primary wrong and the subsequent injuries is also established, the first wrongful act operating through a succession of circumstances, each connected with and originated by the next preceding."

5. *Stayton, J.*, in *Jones v. George*, 61 Tex. 354, 48 Am. Rep. 280.

reasonably and naturally from such breach, and are not accidental or consequential losses, will be allowed.¹

One Who Commits a Tortious Act is liable for any injury which is the natural and probable consequence of his misconduct. He is liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as according to the common experience of men are likely to result from his act.²

Presumption that Party Intends Natural Consequences. — It has been said that every man is presumed in law to intend the consequences which naturally follow from an unlawful act, and is therefore responsible for any damage thereby resulting.³

c. **IF NATURAL AND PROBABLE, NEED NOT BE PROXIMATE.** — The doctrine that a person is responsible for the natural and probable consequences of his acts holds good, it seems, whether the consequences are, in the sense in which the term is herein used, proximate or not. In other words, the fact that a consequence is not immediate, either in point of time or in the sequence of events, will not vary the responsibility of the author of the original wrong provided the consequences which followed are natural and probable.⁴ Damage is never too remote if, according to the usual experience of mankind, the result was to be expected.⁵

Test. — It has been said in this connection that the test is not to be found in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the first act as a result which might reasonably have been foreseen as probable, the legal liability continues.⁶

That Which Is Reasonably to Be Expected will be regarded although it may be considerably removed.⁷

f. **SEQUENCE IN POINT OF TIME IMMATERIAL.** — It is not necessary that

1. *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635; *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756.

2. *Shafer v. Wilson*, 44 Md. 268; *Derry v. Flitner*, 118 Mass. 131; *Hopkins v. Atlantic, etc.*, R. Co., 36 N. H. 9, 72 Am. Dec. 287; *Scott v. Hunter*, 46 Pa. St. 102, 84 Am. Dec. 542. See *infra*, this title, *Measure of Damages and Elements of Recovery*.

3. *Welch v. Piercy*, 7 Ired. L. (29 N. Car.) 365.

4. *The Gertor*, 70 L. T. 703; *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193; *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544; *Hill v. Winsor*, 118 Mass. 251; *Barbee v. Reese*, 60 Miss. 906; *Pollett v. Long*, 56 N. Y. 200; *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 41 Am. Rep. 41.

And in Order that a Given Result May Be Natural or Probable, it is not necessary that a wrongdoer or one guilty of negligence should be able to anticipate the precise consequences which in fact happen. *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193; *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544; *Hill v. Winsor*, 118 Mass. 251.

A Wrongdoer Is Not Exonerated from Liability by the fact that intervening events or agencies contributed to the injury, if the injury sustained was such as, according to common experience and the usual course of events, might reasonably have been anticipated. *Derry v. Flitner*, 118 Mass. 131.

The Fact that Some Agency Intervened between the original act and the injury does not

preclude a recovery if the injury was the natural and probable result of the original wrong. *Binford v. Johnston*, 82 Ind. 428, 42 Am. Rep. 508.

Consequences Reasonably to Have Been Foreseen. — Where the effect of an act was reasonably to have been foreseen, and where in the usual course of events it was likely to follow from the cause, the persons putting such cause in motion will be responsible, even though there may have been other concurring events and agencies between such cause and its consequences. *Beasley, C. J.*, in *Hughes v. McDonough*, 43 N. J. L. 459.

Accidental and Not Natural Consequences. — In the case of *Vedder v. Hildreth*, 2 Wis. 427, the court said that "no case can be found where a mere accident or event not resulting naturally from the act done by the defendant has been held sufficient to constitute a valid claim for damages." And see *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193; *Hill v. Winsor*, 118 Mass. 251.

5. See *Foster, J.*, in *McDonald v. Snelling*, 14 Allen (Mass.) 292, 92 Am. Dec. 768. Compare *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 475.

6. *McDonald v. Snelling*, 14 Allen (Mass.) 292, 92 Am. Dec. 768.

7. *Wardlaw, J.*, in *Harrison v. Berkley*, 1 Strobb. L. (S. Car.) 547, 47 Am. Dec. 578; *McDonald v. Snelling*, 14 Allen (Mass.) 292, 92 Am. Dec. 768; *State v. Finn*, 87 Mo. 310; *Appleby v. State*, 45 N. J. L. 161.

the result of a wrongful act for which damages are sought should have followed the act immediately in point of time or within any certain period of time. It is sufficient if the damages which follow are the natural consequences of the act and might have been regarded as the not improbable consequence when the act itself was committed.¹

6. What Is the Proximate Cause of a Loss — a. DEFINITION. — The proximate cause of a loss means literally the nearest cause. The proximate consequences of an act are the immediate consequences.² In the law of damages the proximate cause of an injury may in general be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, where, had it not happened, the injury would not have been inflicted, notwithstanding the latter.³

b. EFFICIENT PRODUCING CAUSE PRESUMED PROXIMATE CAUSE. — Where an efficient producing cause for injuries is found, it will be considered the proximate cause, unless another cause or causes, not incident to but independent of it, are shown to have intervened and produced the injury.⁴

The Question Must Always Be, Therefore, whether there was any intermediate cause disconnected from the primary act and self-operating, which produced the injury; an inquiry to be answered in accordance with common understanding.⁵

Where This Question Can Be Answered in the Affirmative, the independent intervening cause will be regarded as the proximate cause, and the author of the original act discharged.⁶

c: EFFECT OF MERE CONCURRENCE IN PRODUCING INJURY. — The mere fact of concurrence of the defendant's act in producing the injury is not alone

1. *Dickinson v. Boyle*, 17 Pick. (Mass.) 78, 28 Am. Dec. 281; *Wabash, etc., R. Co. v. Locke*, 112 Ind. 401, 2 Am. St. Rep. 193; *Barbee v. Reese*, 60 Miss. 906; *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 41 Am. Rep. 41. And see *Hill v. Winsor*, 118 Mass. 251; *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544.

Thus where the defendant had broken and entered the plaintiff's close adjacent to a river, and carried away gravel from a bank near to a dam, in consequence of which a flood in the river three weeks afterwards swept away a portion of the close and a cider mill, it was held that the whole damage might be recovered. *Dickinson v. Boyle*, 17 Pick. (Mass.) 78, 78 Am. Dec. 281.

2. *Schumaker v. St. Paul, etc., R. Co.*, 46 Minn. 39; *Dixon, J.*, in *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247.

3. *Snodgrass, J.*, in *Deming v. Merchants' Cotton-press, etc., Co.*, 90 Tenn. 353.

Proximate Cause the Efficient Cause. — In the case of *Ætna F. Ins. Co. v. Boon*, 95 U. S. 130, the court said: "The proximate cause is the efficient cause — the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones, though they may be nearer in time to the result."

First Direct Producing Power. — In the case of *Fairbanks v. Kerr*, 70 Pa. St. 86, 10 Am. Rep. 664, the court seems to have approved in the abstract an instruction of the trial court to the effect that a proximate cause is one which is a first and direct power producing the result, and a remote cause one removed from the direct, which might be called a secondary cause.

"Primary, Proximate, Responsible, and Juridical Cause." — In the case of *Smith v. St. Paul, etc., R. Co.*, 30 Minn. 169, it was said of the negligent derailment of a railway car that it was of certain injuries received the "primary, proximate, responsible, and juridical cause." Needless to say, the defendants were held liable.

4. *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469; *Schumaker v. St. Paul, etc., R. Co.*, 46 Minn. 39; *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 41 Am. Rep. 41; *Kellogg v. Chicago, etc., R. Co.*, 26 Wis. 223, 7 Am. Rep. 69.

5. *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469; *Georgetown, etc., R. Co. v. Eagles*, 9 Colo. 544.

6. *East Tennessee, etc., R. Co. v. Lockhart*, 79 Ala. 315; *Purcell v. St. Paul City R. Co.*, 48 Minn. 138.

Test of Remoteness — Intervention of Independent Act of Third Person. — The intervention of the independent act of a third person between the wrong complained of and the injury, which act was the immediate cause of the injury, has been made a test of that remoteness of damages which forbids recovery. *Mutual Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44; *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469; *East Tennessee, etc., R. Co. v. Lockhart*, 79 Ala. 315; *Cuff v. Newark, etc., R. Co.*, 35 N. J. L. 18, 10 Am. Rep. 205; *Brandon v. Gulf City Cotton Press, etc., Co.*, 51 Tex. 121.

Damages by Trespassers Acting in Concert. — In order that damage caused by one trespasser may be attributed to another as the proximate consequence of the act of the latter, it must appear either that the two acted in concert, or that the acts of the former were naturally induced by those of the latter. *Guille v. Swan*, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234.

sufficient to charge him,¹ for everything which induces or influences an accident does not necessarily, in a legal sense, cause it.²

d. FACT THAT LOSS WOULD NOT HAVE OCCURRED WITHOUT DEFENDANT'S CONCURRENCE. — Nor, indeed, is it alone sufficient to show that the loss would not have occurred without the concurrence of the defendant's act.³

Where, However, There Is Such Nearness in the Order of Events, and such closeness in the relation of cause and effect subsists, as that the influence of the injurious act predominates over that of other concurring causes, the former will in general be held to be the proximate cause of the loss.⁴

e. EFFECT OF INTERVENING CAUSES — (1) *Mere Circumstance of Some Intervening Cause.* — On the other hand, the circumstance alone that there has been some intervening cause between the defendant's act and the injury complained of does not necessarily relieve him from responsibility.⁵

The Primary Cause may be the proximate cause of a disaster, though it may operate through successive instruments.⁶ It is not essential, therefore, for a plaintiff to show that an act, claimed to have been the proximate cause of a certain result, was the only cause. It is sufficient if it be established that the defendant's act produced or set in motion other agencies, which in turn produced or contributed to the final result.⁷

Where, However, the Connection Is Not Immediate between the injurious act complained of and the consequence, such nearness in the order of events and closeness in the relation of cause and effect must subsist that the influence of the injurious act predominates over that of other causes, and concurs to produce the consequence.⁸

(2) *Intervening Acts of Irresponsible Agencies* — (a) *Intervening Acts of Children.* — From a good many decisions the rule seems deducible that the intervening acts of children not yet arrived at the age of discretion will not in law interrupt the relation of cause and effect between a defendant's prior wrongful act and the result for which compensation is claimed.⁹

1. *McGrew v. Stone*, 53 Pa. St. 436; *Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559; *Backes v. Dant*, 55 Ind. 181; *Bosch v. Burlington*, etc., R. Co., 44 Iowa 402, 24 Am. Rep. 754. Compare *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42.

2. *Spaulding v. Winslow*, 74 Me. 534.

Thus where a recovery was sought against a railroad company for loss sustained by the plaintiff from fire, the contention being that the plaintiff's access to a river had been obstructed, so that he could not procure water to extinguish the flames, it was held that the defendants were not liable. *Bosch v. Burlington*, etc., R. Co., 44 Iowa 402, 24 Am. Rep. 754.

3. *Fact that Loss Would Not Have Occurred Without Defendant's Concurrence.* — *McGrew v. Stone*, 53 Pa. St. 436.

It is not enough to entitle a party to recover damages for breach of contract to say that without the breach of contract relied on the injury would not have been received, when the injury results from an independent and unexpected cause, or from a cause which no reasonable human exertion could counteract. *Stayton, J.*, in *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280.

4. *Wardlaw, J.*, in *Harrison v. Berkley*, 1 Strobh. L. (S. Car.) 547, 47 Am. Dec. 578.

5. *McDonald v. Snelling*, 14 Allen (Mass.) 292, 92 Am. Dec. 768; *Pollett v. Long*, 56 N. Y. 200; *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 52 Am. Rep. 12. And see *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446.

6. *Mr. Justice Strong*, in *Milwaukee*, etc., R. Co. v. *Kellogg*, 94 U. S. 469.

7. *Proximate Cause Not Necessarily Sole Cause.* — *Weber v. Third Ave. R. Co.*, 12 N. Y. App. Div. 512. See also *Pollett v. Long*, 56 N. Y. 200.

8. *Harrison v. Berkley*, 1 Strobh. L. (S. Car.) 525, 47 Am. Dec. 578.

9. *Intervening Acts of Children.* — *Lynch v. Nurdin*, 1 Q. B. 29, 41 E. C. L. 422; *Osage City v. Larkin*, 40 Kan. 206, 10 Am. St. Rep. 186; *Lane v. Atlantic Works*, 111 Mass. 136; *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418; *Pittsburg*, etc., Pass. R. Co. v. *Caldwell*, 74 Pa. St. 421. See also *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503; *Holly v. Boston Gas Light Co.*, 8 Gray (Mass.) 123, 69 Am. Dec. 233; *Stillson v. Hannibal*, etc., R. Co., 67 Mo. 671; *Sheridan v. Brooklyn City*, etc., R. Co., 36 N. Y. 39.

Or, as it has been expressed, for proximate and natural consequences, not controlled by the unforeseen agency of a moral being capable of discretion and left free to choose, or by some unconnected cause of greater influence, a wrongdoer must generally answer, however small was the probability of their occurrence. *Harrison v. Berkley*, 1 Strobh. L. (S. Car.) 525, 47 Am. Dec. 578.

It has been accordingly held that the damage caused by the discharge of a loaded gun negligently placed in the hands of a child who discharged it is the proximate consequence of the act of the person placing the gun in the child's possession, and the former is liable in

Conflict of Cases. — But in this class of cases, as in most others involving the rule of proximate cause, a conflict of authority is met with in the results attained from the application of established rules to the various complications of facts.¹

(b) **Intervening Acts of Animals.** — As a general rule, the intervening acts of animals will not be regarded as destroying the legal proximity of the defendant's earlier wrongful act.²

damages therefor. *Dixon v. Bell*, 5 M. & S. 198.

Consider, in this connection, *Nearest Wrongful Cause, infra*, and subordinate divisions.

Mere Fact of Vendee's Minority Insufficient to Charge Vender of Firearms for the Consequences.

— In order, however, that the act of a party in selling firearms to a minor may be regarded as the proximate cause of an injury to the latter, it is not sufficient merely that the sale was made in violation of law. It is necessary to be shown that there was something in the character, disposition, or extreme youth of the child from which the defendant might reasonably have anticipated that the accident would happen. *Poland v. Earhart*, 70 Iowa 285. "It cannot be said," said the court in this case, "that defendant might reasonably have anticipated that an accident would occur from the handling of the weapon, from the fact alone that the person to whom he sold it was a minor." See also *Harris v. Cameron*, 81 Wis. 239, 29 Am. St. Rep. 891; *Meyer v. King*, 72 Miss. 1.

And where a defendant negligently sold dangerous explosives to children, it was held that such act was the proximate cause of injury resulting therefrom, although the explosion was not attributable to the ignorance of the child to whom the explosives had first been sold, but to the conduct of another child who had procured the dangerous substance from the first. *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508.

But where gunpowder was sold to a boy eight years old, who took it home, and with the consent of his mother fired it off, the vender of the powder was held not liable for injuries resulting from the explosion. *Carter v. Towne*, 103 Mass. 507.

1. For example, injuries to a child in consequence of a railroad company's having left a turntable unfastened and unguarded have been held the natural and proximate consequence of the negligence of the company, though the turntable was being revolved by other children at the time of the injury. *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418.

But where a defendant left on a street, exposed for sale, a machine for crushing oil cake by rollers, into the cogs of which one child put his fingers while another turned the crank, and the fingers of the first were crushed, the court held the damages too remote. *Mangan v. Atherton*, L. R. 1 Exch. 239.

Casting Rolled Off Truck by One Child upon Another. — In the case of *Lane v. Atlantic Works*, 107 Mass. 104, it appeared that the defendant in violation of a city ordinance left a truck standing upon the street for a considerable time, upon which rested an iron casting of such a shape as to roll readily upon the movement of the truck. The defendant knew

that children were accustomed to play in the street, and several hours after the truck and casting had been left by the defendant a boy twelve years old moved the truck, from which the casting rolled off and injured another child about seven years of age. It was held, under the circumstances, that the occurrence by which the injury was received was one which might reasonably have been anticipated as the result of placing the truck and casting in the street, and that the act of the defendant in so doing was the proximate cause of the resulting injury, although but for the act of the boy who moved the truck the injury would probably have not occurred. See also *Osage City v. Larkin*, 40 Kan. 206, 10 Am. St. Rep. 186.

Children Illegally Permitted upon Street Car — Injuries to One Pushed Off by Another. — Where a street car driver permitted several boys to ride on his car without payment of fare, and one of the boys sustained injuries by being pushed off the car by another, it was held that the wrongful act of the street car driver permitting the boys to ride on the car was not the proximate cause of the injury received. *Lott v. New Orleans City, etc., R. Co.*, 37 La. Ann. 337, 55 Am. Rep. 500.

2. Intervening Acts of Animals. — *Barnum v. Vandusen*, 16 Conn. 200; *Griggs v. Fleckenstein*, 14 Minn. 81; *Fultz v. Wycoff*, 25 Ind. 321; *West v. Ward*, 77 Iowa 323, 14 Am. St. Rep. 284; *Foster, J., in McDonald v. Snelling*, 14 Allen (Mass.) 292, 92 Am. Dec. 768; *Clark v. Union Ferry Co.*, 35 N. Y. 485, 91 Am. Dec. 66; *Radway v. Briggs*, 37 N. Y. 256; *Kennedy v. New York*, 73 N. Y. 365, 29 Am. Rep. 169; *Welch v. Piercy*, 7 Ired. L. (29 N. Car.) 365; *Vital v. Tetrault*, 4 Montreal L. R. Super. Ct. 204; *St. Louis Cattle Co. v. Gholson*, (Tex. Civ. App. 1895) 30 S. W. Rep. 269.

And see *Powell v. Salisbury*, 2 Y. & J. 391; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; *Lee v. Riley*, 18 C. B. N. S. 722, 114 E. C. L. 722; *Read v. Edwards*, 34 L. J. C. P. 31; *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10, 44 L. J. C. P. 24, 31 L. T. N. S. 483, 23 W. R. 246.

Turning Loose Dangerous Animal. — In *Leame v. Bray*, 3 East 595, Lord Ellenborough said: "If I put in motion a dangerous thing, as if I let loose a dangerous animal and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass. * * * And if one put an animal or carriage in motion which causes an immediate injury to another, he is the actor, the *causa causans*."

Injuries by Runaway Horse. — In the case of *Illidge v. Goodwin*, 5 C. & P. 190, 24 E. C. L. 272, a horse attached to a cart was left standing in the street, unhitched, and without an attendant. A wrongdoer struck the horse, which ran away and injured the plaintiff. The owner of the horse and cart was held, notwithstanding the intervening act of the wrongdoer, to be liable for the damages. It does not appear

Consideration of Natural and Probable Cause. — Though many of the cases supporting the rule as given are discussed in terms with reference to the proximate cause of the loss, or, oppositely, the remote cause, the real consideration will generally be found to be whether the injury resulted naturally or probably from the defendant's act or omission.¹

(3) *Intervention of Natural Agencies* — (a) **Concurrence of Natural Forces with Affirmative Acts of Trespass.** — The intervention of natural agencies of an ordinary character will not excuse a trespasser from liability.² A person must be presumed to have contemplated the possibility of such events;³ which observation, however, brings such cases more directly within the rule of natural and probable consequences than that which is now under consideration.

(b) **Concurrence of Natural Causes with Negligence.** — Where the wrongful act with which the defendant is charged consists of negligence merely, the natural cause actually producing the loss, it must be shown that the loss might have been reasonably anticipated as a result of the negligence or of the conjunction of natural causes therewith.⁴

(c) **Concurrence of Natural Causes with Breaches of Contract.** — Where a defendant contracted to return certain coal barges to the plaintiff within a certain time, but they were not returned within the stipulated period, some time after the expiration of which the barges were lost by reason of an extraordinary ice gorge, it was held that the defendant's breach of contract could not be regarded as the proximate cause of the loss and that he was not therefore liable in damages for the value of the barges;⁵ and where rice brought to a mill to be beaten was not disposed of according to contract, but was retained at the mill some time after the agreement stipulated, and during the period of delay was destroyed by an accidental fire, such loss was held to be not a proximate

in this case whether the striking of the horse was merely an accidental or negligent striking or a wilful act.

In *Atlanta v. Wilson*, 59 Ga. 544, 27 Am. Rep. 396, it was held that though the plaintiff's horse took fright, overturning the vehicle in which he was driving and throwing it down an embankment adjacent to the street, yet if the city was negligent in constructing the embankment, or in not providing it with the necessary guards or other protections, or in not keeping the street in safe condition, such negligence was the proximate cause of the injury, and the city liable in damages therefor.

1. *Cox v. Burbidge*, 32 L. J. C. P. 89; *Topeka v. Tuttle*, 5 Kan. 311; *Aldrich v. Gorham*, 77 Me. 288; *Barnes v. Chapin*, 4 Allen (Mass.) 444, 81 Am. Dec. 710. See *Lee v. Riley*, 34 L. J. C. P. 212; and also *Read v. Edwards*, 34 L. J. C. P. 31; *Westfall v. Perry*, (Tex. Civ. App. 1893) 23 S. W. Rep. 740.

2. **Intervention of Natural Agencies.** — *Illinois Cent. R. Co. v. Heisner*, 45 Ill. App. 143; *Derry v. Flitner*, 118 Mass. 131; *Mississippi, etc., R. Co. v. Archibald*, 67 Miss. 38; *Heaney v. Heaney*, 2 Den. (N. Y.) 625; *Scott v. Hunter*, 46 Pa. St. 192, 84 Am. Dec. 542; *Postal Telegraph-Cable Co. v. Zopfi*, 93 Tenn. 374; *Buffalo Bayou Ship Channel Co. v. Milby*, 63 Tex. 492, 51 Am. Rep. 668; *Cobb v. Smith*, 38 Wis. 21.

3. *Mississippi, etc., R. Co. v. Archibald*, 67 Miss. 38.

4. **Concurrence of Natural Causes with Negligence.** — *Memphis, etc., R. Co. v. Reeves*, 10 Wall. (U. S.) 176; *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645;

Hoadley v. Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; *McClary v. Sioux City, etc., R. Co.*, 3 Neb. 44, 19 Am. Rep. 631; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264. And see *Illinois Cent. R. Co. v. Heisner*, 45 Ill. App. 143; *Cobb v. Smith*, 38 Wis. 21.

Consider, in this connection, *Necessity for Anticipation of Particular Result, infra*.

Where, by reason of the failure of a municipal corporation to repair a bridge, the plaintiff was delayed in the transportation of his property, during which it was carried away by a flood, it was held that the damages to the owner by the loss of his property resulted too remotely from the negligence of the municipal corporation to make the latter liable therefor. *Dubuque Wood, etc., Assoc. v. Dubuque*, 30 Iowa 176. But where the defendant negligently moored a coal barge, which, on account of a rise in the river, broke from its moorings and injured the plaintiff's barges below, the former was held liable for the damages suffered, although it was shown that the rise in the river was unexpected. *McGrew v. Stone*, 53 Pa. St. 436.

Damages by Overflow Caused by the Building of a Dam are not too remote, and a defendant corporation may be held liable therefor, though it was authorized to build the dam. *Ten Eyck v. Delaware, etc., Canal Co.*, 18 N. J. L. 200. See the title DAMS, *post*.

5. *Jones v. Gilmore*, 91 Pa. St. 310. And see *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Tobin v. Symonds*, 6 Nova Scotia 141. Compare, however, in this connection, the case of *Parmalee v. Wilks*, 22 Barb. (N. Y.) 539.

consequence of the breach of contract.¹ But where the defendant, a warehouseman, undertook to store and keep certain goods for the plaintiff at a particular place, but he removed a part of the goods to another place where they were destroyed by fire without his fault, it was decided that the loss was not too remote as a consequence of the breach of contract, and the defendant held liable in damages.² It has been held also that illness resulting from dampness caused by a leaky roof will not be deemed a proximate consequence of the breach of a covenant to repair by a lessor.³ And for delay in furnishing materials necessary to the completion of a house, it has been decided that injury to the uncompleted building from rain during the period of delay could not be recovered for in damages.⁴

Breach of Contract to Prevent Loss from Controllable Natural Cause. — If, however, it appears that a contract was made for the express purpose of avoiding a loss likely to occur from a natural cause which could be controlled and avoided, that this was known to the contracting parties, and that compliance with the contract would have prevented the injury by destroying the thing which immediately inflicted it, then the breach of such a contract may be said within the meaning of the law to be the direct cause of the injury.⁵

(d) **Actions Against Carriers — Concurrence of Negligence or Delay with More Immediate Cause of Loss.** — On this point there is a conflict of authority. The question has arisen where the loss has immediately resulted from some cause, exemption from responsibility for which is claimed either under the common law or by express stipulation in the contract of transportation, where the loss, however, would not have occurred but for some delay on the part of the carrier.⁶

Doctrine that More Immediate Producing Cause to Be Considered Proximate Cause — Loss by Flood or Storm. — A leading case on this question was one where, on account of the use of a lame horse, a delay in the trip of a canal boat resulted, in consequence of which the boat reached a dam on the canal just as an unusual flood occurred. It was held that the fault of using the lame horse was too remote from the loss of the goods to render the carrier liable, although but for the delay the boat would have passed the point of danger before the occurrence of the flood.⁷ And where a passenger train about an hour behind time was blown from the track by a cyclone, the railroad company was not liable to the injured passengers therefor, although it was shown that if the train had not been delayed it would not have crossed the path of the storm.⁸

1. *Ashe v. De Rossett*, 5 Jones L. (50 N. Car.) 297, 72 Am. Dec. 552.

2. *Lilley v. Doubleday*, 7 Q. B. Div. 510, 44 L. T. 814.

3. *Eschbach v. Hughes*, 7 Misc. Rep. (N. Y. C. Pl.) 172.

4. *Carnegie v. Holt*, 99 Mich. 606.

5. *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280.

Loss by Rain from Window Negligently Constructed. — Where one party to a contract agrees to put a window in the storehouse of another in a first-class manner, but the work is so unskillfully done that the window leaks and thereby the goods of the latter are injured, such damage is the direct and proximate result of the default, for which a recovery may be had. *Krebs Mfg. Co. v. Brown*, 108 Ala. 508.

6. **Immaterial whether Exemption Claimed Arises by Implication of Law or Is Created by Contract.** — It makes no difference whether the exemption claimed arises from the common law, or is secured by special contract. *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106.

And the same is true where the exemption

claimed results from the changed responsibility which takes place when the carrier becomes a warehouseman. See *McDonald v. Snelling*, 14 Allen (Mass.) 290, 92 Am. Dec. 768; *Lane v. Atlantic Works*, 111 Mass. 136; *Colt, J., in Hoadley v. Northern Transp. Co.*, 115 Mass. 308, 15 Am. Rep. 106.

7. **Use of Lame Horse with Canal Boat — Loss by Flood.** — *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695.

A Carrier Is Not Responsible for Loss Occasioned by Flood, though loss would not have occurred but for the carrier's delay. See *Memphis, etc., R. Co. v. Reeves*, 10 Wall. (U. S.) 176; *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106; *McClary v. Sioux City, etc., R. Co.*, 3 Neb. 44, 19 Am. Rep. 631; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264.

8. *McClary v. Sioux City, etc., R. Co.*, 3 Neb. 44, 19 Am. Rep. 631.

Delay of Carrier — Loss by Storm. — The defendants contracted to tow the plaintiff's barge by means of a steam tug from Bay City, Michigan, to Buffalo, New York. After the voyage

Doctrine that Negligence or Delay to Be Considered Proximate Cause. — On the other hand, it has been held, inasmuch as a carrier can only exempt himself from responsibility in any event by showing the particular loss to have occurred without his negligence, that unless the latter requirement can be complied with the negligence or delay will be regarded the legally proximate cause, though there may be another cause nearer in point of physical operation.¹

(4) *Intervening Cause Set in Motion by Original Cause* — (a) **In General.** — The principle that the fact that an intervening or contributing agency concurred in a result for which a defendant is sought to be held responsible in damages will not of itself defeat a recovery, is most readily and uniformly applicable to those cases where the concurring causes were induced or themselves put in motion by the original wrongful act.²

had been commenced and partly performed, it was voluntarily suspended or delayed by the defendants; the barge during the delay, however, being exposed to none of the perils peculiar to the voyage. After the voyage was resumed and while it was being duly prosecuted, a storm was encountered in which the barge was lost. It was held in this case that the defendants did not, by the mere fact of the delay, become responsible for the loss of the barge, although the delay was unreasonable and unnecessary, and although, as events proved, the barge, but for the delay, would probably have been safely towed to its place of destination. In such case, the storm must be regarded as the proximate and the delay as only the remote cause of the loss. *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264. And see *Jones v. Gilmore*, 91 Pa. St. 310; *Tobin v. Symonds*, 6 Nova Scotia 141. Compare, however, as announcing a contrary conclusion, *Parmalee v. Wilks*, 22 Barb. (N. Y.) 539.

Loss by Accidental Fire or Act of Public Enemy. — Where the contract of transportation, as evidenced by the bill of lading, exempted the carrier from responsibility for loss by fire occurring without its negligence, there was held to be no liability in damages to the owner of property so destroyed, though but for the delay of the carrier in forwarding the property to its destination the loss would not have occurred. *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106.

And where there had been injury to the plaintiff's goods while in charge of a common carrier, resulting from the act of a public enemy, which might, it was contended, have been avoided but for an inexcusable delay along the route, the rule holding a wrongdoer liable for only the proximate consequences of his acts was again applied and the defendant held not responsible in damages. *Clark v. Pacific R. Co.*, 39 Mo. 184, 90 Am. Dec. 458.

In case of a loss of which the proximate cause is an act of God or the public enemy, the common carrier is excused, though his own negligence or laches may have contributed as a remote cause. *Memphis, etc., R. Co. v. Reeves*, 10 Wall. (U. S.) 176.

1. *Parmalee v. Wilks*, 22 Barb. (N. Y.) 539; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Deming v. Merchant's Cotton-press, etc.*, Co., 90 Tenn. 353; *East Tennessee, etc., R. Co. v. Kelly*, 91 Tenn. 699. And see *Richmond, etc., R. Co. v. Benson*, 86 Ga. 203, 22 Am. St. Rep. 446.

Loss by Flood or Storm. — Thus, where goods in the freight house of a carrier were damaged by an unprecedented flood, and it was shown that but for an unreasonable delay on the part of the carrier in forwarding the goods the loss would not have occurred, the carrier was held liable. *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426. The court in this case expressly disapproving the cases of *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695, and *Denny v. New York Cent. R. Co.*, 13 Gray (Mass.) 481, 74 Am. Dec. 645, *supra*, so far as in conflict with its holding.

And where the owners of a steamboat contracted to take a raft of sawlogs in tow on the morning of a certain day and proceed with it to a designated destination, but they did not begin the journey until the night of the day named, whereby they encountered a storm which would have been avoided had they begun the journey according to contract, they were held liable for the destruction of the raft and loss of the logs. *Parmalee v. Wilks*, 22 Barb. (N. Y.) 539.

See in this connection the case of *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264, in conflict with the foregoing case. Compare also *Jones v. Gilmore*, 91 Pa. St. 310.

Loss by Fire. — Where the loss of goods was due to a fire which would have been avoided but for the negligence of a railroad company causing a slight delay, the latter was held liable for the injuries sustained. *Deming v. Merchants' Cotton-press, etc., Co.*, 90 Tenn. 353.

In another case where the liability of the carrier was as warehouseman only, it was held that his negligence was the proximate cause of the loss, and he was liable for the value of goods where they were destroyed by fire, after they had been deposited in the depot of destination, and after the consignee had demanded them and had been erroneously informed by the carrier's agent that they had not arrived. The negligence that caused the loss, it was held, consisted in withholding the goods, whereby they were exposed to the fire. *East Tennessee, etc., R. Co. v. Kelly*, 91 Tenn. 699. See also *Richmond, etc., R. Co. v. Benson*, 86 Ga. 203, 22 Am. St. Rep. 446.

2. **Intervening Cause Set in Motion by Original Cause** — *England.* — *Sneesby v. Lancashire, etc., R. Co.*, 1 Q. B. Div. 42, L. R. 9 Q. B. 263; *Romney Marsh v. Trinity House*, L. R. 5 Exch. 204; *George v. Skivington*, L. R. 5 Exch. 1; *Collins v. Middle Level Comrs, L.*

(b) **Damages Resulting from Negligent Fires.**—Where buildings or combustible materials have been set on fire by the defendant's negligence, and the flames have been thence communicated to other property, the question has arisen as to whether the defendant's act could be considered the proximate cause of the entire loss, or whether his liability would be restricted to the loss of the property first ignited. Though the more restrictive rule has been applied in some cases ¹ the weight of authority favors a responsibility for the entire damage so resulting, ² or, as it has been expressed, tends to regard the results of a negligent fire as a unity ³ without special consideration of the distance between the

R. 4 C. P. 279; *The George*, L. R. 3 Adm. & Eccl. 466; *Byrne v. Wilson*, 15 Ir. C. L. 332.

Alabama.—*East Tennessee, etc.*, R. Co. v. Lockhart, 79 Ala. 315.

Connecticut.—*Bristol Mfg. Co. v. Gridley*, 28 Conn. 201, 27 Conn. 221, 71 Am. Dec. 56.

Illinois.—*Philpot v. Taylor*, 75 Ill. 309, 20 Am. Rep. 241.

Massachusetts.—*Lund v. Tyngsboro*, 11 Cush. (Mass.) 563; *Powell v. Deveney*, 3 Cush. (Mass.) 300, 50 Am. Dec. 738.

Minnesota.—*Schumaker v. St. Paul, etc.*, R. Co., 46 Minn. 39.

New York.—*Pollett v. Long*, 56 N. Y. 200; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464, 47 Am. Dec. 268; *Bean v. Wells*, 28 Barb. (N. Y.) 466.

North Carolina.—*Harrison v. Berkley*, 1 Strobb. L. (S. Car.) 525, 47 Am. Dec. 578.

Pennsylvania.—*Pittsburgh City v. Grier*, 22 Pa. St. 54, 60 Am. Dec. 65.

Causes Put in Operation by Defendant's Wrongful Act.—In the case of *East Tennessee, etc.*, R. Co. v. Lockhart, 79 Ala. 315, Clopton, J., delivering the opinion of the court, said: "Though a defendant is not responsible for any events produced by independent intervening circumstances which have no connection with the primary act, if the intervening agencies are put in operation by the wrongful act of the defendant the injuries directly produced by such agencies are proximate consequences of the primary cause, though they may not have been contemplated or foreseen."

Principle Applied in Cases of Slander and Libel.—Where, though the act of a third person has actually caused the damage suffered, it is shown to have been naturally and proximately the result of the slander or libel of another, the latter may be held liable to the party injured. *Parkes v. Prescott*, L. R. 4 Exch. 169; *Adams v. Kelly*, R. & M. 157, 21 E. C. L. 403; *Knight v. Gibbs*, 1 Ad. & El. 43, 28 E. C. L. 30; *Bateman v. Lyall*, 7 C. & B. N. S. 638, 97 E. C. L. 638; *Kendillon v. Maltby*, 1 C. & M. 402, 41 E. C. L. 221; *Derry v. Handley*, 16 L. T. N. S. 263; *Williams v. Hill*, 19 Wend. (N. Y.) 305; *Moody v. Baker*, 5 Cow. (N. Y.) 351. And see *Ward v. Weeks*, 7 Bing. 211, 20 E. C. L. 104; *Gough v. Goldsmith*, 44 Wis. 262, 28 Am. Rep. 579. See also the title LIBEL AND SLANDER.

1. Negligent Fires.—*Toledo, etc.*, R. Co. v. Muthersbaugh, 71 Ill. 572; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353, 1 Am. Rep. 431. See also the titles FIRES; NEGLIGENCE.

The defendant negligently, but accidentally set fire to his own building, and the flames were, by force of the wind, carried to the plaintiff's building near by, which was consumed. In an action for damages for the loss, it was held that the defendant was not liable, the wind being an independent intervening cause, and the proximate cause of the injury. *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71. And see *Toledo, etc.*, R. Co. v. Muthersbaugh, 71 Ill. 572.

Compare, however, in this connection, the cases of Poeppers v. Missouri, etc., R. Co., 67 Mo. 715, 29 Am. Rep. 518, and *Brink v. Kansas City, etc.*, R. Co., 17 Mo. App. 177, holding that, if a railroad company should negligently cause a fire on its own right of way, or if it negligently allows grass to grow on its right of way and fire is communicated by one of its passing trains to this grass, which fire is carried, though by reason of an unusually high wind arising at the instant, to adjoining farms, whereby property is destroyed, the railroad company will nevertheless be liable.

2. United States.—*Milwaukee, etc.*, R. Co. v. Kellogg, 94 U. S. 474.

Illinois.—*Fent v. Toledo, etc.*, R. Co., 59 Ill. 349, 14 Am. Rep. 13.

Iowa.—*Small v. Chicago, etc.*, R. Co., 55 Iowa 582.

Kansas.—*Atchison, etc.*, R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362; *Atchison, etc.*, R. Co. v. Bales, 16 Kan. 252; *St. Joseph, etc.*, R. Co. v. Chase, 11 Kan. 47.

Massachusetts.—*Hart v. Western R. Corp.*, 13 Met. (Mass.) 99, 46 Am. Dec. 719; *Perley v. Eastern R. Co.*, 98 Mass. 414, 96 Am. Dec. 645; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63.

Minnesota.—*Krippner v. Biebl*, 28 Minn. 139.

New York.—*O'Neill v. New York, etc.*, R. Co., 115 N. Y. 579; *Webb v. Rome, etc.*, R. Co., 49 N. Y. 420, 10 Am. Rep. 389.

Ohio.—*Adams v. Young*, 44 Ohio St. 80, 58 Am. Rep. 789.

Pennsylvania.—*Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373, 21 Am. Rep. 100.

Wisconsin.—*Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 50 Am. Rep. 352.

See also the titles FIRES; NEGLIGENCE.

3. Weight of Authority.—Negligent Fires Regarded as Unity.—*Niblack, J.*, in *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71, commenting upon the *New York* and *Pennsylvania* rules, as announced in *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49, and *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 353, 1 Am. Rep. 431, respectively, said that the weight of authority in other states

things consumed or the interval of time elapsing between the communication of the flames to the first object and the spread of the fire to the last.¹

Question of Fact. — After all, however, the real question involved is one of natural and probable consequence, in the light of all the circumstances known or which should have been known or reasonably apprehended;² a question, generally, of fact for the jury, to be determined according to the circumstances of each particular case.³

(c) Intervention of Plaintiff's Own Act. — Though an act of the plaintiff himself has intervened between the defendant's wrong and the injury suffered, the latter is not thereby excused if the intervening act was the result of or naturally and reasonably induced by the defendant's earlier wrong.⁴

False Representations. — Where the plaintiff is deceived by the false representations of another in a business transaction, the latter is liable for ensuing loss, if any, although it was the act of the former from which the loss proximately resulted.⁵

Acts Subsequent to Breach of Contract. — But the result of any act or omission of the complaining party subsequent to a breach of contract and not directly attributable to it, although it is an act or omission which except for the breach would not have taken place, is not in general a ground for damages.⁶

Injuries in Attempt to Escape Threatened Danger. — Where a person placed in a position of peril by the negligence of another is injured in an attempt made by him to escape the threatened danger, there may be a recovery for injuries so sustained, although they would not, in fact, have occurred but for the plaintiff's own acts. This principle has been qualified, however, by the condition

tended to regard any negligent fire as a unity, responsibility attaching for the loss of the last building consumed in the same measure and to the same extent as the first. See also *Fent v. Toledo*, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13; *Billman v. Indianapolis*, etc., R. Co., 76 Ind. 166, 40 Am. Rep. 230. See also the titles FIRES; NEGLIGENCE.

1. *United States*. — *Milwaukee*, etc., R. Co. *v. Kellogg*, 94 U. S. 469.

Iowa. — *Small v. Chicago*, etc., R. Co., 55 Iowa 582.

Kansas. — *Atchison*, etc., R. Co. *v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362; *Atchison*, etc., R. Co. *v. Bales*, 16 Kan. 252; *St. Joseph*, etc., R. Co. *v. Chase*, 11 Kan. 47.

Massachusetts. — *Hart v. Western R. Corp.*, 13 Met. (Mass.) 99, 46 Am. Dec. 719; *Perley v. Eastern R. Co.*, 98 Mass. 414, 96 Am. Dec. 645; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63.

Missouri. — *Poeppers v. Missouri*, etc., R. Co., 67 Mo. 715, 29 Am. Rep. 518; *Brink v. Kansas City*, etc., R. Co., 17 Mo. App. 177.

New York. — *O'Neill v. New York*, etc., R. Co., 115 N. Y. 579; *Webb v. Rome*, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389.

Ohio. — *Adams v. Young*, 44 Ohio St. 80, 58 Am. Rep. 789.

Wisconsin. — *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 50 Am. Rep. 352; *Kellogg v. Chicago*, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69.

See also the titles FIRES; NEGLIGENCE.

2. **Question of Fact.** — *Milwaukee*, etc., R. Co. *v. Kellogg*, 94 U. S. 469; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; *Delaware*, etc., R. Co. *v. Salmon*, 39 N. J. L. 311, 23 Am. Rep. 214; *Kellogg v. Chicago*, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69. And see

Toledo, etc., R. Co. *v. Muthersbaugh*, 71 Ill. 572. See also the titles FIRES; NEGLIGENCE.

3. *Milwaukee*, etc., R. Co. *v. Kellogg*, 94 U. S. 469; *Delaware*, etc., R. Co. *v. Salmon*, 39 N. J. L. 311, 23 Am. Rep. 214; *Webb v. Rome*, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389; *Fent v. Toledo*, etc., R. Co., 59 Ill. 349, 14 Am. Rep. 13; *Kellogg v. Chicago*, etc., R. Co., 26 Wis. 223, 7 Am. Rep. 69. See generally the titles FIRES; NEGLIGENCE.

4. **Intervention of Plaintiff's Own Act.** — *George v. Skivington*, L. R. 5 Exch. 1; *Lund v. Tyngsboro*, 11 Cush. (Mass.) 563; *Schumaker v. St. Paul*, etc., R. Co., 46 Minn. 39; *Bean v. Wells*, 28 Barb. (N. Y.) 466; *Pittsburgh City v. Grier*, 22 Pa. St. 54, 60 Am. Dec. 65. See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368.

A Chemist Who Sells a Bottle of Liquid made up of ingredients known only to himself, representing it to be fit to be used for washing the hair, and knowing that it is to be used by the purchaser's wife, is liable for an injury occasioned to her by using it according to directions. *George v. Skivington*, L. R. 5 Exch. 1.

Injuries Received on Illegal Sunday Excursion. — Responsibility of the owners of a steamboat for injuries to a passenger, is not affected by the fact that the person injured was at the time the injuries were received engaged in an excursion with other passengers upon its steamboat in violation of the Sunday law. *Opsahl v. Judd*, 30 Minn. 126.

5. *Polhill v. Walter*, 3 B. & Ad. 114, 23 E. C. L. 38; *Gerhard v. Bates*, 2 El. & Bl. 476, 75 E. C. L. 476; *Morse v. Swits*, 19 How. Pr. (N. Y. Supreme Ct.) 275; *Bean v. Wells*, 28 Barb. (N. Y.) 466.

6. *Jordan v. Patterson*, 67 Conn. 473.

that the efforts of the person in attempting to escape the threatened danger must be such as an ordinary person acting with reasonable prudence might, under the circumstances, be expected to make, as where the injury results from reasonable acts of precaution adopted by the party apparently exposed to harm.¹

(d) *Disease Superinduced by Injuries.* — A person may be liable in damages to another who has been injured as a result of the former's negligence, though the immediate cause of the damage is disease, if it can be shown that the injury received rendered the person subsequently diseased more susceptible to disease and less able to resist its effects. It seems, however, that the disease which ensues must be in some manner connected with, or a result or development of, or at least something which would not have occurred but for, the antecedent injury.²

(5) *Where Loss Would Not Have Occurred but for Intervening Cause.* — It may be that the loss would not have happened at all but for the intervening act of a third person, and yet the defendant be held liable.³

The Predominating Cause the Proximate Cause. — As a general rule, it has been said, the efficient and predominating cause in producing a given event or fact is taken to be the proximate cause though there may be separate, and to a certain extent independent, causes in operation.⁴ The negligent act of a third person may be the immediate cause of the injury, but the still earlier wrongful act may have so influenced and contributed to the loss as to be regarded in law the proximate cause thereof.⁵

Where Intervening Agent Is the More Powerful Producing Cause. — Where any new agent, introduced by accident or independent design, becomes more powerful in producing the consequence for which compensation is sought than the first injurious act, the former is usually regarded as the proximate cause.⁶

f. NEAREST WRONGFUL CAUSE — (1) *In General.* — As between an innocent and a wrongful cause, the law uniformly regards the latter as the proximate and legally responsible cause.⁷ The author of an original wrongful act is

1. For a Full Discussion of this subject, see the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 399.

2. For a Full Discussion of this question, see the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 388.

3. *Burrows v. March Gas, etc., Co.*, L. R. 5 Exch. 67.

4. *Baltimore, etc., R. Co. v. Reaney*, 42 Md. 117.

5. *Burrows v. March Gas, etc., Co.*, L. R. 5 Exch. 67; *Pastene v. Adams*, 49 Cal. 87.

6. *Wardlaw, J.*, in *Harrison v. Berkley*, 1 Strobh. L. (S. Car.) 547, 47 Am. Dec. 578.

7. *England.* — *Halestrap v. Gregory*, (1895) 1 Q. B. 561, 64 L. J. Q. B. 415, 72 L. T. 292, 43 W. R. 507, 15 Reports 306; *Collins v. Middle Level Com'rs*, L. R. 4 C. P. 279, 38 L. J. C. P. 236, 20 L. T. 442; *Dixon v. Bell*, 5 M. & S. 198; *Lynch v. Nurdin*, 1 Q. B. 29, 41 E. C. L. 422; *Illidge v. Goodwin*, 5 C. & P. 190, 24 E. C. L. 272; *Farrant v. Barnes*, 11 C. B. N. S. 553, 103 E. C. L. 553; *Byrne v. Wilson*, 15 Ir. C. L. 332; *Scott v. Shepherd*, 2 W. Bl. 892.

Georgia. — *Atlanta v. Wilson*, 59 Ga. 544, 27 Am. Rep. 396.

Illinois. — *Weick v. Lander*, 75 Ill. 93.

Indiana. — *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508.

Kansas. — *Osage City v. Larkin*, 40 Kan. 206.

Massachusetts. — *Powell v. Deveney*, 3 Cush. (Mass.) 300, 50 Am. Dec. 738; *Lane v. Atlantic*

Works, 111 Mass. 136; *Foster, J.*, in *McDonald v. Snelling*, 14 Allen (Mass.) 292, 92 Am. Dec. 768.

Minnesota. — *Griggs v. Fleckenstein*, 14 Minn. 81, 100 Am. Dec. 199.

Missouri. — *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418.

New Jersey. — *Hughes v. McDonough*, 43 N. J. L. 459, 39 Am. Rep. 603.

New York. — *Olmsted v. Miller*, 1 Wend. (N. Y.) 506; *Kennedy v. New York*, 73 N. Y. 365, 29 Am. Rep. 169; *Beach v. Ranney*, 2 Hill (N. Y.) 314; *Clark v. Union Ferry Co.*, 35 N. Y. 485, 91 Am. Dec. 66; *Radway v. Briggs*, 37 N. Y. 256.

North Dakota. — *Chacey v. Fargo*, 5 N. Dak. 173.

Pennsylvania. — *Pittsburg, etc., Pass. R. Co. v. Caldwell*, 74 Pa. St. 421. See also *Barney v. Burstenbinder*, 7 Lans. (N. Y.) 210; *Stacy v. Wetherill*, 7 Haz. Pa. Reg. 92.

South Carolina. — *Harrison v. Berkley*, 1 Strobh. L. (S. Car.) 525, 47 Am. Dec. 578.

The "Squib" Case. — In the case of *Scott v. Shepherd*, 2 W. Bl. 892, *Shepherd* threw a lighted squib composed of gunpowder into a market house where a large concourse of people were assembled. The person near whom the squib first fell threw it, to save himself, across the market, from which latter spot it was again thrown, before explosion, into another part of the market house. It struck the plaintiff in the face and exploded, destroy-

responsible for the resulting injury, though the damages to the party injured occur through the intervention of the legal and innocent acts of third parties. In such instances the damage is regarded as occasioned by the wrongful cause and not by those which are not wrongful.¹

(2) *Independent Illegal Acts of Third Persons.* — Where there has intervened between the defendant's act and the injury an independent illegal act of a third person producing the injury, and without which it would not have happened, the latter is held the proximate cause of the loss and the defendant is excused.² Or, as the principle has been expressed, though there may have been an original wrongful act, if it only produced injury through the intervening, independent and wrongful acts of others, the author of the former is not liable in damages.³

(3) *Where Intervening Act neither Wilful nor Criminal.* — But where the intervening act of the third person is neither wilful nor criminal, the defendant's act will be held the proximate cause of the loss.⁴

Negligence. — Where a plaintiff, therefore, has been injured in his person or property by the wrongful act or omission of the defendant, the fact that a third party by his negligence contributed to the injury does not relieve the defendant from liability.⁵

g. SEVERAL PROXIMATE CAUSES. — In a certain sense there may be more than one proximate cause of the same consequence, when either or any one

ing the sight of one eye. It was held that Shepherd, the thrower of the squib, was answerable in an action of trespass to the person injured. *De Grey, C. J.*, held that throwing the squib was an unlawful act, and that whatever mischief followed the person throwing it was the responsible author thereof. All that was done subsequent to the original throwing, it was said, was a continuance of the first force and first act. Any innocent person removing the danger from himself was justifiable; the blame lies upon the first thrower; the new direction and new force flowing out of the first force. And it was laid down as a general principle that every one who does an unlawful act is considered the author of all that follows.

1. "There Is a Marked Distinction," said Wilkes, J., in *Anderson v. Miller*, 96 Tenn. 35, "between the proximate cause of an accident and the proximate cause of the injury resulting from the accident."

2. *Illegal Acts of Third Persons.* — *Vicars v. Wilcocks*, 8 East 1; *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359; *Bosworth v. Brand*, 1 Dana (Ky.) 377; *Beasley, C. J.*, in *Hughes v. McDonough*, 43 N. J. L. 459, 39 Am. Rep. 603; *Olmsted v. Brown*, 12 Barb. (N. Y.) 657; *Beach v. Ranney*, 2 Hill (N. Y.) 314; *Carpenter v. Pennsylvania R. Co.*, 13 N. Y. App. Div. 328; *Wardlaw, J.*, in *Harrison v. Berkley*, 1 Strobb. L. (S. Car.) 547, 47 Am. Dec. 578; *State v. Ward*, 9 Heisk. (Tenn.) 100. And see *Crain v. Petrie*, 6 Hill (N. Y.) 523, 41 Am. Dec. 765.

The connection is usually enfeebled and the influence of the injurious act controlled where the wrongful act of a third person intervenes. *Wardlaw, J.*, in *Harrison v. Berkley*, 1 Strobb. L. (S. Car.) 547, 47 Am. Dec. 578.

In Actions under Civil Damage Acts the seller of liquor will not be held liable for a wilful and independent act of a third person intervening between the selling of the liquor and the death of a party for which damages are sought. *Shugart v. Egan*, 83 Ill. 56, 25 Am.

Rep. 359. See the title *CIVIL DAMAGE ACTS* vol. 6, p. 36.

3. *Vicars v. Wilcocks*, 8 East 1; *Beasley, C. J.*, in *Hughes v. McDonough*, 43 N. J. L. 459, 39 Am. Rep. 603.

4. *Where Act of Third Person neither Wilful nor Criminal.* — *Green v. Button*, 2 C. M. & R. 707; *Burrows v. March Gas, etc., Co.*, L. R. 5 Exch. 67; *Halestrap v. Gregory*, (1895) 1 Q. B. 561, 64 L. J. Q. B. 415, 72 L. T. 292, 43 W. R. 507, 15 Reports 306; *Collins v. Middle Level Com'rs*, L. R. 4 C. P. 279, 38 L. J. C. P. 236, 20 L. T. 442; *Pastene v. Adams*, 49 Cal. 87; *Schroder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236; *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 166, 40 Am. Rep. 230; *Griggs v. Fleckenstein*, 14 Minn. 81, 100 Am. Dec. 199; *Myers v. Malcolm*, 6 Hill (N. Y.) 292, 41 Am. Dec. 744; *Keenholtz v. Becker*, 3 Den. (N. Y.) 346.

Damages for Obstructing Canal. — Where a plaintiff was injured by an obstruction in a canal caused by the falling into it of a bridge, making it necessary to shut off the water in order to clear the canal, it was held that there might be a recovery in damages for the loss occasioned. *Dayton v. Pease*, 4 Ohio St. 80.

5. **Negligence.** — *Burrows v. March Gas, etc., Co.*, L. R. 5 Exch. 67; *Pastene v. Adams*, 49 Cal. 87; *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 166, 40 Am. Rep. 230; *Griggs v. Fleckenstein*, 14 Minn. 81, 100 Am. Dec. 199. And see *Schroder v. Crawford*, 94 Ill. 357, 34 Am. Rep. 236.

One who keeps gunpowder insufficiently protected near buildings belonging to others is held liable for an injury suffered in consequence of its explosion though through the negligence of a third person, or by accident; because a natural result of leaving a highly explosive substance unguarded is its explosion by very frequent and ordinary occurrences, against which it is the duty of the owner of the explosive to provide, and his neglect to do so is the efficient cause of the damage. *Myers v. Malcolm*, 6 Hill (N. Y.) 292, 41 Am. Dec. 744.

of two or more independent persons, acting not in conjunction with each other, may be held responsible for an injury.¹ Where several proximate causes contribute to an accident, each being an efficient cause without the operation of which the injury would not have happened, it has been declared that the injury may be attributed to any or all of the causes.² A person in fault, it has been said, cannot escape full liability for an injury because some third party may be equally to blame.³

7. Natural and Proximate Cause Question of Fact for the Jury. — The question as to what is the natural or proximate cause of a loss, or what the probable or immediate consequences of a given act, has been generally held one of fact for the determination of a jury;⁴ a question which is, ordinarily, not one of science or legal knowledge, but is for the jury to determine in view of the accompanying circumstances,⁵ and in accordance with common sense and understanding.

Exceptions to Rule. — But the question of natural or proximate cause is not always one for the jury.⁶ Indeed, the nature of the question has been said to be one which depends upon the circumstances of the particular case.⁷ Thus, though where the question whether or not the consequences of an act for which damages are sought were the natural consequences of the act, depends upon whether or not such circumstances should have been foreseen by a person of ordinary prudence, it is proper to submit the issue to a jury;⁸ yet in actions for damages for the breach of contracts where recovery is sought for losses sustained or gains prevented, it has been held that whether the circumstance from which the loss results or the gain is prevented is or is not one which may be reasonably considered to have been in the contemplation of the parties at the time they made the contract, is, from the necessities of the case, a preliminary question for the decision of the trial judge, before evidence of such losses suffered or gains prevented can be introduced.⁹ This last proposition suggests the true answer to the inquiry as to the extent to which the question considered is one for the determination of the jury. The trial judge has it in his power to refuse to admit evidence as to any alleged element of damage if he deems it not to have been a natural or proximate consequence of the defendant's act proved.¹⁰

1. *Green v. Button*, 2 C. M. & R. 707; *Skinner v. Shew*, 8 Reports 455 (1894), 2 Ch. 581.

2. *Chacey v. Fargo*, 5 N. Dak. 173; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574.

When Two Causes Combine to Cause Injury to a traveler on a highway, both of which are in their nature proximate, the one being a culpable defect in the highway and the other some occurrence for which neither party is responsible, the municipality is liable providing the injury would not have been sustained but for the circumstance complained of. *Chacey v. Fargo*, 5 N. Dak. 173.

3. *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267.

4. **Question for Jury.** — *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 475; *East Tennessee, etc., R. Co. v. Lockhart*, 79 Ala. 315; *Sloan v. Southern California R. Co.*, 111 Cal. 683; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *West v. Ward*, 77 Iowa 323, 14 Am. St. Rep. 284; *Atchison, etc., R. Co. v. Bales*, 16 Kan. 252; *Weber v. Third Ave. R. Co.*, 12 N. Y. App. Div. 522; *Morrison v. Long Island R. Co.*, 3 N. Y. App. Div. 205; *Hoag v. Lake Shore, etc., R. Co.*, 85 Pa. St. 293, 27 Am. Rep. 653; *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373, 21 Am. Rep. 100; *Scott v. Hunter*, 46 Pa. St. 192; *Drake v. Kiely*, 93 Pa.

St. 492; *Fairbanks v. Kerr*, 70 Pa. St. 86, 10 Am. Rep. 664; *Patten v. Chicago, etc., R. Co.*, 32 Wis. 524. And see *Seckinger v. Philibert, etc., Mfg. Co.*, 129 Mo. 590; *Mt. Carmel v. Howell*, 36 Ill. App. 68. See generally the title **QUESTIONS OF LAW AND FACT**.

5. *Schumaker v. St. Paul, etc., R. Co.*, 46 Minn. 39; *Mr. Justice Strong in Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469.

6. *McMahon v. Field*, 7 Q. B. Div. 595; *Jordan v. Patterson*, 67 Conn. 473; *Weber v. Third Ave. R. Co.*, 12 N. Y. App. Div. 512.

7. **Sometimes Question of Law and Sometimes of Fact.** — Thus it has been said: "Whenever an intervening agency which has transmitted the force of the defendant's wrongful act to the injury complained of appears, the question whether causal connection exists, so that the original wrongdoer shall be liable, is sometimes a question of law and sometimes a question of fact according to the circumstances of the particular case." *Depue, J., in Delaware, etc., R. Co. v. Salmon*, 39 N. J. L. 310, 23 Am. Rep. 214.

8. *Fairbanks v. Kerr*, 70 Pa. St. 86, 10 Am. Rep. 664; *Scott v. Hunter*, 46 Pa. St. 192.

9. *Jordan v. Patterson*, 67 Conn. 473.

10. **How Far Question of Natural and Proximate Cause One for the Court.** — The case of *Weber v.*

8. What Regarded in Law as Natural and Probable Consequences — *a. GENERAL RULE IN THE CASE OF CONTRACTS* — (1) *Statement of the Rule.* — The first and most obvious rule on this subject is that a contracting party who is guilty of a breach of contract is liable for such damages and such only as are the natural or probable results of the breach.¹

Third Ave. R. Co., 12 N. Y. App. Div. 512, was an action for damages for the death of a person due directly to tuberculosis of the lungs which, however, it was contended, resulted from an injury to the decedent's knee causing tuberculosis of the joint. The court, while announcing the rule that proximate cause is a question of fact to be decided upon the evidence, held nevertheless that in the case at bar there was not sufficient proof to warrant the judge in submitting to the jury the question whether the consumption of the lungs which produced death was caused by the injury inflicted by the defendant. "There must be at least, to warrant such a conclusion," said the court, "so much testimony that the inference is reasonable; and when that has not been given, a verdict based upon less testimony cannot be permitted to stand. We have reached the conclusion, therefore, that it was error to submit this case to the jury upon the testimony which was presented at this trial." And further, the court said: "The rule in such cases is, that a mere conjecture built upon a bare possibility will not suffice to transfer the money or property of one man to the possession and profit of another. *Pauley v. Steam Gauge, etc., Co.*, 131 N. Y. 99."

In the case of *McMahon v. Field*, 7 Q. B. Div. 595, the court construed the case of *Hadley v. Baxendale*, 9 Exch. 341, as laying down the rule that the question of remote or proximate consequences was one for the court. "The question as to the remoteness of damage," said the court in the former case, "has become a difficult one, since, according to the case of *Hadley v. Baxendale*, it is for the court and not the jury to determine whether the case comes within any of the following rules, namely, first, whether the damage is the necessary consequence of the breach; secondly, whether it is the probable consequence; and thirdly, whether it was in the contemplation of the parties when the contract was made. Those two last are rather questions of fact for a jury than of law for the court to determine."

1. *General Rule in Case of Contracts* — *England.* — *M'Collum v. Davis*, 8 U. C. Q. B. 150; *Horne v. Midland R. Co.*, L. R. 8 C. P. 131; *Hobbs v. London, etc., R. Co.*, L. R. 10 Q. B. 111; *Hadley v. Baxendale*, 9 Exch. 341; *Fitzgerald v. Leonard*, 32 L. R. Ir. 675; *Portman v. Middleton*, 4 C. B. N. S. 322, 93 E. C. L. 322, 27 L. J. C. P. 231, 4 Jur. N. S. 689; *Welch v. Anderson*, 61 L. J. Q. B. 167, 66 L. T. 442. And see *Wilson v. Newport Dock Co.*, L. R. 1 Exch. 177, 35 L. J. Exch. 97, 12 Jur. N. S. 233, 14 L. T. 230, 14 W. R. 558, 4 H. & C. 232.

United States. — *Bowas v. Pioneer Tow Line*, 2 Sawy. (U. S.) 30; *Pearson v. Duane*, 4 Wall. (U. S.) 605; *Cunningham v. Bell*, 5 Mason (U. S.) 161; *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159.

Arkansas. — *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279.

Georgia. — *Coweta Falls Mfg. Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602.

Illinois. — *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522; *Benton v. Fay*, 64 Ill. 420.

Indiana. — *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786; *Cline v. Myers*, 64 Ind. 304.

Iowa. — *Mihills' Mfg. Co. v. Day*, 50 Iowa 250; *Prosser v. Jones*, 41 Iowa 674.

Kansas. — *Union Pac. R. Co. v. Shook*, 3 Kan. App. 710. Compare *Houser v. Pearce*, 13 Kan. 104.

Louisiana. — *Doriocourt v. Lacroix*, 29 La. Ann. 286.

Maine. — *Henderson v. Sevey*, 2 Me. 139.

Maryland. — *Furstenburg v. Fawsett*, 61 Md. 184; *Jacob v. Davis*, 34 Md. 204.

Massachusetts. — *Lawton v. Fitchburg R. Co.*, 8 Cush. (Mass.) 230; *Dyer v. Rich*, 1 Met. (Mass.) 180; *Wiley v. Athol*, 150 Mass. 426; *Loker v. Damon*, 17 Pick. (Mass.) 284; *Hayden v. Cabot*, 17 Mass. 169.

Michigan. — *Hickey v. Baird*, 9 Mich. 32; *Cuddy v. Major*, 12 Mich. 368; *Chadwick v. Butler*, 28 Mich. 349; *Wilson v. Wagar*, 26 Mich. 452; *Platt v. Brand*, 26 Mich. 173; *Haskell v. Hunter*, 23 Mich. 305; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *Hutchings v. Ladd*, 16 Mich. 493; *Burrell v. New York, etc., Solar Salt Co.*, 14 Mich. 34; *Clark v. Moore*, 3 Mich. 55.

Minnesota. — *Paine v. Sherwood*, 19 Minn. 515; *Osborne v. Poket*, 33 Minn. 10.

Nebraska. — *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210.

New Hampshire. — *Davis v. Barrington*, 30 N. H. 517.

New Jersey. — *Crater v. Binninger*, 33 N. J. L. 517, 97 Am. Dec. 737.

New York. — *Hosmer v. True*, 19 Barb. (N. Y.) 106; *Swain v. Schieffelin*, 58 Hun (N. Y.) 608, 34 N. Y. St. Rep. 888; *Compton v. Heissenbultall*, (City Ct.) 13 N. Y. Supp. 594; *Engelsdorf v. Sire*, 64 Hun (N. Y.) 209; *Eschbach v. Hughes*, 7 Misc. Rep. (N. Y. C. Pl.) 172; *Wakeman v. Wheeler, etc., Mfg. Co.*, 101 N. Y. 209, 54 Am. Rep. 676; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 566, 1 Am. Rep. 446; *Mack v. Patchin*, 29 How. Pr. (Buffalo Super. Ct.) 30; *Brooklyn v. Brooklyn City R. Co.*, 57 Barb. (N. Y.) 502; *Neary v. Bostwick*, 2 Hilt. (N. Y.) 517; *Baldwin v. U. S. Telegraph Co.*, 1 Lans. (N. Y.) 137; *Smith v. Pettee*, 7 Hun (N. Y.) 335; *Flynn v. Hatton*, 43 How. Pr. (N. Y. C. Pl.) 348; *Cassidy v. Le Fevre*, 45 N. Y. 567; *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 214; *Hamilton v. McPherson*, 28 N. Y. 76, 84 Am. Dec. 330; *Ward v. New York Cent. R. Co.*, 47 N. Y. 32, 7 Am. Rep. 405.

Ohio. — *Trowbridge v. Holcomb*, 4 Ohio St. 38.

Pennsylvania. — *Billmeyer v. Wagner*, 91 Pa. St. 92.

South Carolina. — *Tappan v. Harwood*, 2 Spears L. (S. Car.) 536.

Texas. — *Turner v. Strange*, 56 Tex. 141;

Though to Some Extent Contingent, damages which are the legal and natural result of the act done are not necessarily too remote to be recovered; especially where they are such as may fairly and reasonably be considered as arising either naturally from a breach of the contract itself, or as may reasonably be supposed to have been in the contemplation of both the parties at the time they entered into the contract as the probable result of a breach of it.¹ It is not sufficient, however, that the damages may be a mere possible result of the breach of contract complained of, traceable to the cause the complaining party may assign; they must be such as according to the usual and natural course of events may be considered as fairly and substantially arising from it; otherwise they are not its natural incidents, and cannot be considered to have been within the contemplation of the parties when the contract was made.²

Whether Breach Be by Act of Commission or Omission.—The rule is the same, of course, whether the contract is violated by an act of commission or omission; in either case the wrongdoer or person in default is liable for the losses resulting naturally from and incidental to the breach.³

Alderson v. Gulf, etc., R. Co., (Tex. Civ. App. 1893) 23 S. W. Rep. 617; *Jones v. George,* 56 Tex. 149, 42 Am. Rep. 689.

Vermont.—*Dennis v. Sloughton,* 55 Vt. 371.
Virginia.—*Slaughter v. Denmead,* 88 Va. 1019.

Wisconsin.—*Brown v. Chicago, etc., R. Co.,* 54 Wis. 342; *Flick v. Wetherbee,* 20 Wis. 392; *Richardson v. Chynoweth,* 26 Wis. 656; *Candee v. Western Union Tel. Co.,* 34 Wis. 471, 17 Am. Rep. 452; *Walsh v. Chicago, etc., R. Co.,* 42 Wis. 23, 24 Am. Rep. 376; *Hill v. Chipman,* 59 Wis. 218.

Leading Case—*Hadley v. Baxendale.*—The rule as to the recovery of damages in actions for breach of contracts is thus stated by Alderson, B., in the leading case of *Hadley v. Baxendale*, 9 Exch. 353: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

In the case of *Smeed v. Foord*, 1 El. & El. 612, 102 E. C. L. 612, Lord Campbell said that the doctrine of *Hadley v. Baxendale*, 9 Exch. 353, was in accord with the Code Napoléon, with Pothier, and "with all other authorities."

***Hadley v. Baxendale*—to What Extent Dicta.**—In the case of *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, Marston, J., said that in the case of *Hadley v. Baxendale*, 9 Exch. 341, "the court held the loss of profits while the mill was kept idle could not be recovered, because it did not appear the carrier knew that the want of the shaft was the only thing which was keeping the mill idle. The court also intimated that a different rule might have prevailed had the facts been fully known to the carrier. Of course, no such question was before the court in that case, and intimations given upon facts that may perhaps appear in some future case are not usually relied upon."

For a Wrongful Refusal to Honor a Check drawn upon it by a depositor, a bank is not liable in damages for the arrest and imprisonment of the drawer upon the accusation of the payee for the alleged fraudulent issuance of the check; there may, however, under such circumstances, be a recovery for injury to the drawer's credit. *Bank of Commerce v. Goos*, 39 Neb. 437. See the title CHECKS, vol. 5, p. 1028.

The Plaintiff Made a Contract to Serve on board of an English ship as one of its crew, for a voyage from London to Rio Janeiro and back to its final port of discharge. At the latter place the master engaged in an illegal business, and the plaintiff left the ship. While there he was seized by the authorities and imprisoned as a deserter. In an action for a breach of contract the plaintiff was allowed to recover damages for the loss of the wages he might have earned, but was denied damages for the imprisonment. Bramwell, B., in delivering the opinion of the court, said: "It is true that in one sense the defendant's conduct caused the imprisonment; but for that no doubt the plaintiff would not have been imprisoned. That, however, is not enough. * * * According to the ordinary rule, damage, to be recoverable by a plaintiff, must inevitably flow from the tortious act of the defendant. It must be caused by him as the *causa causans*, and this imprisonment was not so caused." *Burton v. Pinkerton*, L. R. 2 Exch. 340.

1. *Stewart v. Lanier House Co.*, 75 Ga. 582.

2. *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

3. *Mace v. Ramsey*, 74 N. Car. 11.

(2) *Circumstances to Be Considered.* — In all cases, the particular circumstances, situation, and intention of the parties and the use of the property or thing bargained for should be considered carefully in determining what the legitimate damages resulting from the breach are. In estimating damages the court and jury are to look at the nature and terms of the undertaking or thing to be done; how it was expected and intended or proposed to enjoy that which the parties had bargained for, and how they were and would be benefited by performance or damnified by a breach of the particular engagement under the particular circumstances. Then from a view of the whole case the court and jury may trace up to the breach all the alleged injury that is consequent on the state of the case according to its nature.¹

(3) *Where Fraud Taints the Whole Contract.* — It has been said, however, that where fraud taints the whole contract the wrongdoer should be held responsible for all the damages directly traceable to the wrong.²

(4) *Rule as to Liability for All Damages in Contemplation of Parties* — (a) *In General.* — The second rule on this subject is that though the damages resulting may not be the ordinarily natural and probable consequences of the breach of contract, yet the party committing the breach will be held liable therefor if such damages were in the contemplation of the contracting parties when the contract was entered into.³

1. Chicago, etc., R. Co. v. Ward, 16 Ill. 522.

2. Hubbard, J., in Sharon v. Mosher, 17 Barb. (N. Y.) 518. And see Kaiser v. New Orleans, 17 La. Ann. 178; Thompson v. Burgey, 36 Pa. St. 403; Stetson v. Croskey, 52 Pa. St. 230.

Fraudulent Representations in Contract of Sale. — Thus, where a defendant upon the sale of a mare to the plaintiff represented to him that she was perfectly gentle and kind, which representation was false, and in an action to recover damages for such false and fraudulent representation the plaintiff proved that within two days after the sale and purchase he attempted to drive the mare to a buggy when she ran away and injured the plaintiff, it was held that it should have been left to the jury to say as a question of fact whether such injuries resulted from the viciousness of the mare and were the probable and natural consequences of the fraud practiced upon the plaintiff by the defendant, which question, if answered in the affirmative, would entitle the plaintiff to recover for the injuries received. Sharon v. Mosher, 17 Barb. (N. Y.) 518. And see Mullett v. Mason, L. R. 1 C. P. 559; Thompson v. Burgey, 36 Pa. St. 403; Stetson v. Croskey, 52 Pa. St. 230.

Where No Fraud Exists. — In the case of Jones v. George, 56 Tex. 152, 42 Am. Rep. 689, the court said: "No principle is more firmly established than that remote and speculative damages cannot be recovered on account of the breach of contract, when that breach is un-mixed with the elements of force or fraud."

3. **Damages in Contemplation of Parties** — *England.* — Jones v. Bright, 5 Bing. 533, 15 E. C. L. 529; Randall v. Raper, El. Bl. & El. 84, 96 E. C. L. 84; Brown v. Edgington, 2 M. & G. 279, 40 E. C. L. 371; Page v. Pavey, 8 C. & P. 769, 34 E. C. L. 628; Borradaile v. Brunton, 8 Taunt. 535, 4 E. C. L. 202; Smeed v. Foord, 1 El. & El. 602, 102 E. C. L. 602; Hobbs v. London, etc., R. Co., L. R. 10 Q. B. 111; Hadley v. Baxendale, 9 Exch. 341; Portman v. Middleton, 4 C. B. N. S. 322, 93 E. C. L. 322,

27 L. J. C. P. 231, 4 Jur. N. S. 689; Wilson v. Newport Dock Co., L. R. 1 Exch. 177, 35 L. J. Exch. 97, 12 Jur. N. S. 233, 14 L. T. 230, 14 W. R. 558, 4 H. & C. 232; Horne v. Midland R. Co., L. R. 8 C. P. 131, 42 L. J. C. P. 59, 28 L. T. 312, 21 W. R. 481; Sully v. Duranty, 3 H. & C. 270, 33 L. J. Exch. 319; Welch v. Anderson, 61 L. J. Q. B. 167; Mowbray v. Merryweather, 65 L. J. Q. B. 50.

United States. — Bagley v. Cleveland Rolling Mill Co., 21 Fed. Rep. 159; Bowas v. Pioneer Tow Line, 2 Sawy. (U. S.) 30.

Alabama. — Bell v. Reynolds, 78 Ala. 511, 56 Am. Rep. 54.

California. — Mitchell v. Clarke, 71 Cal. 163, 60 Am. Rep. 529.

Florida. — Brock v. Gale, 14 Fla. 523.

Illinois. — Benton v. Fay, 64 Ill. 420.

Iowa. — Kramer v. Messner, 101 Iowa 88; Griffith v. Burden, 35 Iowa 138; Mann v. Taylor, 78 Iowa 355; Mihills Mfg. Co. v. Day, 50 Iowa 250.

Louisiana. — Doriocourt v. Lacroix, 29 La. Ann. 286; Weber v. Coussy, 12 La. Ann. 534; Dyson v. Phelps, 14 La. Ann. 733.

Maryland. — Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635; Furstenburg v. Fawcett, 61 Md. 184.

Michigan. — Clark v. Moore, 3 Mich. 55; Cuddy v. Major, 12 Mich. 368; Chadwick v. Butler, 28 Mich. 349; Wilson v. Wagar, 26 Mich. 452; Platt v. Brand, 26 Mich. 173; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Haskell v. Hunter, 23 Mich. 305; Hutchings v. Ladd, 16 Mich. 493; Burrell v. New York, etc., Solar Salt Co., 14 Mich. 34.

Minnesota. — Paine v. Sherwood, 19 Minn. 315.

Missouri. — Clark v. Marshall, 34 Mo. 429.

Nebraska. — Sycamore Marsh Harvester Mfg. Co. v. Sturm, 13 Neb. 210.

New Hampshire. — Hurd v. Dunsmore, 63 N. H. 171.

New Jersey. — Crater v. Binninger, 33 N. J. L. 517, 97 Am. Dec. 737.

New York. — Milton v. Hudson River Steam-

Contemplation of Parties as a General Rule. — Inasmuch as parties are presumed to contemplate the natural and probable consequences of a breach of contract, as well under ordinary circumstances as when the contract is made with reference to special circumstances known to the parties, it may be said that the parties to a contract are only liable for such consequences as were or might have been contemplated by them. In this sense it has been declared that though the

boat Co., 37 N. Y. 214; *Cassidy v. Le Fevre*, 45 N. Y. 567; *Ward v. New York Cent. R. Co.*, 47 N. Y. 32, 7 Am. Rep. 405; *Hamilton v. McPherson*, 28 N. Y. 76, 84 Am. Dec. 330; *Smith v. Pettie*, 7 Hun (N. Y.) 335; *Neary v. Bostwick*, 2 Hilt. (N. Y.) 517; *Baldwin v. U. S. Telegraph Co.*, 1 Lans. (N. Y.) 137; *Flynn v. Hatton*, 43 How. Pr. (N. Y. C. Pl.) 348; *Mack v. Patchin*, 29 How. Pr. (Buffalo Super. Ct.) 30; *Brooklyn v. Brooklyn City R. Co.*, 57 Barb. (N. Y.) 502; *Hargous v. Ablon*, 5 Hill (N. Y.) 472; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *Compton v. Heissenbuttel* (C. Pl.), 16 N. Y. Supp. 524, 18 N. Y. Supp. 952; *Russell v. Giblin*, 16 Daly (N. Y.) 258; *Liman v. Pennsylvania R. Co.*, 4 Misc. Rep. (N. Y. C. Pl.) 539; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 566, 1 Am. Rep. 446.

North Carolina. — *Mace v. Ramsey*, 74 N. Car. 11.

Ohio. — *Devereux v. Buckley*, 34 Ohio St. 16, 32 Am. Rep. 342.

Pennsylvania. — *Billmeyer v. Wagner*, 91 Pa. St. 92; *McConaghy v. Pemberton*, 168 Pa. St. 121; *U. S. Telegraph Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751.

Texas. — *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689; *Watkins v. Junker*, 4 Tex. Civ. App. 629; *Equitable Mortg. Co. v. Thorn*, (Tex. Civ. App. 1894) 26 S. W. Rep. 276; *Turner v. Strange*, 56 Tex. 141.

Vermont. — *Maynard v. Maynard*, 49 Vt. 297.

Washington. — *Skagit R., etc., Co. v. Cole*, 1 Wash. 330.

Wisconsin. — *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342; *Flick v. Wetherbee*, 20 Wis. 392; *Richardson v. Chynoweth*, 26 Wis. 656; *Candee v. Western Union Tel. Co.*, 34 Wis. 479, 17 Am. Rep. 452; *Hill v. Chipman*, 59 Wis. 218; *Walsh v. Chicago, etc., Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Buffalo Barb Wire Co. v. Phillips*, 64 Wis. 338.

In the case of *Hobbs v. London, etc., R. Co.*, L. R. 10 Q. B. 111, the court stated the rule as to the measure of damages in actions for the breach of contract to be that "such damages are recoverable as a man when making the contract would contemplate would flow from a breach of it."

Illustration — Leading Case — Facts of Hadley v. Baxendale. — In the case of *Hadley v. Baxendale*, 26 Eng. L. & Eq. 398, 9 Exch. 341, the plaintiffs were the owners of a steam grist mill, and contracted with the defendant, a carrier of goods by railway, to carry for hire two pieces of iron, constituting the broken shaft of the mill, and deliver the same to an artificer who lived at a considerable distance, in order to serve as a model for a new shaft to be made for them by him. The defendant having violated his agreement by not delivering these pieces of iron within a reasonable time, a delay necessarily arose in supplying the new shaft,

and a shaft being indispensable to the working of the mill, and the plaintiffs not having any other, the mill remained idle until the delivery of the new one; but although there was evidence that the defendant knew the mill was standing still, he was not aware that this was for want of the shaft for which the iron delivered to him was to serve as a model. Baron Alderson, in the opinion of the court, says: "We find that the only circumstances here communicated by the plaintiff to the defendant at the time the contract was made were that the article to be carried was the broken shaft of a mill, and that the plaintiff was the miller of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiff had another shaft in his possession put up, or putting up at the time, and that he only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that at the time of the delivery to the carrier the machinery of the mill had been in other respects defective, then also the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances such consequences would not in all probability have occurred, and these special circumstances were here never communicated by the plaintiff to the defendant. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract; for such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances."

The general rule in *Hadley v. Baxendale*, 9 Exch. 341, has been recognized and applied by the courts in most of the *United States*, *Cutting v. Grand Trunk R. Co.*, 13 Allen (Mass.) 381; *Scott v. Boston, etc., Steamship Co.*, 106 Mass. 468; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487. See also other cases cited in this note, and others in this subdivision.

courts have established in certain instances rules for the recovery of damages applicable to all cases of a class, they will all be found subject to the general rule that only such damages are recoverable as were in the contemplation of the parties. Indeed, wherever such rules have been established, that circumstance of itself warrants the presumption that the parties contracted and acted with reference to and in the full knowledge of the rules so established.¹

When Property Is Purchased for a Specific Purpose, known to the vendor at the time of the contract, it is just to hold that he contracted with reference to that purpose, not only in respect to the kind and quality of the goods, but also in respect to the injury to result from a breach.² It has been held, therefore, that

Hadley v. Baxendale — Rationale of Rule. — With reference to the measure of damages in actions for breach of contract, it was held in *Hadley v. Baxendale*, 9 Exch. 341, that when the contract was made under special circumstances, if those special circumstances are communicated, the amount of the injury which would ordinarily follow from a breach of the contract, under such circumstances, may be recovered as damages that would reasonably be expected to result from such breach. "This rule was considered," said Depue, J., in *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, "as analogous to an agreement to bear the loss resulting from the exceptional state of things, made part of the principal contract by the fact that such special circumstances were communicated, with reference to which the parties may be said to have contracted." *Horne v. Midland R. Co.*, L. R. 8 C. P. 134. Under the operation of this rule damages arising from the loss of a profitable sale, or the deprivation for a contemplated use, have been allowed when special circumstances of such sale or proposed use were communicated contemporaneously with the making of the contract; and have been denied when such communication was not made so specially, as that the other party was made aware of the consequences that would follow from his non-performance. *Borries v. Hutchinson*, 18 C. B. N. S. 445, 114 E. C. L. 445; *Cory v. Thames Ironworks, etc., Co.*, L. R. 3 Q. B. 181; *Horne v. Midland R. Co.*, L. R. 8 C. P. 134."

The Rule of Damages for the Breach of a Contract, as stated in *Cohn v. Norton*, 57 Conn. 480, is, (1) the damages that would arise naturally and generally from the breach of such a contract, or (2) if the special circumstances under which the contract was made were stated at the time and known to both parties, then the amount of the injury which would ordinarily follow from a breach of the contract under those special circumstances.

In 2 Kent's Com. (12th ed.) 480, note, it is declared that "damages for breaches of contract are only those which are incidental to and directly caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties."

Recovery for Loss of Profits or Advantages. — Strong, J., delivering the opinion of the court in *Adams Express Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382, said that "the loss of profits or advantages which must have resulted from a fulfilment of the contract may be compensated in damages when they are the direct and immediate fruits of the contract, and must therefore have been stipulated for and have

been in the contemplation of the parties when it was made."

Liability for Loss Which Should Have Been Prevented. — In the case of *Hecla Powder Co. v. Sigua Iron Co.*, 91 Hun (N. Y.) 429, it appeared that a party contracted to deliver a certain amount of powder in Cuba, knowing that it was an interdicted article, and that without a proper and necessary permit from the Spanish government the powder was liable to seizure and confiscation. The party undertaking to deliver the powder also bound himself to notify the other contracting party, but failing in these particulars, the powder was seized and confiscated by the Spanish government, and a fine of several thousand dollars imposed by such government upon the party to whom the powder had been shipped, which the latter was compelled to pay. It was held in this case that for breach of the contract to deliver and undertaking to procure the necessary permit and to notify the party to whom the powder was shipped, the party so in default was liable to the former for the amount of fine imposed upon him by the Spanish government.

1. Taylor, J., in *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342.

If the Contract Is Made with Reference to Special Circumstances, fixing or affecting the amount of the damages, such special circumstances are regarded within the contemplation of the parties, and damages may be assessed accordingly. *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 493.

But if the special circumstances under which the contract was made, and which occasioned special and unusual injury to attend its breach, were unknown to the party who committed the breach, he will not be held to make compensation for more than the amount of injury which generally results from the breach of such contracts in cases unattended by any special circumstances. See Strong, J., in *Adams Express Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382.

Actions for Fraudulent Misrepresentations. — In actions for damages for loss incurred by reason of the fraudulent misrepresentations of the defendant, there may be a recovery for all losses to the plaintiff which reasonably may be presumed to have been in the contemplation of the wrongdoer at the time of the commission of the fraud. *Crater v. Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737.

2. *Stewart v. Power*, 12 Kan. 600. This is especially so, it was said in this case, where it is evident that in the event of a breach the vendee will be unable to obtain like goods

where a party contracts to deliver goods upon a certain day, with knowledge that they are required for a particular occasion, upon breach of contract he will be liable for all the actual loss directly and naturally resulting from his default.¹ Where an article purchased is designed by the purchaser for a peculiar and exceptional purpose unknown to the seller, the latter is, nevertheless, liable for the loss which would have been sustained if the article had been used for the purpose for which he supposed it would be used.²

Sale of Article with Warranty. — Where an article, desired for a specified purpose, known to the vendor, is sold with a warranty that it is of a certain necessary quality, which it is not, there may be a recovery not simply of the difference between the value of the article sold and its value as represented, but for any damage which naturally results from the contemplated use of the article sold.³

elsewhere in time to accomplish that purpose.

Where the Contracting Party Is Advised of the Special Purpose of the thing to be completed, and of the damage that would naturally accrue from failure to complete it at the specified time, and in view of this expressly stipulates to finish it at a given time, there is no reason why he should not be held responsible for such damage as is the result of his failure. *Richardson v. Chynoweth*, 26 Wis. 656. See also *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318; *Flick v. Wetherbee*, 20 Wis. 392.

Breach of Contract to Deliver Threshing Machine. — In the case of *Smeed v. Foord*, 1 El. & El. 602, 102 E. C. L. 602, where the question was what damages the plaintiff was entitled to recover on failure to deliver a threshing machine according to the contract, Lord Campbell observed that "the defendant knew that the plaintiff required the machine for the purpose of threshing wheat in the field. Then was it not contemplated by the parties that if the machine was not delivered by the time fixed, damage to the wheat would in all probability be the result? * * * Owing to the nondelivery of the machine, the wheat was stacked, and afterwards damaged by the rain which ensued. This injury, and the loss and expense which it involved, were the natural results of the defendant's delay. They were also results which the parties must have foreseen."

Contract to Set Up Sugar Mill. — The case of *Goodloe v. Rogers*, 9 La. Ann. 273, 61 Am. Dec. 205, was an action brought for damages for breach of contract to furnish and put in operation a sugar mill and steam engine of a certain description and by a fixed day. It was held in that case that the planter was entitled to recover for damage to crop and extra wages paid in consequence of the breach, it being evidently within the contemplation of the parties that the machinery was to be used in connection with a certain crop of sugar cane.

1. *Richardson v. Chynoweth*, 26 Wis. 656. See also *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318.

Heating Apparatus for Greenhouse. — In an action for damages for failure of the defendants to furnish a sufficient steam-heating apparatus for the plaintiff's greenhouse, the former were held liable for the value of plants lost by cold, they knowing the purpose for which the heating apparatus was purchased and the temperature necessary to be maintained. *Kramer v. Messner*, 101 Iowa 88.

Failure to Supply Ice to Butcher. — The plaintiff was a butcher, and the defendant had agreed to furnish him with such a quantity of ice as he might need for his ice-box to keep fresh meat during the summer. The defendant had supplied the plaintiff before, and understood the use for which the ice was required. About the last of July the defendant ceased to furnish ice, and in consequence a quantity of meat was spoiled, as no ice could be procured elsewhere. The defendant was held liable for the value of the spoiled meat. *Hammer v. Schoenfelder*, 47 Wis. 455. In this case the court said: "As the defendant was acquainted with all the special circumstances in respect to this contract, — knew for what purpose the ice agreed to be furnished by him was to be used — he should fully indemnify the plaintiff for the loss he sustained by nondelivery of the ice; he was, therefore, justly chargeable in damages for the meat spoiled in consequence of the inability of the plaintiff to procure ice elsewhere."

Where a Person Contracts to Store Fruit and to keep the interior of the warehouse below a certain temperature, but the temperature is allowed to rise above the stipulated mark, which causes the decay of the fruit and a consequent diminution of the market value, the warehouseman is liable for the injury sustained. *Hyde v. Mechanical Refrigerating Co.*, 144 Mass. 432.

2. *Cory v. Thames Ironworks, etc., Co., L. R. 3 Q. B. 181.*

3. *Milburn v. Belloni*, 39 N. Y. 53, 100 Am. Dec. 403; *Maynard v. Maynard*, 49 Vt. 297.

Damages for the Breaking of Anchor Cable. — In an action for the breach of a warranty that a chain anchor cable would last two years, the cable having broken within the time stipulated, whereby both the cable and the anchor attached thereto were lost, it was held that a recovery might be had, as well for the loss of the anchor as for the cable. *Borradaile v. Brunton*, 8 Taunt. 535, 4 E. C. L. 202. And see *Mowbray v. Merryweather*, 65 L. J. Q. B. 50.

Purchase of Rope for Crane — Loss of Wine in Hoisting. — In *Brown v. Edgington*, 2 M. & G. 279, 40 E. C. L. 371, the defendant was applied to to furnish a rope for a crane, to be used for the purpose of hauling up and letting down pipes and other heavy casks. The defendant undertook to supply the rope for the plaintiff's crane, and the jury found the rope was not fit for that purpose. The rope broke, whereby

What Evidence Deemed Relevant. — According to the principle stated, evidence of knowledge of special circumstances tending to enhance the damages in actions for damages for breach of contract is always deemed to be relevant.¹

Analogies of the Rule. — The doctrine holding parties liable for such consequences as are within their contemplation and excluding those which are not, has been held to be in analogy with the general rule of construction of contracts according to the understanding and intent of the contracting parties.²

Criticism of Rule as to Contemplation of Parties. — The rule with reference to the recovery of such damages as "may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it," has been criticised as inapt and misleading.³ The main objection stated has been that parties entering into contracts contemplate that they will be performed, and not that they will be broken, and that in the infinite majority of instances the damages to arise from the breach never enter into the contemplation of the parties at all;⁴ an objection, however, which goes rather to the form than the substance of the rule as it has been generally construed and applied; for it has never been regarded as necessary that an actual breach of the contract should have been in the minds of the parties when it was entered into,⁵ or that the parties may be presumed to have contemplated the particular losses which ensue.⁶ Indeed, there may be damages for the breach of a contract although the defendant never intends or contemplates a breach at all, as where it occurs through his negligence or mistake.⁷

(b) **Damages for Losses on Collateral Contracts and Transactions** — *aa.* IN GENERAL. — The general rule, subject to qualifications to be hereafter stated, is that the right of a party to recover damages is limited to such as arise out of the contract on which the action is founded, such damages or losses as result from collateral contracts or transactions merely affected by the nonperformance of the particular contract not being recoverable.⁸ Although collateral or subordinate

the plaintiffs lost a pipe of wine, which was being raised by it. The defendant was held liable for all the damages occasioned from the breach of the warranty that the rope was fit for the purpose for which it was purchased.

1. *Kramer v. Messner*, 101 Iowa 88. And see *Mann v. Taylor*, 78 Iowa 355; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 54; *Griffith v. Burden*, 35 Iowa 138.

2. *Allison v. Chandler*, 11 Mich. 549.

3. *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435. In this connection the court, in this case, said: "Altogether, we think it [the rule considered] obscure and misleading, and that an attempt to install it as one of the canons has caused many, very many erroneous rulings." And see *Earl, C. J.*, in *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 566, 1 Am. Rep. 446; *Polles, C. B.*, in *Hamilton v. Magill*, 12 L. R. Ir. 186; *Collins v. Stephens*, 58 Ala. 543.

4. *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435. And see dicta referred to in preceding note.

5. *Wilson v. Dunville*, 6 Ir. L. R. 210; *Hamilton v. Magill*, 12 L. R. Ir. 186; *Collins v. Stephens*, 58 Ala. 543. And see *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435.

6. *Cohn v. Norton*, 57 Conn. 480; *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

7. See *French v. Vining*, 102 Mass. 135, 3 Am. Rep. 440.

8. **Collateral Contracts** — *England*. — *Skinner*

v. London Marine Ins. Corp., 14 Q. B. Div. 882; *Great Western R. Co. v. Redmayne*, L. R. 1 C. P. 329, 35 L. J. C. P. 123, 12 Jur. N. S. 692; *Thol v. Henderson*, 8 Q. B. Div. 457, 40 L. T. N. S. 483; *Williams v. Reynolds*, 6 B. & S. 495, 118 E. C. L. 495, 34 L. J. Q. B. 221, 11 Jur. N. S. 973, 12 L. T. 728, 13 W. R. 940; *Clare v. Maynard*, 6 Ad. & El. 519, 33 E. C. L. 137; *Walker v. Moore*, 10 B. & C. 416, 21 E. C. L. 100; *Woodger v. Great Western R. Co.*, L. R. 2 C. P. 318, 36 L. J. C. P. 177, 15 L. T. N. S. 579, 15 W. R. 383; *Hawes v. South Eastern R. Co.*, 54 L. J. Q. B. 174; *Horne v. Midland R. Co.*, L. R. 8 C. P. 131. *Compare Boyd v. Fitt*, 14 Ir. C. L. R. 43, 11 L. T. 280.

Canada. — *Loney v. Oliver*, 21 Ont. Rep. 89.

United States. — *Philadelphia, etc., R. Co. v. Howard*, 13 How. (U. S.) 344.

California. — *Friend, etc., Lumber Co. v. Miller*, 67 Cal. 464; *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534.

Georgia. — *Stewart v. Lanier House Co.*, 75 Ga. 582.

Illinois. — *Olmstead v. Burke*, 25 Ill. 86.

Indiana. — *Lewis v. Lee*, 15 Ind. 499.

Kansas. — *Johnson v. Mathews*, 5 Kan. 118.

Maine. — *Bridges v. Stickney*, 38 Me. 369.

Massachusetts. — *Fox v. Harding*, 7 Cush. (Mass.) 523; *Somers v. Wright*, 115 Mass. 298; *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201; *Hayden v. Cabot*, 17 Mass. 169.

Michigan. — *Cuddy v. Major*, 12 Mich. 368; *Wetmore v. Pattison*, 45 Mich. 439; *Clark v. Moore*, 3 Mich. 55.

contracts with third persons may have been entered into upon the faith of the principal contract, for the purpose of carrying it into effect, losses thereon are not recoverable in damages for the breach of the principal contract.¹

Losses on or Advantages from Sub-contracts Not in Contemplation of Parties, Too Uncertain to Be Recoverable. — The advantages and benefits of sub-contracts not in the contemplation of the parties when the original contract was made are too uncertain and contingent to be taken into consideration in estimating the profits the

Minnesota. — *Fairchild v. Rogers*, 32 Minn. 269.

New York. — *Lowenstein v. Chappell*, 30 Barb. (N. Y.) 241; *Horner v. Wood*, 16 Barb. (N. Y.) 389; *Walrath v. Redfield*, 11 Barb. (N. Y.) 372; *Story v. New York, etc., R. Co.*, 6 N. Y. 90; *Devlin v. New York*, 63 N. Y. 25; *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Lattin v. Davis, Hill & D. Supp.* (N. Y.) 9; *Cram v. Dresser*, 2 Sandf. (N. Y.) 127; *Deming v. Kemp*, 4 Sandf. (N. Y.) 147; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Cassidy v. Le Fevre*, 45 N. Y. 562; *Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250; *Myers v. Burns*, 35 N. Y. 269.

Ohio. — *Rhodes v. Baird*, 16 Ohio St. 581.
Texas. — *Wells v. Battle*, 5 Tex. Civ. App. 532.

Statement of General Rule. — In the case of *Fairchild v. Rogers*, 32 Minn. 269, the court said: "It may be conceded to be the general rule that loss of profits affords no basis for the awarding of damages for breach of contract, in cases where the profits were to have accrued from some engagement or contract independent of and collateral to the principal contract, for the breach of which the action is brought; that is to say, in cases where the contemplated profits do not either arise naturally — that is, in the usual course of things — from the breach itself, or are not such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach."

Common Law Has Followed Civil Law in This Respect. — Cowen, J., in *Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250, considering the doctrine of damages for breach of contract, observed that the courts of common law seem inclined to follow the rule of the civil law in respect to damages for breach of contracts relating to personal property, which was that the party entitled to claim performance might claim damages for the nonperformance in respect to the particular thing which was the object of the contract, but not in respect to an injury accidentally occasioned thereby in respect to his own affairs. For illustration, it was said, a lessee evicted by title paramount might claim the expense of removal and indemnity for advanced rents, but would not be entitled to recover for loss of custom established whilst residing on the premises.

Masterton v. Mayor — Leading Case. — In an action for damages for breach of contract, loss of profits, which would have been an immediate result of the contract, may be recovered, but not the loss of such profits or other damages arising out of collateral undertakings entered into on the faith of the contract. *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38.

A Party Seeking Compensation for the loss of profits upon a contract is not entitled to the benefits of, or to be indemnified against, a contract made with a third person not in the contemplation of the parties when the original agreement was made. *Devlin v. New York*, 63 N. Y. 26.

Contract to Furnish Machinery for Flour Mill — Breach as to Quality and Capacity. — In the case of *Pennypacker v. Jones*, 106 Pa. St. 237, the plaintiffs, who owned and operated a flour mill in Philadelphia, entered into a contract with the defendants, by certain of the terms of which the defendants were to place in their mill by a specified time machinery of a certain capacity to make a flour of a high grade. The machines when furnished were found not to make high-grade flour, and to be incapable of producing the stipulated number of barrels per day. In an action for damages by the plaintiffs for a breach of the contract, it was held that the loss of possible profits which might have been made if the mill had run properly was not a proper subject of damages, for the reason that such damages were too remote and speculative. In delivering its opinion, the court observed that it was not part of the contract that the plaintiffs should make profits, or even have the opportunity of doing so, by carrying on a business with the machinery which the defendants agreed to erect; that when a machinist furnished machinery to a millowner, it is no part of his engagement that a profitable business shall be carried on with the machinery furnished. Of course, it was conceded that the machinist is responsible for the damage resulting from defect in the machinery furnished, but such a liability is a very different thing from liability for uncertain, remote, and speculative profits which might or might not be made in a business to be carried on.

1. *Philadelphia, etc., R. Co. v. Howard*, 13 How. (U. S.) 344; *Fox v. Harding*, 7 Cush. (Mass.) 523; *Somers v. Wright*, 115 Mass. 298; *Walrath v. Redfield*, 11 Barb. (N. Y.) 372; *Horner v. Wood*, 16 Barb. (N. Y.) 389; *Lowenstein v. Chappell*, 30 Barb. (N. Y.) 245; *Story v. New York, etc., R. Co.*, 6 N. Y. 90. And see cases cited in foregoing note.

In an Action by a Lessee Against the Lessor to recover damages for a refusal to give possession of the demised premises, the plaintiff cannot, for the purpose of showing the amount of damages sustained, give evidence of an advantageous contract for the assignment of the lease, or of an offer to purchase it by another person, where an assignment or resale of the lease was not within the contemplation of the parties at the time the contract of lease was entered into. *Lawrence v. Wardwell*, 6 Barb. (N. Y.) 423.

original contractor might have made under his contract.¹

bb. WHERE COLLATERAL CONTRACT WITHIN CONTEMPLATION OF PARTIES TO PARTICULAR CONTRACT. — Where, however, the collateral contract was in the contemplation of the parties to the original or particular contract when it was made, the latter being made with reference to the former, there may, upon a breach of the particular contract, be a recovery in damages for losses sustained or gains prevented with reference to the collateral undertaking.² If at the time of a contract of sale the vendor knows that a vendee has already contracted to resell a portion of the goods to others at a profit, the damage-recoverable may fairly include such profits.³ It is immaterial whether the particular contract is entered into for the purpose of enabling the plaintiff to comply with a former contract already made,⁴ or whether the contract for the

1. *Devlin v. New York*, 63 N. Y. 26.

2. *When Collateral Contract Within Contemplation of Parties* — *England.* — *Boyd v. Fitt*, 14 Ir. C. L. R. 43, 11 L. T. 280; *Borries v. Hutchinson*, 18 C. B. N. S. 445, 114 E. C. L. 445; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Grébert-Borgnis v. Nugent*, 15 Q. B. Div. 85, 54 L. J. Q. B. 511; *Waters v. Towers*, 8 Exch. 401; *Smeed v. Foord*, 1 El. & El. 602, 102 E. C. L. 602; *Smith v. Green*, 1 C. P. Div. 92; *Simpson v. London*, etc., R. Co., 1 Q. B. Div. 274; *Alder v. Keighley*, 15 M. & W. 117; *Prior v. Wilson*, 2 L. T. 549, 8 W. R. 260; *Cort v. Ambergate*, etc., R. Co., 17 Q. B. 127, 79 E. C. L. 127, 20 L. J. Q. B. 460, 15 Jur. 877. *Compare Hawes v. South Eastern R. Co.*, 54 L. J. Q. B. 174; *Horne v. Midland R. Co.*, L. R. 8 C. P. 131.

Canada. — *Thomson v. Beling*, 1 Quebec L. Rep. 67.

United States. — *Hitchcock v. Galveston*, 3 Woods (U. S.) 287.

California. — *Compare Friend*, etc., *Lumber Co. v. Miller*, 67 Cal. 464.

Connecticut. — *Hubbard v. Rowell*, 51 Conn. 423; *Jordan v. Patterson*, 67 Conn. 473.

Florida. — *Robinson v. Hyer*, 35 Fla. 544.

Illinois. — *Haven v. Wakefield*, 39 Ill. 509.

Iowa. — *Cobb v. Illinois Cent. R. Co.*, 38 Iowa 601.

Kansas. — *Halstead Lumber Co. v. Sutton*, 46 Kan. 192.

Kentucky. — *Campbellsville Lumber Co. v. Bradlee*, 96 Ky. 494.

Michigan. — *Loud v. Campbell*, 26 Mich. 239.

New York. — *Dillon v. Masterson*, 42 N. Y. Super. Ct. 183; *Malony v. Brady*, (C. Pl.) 19 N. Y. Supp. 911; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Messmore v. New York Shot, etc., Co.*, 40 N. Y. 422; *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Cassidy v. Le Fevre*, 45 N. Y. 562; *Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250; *Myers v. Burns*, 35 N. Y. 269; *Devlin v. New York*, 63 N. Y. 26; *Davis v. Talcott*, 14 Barb. (N. Y.) 611. *Compare Lattin v. Davis*, Hill & D. Supp. (N. Y.) 9.

North Carolina. — *Lewis v. Rountree*, 79 N. Car. 122, 28 Am. Rep. 309.

Ohio. — *Rhodes v. Baird*, 16 Ohio St. 573.

Pennsylvania. — *Fiegel v. Latour*, 81* Pa. St. 448.

Texas. — *Wells v. Battle*, 5 Tex. Civ. App. 532; *Yoakum v. Dunn*, 1 Tex. Civ. App. 524.

West Virginia. — *James v. Adams*, 8 W. Va. 568.

Wisconsin. — *Salvo v. Duncan*, 49 Wis. 151.

Recovery for Loss of Definite and Fixed Profits. — *Cooley, J.*, delivering the opinion of the court in *Allis v. McLean*, 48 Mich. 432, said: "It often happens also that one contract, the performance of which will result in certain and definite profits, will be dependent upon the performance of another, and if the second contract is broken the loss of definite and fixed profits under the other is a necessary and immediate consequence." *Citing Loud v. Campbell*, 26 Mich. 239; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Salvo v. Duncan*, 49 Wis. 151; *Hitchcock v. Galveston*, 3 Woods (U. S.) 287; *Fiegel v. Latour*, 81* Pa. St. 448; *James v. Adams*, 8 W. Va. 568; *Waters v. Towers*, 8 Exch. 401.

3. *Contracts of Sale* — *England.* — *Thol v. Henderson*, 8 Q. B. Div. 457, 46 L. T. N. S. 483; *Grébert-Borgnis v. Nugent*, 15 Q. B. Div. 85, 54 L. J. Q. B. 511; *Borries v. Hutchinson*, 18 C. B. N. S. 445, 114 E. C. L. 445; *Smeed v. Foord*, 1 El. & El. 602, 102 E. C. L. 602; *Smith v. Green*, 1 C. P. Div. 92; *Simpson v. London*, etc., R. Co., 1 Q. B. Div. 274; *Alder v. Keighley*, 15 M. & W. 117; *Hinde v. Liddell*, L. R. 10 Q. B. 265.

Canada. — See *Thomson v. Beling*, 1 Quebec L. Rep. 67.

Connecticut. — *Jordan v. Patterson*, 67 Conn. 473; *Hubbard v. Rowell*, 51 Conn. 423.

Florida. — *Robinson v. Hyer*, 35 Fla. 544.

Illinois. — *Haven v. Wakefield*, 39 Ill. 509.

Iowa. — *Cobb v. Illinois Cent. R. Co.*, 38 Iowa 601.

Kentucky. — See *Campbellsville Lumber Co. v. Bradlee*, 96 Ky. 494.

New York. — *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 488; *Messmore v. New York Shot, etc., Co.*, 40 N. Y. 422.

North Carolina. — *Lewis v. Rountree*, 79 N. Car. 122, 28 Am. Rep. 309.

Ohio. — *Rhodes v. Baird*, 16 Ohio St. 573.

Texas. — *Gulf, etc., R. Co. v. Hodge*, (Tex. Civ. App. 1897) 39 S. W. Rep. 986.

4. *Sub-contract to Enable Party to Perform Principal Contract Already Made.* — Where a sub-contract is entered into for the purpose of enabling the obligee to perform the principal contract, with the full knowledge of the obligor in the sub-contract that such is its object and purpose, then upon the breach of the sub-contract by the obligor therein, the obligee may, in an

breach of which the action is brought was made for the purpose of enabling the plaintiff to enter into a future contract within the contemplation of the parties to the particular undertaking.¹

Plaintiff's Liability in Damages or Penalties on Collateral Contracts. — Where a vendor undertook to supply goods to his vendee with knowledge that the latter required them under a contract of sale with a foreign customer, it was held that such vendor would be presumed to contemplate the possibility of his vendee's liability in damages to his customer in case the goods were not supplied, and, therefore, liable over in damages accordingly.² And it was also held that a judgment of a court of the country of the plaintiff's customer against the former, fixing such damages, would, in the absence of proof to the contrary, be presumed reasonable and, *prima facie*, what the plaintiff would be entitled to recover against his delinquent vendor.³

cc. **COLLATERAL CONTRACT UNENFORCEABLE UNDER STATUTE OF FRAUDS.** — The fact that the collateral contract for the loss of the benefits of which a recovery is

action for its breach, recover damages for loss occasioned by his consequent inability to perform the principal undertaking. *Dillon v. Masterson*, 42 N. Y. Super Ct. 183.

If a contract is made to enable one of the parties thereto to perform a sub-contract, the terms of which are known to both, upon breach thereof the party in default may be held liable for the difference between the sub-contract price and the principal contract price, upon the ground that the parties have impliedly fixed the measure of damages themselves, or rather, made the contract upon the basis of a fixed rule by which they may be assessed. *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 493.

1. *Hubbard v. Rowell*, 51 Conn. 423; *Jordan v. Patterson*, 67 Conn. 473; *Blue Grass Cordage Co. v. Luthy*, 98 Ky. 583.

Purchase for Sale to Foreign Customer. — In the case of *Borries v. Hutchinson*, 18 C. B. N. S. 445, 114 E. C. L. 445, the article sold was caustic soda, which was purchased to be sold to a foreign correspondent, of which fact the defendant was informed. There were several items of damage claimed. That of the profits of the sub-contract was conceded, and the money paid into court, but it was held nevertheless, in passing judgment, that the plaintiff was entitled to recover such profits. *Erle, C. J.*, said in this connection: "Here the vendor had notice that the vendee was buying the caustic soda, an article not ordinarily procurable in the market, for the purpose of resale to a sub-vendee on the continent. He made the contract therefore with knowledge that the buyers were buying for the purpose of fulfilling a contract which they had made with a merchant abroad."

2. *Grébert-Borgnis v. Nugent*, 15 Q. B. Div. 85. And see *Sawdon v. Andrew*, 30 L. T. N. S. 23; *Cort v. Ambergate, etc.*, R. Co., 17 Q. B. 127, 79 E. C. L. 127, 20 L. J. Q. B. 460, 15 Jur. 877; *Die Elbinger Actien-Gesellschaft, etc.*, v. *Armstrong*, L. R. 9 Q. B. 473; *Murdock v. Jones*, 3 N. Y. App. Div. 221; *Smith v. Flanders*, 129 Mass. 322.

Plaintiff's Liability in Penalties on Collateral Contracts. — The case of *Die Elbinger Actien-Gesellschaft, etc.*, v. *Armstrong*, L. R. 9 Q. B. 473, was a contract for the purchase of six hundred and sixty-six sets of wheels and axles

which the plaintiff designed to use in the manufacture of wagons which he had contracted to deliver to a Russian company by a certain day or forfeit two roubles a day. The defendant was informed of the contract, but not of the amount of penalties. Some delay occurred in the delivery, in consequence of which the plaintiff had to pay a hundred pounds in penalties, and the action was brought to recover that sum, which was recovered. The court held in this case that the plaintiff could not recover the penalties as a matter of right, mainly upon the ground that such a consequence was not, from the nature of the notice, contemplated by the parties; and yet the judgment directing the amount of the penalties paid was allowed to stand, as being a sum which the jury might reasonably find.

Breach of Contract to Furnish Building Materials. — In an action for damages for breach of a contract to furnish building materials to a contractor within a reasonable time, it was held that the contractor might recover as damages the amount he was, under his contract with the owner of the building, required to pay the latter for the delay resulting from the default of the party who had undertaken to furnish the materials, and this though the latter did not know the date within which the contractor was required to complete the structure. The material man did know, however, that the plaintiff was constructing the house under a contract with the builder, and he also knew that the materials furnished were for that particular house, and that they were not such as could readily be supplied in the general market, but had to be manufactured in accordance with special designs. *Murdock v. Jones*, 3 N. Y. App. Div. 221. And see *Smith v. Flanders*, 129 Mass. 322.

Liability of Landlord to Tenants for Damage from Leaky Roof — Liability of Contractor to Former. — Where a landlord was compelled to compensate his tenants for injuries caused by a defective roof, it was held that such amount, if not unreasonable, might be recovered as damages from a contractor who had undertaken to repair the roof but had done so in a defective manner. *Malony v. Brady*, (C. Pl.) 18 N. Y. Supp. 757, 19 N. Y. Supp. 911.

3. *Grébert-Borgnis v. Nugent*, 15 Q. B. Div. 85.

sought in an action on the original contract is unenforceable under the statute of frauds is not material as affecting the plaintiff's right of recovery.¹

dd. REQUISITES OF NOTICE OF COLLATERAL CONTRACT — (aa) Time of Notice. — It has been decided in this connection that notice to a vendor who had undertaken to deliver goods sold at a specified time, after the contract of sale and delivery had been executed, but before the time for delivery, that the vendee had contracted to resell the goods at a profit, would not increase the liability of the vendor so as to include the profits of resale lost to the vendee in the original purchase by reason of the vendor's failure to deliver at the time specified.²

(bb) Certainty as to Price and Terms. — In order to render a defendant, the obligor in a sub-contract, liable in damages for the loss of the principal contract of which he had notice when the sub-contract was entered into, it is not necessary that he be informed of the precise terms of the principal contract or of the exact amount which the plaintiff will lose if unable to comply with such principal contract.³ But where the obligor in the particular contract is not informed as to price and terms, the plaintiff cannot recover upon an exceptional or extravagant basis, no matter what the actual terms of the collateral contract may have been.⁴ Accordingly it has been held that though in a contract of sale the vendor knows that the vendee purchased the goods to sell them thereafter at a profit, he is only chargeable with knowledge of such profits from contemplated resales as the market price at the time stipulated for delivery would have brought the vendee.⁵ Where the vendor in the particular contract knows only that the goods have been purchased for sale at some other market than that in which purchased, it will be regarded as a contract made with reference to any usual market, and the damages for a breach assessed accordingly.⁶ In the

1. *Contract Void under Statute of Frauds.* — *Waters v. Towers*, 20 Eng. L. & Eq. 470. And see *M'Neill v. Reid*, 9 Bing. 68, 23 E. C. L. 265.

2. *Jordan v. Patterson*, 67 Conn. 473.

Breach of Contract to Deliver Stock. — In an action for damages for breach of a contract to deliver hogs purchased by the time stipulated for in the contract, no damages are recoverable for losses sustained by reason of not having the stock to complete the loading of cars engaged for the transportation of the hogs, subsequent to the contract of purchase. *Cuddy v. Major*, 12 Mich. 368.

But Though at the Time of Shipment by an Express Company of the order book of a nurseryman containing the names of his customers and orders given, the carrier had no notice of the importance of its prompt delivery, yet if such notice was received at the point of destination, and the defendant negligently failed to deliver the book within a reasonable time thereafter, it was held that there might be a recovery of losses sustained on account of the delay, by reason of inability to fill orders. *Wells v. Battle*, 5 Tex. Civ. App. 532.

3. *Jordan v. Patterson*, 67 Conn. 473; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128; *Bluegrass Cordage Co. v. Luthy*, 98 Ky. 583; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487. And see *Grébert-Borgnis v. Nugent*, 15 Q. B. Div. 85.

Action Against Carrier — Sale of Corn to Government. — Where the owner of corn shipped to him at Cairo had sold the same to the government at one dollar and fifty cents per bushel, which was more than the market value of the corn at that place at the time when it should have arrived it is not necessary that the

owner should have communicated to the carrier the terms of the contract of sale in order to recover the contract price as damages. It is sufficient that the carrier knew that the corn was intended for the government under a contract of resale with it. *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128.

4. *Horne v. Midland R. Co.*, L. R. 7 C. P. 583; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 493.

Where Collateral Contract Price Unusual and Extraordinary. — In the case of *Horne v. Midland R. Co.*, L. R. 7 C. P. 583, a carrier was sued for damages for a negligent delay in the transportation of goods, a recovery being sought for profits lost on a contract of sale by reason of the failure of the goods to reach the vendee in the time stipulated in the contract. The defendant had notice that the goods were intended for a purchaser to whom they must be delivered within a certain time, but was not informed of the contract price, which was, in this instance, unusual and extraordinary. Such information alone was held insufficient to charge the defendant with damages to the extent of the loss of profits according to the contract price.

5. *Jordan v. Patterson*, 67 Conn. 473. *Compare*, however, in this connection the case of *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128, *supra*, where there had been a sale of corn to the government at a price in excess of that prevailing in the market. Perhaps the distinction may be that in the latter case there had been an actual contract for a price which, though in excess of the market value, could not be regarded as unusual and extraordinary.

6. **Contract for Sale of Rosin — Any Usual Market.** — In the case of *Lewis v. Rountree*, 79

absence of proof to the contrary, however, it will be presumed that the profits which would have been made under the collateral contract were of usual and unexceptional character.¹

(cc) *Mere Knowledge of Existence of Collateral Contract.* — Mere knowledge on the part of the defendant of the existence of a collateral contract when he entered into the particular agreement has not in all cases been held sufficient to charge him with the loss of profits or benefits which would have accrued therefrom. There must be, it seems, according to the doctrine of these cases, in addition to mere knowledge of the collateral contract, from whatever source derived, something to show that the defendant made himself in a sense responsible for the performance of the collateral contract, or agreed to liability for the loss therein as the measure of damages.²

(dd) *Mere Knowledge of Intended Resale.* — It is held that knowledge alone that a vendee is purchasing articles for the purpose of resale at a profit is sufficient to render the vendor, upon breach of the contract of sale, liable for the reasonable profits which the plaintiff would have made.³

(5) *Sufficiency of Mere Notice of Special Circumstances.* — Where the consequences of a breach of contract are not ordinarily natural and probable, but resulted from special circumstances, some courts have held outright and others inclined to the position that, in addition to mere knowledge of the special circumstances on the part of the defendant, there must be also, on his part, an implied or express undertaking to assume the particular risks resulting from the special circumstances under which the contract is made.⁴

N. Car. 122, 28 Am. Rep. 309, the plaintiff contracted with the defendant for a certain number of barrels of rosin for a stipulated price. The defendant had notice that the plaintiff bought to ship and sell in a market other than that of the purchaser. The court said: "For the purposes of the present question, the contract of the defendant may be regarded as a contract to deliver the rosin at any usual market, to be named by the purchaser, the purchaser taking on himself the risk, trouble, and expense of the transportation." The market stated was New York, and it was held that the plaintiff had a right to recover what would have been his profits in New York if the contract had been complied with. The contract was for a specified number of barrels at a stipulated price, and the measure of the profit or loss was the difference between the price to be paid and the price at which the plaintiff could have sold in New York, deducting costs of transportation; and this, it was held, was capable of ascertainment with reasonable certainty, and the damages were not speculative. See also the case of *Mace v. Ramsey*, 74 N. Car. 11.

1. *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 493.

2. See *infra*, this section, *Sufficiency of Mere Notice of Special Circumstances*.

3. *Mere Knowledge of Intended Resale.* — *Hubbard v. Rowell*, 51 Conn. 423; *Jordan v. Patterson*, 67 Conn. 473; *Bluegrass Cordage Co. v. Luthy*, 98 Ky. 583; *Lewis v. Rountree*, 79 N. Car. 122, 28 Am. Rep. 309. And see *Thomson v. Beling*, 1 Quebec L. Rep. 67; *Robinson v. Hyer*, 35 Fla. 544; *Campbellsville Lumber Co. v. Bradlee*, 96 Ky. 494. Compare, however, in this connection, authorities cited *supra* to the effect that mere knowledge of an existing contract is not always sufficient to charge a delinquent vendor with responsibility

for losses sustained in such connection. And see also, in this connection, *Thol v. Henderson*, 8 Q. B. Div. 457, 46 L. T. N. S. 483, where it was held that where the vendor did not know of an existing contract of subsale, but only that the goods were purchased for the purpose of resale, there could be no recovery of profits lost on the intended resale.

Sale of Advertising Space. — The defendants, who were advertising agents, sold the plaintiff certain space for advertisements in a large number of newspapers, for fifteen months. The defendants knew that the plaintiff had purchased the space to sell again at an advance, and it was, in fact, so sold. In a suit for a breach of the defendant's contract, the plaintiff was held to be entitled to recover for the profits he would have received from responsible parties to whom he had resold this space. *Hubbard v. Rowell*, 51 Conn. 423.

Where Article Has No Market Price. — "Estimated Profits." — In the case of *Bluegrass Cordage Co. v. Luthy*, 98 Ky. 583, it was held that where the article sold was not one which had a regular market value, and was not procurable elsewhere, the vendee in an action for damages for the breach of a contract of sale might recover "estimated profits" if the vendor knew simply that the article purchased was intended to be sold again.

4. *Where Special Circumstances Exist.* — See *Horne v. Midland R. Co.*, L. R. 8 C. P. 131; *Hawes v. South Eastern R. Co.*, 54 L. J. Q. B. 174, 52 L. T. 514; *Snell v. Cottingham*, 72 Ill. 161; *Bridges v. Stickney*, 38 Me. 369; *Clark v. Moore*, 3 Mich. 55; *Cuddy v. Major*, 12 Mich. 368; *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458; *Church, C. J.*, in *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Lattin v. Davis*, Hill & D. Supp. (N. Y.) 9.

Express or Tacit Submission to "Extrinsic" Damages. — "When the debtor," says Pothier,

Rule as Applied to Contracts of Sale. — In this connection it has been said that in order that damages may be recovered for other than the natural and proximate consequences of the breach of a contract of sale, there must in every case "be something in the terms of the contract, read in the light of surrounding circumstances, which shows an intention on the part of the vendor to assume an enlarged engagement, a wider responsibility than is assumed by the vendor in ordinary contracts for the sale and delivery of merchandise." ¹

Rule as Applied to Common Carriers. — In the case of common carriers, who are

"cannot be charged with fraud, and is merely in fault for not performing his obligation, he is only liable for the damages and interest which might have been contemplated at the time of the contract; for to such alone the debtor can be considered as having intended to submit. In general, the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the nonperformance of the obligation in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned by it. * * * Sometimes the debtor is liable for the damages and interest of the creditor, although extrinsic; as when it appears they were contemplated in the contract, and that the debtor submitted to them either expressly or tacitly, in case of non-performance." 1 Poth. on Oblig. 161, 162.

Bare Notice of Special Circumstances. — In the case of *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487, *Church, C. J.*, said: "Some of the judges * * * have held that a bare notice of special consequences which might result from a breach of the contract, unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient. I concur with the views expressed in these cases."

Goods to Be Exhibited. — It has been held that the delivery by the plaintiff of certain goods to the agent of the defendant on a show-ground, to be transported by a stipulated day to another show-ground, was sufficient notice to the defendant that special damages would result from a failure to deliver to specified day, from loss of opportunity to exhibit. *Simpson v. London, etc., R. Co.*, 1 Q. B. Div. 274.

Likewise, a mark upon goods delivered to a carrier, "Stand 23, show-ground," has been held a sufficient notice to the carrier that the goods were intended to be entered in a competition for premiums offered, and that therefore, for breach of contract to deliver the goods at the intended destination, the carrier would be liable in damages for loss of opportunity to compete. *Jameson v. Midland R. Co.*, 50 L. T. 426.

Failure to Furnish Goods — Loss of Time of Salesmen. — Again, it has been decided that a purchaser of goods might recover as damages for the vendor's failure to furnish goods according to contract, for loss of time during which the former's traveling salesmen were idle before a supply of the goods could be obtained from other dealers, where the vendor was told at the time of the contract of sale that the purchaser desired to employ his salesmen with the goods purchased, although the vendor was not informed that the vendee's salesmen would be idle if the goods were not

furnished at the time agreed upon. *Blumenthal v. Stahle*, 98 Iowa 722.

Parcel Labeled: "Travelers' Goods. Deliver Immediately." — Such notice has been held insufficient to charge a carrier with the expenses of a traveling salesman while waiting for the goods during one day's period of delay. *Candy v. Midland R. Co.*, 38 L. T. 226.

Cordage for Vessel — Stipulation for Quantity. — Where, however, one of two parties undertook to furnish the other with all the cordage necessary to rig a certain vessel, which contract was broken by the failure to deliver all of the cordage required, it was held that the designation in the contract of the use to which the materials were to be put was merely to stipulate for the quantity to be furnished, and not an undertaking that the vendee should have the use of the goods for the purpose specified. The vendee therefore, it was held, could only be allowed as damages the difference between the contract price and the market value of the articles. *Clark v. Moore*, 3 Mich. 55.

The Fact that a Telegram Ordered Stock to Be Purchased on the day of its transmission was held sufficient to charge a telegraph company in damages for an advance in the price of the stock during the period of delay in the delivery of the order caused by the negligence of the company. *U. S. Telegraph Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751. See the title **TELEGRAPHS AND TELEPHONES**.

Putting upon Inquiry. — Where the defendant contracted to deliver to the plaintiffs' employee a railroad ticket to a specified point on a certain day, the defendant being informed that it was important that the passenger should start on such day, it was held that the carrier was put on inquiry as to the special circumstances existing, and on failure to deliver the ticket according to contract, was liable for the excess of wages which might have been earned under a contract of employment at the intended destination. *Liman v. Pennsylvania R. Co.*, 4 Misc. Rep. (N. Y. C. Pl.) 539.

1. *Clark v. Moore*, 3 Mich. 55; *Cuddy v. Major*, 12 Mich. 368.

Breach of Contract to Furnish Machinery. — In the case of *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, although the defendant in an action for the breach of a contract to furnish boilers by a day named to be used in running the plaintiff's steam mill and salt block had been notified that they were the only boilers that the plaintiff would have to furnish steam, and what the capacity of the plaintiff's establishment was, it was held that there could be no recovery as damages resulting from the plaintiff's inability to operate the boilers, or what might have been made by their use.

required by law to receive for transportation all goods offered (with certain qualifications not necessary here to be noticed), there would seem especial reasons for applying the rule under consideration, and for requiring more than mere notice of particular circumstances to impose an extraordinary liability for breach of contract of carriage.¹ Of course, however, a carrier may make a special contract for the delivery of property at a certain time, so as to assume all the risks of loss from special causes of which he is informed by the owner.²

(6) *What Consequences Parties Presumed to Contemplate.* — Parties to a contract will be presumed to contemplate all the damages which may be considered as liable to arise naturally from its breach,³ in the light of all the facts known or which should have been known to them.⁴ This rule applies though an actual breach of contract may not have been in the minds of either of the parties when the contract was made.⁵ The facts being ascertained, the law, and not what the actual contemplation of the parties happened to be, is controlling.⁶ Any loss, therefore, which is the natural and proximate result of a breach of contract, is recoverable in damages whether actually contemplated by

1. *Horne v. Midland R. Co.*, L. R. 7 C. P. 583. See also *Hawes v. South Eastern R. Co.*, 54 L. J. Q. B. 174, 52 L. T. 514; *British Columbia, etc., Lumber, etc., Co. v. Nettleship*, L. R. 3 C. P. 499. Compare *Simpson v. London, etc., R. Co.*, 1 Q. B. Div. 274; *Jameson v. Midland R. Co.*, 50 L. T. 426. See also the title CARRIERS OF GOODS, vol. 5, p. 154.

2. *Marvin, P. J., in Wibert v. New York, etc., R. Co.*, 19 Barb. (N. Y.) 48. See the title CARRIERS OF GOODS, vol. 5, p. 154.

3. *Hadley v. Baxendale*, 9 Exch. 341; *Clopton, J., in Brigham v. Carlisle*, 78 Ala. 247, 56 Am. Rep. 28; *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529; *Page v. Ford*, 12 Ind. 46; *Miller v. Mariner's Church*, 7 Me. 55, 20 Am. Dec. 341; *Burrell v. New York, etc., Solar Salt Co.*, 14 Mich. 34; *Frohreich v. Gammon*, 28 Minn. 476; *Smith v. St. Paul, etc., R. Co.*, 30 Minn. 169; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 492; *Brown v. Foster*, 51 Pa. St. 165; *Collard v. Southeastern R. Co.*, 7 H. & N. 79.

Damages Only With Respect to Particular Thing Contracted For. — The general rule of the civil law, as stated in 1 Evans Poth. 91, is that "the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the nonperformance of the obligation, in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby in respect to his other affairs. The debtor is therefore not answerable for these; but only for such as are suffered with respect to the thing which is the object of the obligation, *damni et interesse ipsam rem non habuit.*"

No Presumption as to Collateral Transactions. — Parties, when they enter into contracts, may well be supposed to contemplate the ordinary natural incidents either of performance or of nonperformance, but neither can be supposed to take into consideration any transaction between the other and strangers. *Strong, J., in Horner v. Wood*, 16 Barb. (N. Y.) 386.

4. *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

Injury to Horses from Exposure to Weather. — In the case of *McMahon v. Field*, 7 Q. B. Div.

595, the plaintiff recovered for an injury to his horses which had caught cold from unnecessary exposure to the weather. The action was for breach of contract by which the plaintiff had secured stable accommodations from the defendant for his horses. The defendant, however, violated his agreement and turned out the plaintiff's horses, whereby the result above indicated ensued.

Breach of Contract to Lease — Expenses of Lessee in Preparing to Take Possession. — For the breach of a contract of lease by a lessor, the property having been leased to be used as a dwelling-house and clothing store, it was held that there might be a recovery for such damages as were incurred by the plaintiff in preparing to take possession under the lease, such losses on goods purchased, and amounts paid to clerks employed to secure releases upon the contracts of employment made. *Cohn v. Norton*, 57 Conn. 480.

Storing Inflammable Material on Leased Premises. — A lessee who, contrary to agreement, stores inflammable material on the premises leased, is liable for the destruction of the premises by a fire originating on adjoining premises, which would not, however, have been communicated to the premises occupied by the defendant lessee but for the presence of the inflammable material. *Anderson v. Miller*, 96 Tenn. 35.

Breach of Contract by Railroad to Fence Right of Way. — For breach of a contract by a railroad company with a landowner to fence its right of way, damages for animals killed and also for injuries done by the trespass of animals are recoverable. In such a case the very object of the contract was to provide against such consequences, and it must be presumed therefore that the parties contemplated the probability of such damages as a result of the breach. *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719.

5. *Wilson v. Dunville*, 6 L. R. Ir. 210; *Hamilton v. Magill*, 12 L. R. Ir. 186; *Collins v. Stephens*, 58 Ala. 543; *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435.

6. *Collins v. Stephens*, 58 Ala. 543. And see *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435.

the parties at the time they made the contract or not.¹

With the Foregoing Considerations in View, it may be stated that in actions on contract there may only be a recovery of such damages as were actually or presumably in the contemplation of the contracting parties.²

(7) *Extent and Application of Rule as to Contemplation of Parties.* — As has been seen, it is not necessary that the parties should actually have contemplated the very consequences of the breach of a contract for which an action for damages is brought, provided such consequences are such as the parties may be reasonably supposed to have considered as likely to follow from a breach of the contract in the light of all the facts known or which should have been known to them.³ It is sufficient if from the nature of the contract and circumstances of the transaction it is fair to presume that the defendant might have known that from the breach of a contract of a similar character to the one entered into consequences of a certain general nature would follow.⁴

(8) *Consequences neither Natural nor Contemplated.* — If the resulting damages do not come within either of the two rules given, or, in other words, are not such as arise naturally from the breach or were not within the contemplation of the parties, they are not recoverable.⁵ Accordingly, where it is claimed that a special purpose was intended to be accomplished by one of the parties, a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily follow from a breach by the other party, such purpose must have been made known to the other party, or there can be no recovery.⁶

1. *Per* Strong, J., in *Adams Express Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382.

Such Profits as Are Naturally Incident to a Contract made will be presumed to have been within the contemplation of the contracting parties. *Willie, C. J.*, in *Houston, etc.*, R. Co. v. *Hill*, 63 Tex. 381, 51 Am. Rep. 642.

2. *Montgomery, J.*, in *Fell v. Newberry*, 106 Mich. 542.

In *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341, *Weston, J.*, said: "In general, the delinquent party is holden to make good the loss occasioned by his delinquency. But his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof, and deducible from the nonperformance, are not allowed." See also *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437.

Damages for Breach of Contract of Sale of Goods. — Damages for a breach of a contract of sale and delivery of goods must, generally speaking, be confined to such as result from those circumstances which may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract. *Jordan v. Patterson*, 67 Conn. 473.

3. *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

It is not required that the person must have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may fairly be supposed to have contemplated when they made the contract. *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 566, 1 Am. Rep. 446.

4. *Cohn v. Norton*, 57 Conn. 480.

5. *Consequences neither Natural nor Contem-*

plated — England. — *Skinner v. London Marine Ins. Corp.*, 14 Q. B. Div. 882; *Woodger v. Great Western R. Co.*, L. R. 2 C. P. 318, 36 L. J. C. P. 177, 15 L. T. N. S. 579, 15 W. R. 383.

Canada. — *Loney v. Oliver*, 21 Ont. Rep. 89. *United States.* — *Bowes v. Pioneer Tow Line*, 2 Sawy. (U. S.) 30.

Illinois. — *Benton v. Fay*, 64 Ill. 420.

Maryland. — *U. S. Telegraph Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519.

Massachusetts. — *Hayden v. Cabot*, 17 Mass. 169.

Michigan. — *Friedland v. McNeil*, 33 Mich. 40; *Allison v. Chandler*, 11 Mich. 549.

New Jersey. — *Warwick v. Hutchinson*, 45 N. J. L. 61; *Crater v. Binninger*, 33 N. J. L. 517, 97 Am. Dec. 737.

New York. — *Horner v. Wood*, 16 Barb. (N. Y.) 386; *Compton v. Heissenbuttel*, (C. Pl.) 16 N. Y. Supp. 524, 18 N. Y. Supp. 952; *Russell v. Giblin*, 16 Daly (N. Y.) 258; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Ward v. New York Cent. R. Co.*, 47 N. Y. 32, 7 Am. Rep. 405; *Cassidy v. Le Fevre*, 45 N. Y. 567; *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 214; *Hamilton v. McPherson*, 28 N. Y. 76, 84 Am. Dec. 330; *Smith v. Pettee*, 7 Hun (N. Y.) 335; *Flynn v. Hatton*, 43 How. Pr. (N. Y. C. Pl.) 348; *Mack v. Patchin*, 29 How. Pr. (Buffalo Super. Ct.) 30; *Brooklyn v. Brooklyn City R. Co.*, 57 Barb. (N. Y.) 502; *Neary v. Bostwick*, 2 Hilt. (N. Y.) 517.

Texas. — *Watkins v. Junker*, 4 Tex. Civ. App. 629.

Wisconsin. — *Buffalo Barb Wire Co. v. Phillips*, 64 Wis. 338.

6. *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529.

The Rule as between Vendor and Vendee or Shipper and Carrier is, that where an article is destined for a specific purpose, that fact should be communicated to the vendor or carrier if it is to be made the foundation for special damages against him, or if it is of a character likely to affect the actions of the vendor or carrier.¹

In an Action upon a Contract of Indemnity, loss or expense occasioned by an attempt to avoid payment of the obligation is not ordinarily contemplated by the parties as a subject of indemnity, the true meaning of the contract being that if the surety pays voluntarily he shall be reimbursed. If he is compelled by suit to pay, he shall also be indemnified for his costs and expenses. The flight of the surety to avoid payment of the debt will therefore be regarded as an unusual and unforeseen circumstance, and its consequences cannot be considered as elements of damage.²

Breach of Contract to Pay Money to Third Person. — And where damages were claimed for breach of a contract to pay a creditor of the plaintiff with money entrusted to the defendant by the plaintiff for such purpose, the plaintiff sought to prove as an element of recovery that he had been sued by his creditor for the amount due the latter, and that his property had been attached by such creditor and sacrificed at the sale thereunder. It was held, however, that there could be no recovery for such alleged losses, unless it could be shown that the defendant had knowledge of the special circumstance and might have anticipated the consequences which resulted from his default.³

Breach of Contract of Employment by Farm-hand — Loss of Crops. — Where one employed for a term of months as a farm-hand abandoned his employer before the end of the term, it was held that the damages sustained by the employer in the loss of his crops were too remote to be recoverable in an action for the violation of such contract.⁴

(9) *Damage to Third Person Not Party to Contract.* — As a general rule, damages to third persons not parties to the contract cannot be considered as a natural consequence of the breach.⁵ A tradesman not the manufacturer of

1. Illinois Cent. R. Co. v. Cobb, 64 Ill. 128. See the titles CARRIERS OF GOODS, vol. 5, p. 154; SALES.

In *Brayton v. Chase*, 3 Wis. 456, which was an action by the vendee against the vendor for failure to deliver a reaper which the plaintiff purchased to harvest his crops, the plaintiff sought to prove that he suffered great loss and damage in his crops, and in extra expense in hiring hands, by reason of the nonfulfilment of the contract to deliver. This evidence was excluded, however, the court holding that such damages did not result naturally and directly from the injury complained of, but rather from the peculiar situation of the plaintiff.

But in the case of *Houser v. Pearce*, 13 Kan. 104, which was an action for breach of a contract to harvest a certain crop of oats, an instruction was approved to the effect that if the plaintiff, after using all reasonable precautions, lost his crop solely on account of the failure of the defendants to perform their contract, he was entitled to recover the amount of such loss.

2. *Hayden v. Cabot*, 17 Mass. 169. See the title INDEMNITY CONTRACTS.

3. *Mitchell v. Clarke*, 71 Cal. 163, 60 Am. Rep. 529.

A Defendant's Condition, it has been said, in respect to the measure of damages, ought not to be worse for having failed in his engagement to a person whose affairs were embarrassed than if it had been made with one in prosperous or affluent circumstances. Nel-

son, C. J., in *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38.

4. *Macy v. Peach*, 2 Kan. App. 575. In this case the court called attention to the fact that the contract of employment between the parties was not made with any special reference to the harvesting of the defendant's wheat, nor to the cultivation of any particular field of growing crops. On the contrary, it was observed, it was fair to presume that the work expected to be performed by the employee was general in its nature, such as that usually required of a farm hand, from which it could not fairly be supposed that the damages alleged were within the contemplation of the parties to the contract when it was executed, nor could such damages be naturally expected to follow a violation of the contract.

To the same effect, see *Riech v. Bolch*, 68 Iowa 526.

5. *Winterbottom v. Wright*, 10 M. & W. 109; *Longmeid v. Holliday*, 6 Exch. 761; *Thomas v. Winchester*, 6 N. Y. 408, 57 Am. Dec. 455.

Where a Right or Duty Is Created Wholly by Contract, it can only be enforced by the contracting parties. *McDonald v. Snelling*, 14 Allen (Mass.) 290, 92 Am. Dec. 768.

Illustrations. — The doctrine stated in the text has been illustrated and applied as follows: If A builds a wagon and sells it to B, who sells it to C, and C hires it to D, who, by reason of a defect in the construction of the wagon in consequence of the negligence of A in building it, is overturned and injured, D

an article sold, who contracts with an individual for the sale to him of an article not in itself dangerous, to be used for a particular purpose by a third person, is not, in the absence of fraud, liable for injury caused to such person by a defect in the construction of the article.¹

b. GENERAL RULE IN CASE OF TORTS — (1) Torts Amounting to Wanton Wrong — Responsibility for All Direct Consequences — (a) General Rule. — The author of a wilful tort is responsible for the direct and immediate consequences thereof, whether or not they may be regarded as natural or probable,² or whether they might have been contemplated, foreseen, or expected, or not.³

cannot recover damages against A, the manufacturer. A's obligation to build the wagon faithfully arises solely out of his contract with B. The public has nothing to do with it. Misfortune to third parties not parties to the contract would be neither a necessary nor natural consequence of the dealer's negligence. So, for the same reason, if a horse is defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury. The smith's duty in such a case grows exclusively out of his contract with the owner of the horse; it was a duty which the smith owed to him alone and no one else. And, although the injury to the rider may have been in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with. *Ruggles, C. J., in Thomas v. Winchester, 6 N. Y. 408, 57 Am. Dec. 455.*

A contracted with the postmaster-general to provide a coach to convey the mail bags along a certain line of road, and B and others also contracted to furnish horses along the same line. B and his co-contractors hired C, who was the plaintiff, to drive the coach. The coach, in consequence of some latent defect, broke down, and the plaintiff was thrown from his seat and injured. It was held that C could not maintain an action against A for the injury thus sustained. *Winterbottom v. Wright, 10 M. & W. 109.*

1. *Longmead v. Holliday, 6 Exch. 761.*

2. *Authors of Tort Responsible for All Direct Consequences — England.* — *Scott v. Shepherd, 2 W. Bl. 892; Collard v. South Eastern R. Co., 7 H. & N. 79.*

United States. — *Bowas v. Pioneer Tow Line, 2 Sawy. (U. S.) 21; Pacific Ins. Co. v. Conard, 1 Baldwin. (U. S.) 142.*

Colorado. — *Clifford v. Denver, etc., R. Co., 9 Colo. 333.*

Illinois. — See *Philpot v. Taylor, 75 Ill. 310, 20 Am. Rep. 241.*

Indiana. — *Coy v. Indianapolis Gas Co., 146 Ind. 655.*

Massachusetts. — See *Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 277, 12 Am. Rep. 689; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354.*

Minnesota. — *Schumaker v. St. Paul, etc., R. Co., 46 Minn. 39.*

New York. — *Eten v. Luyster, 60 N. Y. 252; Ehr Gott v. New York, 96 N. Y. 280, 48 Am. Rep. 622.*

Pennsylvania. — *Scott v. Hunter, 46 Pa. St. 192, 84 Am. Dec. 542.*

South Carolina. — *Harrison v. Berkley, 1 Strobb. L. (S. Car.) 547, 47 Am. Dec. 578.*

Wisconsin. — *Brown v. Chicago, etc., R. Co., 54 Wis. 342, 41 Am. Rep. 41.*

Tortfeasor Presumed to Contemplate All Direct Consequences of Act. — In *Bowas v. Pioneer Tow Line, 2 Sawy. (U. S.) 21*, it was said that the rule which restricts damages to such as may reasonably be supposed to have been contemplated by the parties has no application to cases of tort. He who commits a trespass must be held to contemplate all the damage which may legitimately follow from his illegal act, whether he may have foreseen it or not; and so far as it is plainly traceable he must make compensation for it. See also *Allison v. Chandler, 11 Mich. 548.*

Damages Resulting while Injurious Act Continues in Operation and force are to be distinguished, it has been said, from damage following after the act has ceased. In the former case the immediate connection between the wrongful act and the damage sustained shows that the damage, however extraordinary, has actually resulted directly from the injury. But in the latter the connection is not immediate, and it becomes necessary to discriminate in some way between the various consequences that in some sense may be said to proceed from the act, for all of them cannot constitute legal damage. *Harrison v. Berkley, 1 Strobb. L. (S. Car.) 547, 47 Am. Dec. 578.*

A Blow Which Causes a Person to Fall and strike his head against the pavement, from which death ensues, may be held the proximate cause of the death. *Mitchell v. Cody, 6 Misc. Rep. (N. Y. Super. Ct.) 307.*

3. *Immaterial that Results Not Foreseen or Expected — England.* — *Scott v. Shepherd, 2 W. Bl. 892.*

United States. — *Bowas v. Pioneer Tow Line, 2 Sawy. (U. S.) 21.*

Illinois. — *Schroder v. Crawford, 94 Ill. 357, 34 Am. Rep. 236.*

Indiana. — See *Dunlap v. Wagner, 85 Ind. 529, 44 Am. Rep. 42; Mulcahey v. Givens, 115 Ind. 286.*

Massachusetts. — *Lane v. Atlantic Works, 111 Mass. 136; Hill v. Winsor, 118 Mass. 251; Perley v. Eastern R. Co., 98 Mass. 414, 96 Am. Dec. 645.*

Missouri. — See *Brink v. Kansas City, etc., R. Co., 17 Mo. App. 177.*

New York. — *Mead v. Stratton, 87 N. Y. 493, 41 Am. Rep. 386; Bertholf v. O'Reilly, 8 Hun (N. Y.) 16; Aldrich v. Sager, 9 Hun (N. Y.) 537; Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Ward v. Vanderbilt, 34 How. Pr. (N. Y. Ct. App.) 144.*

Vermont. — *Stevens v. Dudley, 56 Vt. 168.*

Numerous illustrations of the application of these principles are gathered in the note.¹

Where Consequences neither Proximate nor Natural. — But where the consequence for which damages are claimed is neither proximate nor natural as to the defendant's act, there can, as has been seen, be no recovery. Thus where as a result of his wrongful arrest and imprisonment for one night, the plaintiff was discharged by his employer, the loss of earnings for several months cannot be regarded as a consequence of the arrest and imprisonment for which damages are recoverable.²

Wisconsin. — *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 41 Am. Rep. 41.

1. Tortfeasor Responsible for All Direct Consequences — Illustrations — Frightening Horses and Causing Them to Run Away. — One who throws a stream of water from a hose upon horses hitched in front of his premises, frightening the horses so that they run away and collide with another team, is liable in damages for the injuries resulting from the collision. *Forney v. Geldmacher*, 75 Mo. 113, 42 Am. Rep. 388.

In an action for damages accruing to the plaintiff from the defendant's wrongfully striking the plaintiff's horses attached to a sleigh, and causing them to run, so as to throw off a load of wood then on the sleigh, break the harness, etc., it was held that, in determining the plaintiff's actual damages, it was proper to consider, as elements thereof, the labor and trouble of reloading the wood, the delay in getting to market or place of destination, the time and expense lost and incurred in making repairs to the harness and sleigh, and the injury done to the horses by causing them to run away, though they were not physically injured thereby — such act of running away having a known tendency to create a vicious habit. *Oleson v. Brown*, 41 Wis. 413.

Severance of Hose at Fire. — Where a railroad company ran its train of cars over a hose that had been laid across its line of road in order to extinguish a burning building, which was shown to have been destroyed by fire as a consequence of the lack of water resulting from the severance of the hose, it was held that as the act of the corporation was the cause of the destruction of the building the defendants were liable. *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277, 12 Am. Rep. 689.

Firing on Negroes on Coast of Africa — Loss of Profits. — A person who unlawfully fired upon some negroes on the coast of Africa, whereby they were frightened away from the plaintiff's trading post with a consequent loss of traffic to the plaintiff, was held liable in damages therefor. *Tarleton v. M'Gawley, Peake N. P.* (ed. 1795) 205. And see comments on this case in *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66.

Abducting Slaves — Loss Resulting from Lack of Laborers. — In consequence of the wrongful abduction of the plaintiff's slaves his wood was swept away by a flood in the river, and it was held that there might be a recovery of the value of the wood in an action for carrying away the slaves. *McAfee v. Crofford*, 13 How. (U. S.) 447.

Injury to Crop by Driving Away Laborers. — It has been held that consequential damages to the plaintiff's crop, by reason of the defendant's

having driven away by threats of violence certain of his negro slaves, might be recovered. *Johnson v. Courts*, 3 Har. & M. (Md.) 510.

Conversion of Mule — Loss of Crops. — For the conversion of a mule it has been held that there may be no recovery for injury to crops from lack of cultivation by reason of the taking of the mule. *Jackson v. Hall*, 84 N. Car. 489. Compare, however, *Steel v. Metcalf*, 4 Tex. Civ. App. 313.

Trespasser Digging in Embankment — Consequent Injury from Flood. — Where the defendant broke and entered the plaintiff's close lying adjacent to a river, dug into a bank near to a dam and carried away some gravel, in consequence of which a flood in the river which took place three weeks afterwards carried away a portion of the close and a cider mill belonging to the plaintiff, it was held that there might be a recovery. *Dickinson v. Boyle*, 17 Pick. (Mass.) 78, 28 Am. Dec. 281.

Making Hole in Fence by Which Cattle Injure Crop. — One who wrongfully made a hole in his neighbor's fence was held liable for all the damage done to the crops by cattle that strayed in at the gap. *Gray v. Waterman*, 40 Ill. 522. See also *Bridgers v. Dill*, 97 N. Car. 222.

Damage by Negro Boy Fleeing from Pursuer. — In *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464, 47 Am. Dec. 268, the defendant, who had become involved in a difficulty with a negro boy, seized an axe and started towards him. The boy fled; the defendant in pursuit. The former rushed into the plaintiff's shop, and being unable to escape through the back door ran behind the counter, in doing which he knocked the faucet from a cask of wine, whereby a quantity of the liquid was lost. The plaintiff brought an action against the pursuing party for damages, and was held entitled to recover.

Leaving Horse Unattended in Street. — It has been said that the owner of a horse and cart who leaves them unattended in a street is liable for any damage which may result therefrom. *Lynch v. Nurdin*, 1 Q. B. 29, 41 E. C. L. 422; *Illidge v. Goodwin*, 5 C. & P. 190, 24 E. C. L. 272. The first of these cases was commented upon in *Davidson v. Nichols*, 11 Allen (Mass.) 519, where it is stated that the former case can hardly be supported to its full extent.

2. Carpenter v. Pennsylvania R. Co., 13 N. Y. App. Div. 328.

The Act of One Who Invites Another to Drink with Him, as a result of which the latter becomes intoxicated, is not the natural or proximate cause of injury inflicted by the latter, while under the influence of liquor, upon a third person. *Swinfin v. Lowry*, 37 Minn. 245.

Recovery of Profits Lost from Interruption of Business. — For the tortious interruption of an established business the tortfeasor is liable in damages for the loss of profits directly attributable to his wrongful act.¹

Personal Injuries — Mental Pain and Distress. — Where the result of a wilful injury to the person of another is to cause mental distress as well as physical injuries there may be a recovery in damages therefor, and in such action the manner of commission and motive for the wrongful act may be given in evidence as affecting the question of damages.²

(b) **Injury Resulting to One from Tort Directed Against Another.** — As has been seen, where an obligation is created wholly by contract, it can only be enforced by the contracting parties.³ Where, however, by the wilful tort of a third person, one of two contracting parties is disabled from performing his contract, the wrong having been committed with intent to injure the other, it has been held that the latter may recover from the tortfeasor in damages.⁴ But unless the wrong is done with a wilful intent to injure the complaining party, the latter cannot recover.⁵

1. **Tortious Interruption of Business.** — *Oliver v. Perkins*, 92 Mich. 304; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *Schile v. Brokhahus*, 80 N. Y. 614; *Cincinnati v. Evans*, 5 Ohio St. 594. And see *Allison v. Chandler*, 11 Mich. 548.

Loss of Profits of Mill by Breaking Down Dam. — In an action of trespass for forcibly and violently breaking down the plaintiff's mill dam, the diminution of his profits on account of the interruption of milling operations was allowed to be recovered. *White v. Moseley*, 8 Pick. (Mass.) 356. See also *Crawford v. Parsons*, 63 N. H. 438.

Depreciation of Values during Detention by Attachment. — In an action for damages for wrongful attachment, it was held that the owner of the attached property might show that he was prevented from selling the property as he desired to do, and that by reason of the detention of the property he was unable to dispose of it until there had been a decline in the market, wherefore he was compelled to sell the property at a reduced price. *Chesmore v. Barker*, 101 Iowa 576.

Loss of Business through Obstruction on Street. — There may also be a recovery for damage to business occasioned by the defendant's leaving for an unreasonable length of time certain obstructions in the street on which the plaintiff's shop was located, whereby the plaintiff's custom was diminished. *Wilkes v. Hungerford Market Co.*, 2 Bing. N. Cas. 281, 29 E. C. L. 336.

Loss of Custom through Failure to Furnish Gas for Lighting. — In an action against a gaslight company for wrongfully refusing to furnish the plaintiff's shop with gas, it was held that the plaintiff might introduce evidence to show the nature and extent of his business, and that it was inconvenient and difficult to carry it on without gas, and that the lack of gas made his store less attractive to customers and tended to diminish his patronage. *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318, 82 Am. Dec. 679.

2. *Stowe v. Heywood*, 7 Allen (Mass.) 118; *Smith v. Holcomb*, 99 Mass. 552; *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383; *Virgin, J.*, in *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303.

For a full discussion of this question, see *infra*, this title, *Measure of Damages and Elements of Recovery — Mental Pain and Suffering*.

3. *McDonald v. Snelling*, 14 Allen (Mass.) 290, 92 Am. Dec. 768. See also *supra*, this section, *Damage to Third Party Not Party to Contract*; and the title *CONTRACTS*, vol. 7, pp. 104, 110.

4. *St. Johnsbury, etc., R. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639. See generally the title *INTERFERENCE WITH CONTRACT*.

Injury Directly to One with Intent to Damage Another. — Where an injury is done directly to one with a malicious or fraudulent design to injure another, through a contract relation sustained between the two, the latter may maintain an action for damages against the author of the injury. *Butler, J.*, in *Gregory v. Brooks*, 35 Conn. 437; and see the same case in 37 Conn. 365.

Damages suffered by a railroad company in consequence of a malicious and illegal arrest of its employee, made for the purpose of injuring the company, are not too remote as a consequence of the illegal act of the defendant. *St. Johnsbury, etc., R. Co. v. Hunt*, 55 Vt. 570, 45 Am. Rep. 639.

5. **No Recovery for Indirect Unintended Injury to One from Tort to Another.** — *Connecticut Mut. L. Ins. Co. v. New York, etc., R. Co.*, 25 Conn. 265, 65 Am. Dec. 571; *Gregory v. Brooks*, 35 Conn. 437.

Damages resulting to a plaintiff by reason of the defendant's having assaulted and beaten an actor, whereby the latter was disabled from fulfilling an engagement with the plaintiff, are too remote. *Taylor v. Neri*, 1 Esp. N. P. 386.

In *Anthony v. Slaid*, 11 Met. (Mass.) 290, it was held that one under an obligation by contract to support a pauper could not recover the increased charges to which he was put by reason of an assault by the defendant on the pauper.

A tort inflicted upon a husband will not entitle him to recover for injuries suffered by his wife in consequence of mental anguish resulting from the tort. *Hampton v. Jones*, 58 Iowa 317; *Wulstein v. Mohlman*, 57 N. Y. Super. Ct. 50; *Ellis v. Cleveland*, 55 Vt. 358.

Where a concert singer, in consequence of the defendant's criticisms, refused to carry out a contract with the plaintiff to sing on a certain occasion, for fear of not being well received by the audience, it was held that the plaintiff's

(2) *Torts Not Amounting to Wanton Wrong — Responsibility for Natural Consequences.* — Where a defendant's act, though tortious, does not amount to a wanton wrong, it is generally held that responsibility attaches only for such consequences as were or should have been contemplated, or might, in the light of attending circumstances, have been foreseen.¹

Events Which Cannot Be Foreseen. — An individual, however, is not presumed to contemplate the coincidence of events having no probable or natural connection in the mind and which cannot by prudence, circumspection, and ordinary thoughtfulness be foreseen as likely to happen in consequence of the act in

damages were too remote. *Ashley v. Harrison*, 1 Esp. N. P. 48.

A party who has contracted for the output of a manufacturing establishment cannot recover damages against a wrongdoer who by a trespass interrupted manufacturing operations, so that the quantity of the manufactured product was thereby lessened. *Dale v. Grant*, 34 N. J. L. 142.

Establishment by Lessees of Illicit Still. — Where the lessees of property establish an illicit still, whereby the owner of the property was convicted of the offense, it was held that the damage was not the natural and proximate consequence of the defendant's acts. *Barber v. Lesiter*, 7 C. B. N. S. 175, 97 E. C. L. 175.

1. Responsibility for Consequences Which Might Have Been Foreseen. — Mr. Justice Strong in *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 475; *Helm, J., in Georgetown, etc., R. Co. v. Eagles*, 9 Colo. 544. And see also the following:

England. — *The Notting Hill*, 9 Prob. Div. 105, 53 L. J. P. 56, 51 L. T. 66, 32 W. R. 764, 5 Asp. M. C. 241; *Glover v. London, etc., R. Co.*, L. R. 3 Q. B. 25, 37 L. J. Q. B. 57, 17 L. T. 139; *Rigby v. Hewitt*, 5 Exch. 242; *Sharp v. Powell*, L. R. 7 C. P. 253; *Nicosia v. Val-lone*, 37 L. T. N. S. 106.

United States. — *Haile v. Texas, etc., R. Co.*, 60 Fed. Rep. 557, 23 U. S. App. 80.

Colorado. — *Denver, etc., R. Co. v. DeWitt*, 1 Colo. App. 419.

Illinois. — *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Weick v. Lander*, 75 Ill. 93.

Kentucky. — *Shields v. Louisville, etc., R. Co.*, 97 Ky. 103.

Maryland. — *Baltimore, etc., R. Co. v. Thompson*, 10 Md. 76.

Minnesota. — *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, 20 Am. St. Rep. 589.

Missouri. — *Brink v. Kansas City, etc., R. Co.*, 17 Mo. App. 177; *Shaw v. Missouri, etc., Dairy Co.*, 56 Mo. App. 521.

Pennsylvania. — *Morrison v. Davis*, 20 Pa. St. 171, 57 Am. Dec. 695; *Allegheny v. Zimmerman*, 95 Pa. St. 287, 40 Am. Rep. 649.

Tennessee. — *Childress v. Yourie, Meigs (Tenn.)* 561.

Texas. — *Broussard v. Sabine, etc., R. Co.*, 80 Tex. 329; *St. Louis Southwestern R. Co. v. Thomas*, (Tex. Civ. App. 1894) 27 S. W. Rep. 419.

Consider also in this connection, *infra*, this section, *Necessity for Anticipation of Particular Result*.

The General Rule is that in order to warrant a finding that an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the wrongful act,

and that it ought to have been foreseen in the light of the attending circumstances. *Helm, J., in Georgetown, etc., R. Co. v. Eagles*, 9 Colo. 544. See also *East Tennessee, etc., R. Co. v. Lockhart*, 79 Ala. 315; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303.

Natural and Necessary Consequences. — The injured party is restricted in the recovery of damages for torts, not intentionally committed, to such as result naturally and necessarily from the act complained of. *People v. Albany*, 5 Lans. (N. Y.) 529.

Loss Need Not Be Necessary, if natural and reasonable consequences of unlawful act. *Byrne v. Wilson*, 15 Ir. C. L. 332; *Ballou v. Farmun*, 11 Allen (Mass.) 73, *per* Colt, J.

Expense of Rearing Young Animal Whose Dam Killed. — In *Teagarden v. Hetfield*, 11 Ind. 522, it was held there could be no additional recovery against the defendant for killing the plaintiff's mare, by reason of the fact that the plaintiff was put to expense in rearing a colt to which the mare was giving suck at the time.

Damage to Stock from Overflow of Pasture Land. — In the case of *Broussard v. Sabine, etc., R. Co.*, 80 Tex. 329, it was held that while the direct loss of cattle by overflow might be regarded as the proximate consequence of the negligent construction of a railway roadbed, there could be no recovery for the starvation of stock by reason of the deprivation of pasture land from the same cause, as a too remote consequence. See also, with reference to the last proposition, *Baltimore, etc., R. Co. v. Thompson*, 10 Md. 76.

Damage by Persons Naturally Attracted by Defendant's Act. — Thus, where a number of persons rushed upon the plaintiff's premises and beat and trod down his vegetables and flowers in attempting to extricate from a perilous position an aeronaut whose balloon had descended upon the plaintiff's premises, it was held that the aeronaut was liable for the damage done, since the descent was a circumstance which would naturally draw a crowd, and this he should have foreseen. *Guille v. Swan*, 19 Johns. (N. Y.) 381.

Injury to Means of Business — Lost Profits. — But there may be a recovery by an expressman for a loss of profits in his business as a result of the defendant's negligence in colliding with and killing the horse of the former. *Albert v. Bleecker St., etc., R. Co.*, 2 Daly (N. Y.) 389.

Where a railroad company negligently injured the plaintiff's wagon, which was being loaded with goods for hauling, it was held that the defendant was liable for the loss of the hauling trip in which the plaintiff was engaged. *Shelbyville Lateral Branch R. Co. v. Lewark*, 4 Ind. 471.

which he is engaged.¹

Unavoidable Accidents. — The law gives no redress for unavoidable accidents, because an event that is in strictness an accident cannot be regarded as the natural or probable consequence of an individual's act.²

Effect of Intervening Agencies. — Where the result of an injury is such as might have been expected to occur in the ordinary or natural course of events, the wrongdoer is not relieved from responsibility, although there may have been some intervening agency contributing to the result.³

Ordinary Events of Nature. — A person will be presumed to have considered the ordinary events of nature, as well as the concurrence of natural forces with his own acts in producing injury.⁴

(3) *Necessity for Anticipation of Particular Result.* — It is not necessary to the liability of a wrongdoer that the result which actually follows should have been anticipated by him.⁵ It is the general character of the act, and not the

1. Unconnected and Remote Consequences Which Cannot Be Foreseen. — Agnew, J., in *McGrew v. Stone*, 53 Pa. St. 436.

In *McDonald v. Snelling*, 14 Allen (Mass.) 292, 92 Am. Dec. 768, Foster, J., said: "The test is to be found, not in the number of intervening events or agents, but in their character and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues."

A leading case on this branch of the subject was where the defendant unlawfully washed a van in the street, and the water ran down the gutter to a grating leading to the sewer. In consequence of the extreme cold weather the grating was obstructed with ice so that the water could not escape, and it spread out and froze over the causeway, which was badly paved and rough, and there froze. The plaintiff's horse, while being led past the spot, slipped and fell upon the ice and was lamed. An action was brought to recover for the injury to the horse, and because it was shown that the defendant had no knowledge that the grating was stopped so that the water could not escape, he was held not liable. *Sharp v. Powell*, L. R. 7 C. P. 253.

2. *McGrew v. Stone*, 53 Pa. St. 436. And see *Wabash, etc., R. Co. v. Locke*, 112 Ind. 424, 2 Am. St. Rep. 193.

Damage by Crowd Attracted by Engine Run Off the Track. — See the case of *Scholes v. North London R. Co.*, 21 L. T. 835, where, owing to the negligence of the defendants, one of their railway engines had run off the track and fallen into the garden of a private party. Damage was done to flowers in the garden by the crowd that assembled there. In an action against the company by the occupier of the garden it was held that the damage done by the crowd was too remote.

3. *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168. See also *East Tennessee, etc., R. Co. v. Lockhart*, 79 Ala. 315; *Philpot v. Taylor*, 75 Ill. 309, 20 Am. Rep. 241.

Negligently Leaving Open Gate — Injury to Straying Stock. — But where a defendant negligently left insecure a gate which he was bound to repair, in consequence of which his horse

strayed into the field of an adjoining proprietor and there kicked another horse, the defendant was held liable, because, it was held, such a result was the natural consequence of two horses meeting under such circumstances, and the injury resulting therefrom might be regarded as the proximate consequence of the defendant's negligence. *Lee v. Riley*, 34 L. J. C. P. 212. See also *Read v. Edwards*, 34 L. J. C. P. 31.

4. Ordinary Events of Nature. — *Brink v. Kansas City, etc., R. Co.*, 17 Mo. App. 177; *Mississippi, etc., R. Co. v. Archibald*, 67 Miss. 38.

Thus, in an action for damages for unlawfully obstructing certain watercourses, whereby the plaintiff's property was damaged by overflow, the court held that it was the duty of the defendants to know, according to the usual experience of men, that such streams as those obstructed were liable to sudden rises and overflows, and to consider augmentation of the dangers to adjacent property from such overflows by the placing of obstructions in the streams. *Brink v. Kansas City, etc., R. Co.*, 17 Mo. App. 177.

A defendant cannot escape liability for injuries to the property of another, consequent upon his own acts, because the proof shows that ordinary natural agencies presumably well known may have concurred with such acts in producing the injury. *Mississippi, etc., R. Co. v. Archibald*, 67 Miss. 38.

5. Particular Result Need Not Have Been Foreseen — *England.* — *Sneesby v. Lancashire, etc., R. Co.*, 1 Q. B. Div. 42; *The Steamship Gracie v. The Steamship Argentino*, L. R. 14 App. 519.

Canada. — *Vital v. Tétrault*, 4 Montreal L. R. Super. Ct. 204. And see *Toronto R. Co. v. Grinstead*, 24 Can. Super. Ct. Rep. 570.

United States. — *Mann Boudoir Car Co. v. Dupre*, 54 Fed. Rep. 646; *The Normannia*, 62 Fed. Rep. 469.

Indiana. — *Dunlap v. Wagner*, 85 Ind. 520, 44 Am. Rep. 42; *Mulcahey v. Givens*, 115 Ind. 286; *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544; *Jeffersonville, etc., R. Co. v. Riley*, 39 Ind. 568.

Kansas. — *Topeka v. Tuttle*, 5 Kan. 311.

Maryland. — *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74.

Massachusetts. — *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 251;

particular result, that the law primarily regards in this connection.¹

c. WHEN ACTION MAY BE EITHER IN TORT OR CONTRACT — WHETHER RULE AS TO DAMAGES DIFFERENT. — According to the view taken by some courts there may be a difference in recovery on the same state of facts, according as the action is in contract or tort, where a plaintiff may elect between them, but this is doubtful.²

Allen v. Boston, 159 Mass. 324, 38 Am. St. Rep. 423.

Michigan. — *Maywood v. Logan*, 78 Mich. 135, 18 Am. St. Rep. 431; *McKeller v. Monitor Tp.*, 78 Mich. 485.

Minnesota. — *Schumaker v. St. Paul, etc.*, R. Co., 46 Minn. 39.

Missouri. — *Brink v. Kansas City, etc.*, R. Co., 17 Mo. App. 177.

New York. — *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386; *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 52 Am. Rep. 12; *Bertholf v. O'Reilly*, 8 Hun (N. Y.) 16; *Aldrich v. Sager*, 9 Hun (N. Y.) 537. And see *Booth v. Rome, etc.*, R. Co., 63 Hun (N. Y.) 624, 44 N. Y. St. Rep. 9.

Tennessee. — *Childress v. Yourie, Meigs (Tenn.)* 561.

Texas. — *San Antonio, etc. R. Co. v. Gwynn*, 4 Tex. App. Civ. Cas., § 219; *Gulf, etc. R. Co. v. Southwick*, (Tex. Civ. App. 1895) 30 S. W. Rep. 592.

Wisconsin. — See *Jaquish v. Ithaca*, 36 Wis. 108.

Not Necessary that Either Injured Party or Party Injuring Should Have Foreseen. — In *Hill v. Winsor*, 118 Mass. 251, the court approved the rule that "it is not necessary that the consequences of the negligent act of the defendants should have been foreseen by the defendants. It is not necessary that either the plaintiff or the defendants should be able to foresee the consequences of the negligence of the defendants in order to make the defendants liable."

Where the Defendants Tore Down and Removed a Certain House, acting under an erroneous belief that they had a right to do so, they were held liable to the plaintiff nevertheless for the loss of a sum of money kept in the house, though they did not know that any money was kept there, and the money was kept in an unusual place. *Eten v. Luyster*, 60 N. Y. 252.

Need Not Foresee What Person Will Be Injured. — It is not necessary to the responsibility of a wrongdoer in damages for his act that he should have known or even been able to foresee what person will be injured thereby. *Bird v. Holbrook*, 4 Bing. 628, 15 E. C. L. 91; *McKeller v. Monitor Tp.*, 78 Mich. 485; *Gulf, etc., R. Co. v. Southwick*, (Tex. Civ. App. 1895) 30 S. W. Rep. 592.

Delivery of Letter to Wrong Person. — In the case of *Bishop v. Williamson*, 11 Me. 495, it appeared that a letter had been sent by the managers of a lottery to a vendor of lottery tickets, inclosing a list of the numbers which had drawn prizes at a recent drawing. The postmaster, instead of delivering the letter to the person to whom it was addressed, delivered it to another, who, availing himself of the information contained, purchased of the vendor of tickets one that had drawn a prize. It was held that the injury to the plaintiff was the

immediate consequence of the postmaster's negligence, and that the true measure of damages was the net amount of the prize.

1. *Elliott, J.*, in *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544.

2. Form of Action Tort or Contract — Whether Damages Same. — The plaintiff with his wife and two children purchased tickets to a certain point on the defendant's railway. They were, however, carried to another destination and put down there late at night, where they could neither get accommodations at the inn nor a conveyance to take them away. They had, therefore, to walk five or six miles through the rain, as a result of which the wife contracted a cold and was confined to her bed for some time and unable to assist her husband. The jury found a verdict for eight pounds for the inconvenience of the walk and twenty pounds for the illness of the plaintiff's wife and its consequences. The court held the eight pounds recoverable, but not the twenty pounds, the position being that the latter was for a too remote consequence of the defendant's negligence. *Hobbs v. London, etc., R. Co.*, L. R. 10 Q. B. 111. For a similar case see *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7.

Commenting on *Hobbs v. London, etc., R. Co.*, L. R. 10 Q. B. 111, *Taylor, J.*, delivering the opinion of the court in *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 41 Am. Rep. 41, said, with reference to the ruling that no recovery could be had for the consequent illness of the wife: "It would seem, from the opinions given by the learned judges in the *Hobbs* case, that they treated the action as an action upon contract, and not an action for a tort. All the judges speak of it as an action to recover for the breach of the contract to carry the plaintiffs to their destination." See also *Evans v. St. Louis, etc., R. Co.*, 11 Mo. App. 463; *Cincinnati, etc., R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179.

The case of *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, 41 Am. Rep. 41, was very similar in the facts to that of *Hobbs v. London, etc., R. Co.*, L. R. 10 Q. B. 111. But the former case was held to be an action for tort for negligence and not contract, upon a contract to carry, although the complaint recited that the relation between the parties was a contract relation and that the defendant "wholly disregarded its duty in the premises and its contract and obligations to and with the plaintiffs," etc. The consequence was that a broader rule was applied; or, in other words, the defendant was held to be liable for all the direct consequences of the act, without regard to their natural or probable occurrence. *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Cincinnati, etc., R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Walsh v. Chicago, etc., R. Co.*, 42 Wis. 23, 24 Am. Rep. 376.

d. DEFENDANT LIABLE ONLY FOR CONSEQUENCES OF HIS OWN ACTS. — Where the party injured, by his own voluntary act or negligence increases the damages, the author of the injury is not liable for such consequences as result from the acts or omissions of the plaintiff,¹ nor is a defendant responsible for any but the consequences of his own acts.²

Injuries Caused by Several Not Acting in Concert. — Where damage is caused by the acts of more than one person not acting in concert or with a common purpose, each is responsible only to the extent of the injury he inflicted by his own act.³

In Actions Against Joint Tortfeasors, however, no attempt should be made to

Doctrine that There Is No Difference as to Remoteness Between Tort and Contract. — It has been said that there is no difference in the principles as to remoteness of damage, whether the damages are claimed in contract or in tort. *The Notting Hill*, 9 Prob. Div. 105, 53 L. J. P. 56, 51 L. T. 66, 32 W. R. 764, 5 Asp. M. C. 241. And in the case of *Baltimore, etc., R. Co. v. Pumphrey*, 59 Md. 390, it was held that in actions against a common carrier for the breach of a contract for the carriage and delivery of goods, the suit may be framed either *ex contractu*, upon the breach of the engagement, or *ex delicto*, upon the violation of the public duty. But whether the action be assumpsit on the contract, or case for the violation of duty, the same law is applicable to both classes of action, and the measure of damages is equally a question of law and as much under the control of the court as if the right rested in agreement only. See also the case of *St. Louis, etc., R. Co. v. Heath*, 41 Ark. 476, where it was said that an action against a common carrier for breach of contract for the carriage and delivery of goods may be in form *ex contractu* or *ex delicto*, and that the law applicable and the measure of damages is the same in both classes of action.

See also the title *CARRIERS OF GOODS*, vol. 5, p. 394.

1. Defendant Not Liable for Injuries Resulting from Plaintiff's Acts or Omissions. — *Stewart v. Sculthorp*, 25 Ont. Rep. 544; *Hawker's Case*, 4 Ct. of Cl. 551; *Chicago, etc., R. Co. v. Meech*, 163 Ill. 305; *Nye v. Iowa City Alcohol Works*, 51 Iowa 129, 33 Am. Rep. 121; *John Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156, 30 Am. St. Rep. 463; *Carpenter v. McDavitt*, 53 Mo. App. 393; *Uhlig v. Barnum*, 43 Neb. 584; *Hamilton v. McPherson*, 28 N. Y. 72; *Smith v. Pettee*, 7 Hun (N. Y.) 335; *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 214; *Texas, etc., R. Co. v. Pierce*, 10 Tex. Civ. App. 429; *Galveston, etc., R. Co. v. Ware*, 67 Tex. 635.

Damages Resulting from Plaintiff's Own Act. — Where a plaintiff, because of an agreement entered into by which he was to purchase a saloon of the defendant, gave up his regular engagement, but the defendant refused to perform the contract of sale and the plaintiff remained idle for six months, it was held that an abandonment by the plaintiff of a situation and the ensuing period of idleness was not a natural consequence of the defendant's breach of contract. *O'Conner v. Nolan*, 64 Ill. App. 357.

Personal Injuries — Plaintiff's Continued Use of Intoxicating Liquors. — In an action for damages for personal injuries evidence of the improper continued use of intoxicating liquors

by the plaintiff, offered in support of the theory that the injurious consequences for which damages are claimed have been thereby increased, is admissible. *Bogges v. Metropolitan St. R. Co.*, 118 Mo. 328.

2. Increase of Damages by Intervening Cause. — The damages for which a party is liable are those which are the natural or necessary consequences of his wrongful act. But where some other agency intervenes and extends the injurious effects of the wrongful act beyond the range of its natural or necessary consequences, and beyond what could ordinarily have been anticipated, the party originally at fault is not responsible for such additional injurious effects. *Pennsylvania Co. v. Whitlock*, 99 Ind. 19, 50 Am. Rep. 71.

Breach of Contract to Maintain Fence. — Where the plaintiff rented the defendant a pasture for his stock, with the understanding that the defendant should keep it inclosed with a fence, it was held that any injury to the plaintiff's cattle which could have been prevented by the exercise of proper care on his part would not, in law, be regarded as the natural and proximate consequence of a breach of the contract as to the maintenance of the fence. *Hewitt v. Walker*, 2 Ill. App. 490.

3. Wrong Caused by Two Not Acting with Common Purpose. — *Durgin v. Neal*, 82 Cal. 595; *Buddington v. Shearer*, 20 Pick. (Mass.) 477. And see *Rhyner v. Carver*, 84 Wis. 181.

Where A and B are fighting, and C joins the fight to aid A, and kills B, A cannot be held civilly liable for the death of B, where there is no proof of any common understanding or preconceived design between A and C. *White v. Conly*, 14 Lea (Tenn.) 51, 52 Am. Rep. 154.

In an action for damages resulting from a deposit of tanbark in a millpond, the defendant is liable only for the deposit made by him. If the acts of others have contributed to the deposit, the defendant should not be held liable for their part of the injury, but the damages resulting from his proportion of the trespass should be separated from the rest by the best proof the nature of the case affords, and the defendant's liability ascertained accordingly. *Seely v. Alden*, 61 Pa. St. 302. See also *Little Schuylkill Nav., etc., Co. v. Richards*, 57 Pa. St. 142.

Damages for the overflow of land, alleged to have been caused by the improper construction of an embankment, should, if it can be established that there would have been a certain amount of flooding even though the embankment had been properly constructed, be limited to the excess caused by the improper construction of the embankment. *Workman v. Great Northern R. Co.*, 32 L. J. Q. B. 279.

assess the damages with a view to separate and distinct or proportionate responsibility. Each is liable *in solido*.¹

c. DAMAGES WHICH INJURED PARTY MIGHT HAVE AVOIDED. — As it is the duty of a party injured by a breach of contract or tort to make reasonable effort to avoid damages therefrom, such damages as might by reasonable diligence on his part have been avoided are not to be regarded as the natural and probable result of the defendant's acts. There can be no recovery therefore for damages which might have been prevented by reasonable efforts on the part of the person injured.²

1. **Joint Tortfeasors.** — Booth *v.* Ratté, 21 Can. Sup. Ct. Rep. 637; Keegan *v.* Hayden, 14 R. I. 175.

2. **Injured Party Must Exert Himself to Lessen Damages — England.** — Hochster *v.* De La Tour, 2 El. & Bl. 678, 75 E. C. L. 678; Moller *v.* Jecks, 19 C. B. N. S. 332, 115 E. C. L. 332; Roper *v.* Johnson, L. R. 8 C. P. 167; Wilson *v.* Newport Dock Co., 4 H. & C. 232; Frost *v.* Knight, L. R. 7 Exch. 111; Cherry *v.* Thompson, L. R. 7 Q. B. 573; Ansett *v.* Marshall, 22 L. J. Q. B. 118; Roth *v.* Taysen, 73 L. T. 628.

Canada. — M'Collum *v.* Davis, 8 U. C. Q. B. 150; Stewart *v.* Sculthorp, 25 Ont. Rep. 544.

United States. — Dolph *v.* Troy Laundry Machinery Co., 28 Fed. Rep. 553; Fowle *v.* Park, 48 Fed. Rep. 789; Pennsylvania R. Co. *v.* Washburn, 50 Fed. Rep. 335; Burdon Cent. Sugar Refining Co. *v.* Ferris Sugar Mfg. Co., 78 Fed. Rep. 417; Cunningham Iron Co. *v.* Warren Mfg. Co., 80 Fed. Rep. 878; Warren *v.* Stoddart, 105 U. S. 230; The Baltimore, 8 Wall. (U. S.) 377; Carson *v.* Jennings, 1 Wash. (U. S.) 129.

Alabama. — Watson *v.* Kirby, 112 Ala. 436; Benziger *v.* Miller, 50 Ala. 206.

Arkansas. — St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279.

California. — Wing Chung *v.* Los Angeles, 47 Cal. 531.

Colorado. — Mack *v.* Jackson, 9 Colo. 536.

Connecticut. — Hitchcock *v.* Hunt, 28 Conn. 343; Kelsey *v.* Remer, 43 Conn. 129, 21 Am. Rep. 638; Jordan *v.* Patterson, 67 Conn. 473.

Florida. — Hodges *v.* Fries, 34 Fla. 63.

Georgia. — Driver *v.* Maxwell, 56 Ga. 11; Akridge *v.* Atlanta, etc., R. Co., 90 Ga. 232.

Illinois. — Williams *v.* Chicago Coal Co., 60 Ill. 149; Dobbins *v.* Duquid, 65 Ill. 464; Brant *v.* Gallup, 111 Ill. 487, 53 Am. Rep. 638; Hewitt *v.* Walker, 2 Ill. App. 490.

Indiana. — Heavilon *v.* Kramer, 31 Ind. 241; Hamilton *v.* Feary, 8 Ind. App. 615.

Iowa. — Mather *v.* Butler County, 28 Iowa 253; Simpson *v.* Keokuk, 34 Iowa 568; Beymer *v.* McBride, 37 Iowa 114; Allender *v.* Chicago, etc., R. Co., 37 Iowa 264; Smith *v.* Chicago, etc., R. Co., 38 Iowa 518; Little *v.* McGuire, 43 Iowa 447; Davis *v.* Fish, 1 Greene (Iowa) 406, 48 Am. Dec. 387.

Kansas. — St. Louis, etc., R. Co. *v.* Sharp, 27 Kan. 134; St. Louis, etc., R. Co. *v.* Ritz, 33 Kan. 404; Sherman Center Town Co. *v.* Leonard, 46 Kan. 354, 26 Am. St. Rep. 101; Frick Co. *v.* Falk, 50 Kan. 644.

Louisiana. — Biggs *v.* D'Aquin, 13 La. Ann. 21; Campbell *v.* Miltenberger, 26 La. Ann. 72.

Maine. — Miller *v.* Mariner's Church, 7 Me. 51, 20 Am. Dec. 341; Wright *v.* Keith, 24 Me. 158; True *v.* International Tel. Co., 60 Me. 9,

11 Am. Rep. 156; Bartlett *v.* Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437; Sutherland *v.* Wyer, 67 Me. 69; Grindle *v.* Eastern Express Co., 67 Me. 325, 24 Am. Rep. 31; Fitzpatrick *v.* Boston, etc., R. Co., 84 Me. 33.

Maryland. — Borden Min. Co. *v.* Barry, 17 Md. 419.

Massachusetts. — French *v.* Vining, 102 Mass. 132, 3 Am. Rep. 440; Scott *v.* Boston, etc., Steamship Co., 106 Mass. 468; Sherman *v.* Fall River Iron Works Co., 2 Allen (Mass.) 524, 79 Am. Dec. 799; Eastman *v.* Sanborn, 3 Allen (Mass.) 594, 81 Am. Dec. 677; Thompson *v.* Shattuck, 2 Met. (Mass.) 615; Loker *v.* Damon, 17 Pick. (Mass.) 288. And see Dodd *v.* Jones, 137 Mass. 322.

Michigan. — Hopkins *v.* Sanford, 41 Mich. 243; Talley *v.* Courter, 93 Mich. 473.

Mississippi. — New Orleans, etc., R. Co. *v.* Echols, 54 Miss. 264. *Compare* Louisville, etc., R. Co. *v.* Durfsee, 69 Miss. 439.

Missouri. — Douglass *v.* Stephens, 18 Mo. 362; Fisher *v.* Goebel, 40 Mo. 475; Waters *v.* Brown, 44 Mo. 302; State *v.* Powell, 44 Mo. 436; Haysler *v.* Owen, 61 Mo. 270; Harrison *v.* Missouri Pac. R. Co., 88 Mo. 625.

Nebraska. — Uhlig *v.* Barnum, 43 Neb. 584; Loomer *v.* Thomas, 38 Neb. 277; Chicago, etc., R. Co. *v.* Metcalf, 44 Neb. 848.

New York. — Bagley *v.* Smith, 10 N. Y. 490; Hamilton *v.* McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Williams *v.* Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Milton *v.* Hudson River Steamboat Co., 37 N. Y. 210; Dillon *v.* Anderson, 43 N. Y. 231; Baldwin *v.* U. S. Telegraph Co., 45 N. Y. 752, 6 Am. Rep. 165; Brooklyn *v.* Brooklyn City R. Co., 47 N. Y. 484, 7 Am. Rep. 469; Penn *v.* Buffalo, etc., R. Co., 49 N. Y. 210; Cook *v.* Soule, 56 N. Y. 420; Northrop *v.* Hill, 57 N. Y. 356, 15 Am. Rep. 501; Howard *v.* Daly, 61 N. Y. 362; Becar *v.* Flues, 64 N. Y. 520; Parsons *v.* Sutton, 66 N. Y. 92; Hoffman *v.* Union Ferry Co., 68 N. Y. 385; Roberts *v.* White, 73 N. Y. 380; Rexter *v.* Starin, 73 N. Y. 601; Russell *v.* Giblin, 16 Daly (N. Y.) 258; Perry *v.* Dickinson, 7 Abb N. Cas. (Brooklyn City Ct.) 471; Chase *v.* New York Cent. R. Co., 24 Barb. (N. Y.) 273; Worth *v.* Edmonds, 52 Barb. (N. Y.) 40; Gillis *v.* Space, 63 Barb. (N. Y.) 177; White *v.* Fuller, 67 Barb. (N. Y.) 272; Terry *v.* New York, 8 Bosw. (N. Y.) 504; Bixby *v.* Bennett, 3 Daly (N. Y.) 232; Brioso *v.* Pacific Mut. Ins. Co., 4 Daly (N. Y.) 252; Polk *v.* Daly, 4 Daly (N. Y.) 415; Clark *v.* Marsiglia, 1 Den. (N. Y.) 317, 43 Am. Dec. 670; Spencer *v.* Halstead, 1 Den. (N. Y.) 606; Costigan *v.* Mohawk, etc., R. Co., 2 Den. (N. Y.) 609, 43 Am. Dec. 758; Dorwin *v.* Potter, 5 Den. (N. Y.) 306; Huntington *v.* Ogdensburgh, etc., R. Co., 33 How. Pr. (N. Y.

What Efforts an Injured Party Must Make to limit his damages is to be determined by the rules of common sense and fair dealing.¹ Where the party whose duty it is primarily to perform a contract has equal opportunity for performance and equal knowledge of the consequences of nonperformance, he cannot, while the contract is subsisting and in force, be heard to say that the plaintiff might have performed for him;² and the duty to use care to lessen the damages resulting from a trespass does not impose upon one the obligation to provide against a threatened trespass.³

Must Make Reasonable Expenditures to Avoid Loss.—The efforts which the law requires of a person injured by a tort or breach of contract to avoid what damages he can include the making of reasonable expenditures to such end.⁴

Supreme Ct.) 416; *Flynn v. Hatton*, 43 How. Pr. (N. Y. C. Pl.) 348; *Smith v. Pettee*, 7 Hun (N. Y.) 335; *Bevier v. Delaware, etc., Canal Co.*, 13 Hun (N. Y.) 254; *Funch v. Abenheim*, 20 Hun (N. Y.) 10; *Hogle v. New York Cent., etc., R. Co.*, 28 Hun (N. Y.) 363; *Rose v. Butler*, 60 Hun (N. Y.) 140; *Troy v. Troy, etc., Co.*, 3 Lans. (N. Y.) 277; *Taylor v. Read*, 4 Paige (N. Y.) 561; *Shannon v. Comstock*, 21 Wend. (N. Y.) 401; *Franklin v. Smith*, 21 Wend. (N. Y.) 624; *Heckscher v. McCrea*, 24 Wend. (N. Y.) 304; *Colt v. Owens*, 47 N. Y. Super. Ct. 430. And see *New York State Monitor Milk Pan Co. v. Remington*, 109 N. Y. 143; *Compton v. Heissenbuttel*, (C. Pl.) 18 N. Y. Supp. 952; *Crane v. Powell*, (C. Pl.) 19 N. Y. Supp. 220; *Fromm v. Ide*, 68 Hun (N. Y.) 310.

Ohio. — *Bisher v. Richards*, 9 Ohio St. 495.

Pennsylvania. — *Barclay R., etc., Co. v. Ing-ham*, 36 Pa. St. 194; *Chamberlin v. Morgan*, 68 Pa. St. 168; *O'Conner v. Forster*, 10 Watts (Pa.) 418; *Eicholz v. Fox*, 12 Phila. (Pa.) 382.

Tennessee. — *Walker v. Ellis*, 1 Sneed (Tenn.) 515; *Gibson v. Carlin*, 13 Lea (Tenn.) 440.

Texas. — *Heilbronner v. Hancock*, 33 Tex. 714; *Andrews v. Jones*, 36 Tex. 149; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Buffalo Bayou Ship Channel Co. v. Milby*, 63 Tex. 492, 51 Am. Rep. 668; *Galveston, etc., R. Co. v. Ware*, 67 Tex. 635; *Galveston, etc., R. Co. v. Becht*, (Tex. Civ. App. 1893) 21 S. W. Rep. 971; *Texas, etc., R. Co. v. Pierce*, 10 Tex. Civ. App. 429; *Dallas v. Cooper*, (Tex. Civ. App. 1896) 34 S. W. Rep. 321; *A. B. Frank Co. v. A. H. Motley Co.*, (Tex. Civ. App. 1896) 37 S. W. Rep. 868.

Vermont. — *Pinney v. Andrus*, 41 Vt. 631; *James v. Hodsden*, 47 Vt. 127; *Hathorn v. Richmond*, 48 Vt. 557; *Watkins v. Rist*, 67 Vt. 284.

Wisconsin. — *Bradley v. Denton*, 3 Wis. 557; *Gordon v. Brewster*, 7 Wis. 355. And see *Barden v. Portage*, 79 Wis. 126.

Applications of This Rule to various classes of cases must be sought under special titles. See, for example, the titles AGENCY, vol. 1, p. 1106; CARRIERS OF GOODS, vol. 5, pp. 383, 388; CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, pp. 293, 296.

Violation of Contract of Lease — Duty to Procure Other Premises. — The case of *Hodges v. Fries*, 34 Fla. 63, was a suit for violation of a contract for rent of a store building by refusing to put the plaintiff in possession of the same. It was held to be the duty of the plaintiff to mitigate the damages by accepting another

store which had been offered, in the same vicinity, which was equally well suited for the purposes intended.

Where an Executory Contract Is Renounced by one of the contracting parties, the other cannot unnecessarily increase the damages for the breach. *Wormer's Case*, 4 Ct. of Cl. 258.

Consequence of Fire — Failure to Extinguish. — In an action, for damages for the consequences of a negligent fire, which the plaintiff had failed to make reasonable efforts to extinguish, it was held that there could be a recovery only for damages accruing before the plaintiff should have extinguished the flames. *Talley v. Courter*, 93 Mich. 473. And see *Hogle v. New York Cent., etc., R. Co.*, 28 Hun (N. Y.) 363; *Bevier v. Delaware, etc., Canal Co.*, 13 Hun (N. Y.) 254; *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 214.

1. *Reynolds v. Chandler River Co.*, 43 Me. 513; *Christiancy, J.*, in *Gilbert v. Kennedy*, 22 Mich. 117. And see *Cargill v. Thompson*, 57 Minn. 534.

2. *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719. See also *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522.

3. *Plummer v. Penobscot Lumbering Assoc.*, 67 Me. 363. See also *Gilbert v. Kennedy*, 22 Mich. 117.

4. **Reasonable Expenditures Must Be Made — England.** — *Moller v. Jecks*, 19 C. B. N. S. 332, 115 E. C. L. 332.

United States. — *Pennsylvania R. Co. v. Washburn*, 50 Fed. Rep. 335.

Colorado. — *Mack v. Jackson*, 9 Colo. 536.

Iowa. — *Davis v. Fish*, 1 Greene (Iowa) 406, 48 Am. Dec. 387.

Louisiana. — *Biggs v. D'Aquin*, 15 La. Ann. 21.

Maine. — *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341.

Missouri. — *Haysler v. Owen*, 61 Mo. 270; *State v. Powell*, 44 Mo. 436.

Nebraska. — *Uhlig v. Barnum*, 43 Neb. 584.

New York. — *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Terry v. New York*, 8 Bosw. (N. Y.) 504; *Compton v. Heissenbuttel*, (C. Pl.) 16 N. Y. Supp. 524, 18 N. Y. Supp. 952; *New York State Monitor Milk Pan Co. v. Remington*, 109 N. Y. 143; *Taylor v. Read*, 4 Paige (N. Y.) 561.

Pennsylvania. — *Barclay R., etc., Co. v. Ing-ham*, 36 Pa. St. 194.

Wisconsin. — See *Barden v. Portage*, 79 Wis. 126.

Tennessee. — *Walker v. Ellis*, 1 Sneed (Tenn.) 515.

Texas. — *Galveston, etc., R. Co. v. Ware*, 67

The person injured is not required, however, to make extraordinary expenditures requiring a disproportionate outlay in endeavoring to guard against the consequences of the wrongdoer's act.¹

Does Not Require Commission of Wrong. — The reasonable exertions contemplated by the rule do not include cases where in order to lessen the damages the plaintiff would be compelled to commit a trespass upon the lands of another,² nor to have recourse to fraudulent practices to lighten his losses.³

Where the Party Primarily Liable Promises to Take Steps to Lighten Loss. — Where the party primarily liable himself attempts or promises to take proper steps to reduce or prevent damages when the injury is impending or has actually begun, such fact may be considered in connection with the failure of the plaintiff to perform the necessary act or make the requisite effort to limit or avoid the loss.⁴

Cannot Abandon Injured Property and Claim Total Loss. — Where property is merely injured, and not wholly destroyed, the owner cannot render the person causing the injury liable for the entire value of the property, by an abandonment of it.⁵

The Burden of Proof to show that the party injured did not make proper efforts to avoid the injurious consequences of the act of the other party is upon the latter.⁶

Tex. 635; Galveston, etc., R. Co. v. Becht, (Tex. Civ. App. 1893) 21 S. W. Rep. 971; Jones v. George, 61 Tex. 345, 48 Am. Rep. 280.

Damage to Pork from Leaky Barrels — Expense of New Barrels. — In the case of *Hitchcock v. Hunt*, 28 Conn. 343, one person sold another pork in barrels, warranting the barrels not to leak. They did leak, and the defect became known to the buyer in time to have procured barrels and repacked the pork, which seems to have been the usual and proper course in such cases, by which the loss could have been avoided; and it was held that the buyer was only entitled to recover what he would have been compelled to pay for new barrels and for the repacking of the pork in them.

Damage from Flood — Plaintiff's Duty to Divert Water. — In an action for damages to real estate by overflow, where it appeared that the water might have been diverted and the damages diminished at small cost, it was held that the plaintiffs were entitled to such amount only as it would have cost to divert it. *Galveston, etc., R. Co. v. Becht*, (Tex. Civ. App. 1893) 21 S. W. Rep. 971. And see *Galveston, etc., R. Co. v. Ware*, 67 Tex. 635.

1. Extraordinary Expenditure Not Required. — Thus the lessee of land whose crops are injured by overflow of water caused by the defective construction of the defendant's roadbed cannot be held in fault for not expending three hundred dollars in opening a ditch to carry off the overflow, such an expenditure, under the circumstances, not being a "moderate expense." *Galveston, etc., R. Co. v. Borsky*, 2 Tex. Civ. App. 545; *Galveston, etc., R. Co. v. Ryan*, (Tex. Civ. App. 1893) 21 S. W. Rep. 1013.

Where a person has bought and paid for an article, and suffers loss by reason of a default on the part of a carrier by whom it is shipped to get it to the point to which it is sent, the carrier cannot claim that the injured party should have bought similar goods on the market at the point of consignment, in order to reduce the loss. *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128. The plaintiff cannot be required, said the court, "to have the money in his

pocket with which to buy a second [article] in case of nondelivery of the first."

2. Rule Does Not Require Commission of Trespass. — *Wolf v. St. Louis Independent Water Co.*, 15 Cal. 319; *Fromm v. Ide*, 68 Hun (N. Y.) 310; *Gulf, etc., R. Co. v. Reed*, (Tex. Civ. App. 1893) 22 S. W. Rep. 283.

3. Baker v. Lever, 67 N. Y. 310.

4. Where Wrongdoer Undertakes to Prevent Loss. — *Graves v. Glass*, 86 Iowa 261. See also *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719; *Keyes v. Western Vermont Slate Co.*, 34 Vt. 81.

Thus, in an action by a tenant against his landlord for damages to goods from a leaky roof through a considerable period of time, the tenant was held excused from a failure to repair the roof himself, it appearing that the landlord had undertaken to repair the leak, and had made several unsuccessful efforts to do so. *Dempsey v. Hertzfield*, 30 Ga. 866.

5. Cannot Abandon and Claim Total Loss. — *Georgia Pac. R. Co. v. Fullerton*, 79 Ala. 298; *St. Louis, etc., R. Co. v. Neel*, 56 Ark. 279; *New Orleans, etc., R. Co. v. Echols*, 54 Miss. 264; *Chicago, etc., R. Co. v. Metcalf*, 44 Neb. 848. Compare, however, *Burger v. St. Louis, etc., R. Co.*, 52 Mo. App. 119, where it was held that the owner of stock killed by a railroad company is not bound to make use of the carcass to reduce the damages; and in the case of *Eten v. Luyster*, 60 N. Y. 252, it was said: "The act complained of was the wrongful removal and destruction of the plaintiff's property in his absence, and there was no evidence that any part of the loss was caused by his act or could have been prevented by him. * * * The plaintiff owed no duty to the defendants, and was not called upon to gather up the fragments of his scattered and broken chattels, but was at liberty to leave them where the defendants left them, and look to the latter for their value."

Insurance. — As to the rules in marine and fire insurance, see the titles ABANDONMENT AND TOTAL LOSS, vol. I. p. 1; FIRE INSURANCE.

6. Burden of Proof. — *Boland v. Whitman*, 33 Ind. 64; *Hopkins v. Sanford*, 41 Mich. 243;

f. INJURY WHICH MIGHT HAVE OCCURRED THOUGH DEFENDANT'S WRONG NOT COMMITTED.—Though it has been said that perhaps the wrongdoer might avoid liability by showing that the loss for which it is sought to hold him liable must necessarily have happened, even if the act complained of had not been done, yet it can avail him nothing to show that the loss might have happened if the act had never been done.¹

IV. UNCERTAIN, CONTINGENT, AND SPECULATIVE DAMAGES — 1. General Rule.—The general rule on this subject is that damages which are uncertain, contingent, or speculative are not recoverable.² Damages may be speculative or

Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330; *Costigan v. Mohawk, etc.*, R. Co., 2 Den. (N. Y.) 609, 43 Am. Dec. 758.

1. Proof that Loss Might Have Happened though Defendant's Wrong Not Done.—In *Davis v. Garrett*, 6 Bing. 716, 19 E. C. L. 212, Tindal, C. J., said: "No wrongdoer can be allowed to apportion or qualify his own wrong; and as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show not only that the same loss might have happened, but that it must have happened, if the act complained of had not been done." See also *Lilley v. Doubleday*, 7 Q. B. Div. 510.

In *Reynolds v. Texas, etc.*, R. Co., 37 La. Ann. 694, it is said that where the negligence of the defendant greatly multiplies the chances of accident, and is of a character naturally leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect between the negligence and the injury. Courts in such matters consider the natural and ordinary course of events and do not indulge in fanciful suppositions.

In *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, observations to the same effect are made in a case involving a claim for losses alleged to have resulted from a breach of contract.

2. General Rule—Uncertain, Contingent, and Speculative Damages Not Recoverable—England.—The *Clarence*, 3 Rob. Adm. 283; *Wilson v. Lancashire, etc.*, R. Co., 9 C. B. N. S. 632, 99 E. C. L. 632, 30 L. J. C. P. 232, 7 Jur. N. S. 862, 3 L. T. 859, 9 W. R. 635; *Priestley v. Maclean*, 2 F. & F. 288.

Ireland.—*Fitzgerald v. Leonard*, 32 L. R. Ir. 675.

Canada.—*Marlow v. Lajeunesse*, 18 L. Can. Jur. 188; *Ruthven Woollen Mfg. Co. v. Great Western R. Co.*, 18 U. C. C. P. 316.

United States.—*Gilpins v. Consequa, Pet.* (C. C.) 85; *The Amiable Nancy*, 3 Wheat. (U. S.) 546; *La Amistad de Rues*, 5 Wheat. (U. S.) 385; *Foster v. Cleveland, etc.*, R. Co., 56 Fed. Rep. 436; *Bowas v. Pioneer Tow Line*, 2 Sawy. (U. S.) 30; *Smith v. Condry*, 1 How. (U. S.) 28; *Cincinnati, etc., Gas Illuminating Co. v. Western, etc.*, Co., 152 U. S. 200; *Cahn v. Western Union Tel. Co.*, 46 Fed. Rep. 40; *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680; *Union Pac. R. Co. v. Taggart*, 149 U. S. 698; *Balph v. Rathbun Co.*, 39 U. S. App. 297; *Dusar v. Murgatroyd*, 1 Wash. (U. S.) 13.

Alabama.—*Harper v. Weeks*, 89 Ala. 577; *Gunter v. Beard*, 93 Ala. 227; *Reed Lumber Co. v. Lewis*, 94 Ala. 626.

Arkansas.—*McDaniel v. Crabtree*, 21 Ark. 431; *Goodell v. Bluff City Lumber Co.*, 57 Ark. 203. And see *Gerson v. Slemmons*, 30 Ark. 50.

California.—*Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151; *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93.

Colorado.—*Goldhammer v. Dyer*, 7 Colo. App. 29; *Jones v. Nathrop*, 7 Colo. 1.

Connecticut.—*Lewis v. Hartford Dredging Co.*, 68 Conn. 221.

Delaware.—*Hysore v. Quigley*, 9 Houst. (Del.) 348.

Florida.—*Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356.

Georgia.—*Rucker v. Athens Mfg. Co.*, 54 Ga. 84; *Red v. Augusta*, 25 Ga. 386; *Cooper v. Young*, 22 Ga. 269, 68 Am. Dec. 502; *Richmond, etc., R. Co. v. Allison*, 86 Ga. 145.

Illinois.—*Chicago, etc., R. Co. v. Ward*, 16 Ill. 522; *Olmstead v. Burke*, 25 Ill. 86; *Frazier v. Smith*, 60 Ill. 145; *Benton v. Fay*, 64 Ill. 420; *Haven v. Wakefield*, 39 Ill. 509; *Moline Water Power Co. v. Waters*, 10 Ill. App. 159; *Koch v. Merk*, 48 Ill. App. 26.

Indiana.—*Western Gravel Road Co. v. Cox*, 39 Ind. 260; *Block v. Ebner*, 54 Ind. 544; *Glass v. Garber*, 55 Ind. 336; *Fairfield v. Jeffreys*, 68 Ind. 582; *Williamson v. Brandenburg*, 133 Ind. 594.

Iowa.—*Howe Mach. Co. v. Bryson*, 44 Iowa 159, 24 Am. Rep. 735; *Winne v. Kelley*, 34 Iowa 339; *Davis v. Fish*, 1 Greene (Iowa) 406, 48 Am. Dec. 387.

Kansas.—*Walrath v. Whittekind*, 26 Kan. 482; *Sherman Center Town Co. v. Leonard*, 46 Kan. 354, 26 Am. St. Rep. 101; *Arkansas Valley Town, etc., Co. v. Lincoln*, 56 Kan. 145; *Brown v. Hadley*, 43 Kan. 267; *Hoge v. Norton*, 22 Kan. 374; *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614.

Kentucky.—*Keith v. Hinkston*, 9 Bush (Ky.) 283; *Smith v. Phillips*, (Ky. 1895) 29 S. W. Rep. 358; *Koch v. Goodshaw*, 12 Bush (Ky.) 318; *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126.

Louisiana.—*Smith v. Thielen*, 17 La. Ann. 239; *Bergen v. New Orleans*, 35 La. Ann. 523; *Rigney v. Monette*, 47 La. Ann. 648; *Minor v. Picayune*, 13 La. Ann. 564. And see *Grant v. McDonogh*, 7 La. Ann. 447; *Dennery v. Bisa*, 6 La. Ann. 365.

Maine.—*Winslow v. Lane*, 63 Me. 161.

Maryland.—*Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618; *Shafer v. Wilson*, 44 Md. 268;

uncertain in several respects. In the first place, it may be a matter of uncertainty whether the party claiming damages has, in a legal sense, been damaged at all. In the next place, though damages from some cause be shown, it may be uncertain whether in the particular case they resulted from the defendant's

Stern v. Rosenheim, 67 Md. 503; *Lanahan v. Heaver*, 79 Md. 413.

Massachusetts. — *Brown v. Smith*, 12 Cush. (Mass.) 366; *Loker v. Damon*, 17 Pick. (Mass.) 284; *Ballou v. Farnum*, 11 Allen (Mass.) 73; *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157.

Michigan. — *Montgomery, J., in Fell v. Newberry*, 106 Mich. 542; *Fitzsimmons v. Chapman*, 37 Mich. 139, 26 Am. Rep. 508; *Gilbert v. Kennedy*, 22 Mich. 117.

Minnesota. — *Loudy v. Clarke*, 45 Minn. 477; *Doud v. Duluth Milling Co.*, 55 Minn. 53; *Williams v. Wood*, 55 Minn. 323; *Fairchild v. Rogers*, 32 Minn. 269.

Mississippi. — *Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 480; *Wright v. Petrie*, 1 Smed. & M. Ch. (Miss.) 282.

Missouri. — *Taylor v. Maguire*, 13 Mo. 517; *Wilson v. Weil*, 67 Mo. 399; *Saunders v. Brosius*, 52 Mo. 50; *Callaway Min., etc., Co. v. Clark*, 32 Mo. 305.

Nebraska. — *Denver, etc., R. Co. v. Hutchins*, 31 Neb. 572.

Nevada. — *Clark v. Nevada Land, etc., Co.*, 6 Nev. 203.

New Jersey. — *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438.

New York. — *Hamilton v. McPherson*, 28 N. Y. 76, 84 Am. Dec. 330; *Flynn v. Hatton*, 43 How. Pr. (N. Y. C. Pl.) 348; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 566, 1 Am. Rep. 446; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 496; *Bernstein v. Meech*, 130 N. Y. 354; *Colrick v. Swinburne*, 105 N. Y. 507; *Cassidy v. Le Fevre*, 45 N. Y. 562; *Scott v. Rogers*, 4 Abb. App. Dec. (N. Y.) 161, note; *Beals v. Terry*, 2 Sandf. (N. Y.) 127; *Baldwin v. U. S. Telegraph Co.*, 1 Lans. (N. Y.) 137; *New York Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 234; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Freeman v. Clute*, 3 Barb. (N. Y.) 427; *Holloway v. Stephens*, 2 Thomp. & C. (N. Y.) 658; *Kelly v. Miles*, 58 N. Y. Super. Ct. 495; *White v. Miller*, 7 Hun (N. Y.) 427; *Bean v. Carleton*, 58 Hun (N. Y.) 611, 36 N. Y. St. Rep. 123, 124; *Miley v. Broadway, etc., R. Co.*, (Supreme Ct.) 8 N. Y. Supp. 455; *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Manhattan Stamping Works v. Koehler*, 45 Hun (N. Y.) 150; *Hunt v. Hoboken Land Imp. Co.*, 3 E. D. Smith (N. Y.) 144; *Neary v. Bostwick*, 2 Hilt. (N. Y.) 517; *Ward v. New York Cent. R. Co.*, 47 N. Y. 32; *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 214; *Smith v. Pettee*, 7 Hun (N. Y.) 335; *Mack v. Patchin*, 29 How. Pr. (Buffalo Super. Ct.) 30; *Brooklyn v. Brooklyn City R. Co.*, 57 Barb. (N. Y.) 502; *Lattin v. Davis*, Hill & D. Supp. (N. Y.) 9; *Bennett v. Drew*, 3 Bosw. (N. Y.) 355; *Havemeyer v. Havemeyer*, 45 N. Y. Super. Ct. 464. And see *Kane v. Johnston*, 9 Bosw. (N. Y.) 154.

North Carolina. — *Fagan v. Newson*, 1 Dev. L. (12 N. Car.) 20; *Jones v. Call*, 96 N. Car. 337, 60 Am. Rep. 416; *Sledge v. Reid*, 73 N.

Car. 440; *Boyle v. Reeder*, 1 Ired. L. (23 N. Car.) 607; *Roberts v. Cole*, 82 N. Car. 292.

Ohio. — *Knorr v. Reedy*, (Cinc. Super. Ct.) 27 Ohio L. J. 103.

Oregon. — *Drake v. Sears*, 8 Oregon 209.

Pennsylvania. — *Eisenlohr v. Swain*, 35 Pa. St. 107, 78 Am. Dec. 328; *Adams Express Co. v. Egbert*, 36 Pa. St. 360; *McKnight v. Ratcliff*, 44 Pa. St. 156; *Morgan v. Negley*, 53 Pa. St. 153; *Duffield v. Rosenzweig*, 144 Pa. St. 520; *Rogers v. Bemus*, 69 Pa. St. 432.

South Carolina. — *Tappan v. Harwood*, 2 Spears L. (S. Car.) 536; *Hunt v. D'Orval*, Dudley L. (S. Car.) 180; *Sanders v. Anderson*, 10 Rich. Eq. (S. Car.) 232; *Sitton v. Macdonald*, 25 S. Car. 68, 60 Am. Rep. 484; *Massey v. Craine*, 1 McCord L. (S. Car.) 489; *Bond v. Quattlebaum*, 1 McCord L. (S. Car.) 584, 10 Am. Dec. 702.

Tennessee. — *McWhirter v. Douglas*, 1 Coldw. (Tenn.) 591; *Porter v. Woods*, 3 Humph. (Tenn.) 56, 39 Am. Dec. 153; *Walker v. Ellis*, 1 Sneed (Tenn.) 1515; *Roynan v. Patterson*, (Tenn. 1886) 1 S. W. Rep. 103; *Fort v. Orndoff*, 7 Heisk. (Tenn.) 167.

Texas. — *De la Zerda v. Korn*, 25 Tex. Supp. 188; *Yoakum v. Dunn*, 1 Tex. Civ. App. 524; *Gulf, etc., R. Co. v. Hepner*, 83 Tex. 136; *Fraser v. Echo Min., etc., Co.*, 9 Tex. Civ. App. 210; *Houston, etc., R. Co. v. Hill*, 63 Tex. 381, 51 Am. Rep. 642; *Holliday v. Brosig*, (Tex. Civ. App. 1895) 30 S. W. Rep. 841.

Vermont. — *Dennis v. Stoughton*, 55 Vt. 371; *Smith v. Smith*, 45 Vt. 433.

West Virginia. — *James v. Adams*, 8 W. Va. 568.

Wisconsin. — *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318, 82 Am. Dec. 679; *Wright v. Mulvaney*, 78 Wis. 89, 23 Am. St. Rep. 393.

Rule as to Certainty Distinguished from Rule as to Natural Result. — In *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, *Selden, J.*, said: "The damages [recoverable for a breach of contract] must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. * * * These two conditions are entirely separate and independent, and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural, and even necessary, result of the breach, and yet if in their nature uncertain they must be rejected. * * * So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach but for some special circumstances, collateral to the contract itself or foreign to its apparent object, they cannot be recovered." See also *Brigham v. Carlisle*, 78 Ala. 247, 56 Am. Rep. 28; *Miller v. Mariner's Church*, 7 Me. 55, 20 Am. Dec. 341.

acts; or, again, the damages may be wholly uncertain in measure or extent.¹

Conjectural Probabilities. — Compensation, it is held, cannot be based on mere conjectural probability of future loss;² nor can a conjectural or speculative loss, which may or may not have been sustained or may or may not happen, be considered in assessing damages.³

Certainty as to Nature and Cause from Which Proceeding. — Damages, it is held, must be certain both in their nature and in respect to the cause from which they proceed.⁴

2. Degree of Certainty Required. — In actions for damages the requirement that the damages must not be uncertain is satisfied by a reasonable certainty in this respect.⁵ It is sufficient if there be "such certainty as satisfies the mind of a prudent and impartial person."⁶ The law, it has been said, never insists

1. See *infra*, this section, *Various Elements of Uncertainty*.

2. *Chicago City R. Co. v. Henry*, 62 Ill. 142; *Watt v. Nevada Cent. R. Co.*, 23 Nev. 154. And see *Massey v. Craine*, 1 McCord L. (S. Car.) 489; *Bond v. Quattlebaum*, 1 McCord L. (S. Car.) 584, 10 Am. Dec. 702.

3. *Keith v. Hinkston*, 9 Bush (Ky.) 283; *Bond v. Quattlebaum*, 1 McCord L. (S. Car.) 584, 10 Am. Dec. 702.

4. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, *per Selden*, J.; *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *Colrick v. Swinburne*, 105 N. Y. 507.

5. **Reasonable Certainty Sufficient** — *England*. — *The Clarence*, 3 Rob. Adm. 283; *Lepage v. Girard*, 4 Rev. Leg. 554.

United States. — *Bowes v. Pioneer Tow Line*, 2 Sawy. (U. S.) 30; *Anvil Min. Co. v. Humble*, 153 U. S. 540.

Alabama. — *Harper v. Weeks*, 89 Ala. 577; *Danforth v. Tennessee, etc., R. Co.*, 99 Ala. 331.

Arkansas. — *McDaniel v. Crabtree*, 21 Ark. 431.

California. — *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93.

Colorado. — *Goldhammer v. Dyer*, 7 Colo. App. 29.

Florida. — *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356.

Illinois. — *Benton v. Fay*, 61 Ill. 420.

Indiana. — *Western Gravel Road Co. v. Cox*, 39 Ind. 260.

Kansas. — *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614; *Hoge v. Norton*, 22 Kan. 374; *Brown v. Hadley*, 43 Kan. 267; *Arkansas Valley Town, etc., Co. v. Lincoln*, 56 Kan. 145.

Michigan. — *Christiancy, J.*, in *Gilbert v. Kennedy*, 22 Mich. 117.

Minnesota. — *Fairchild v. Rogers*, 32 Minn. 269.

Mississippi. — *Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 458.

Missouri. — *Birney v. Wabash, etc., R. Co.*, 20 Mo. App. 470; *Manter v. Truesdale*, 57 Mo. App. 435; *Squires v. Chillicothe*, 89 Mo. 226.

New Jersey. — *Wolcott v. Mount*, 36 N. J. L. 271, 13 Am. Rep. 438; *Houston v. Traphagen*, 47 N. J. L. 23.

New York. — *Goodsell v. Western Union Tel. Co.*, 53 N. Y. Super. Ct. 46; *Neary v. Bostwick*, 2 Hilt. (N. Y.) 517; *Ward v. New York Cent. R. Co.*, 47 N. Y. 32; *Cassidy v. Le Fevre*, 45 N. Y. 567; *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 214; *Hamilton v. McPherson*, 28 N. Y. 76, 84 Am. Dec. 136;

Baldwin v. U. S. Telegraph Co., 1 Lans. (N. Y.) 137; *Smith v. Pettee*, 7 Hun (N. Y.) 335; *Flynn v. Hatton*, 43 How. Pr. (N. Y. C. Pl.) 348; *Mack v. Patchin*, 29 How. Pr. (Buffalo Super. Ct.) 30; *Brooklyn v. Brooklyn City R. Co.*, 57 Barb. (N. Y.) 502; *New York Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 234; *Miley v. Broadway, etc., R. Co.*, (Supreme Ct.) 8 N. Y. Supp. 455.

North Carolina. — *Sledge v. Reid*, 73 N. Car. 440.

Pennsylvania. — *Bradford Oil Co. v. Blair*, 113 Pa. St. 83.

Tennessee. — *Roynan v. Patterson*, (Tenn. 1886) 1 S. W. Rep. 103.

Texas. — *Gulf, etc., R. Co. v. Hepner*, 83 Tex. 136.

Wisconsin. — *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318, 82 Am. Dec. 679.

Where Merely "to Some Extent" Contingent. — Damages which are the legal and natural result of the act done, though to some extent contingent, are not necessarily too remote to be recovered where they are such as may be fairly and reasonably considered as arising either naturally from the breach of the contract itself, or may be supposed to have been in the contemplation of both parties at the time they entered into contract as the probable result of a breach of it. *Stewart v. Lanier House Co.*, 75 Ga. 582.

In an Action for Breach of Contract of Sale of a Physician's Practice it has been held that damages for losses sustained by the plaintiff in the abandonment of his former practice relying upon the contract of sale cannot be recovered. *Rigney v. Monette*, 47 La. Ann. 648. But in determining the compensation of a physician who had, pursuant to his patient's request, attended him exclusively for a certain period, evidence of losses sustained in the abandonment of his other practice was held properly admissible. *Maddin v. Head*, 1 Lea (Tenn.) 664. And where a physician abandoned his practice to become an agent for the sale of a manufactured article under a contract by which he was to have the exclusive right to sell within a specified territory, it was held, upon a total breach of the contract by the manufacturers, that there might be a recovery of the earnings which the evidence shows the physician otherwise would have made from his profession. *Meylert v. Gas Consumers' Ben. Co.*, 26 Abb. N. Cas. (N. Y. Supreme Ct.) 262.

6. *Brigham v. Carlisle*, 78 Ala. 248, 56 Am. Rep. 28.

upon a higher degree of certainty than the nature of the case admits,¹ but certainty, so far as the nature of the case will admit of, is to be aimed at and attained.² No greater degree of certainty in the evidence upon which damages are to be estimated is required than in respect to any other branch of the case, or any other class of civil actions.³ Absolute certainty is never required.⁴ As there can be no recovery in damages for remote possibilities, neither will the existence of remote possibilities defeat a recovery; which is but another way of saying that absolute certainty is not required.⁵

Chance of Future Promotion. — In actions for damages for personal injuries, the loss of chances of future promotion in business, and higher wages in consequence, is too uncertain and conjectural to be considered as an element of damages.⁶

3. Most Certain Method of Estimating Damages to Be Adopted. — Where the damages may be estimated in more than one way, that mode should be adopted which is most definite and certain.⁷ Some cases are such in their nature and

1. *Allison v. Chandler*, 11 Mich. 548.

2. *Weisel, J.*, in *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618.

3. *Allison v. Chandler*, 11 Mich. 548.

Reasonable and Probable Inferences Permissible. — There can be no rule of law founded on any just or intelligible principle, which, in actions of trespass at least, requires any higher degree of certainty in the evidence upon which the damages are to be estimated, than in reference to any other branch of the cause. Juries, in such cases, have as much right, and it is as clearly their duty, to draw reasonable and probable inferences from the facts and circumstances in evidence in reference to the amount of damages, as in reference to any other subject of inquiry in the case. *Christianity, J.*, in *Gilbert v. Kennedy*, 22 Mich. 117.

Fair Preponderance of Evidence Sufficient. — With reference to the rule that in actions for the breach of contract profits are recoverable when they can be ascertained, the court, in *Lavens v. Lieb*, 12 N. Y. App. Div. 487, said: "If he [the plaintiff] makes it appear by a fair preponderance of the evidence that profits would have resulted from a continuance of the business, and produces such evidence as would authorize the court upon legitimate and proper inferences to ascertain the amount of profits which would have been made, he will be entitled to recover them." See also *U. S. Trust Co. v. O'Brien*, 143 N. Y. 284; *Alexander v. Breeden*, 14 B. Mon. (Ky.) 125.

4. Absolute Certainty Not Required. — *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318, 82 Am. Dec. 679.

In the case of *Danforth v. Tennessee, etc.*, R. Co., 99 Ala. 331, an instruction limiting the plaintiff's recovery to profits which were "certain" was held erroneous, as excluding such as were reasonably certain.

In actions for damages for tort to a vessel, whereby loss of profits resulted, the amount lost is not required to be proved with absolute, but only with reasonable, certainty. *The Mayflower*, 1 Brown Adm. 388.

The fact of loss must be shown, together with its amount, not necessarily with precision and accuracy, but approximately. *Peoria, etc.*, *Union R. Co. v. Peoria, etc.*, R. Co., 105 Ill. 110; *Chicago, etc.*, R. Co. *v. Cicero*, 157 Ill. 56; *Manter v. Truesdale*, 57 Mo. App. 435.

Opinion Evidence on Question of Damages. —

The plaintiffs sued the defendant for a balance claimed to be due them as architects of a county court-house. The defendant reconvened for an amount slightly in excess of the amount claimed by the plaintiffs, the foundation of the defendant's reconventional claim being defective stove flues. Witnesses were introduced by whom it was proved that the flues smoked badly, and various opinions were expressed as to the manner and cost of remedying the defect. Such evidence was held to furnish the jury with sufficient data to enable them to estimate the damages on the reconventional claim. *Larrimore v. Comanche County, (Tex. Civ. App. 1895)* 32 S. W. Rep. 367. Compare *Birney v. Wabash, etc.*, R. Co., 20 Mo. App. 470.

5. Remote Possibility Will Not Defeat Recovery. — *Squires v. Chillicothe*, 89 Mo. 226.

Thus it has been said that "a workman engaged with a team may meet with an accident to his wagon, * * * but if this be the only element of uncertainty he would be entitled to recover the prospective profits of an employment." *Montgomery, J.*, in *Fell v. Newberry*, 106 Mich. 542.

Anything Prospective to Some Extent Contingent. — With reference to the recovery of future profits for breach of contract, *Earl, J.*, in *Wakeman v. Wheeler, etc.*, Mfg. Co., 101 N. Y. 210, 54 Am. Rep. 676, said: "As they are prospective they must, to some extent, be uncertain and problematical; and yet, on that account, a person complaining of breach of contract is not to be deprived of all remedy."

6. Richmond, etc., R. Co. *v. Allison*, 86 Ga. 145. See also the title DEATH BY WRONGFUL ACT, *post*, subtitle *Elements to Be Considered in Estimating Damages — Chances for Promotion of Deceased*.

7. Definite Method of Calculation — United States. — *Washington, etc.*, R. Co. *v. American Car. Co.*, 5 App. Cas. (D. C.) 524. And see *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680. *Arkansas.* — See *O'Connell v. Rosso*, 56 Ark. 603.

Florida. — *Sullivan v. McMillan*, 26 Fla. 543.

Georgia. — *Hobbs v. Davis*, 30 Ga. 423.

Indiana. — *Singer v. Farnsworth*, 2 Ind. 597.

Kansas. — *Johnston, J.*, in *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614.

circumstances as to afford an obvious rule by which a just and adequate compensation can be readily and accurately measured, and whenever this is the case such rule should be applied in actions of tort as well as in those upon contract.¹

More Certain Method of Computation Preferred Though Compensation Incomplete. — The law prefers the more certain method even though full compensation will not be accomplished thereby, provided the redress afforded is not grossly inadequate.²

4. Various Elements of Uncertainty — *a.* **UNCERTAINTY AS TO ANY RESULTANT DAMAGE.** — Where it cannot be shown with reasonable certainty that any damages resulted from the act complained of, either as to the entire consequences or as to some particular element of injury claimed, the rule under dis-

Louisiana. — See *Moor v. Howard*, 18 La. Ann. 635.

Michigan. — *Allison v. Chandler*, 11 Mich. 548.

Minnesota. — See *Olson v. Nonenmacher*, 63 Minn. 425.

Missouri. — *Taylor v. Maguire*, 12 Mo. 313.

New York. — *Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250; *Selden, J.*, in *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

Ohio. — *White, J.*, in *Rhodes v. Baird*, 16 Ohio St. 581. And see *Cincinnati v. Evans*, 5 Ohio St. 594.

Pennsylvania. — *Brown v. Foster*, 51 Pa. St. 165; *Duffield v. Rosenzweig*, 144 Pa. St. 520.

Tennessee. — *Walker v. Ellis*, 1 Sneed (Tenn.) 515; *Porter v. Woods*, 3 Humph. (Tenn.) 56, 39 Am. Dec. 153.

Texas. — *Yoakum v. Dunn*, 1 Tex. Civ. App. 524.

Where Elements of Certainty Are Lacking by which damages can be accurately measured, resort must be had to such principle or basis of calculation applicable to the circumstances of the case as will be most likely to approximate certainty, and which may serve as a guide in making the most probable estimate of which the nature of the case will admit. *Christiancy, J.*, in *Gilbert v. Kennedy*, 22 Mich. 117.

1. *Christiancy, J.*, in *Gilbert v. Kennedy*, 22 Mich. 117. And see *Allison v. Chandler*, 11 Mich. 542; *Warren v. Cole*, 15 Mich. 274.

If There Be a Legal Rule for the Measurement of Damages, the jury are not at liberty to depart from it. *Ryan v. Baldrick*, 3 McCord L. (S. Car.) 498; and see *Wallis v. Frazier*, 2 Nott & M. (S. Car.) 516; *Richardson v. Dukes*, 4 McCord L. (S. Car.) 156. Thus, where injury to property is in issue, the value of the property is generally regarded as furnishing the measure which must control the jury. *Hildebrand v. Brewer*, 6 Tex. 45, 55 Am. Dec. 757.

Where Market Price in an action for the non-delivery of goods is an element of damages, the jury are confined to the actual condition of the market and the price at the stipulated time of delivery. They cannot consider the conjectural or probable effect upon the market and price which might have resulted if the party claiming damages had gone into the market to buy there the property which the other party failed to deliver. *Jemison v. Gray*, 20 Iowa 537. And see *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130.

The proper measure of damages for the

breach of a contract to insert an advertisement is the market value of such an advertisement or the cost for which one similar to the one bargained for could be procured at the time elsewhere. *Tribune Co. v. Bradshaw*, 20 Ill. App. 17.

2. Rule Especially Applicable to Cases of Contract. — In the case of *Allison v. Chandler*, 11 Mich. 550, the court said: "In actions upon contract especially, and those nominally in tort, but substantially upon contract, courts have thought it generally safer upon the whole to adopt certain definite rules for the government of the jury by which the damages could be estimated, at the risk of falling somewhat short of the actual damages, by rejecting such as could not be estimated by a fixed rule, than to leave the whole matter entirely at large with the jury, without any rule to govern their discretion or to detect or correct errors or corruption in the verdict. In such cases, therefore, there has been a strong inclination to seize upon such elements of certainty as the case might happen to present, and as might approximate compensation, and to frame thereon rules of law for the measurement of damages, though it might be evident that further damages must have been suffered, which, however, could only be estimated as matter of opinion, and must therefore be excluded under the rules thus adopted. And it is not to be denied that this course of decision has sometimes been extended to actions purely of tort."

Breach of Contract to Repair Steamboat by Stipulated Time. — The case of *Brown v. Foster*, 51 Pa. St. 165, was an action brought by the plaintiffs to recover for work that was to be done for a steamboat by a day fixed, for a specified price, in which they had made default as to time. It was held that the measure of damages for the delay was the ordinary rental or hire of such a boat while the plaintiffs were in default, and the court rejected as wholly inadmissible the proposition made to measure the damages by what the boat could earn had there been no default on the part of the plaintiffs as to the time for doing the work.

In Actions for Damages for Tortious Injuries a principle or basis of calculation may be resorted to if, though it may be less certain as a scale of measurement, the principle is just in itself and more likely to approximate the damages than some rule which, though certain, must produce injustice by excluding a large portion of the damages actually sustained. *Gilbert v. Kennedy*, 22 Mich. 117. See also *Allison v. Chandler*, 11 Mich. 548.

cussion applies, and no damages at all, or no damages for the particular element referred to, are recoverable¹ unless there is a cause of action proved entitling the plaintiff to recover nominal damages.²

Failure of Enhancement of Value. — Where the location of business enterprises or improvements forms the consideration or inducement for a person to enter into a contract for the disposal of real property, the prospective increase in value of adjoining property which will follow from the location of such business or improvements is too indefinite and uncertain to be recoverable in an action based upon a failure to make the location according to the terms of the contract.³ And where a person subscribes to a fund to induce the proprietors of a manufacturing establishment to locate in a certain place, the loss of the subscriber, in case the establishment is not located in accordance with the repre-

1. Uncertainty as to Any Damages. — *Beck v. West*, 87 Ala. 213; *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93; *Loudy v. Clarke*, 45 Minn. 477; *Saunders v. Brosius*, 52 Mo. 50; *Clark v. Nevada Land, etc., Co.*, 6 Nev. 203.

Damages for Deprivation of Use of Mill Never Built. — The plaintiff contracted with the defendants to construct a stone flume to be completed by a certain date on the site of a mill which had been destroyed by fire. It was the alleged intention of the defendants, when the contract for the flume was made, to erect, upon the completion of the flume, a corn-feed mill for temporary use, which intention was known to the plaintiff. The flume was not completed until several months after the time provided in the contract. No corn-feed mill was ever built. In an action by the plaintiff for the contract price of the flume the defendants were permitted to recoup their damages for the loss of the use of the corn-feed mill, which they were, as they alleged, prevented from completing by reason of the plaintiff's failure to complete the flume as contracted. It was held, however, that such damages were too remote and uncertain, and that therefore the defendants could not be permitted to have recoupment therefor. *Bridges v. Lanham*, 14 Neb. 369, 45 Am. Rep. 121.

Failure to Insert Plaintiff's Name in Defendant's Advertisement. — The rule against speculative damages prevents a recovery for the breach of a contract by the proprietor of certain toilet articles to include in the printed advertisements of his wares the name of a business firm which had undertaken to sell such goods. *Stevens v. Yale*, (Mich. 1897) 72 N. W. Rep. 5.

Failure to Insert Advertisement. — Where the publishers of a newspaper failed to insert, according to contract, an advertisement of a public sale of real estate, it was held, nevertheless, that they could be held liable in damages only for the amount paid them therefor, anything in excess of this being speculative and uncertain. *Eisenlohr v. Swain*, 35 Pa. St. 107, 78 Am. Dec. 328.

Losses from Wrongful Competition in Business. — There can be no recovery, in an action for the breach of a contract not to sell a certain proprietary article in a certain specified territory, for losses sustained by the plaintiff by reason of the permanent reduction in price of the article necessitated by the defendant's unlawful competition. *Fowle v. Park*, 48 Fed. Rep. 789. But where the lessor of a hotel building bound himself not to engage in a rival business, it was held, upon breach of the covenant, that

the plaintiff might recover for the loss of profits on patrons who left him in consequence thereof. *Smith v. Thielien*, 17 La. Ann. 239.

Loss of Protective Situation. — Alleged damages from an assault and battery or a false imprisonment by reason of the plaintiff's having been compelled to withdraw an application for a situation of profit, or having been delayed in making such application, are too speculative to be recoverable. *Brown v. Cummings*, 7 Allen (Mass.) 507; *Hoey v. Felton*, 11 C. B. N. S. 142, 103 E. C. L. 142.

Damages resulting from the loss of a job of work by reason of the delay of the passenger at the station at which he was ejected have been held too remote. *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, 20 Am. St. Rep. 589. And see *Moore v. Adam*, 12 Chit. Rep. 198, 18 E. C. L. 304; *Hoey v. Felton*, 11 C. B. N. S. 142, 103 E. C. L. 142.

Loss of Prospective Sale or Contract. — The mere fact that since excavations made on the plaintiff's property and on streets contiguous thereto the plaintiffs have not been able to find a purchaser for their property, is too uncertain or remote to constitute a ground for damages. *San Antonio v. Mullaly*, 11 Tex. Civ. App. 596.

Damages for failure to rent rooms in an office building, alleged to have resulted from the breach of a contract to construct an elevator as provided therein, are too uncertain and speculative to be recoverable. *Clifford v. Leroux*, (Tex. Civ. App. 1896) 37 S. W. Rep. 172.

2. See *supra*, this title, *Nominal and Substantial Damages*.

3. *Dullea v. Taylor*, 35 U. C. Q. B. 395. See also *McConaghy v. Pemberton*, 168 Pa. St. 121.

Exchange of Lands on Faith of Representations as to Improvements. — But where one person exchanged lands for lands of very much less value belonging to another, upon the faith of false representations that valuable improvements were to be made upon adjoining lands, it was held, in an action for damages for such false representations, that there might be a recovery, the measure of damages being the difference in the value of the two tracts of land exchanged. *Wilson v. Yocum*, 77 Iowa 569. See also *Fraley v. Bentley*, 1 Dakota 24.

Contracts to Build Railroad or Maintain Station. — Whether, for the breach of a contract to build a railroad within a time specified or to maintain a station or depot at a designated point, there can be a recovery for loss of profits which would have been realized by an owner of contiguous property by reason of an increase in realty value, is a question upon which

sentations of the proprietors, is too speculative to afford a basis for damages.¹

Damages for Removing Debtor's Property. — There can be no recovery against a debtor and another for removing the former's property beyond the reach of an execution on a judgment recovered by the plaintiff, the reason being that it cannot be shown with the requisite certainty that the property could have been subjected but for the defendant's acts.²

b. UNCERTAINTY WHETHER DAMAGE FLOWED FROM DEFENDANT'S ACT. — Where it cannot be shown with reasonable certainty that the damages suffered resulted from the defendant's act there can be no recovery.³

c. UNCERTAINTY AS TO MEASURE OR EXTENT — General Principles. — The rule against the recovery of uncertain damages has been generally directed against uncertainty as to cause, rather than uncertainty as to measure or extent; that is, if it is uncertain whether the defendant's act caused any damage, or whether the damage proved flowed from the defendant's act, there can be no recovery; whereas uncertainty which affects merely the measure or extent of the injury suffered does not bar a recovery.⁴ In other words, the rule against uncertain or contingent damages applies only to such damages as are not the certain results of the breach, and not to such as are the certain results but uncertain in amount.⁵ A person violating a contract should not be permitted to escape liability because the amount of the damages

there is a conflict of opinion. For a discussion of the subject see the titles *RAILROADS; STATIONS (RAILROAD)*.

1. *Fitzsimmons v. Chapman*, 37 Mich. 139, 26 Am. Rep. 503. See also the title *SUBSCRIPTIONS*.

Action on Contract of Guaranty. — In *Arkansas Valley Town, etc., Co. v. Lincoln*, 56 Kan. 145, the defendant induced the plaintiff to remove his store building and stock of goods, at considerable expense, from a village some distance away to a new town site, by a contract of guaranty that a railroad would be constructed and in operation to the town site within a given time. Both parties contemplated the breaking up of plaintiff's established business; and in an action for damages upon the guaranty, the railroad having never been constructed, it was held that the plaintiff's loss of profits in his established business might properly be taken into consideration in connection with other things in estimating the measure of his recovery.

2. *Wellington v. Small*, 3 Cush. (Mass.) 145, 50 Am. Dec. 719. See also *Adler v. Fenton*, 24 How. (U. S.) 407; *Smith v. Blake*, 1 Day (Conn.) 258; *Green v. Kimble*, 6 Blackf. (Ind.) 552; *Lamb v. Stone*, 11 Pick. (Mass.) 527; *Bradley v. Fuller*, 118 Mass. 239; *Hall v. Eaton*, 25 Vt. 458.

Misrepresentations Inducing Creditor to Delay Collection of Debt. — And where a creditor was induced by the misrepresentations of a debtor to delay proceeding at law to collect his debt, whereby the effects of the debtor were seized by other creditors, it was held that damages could not be recovered, for the reason that it could not be shown with certainty that any had been actually suffered. *Bradley v. Fuller*, 118 Mass. 239.

Damages to a Creditor of a Municipal Corporation for breach by the corporation of a contract to provide a sinking fund for the payment of the debts of the corporation, are too uncertain and speculative to be recoverable. *Memphis v. Brown*, 20 Wall. (U. S.) 289.

3. **Where Damages Are So Remote** as not to be directly traceable to the breach of contract, or the result of other intervening causes, they cannot be allowed. *Earl, J., in Wakeman v. Wheeler, etc., Mfg. Co.*, 101 N. Y. 209, 54 Am. Rep. 676.

Disease Caused by Fall. — In the case of *Honston v. Traphagen*, 47 N. J. L. 23, which was an action for damages for the consequences of disease alleged to have been caused by a fall, it was held that in order for a recovery it must be made to appear with reasonable certainty that the fall was the actual cause of the disease.

An Application of Rule as to Proximate Cause. — This proposition, however, is but a branch of the subject of natural and proximate cause, which has already been fully treated. See *supra*, this title, *Natural and Proximate Cause and Consequence*. See also *Grover, J., in Taylor v. Bradley*, 4 Abb. App. Dec. (N. Y.) 336.

4. **Rule as Applied to Breach of Contract.** — "It is sometimes said," said *Grover, J., in Taylor v. Bradley*, 4 Abb. App. Dec. (N. Y.) 363, "that speculative damages cannot be recovered, because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of. The general rule is that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount." See also *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415.

5. *Wakeman v. Wheeler, etc., Mfg. Co.*, 101 N. Y. 205, 54 Am. Rep. 676; *Fraser v. Echo Min., etc., Co.*, 9 Tex. Civ. App. 210.

which he has caused is uncertain.¹ The fact that the full extent of damages for the breach of contract must be a matter of speculation affords no reason for not awarding any damages at all.²

In Many Actions the Damages Are Wholly Uncertain in Extent, at least so far as any pecuniary standard of compensation is concerned. In such cases the amount is ordinarily left to the jury,³ when all facts and circumstances tending to show the probable amount of the damages claimed should be submitted to enable them, in the exercise of good sense and sound judgment, to determine what is a reasonable compensation. These principles apply with especial force to actions of tort.⁴

Where Goods Are Shipped for Public Exhibition at a Fair or Show, and, on account of the carrier's delay in transmission, fail to reach their destination in time for the exhibition, the owner, if he can fix the carrier with notice of the special purpose for which the goods were intended, may recover for anticipated profits and increase of custom in his business expected to result from the exhibit;⁵

1. *Lepage v. Girard*, 4 Rev. Leg. 554; *Earl, J., in Wakeman v. Wheeler, etc., Mfg. Co.*, 101 N. Y. 209, 54 Am. Rep. 676.

Where a Wrong Is Done from Which Pecuniary Injury Results, or where injury is the natural and probable result of a wrong, the injured party is not remediless, although the extent of the injury is not capable of exact proof. *Andrews, C. J., in Butler v. Manhattan R. Co.*, 143 N. Y. 417, 42 Am. St. Rep. 738; *Birmingham v. Lewis*, 92 Ala. 352.

"If it is reasonably sure that loss has been sustained, then you may make the inquiry, though the extent of the loss may in some respects be uncertain." *Bluegrass Cordage Co. v. Luthy*, 98 Ky. 583.

2. Where Full Extent of Damages Matter of Speculation. — See *Cockburn, C. J., in Simpson v. London, etc., R. Co.*, 1 Q. B. Div. 274. In this case the plaintiff, who was a manufacturer of cattle food, was in the habit of exhibiting samples of his goods at agricultural shows, and made a profit by the practice. It appeared that he delivered such samples upon a show-ground, where he had been exhibiting them, to a receiving agent of the defendant's railroad to be carried by a particular day to a show-ground at another place, when and where a similar show, at which he intended to exhibit, was to be held, nothing, however, being expressly said about this intention of the plaintiff. The samples did not arrive at their destination until after the day stipulated, when the exhibition was over, and in an action for breach of contract a verdict was given for damages which included loss of profits.

Failure of Plaintiff to Show Separability Where a Part Too Remote. — It has been held, however, that where on the face of a pleading a portion of the damages claimed were too remote and speculative to be recovered, upon a failure to show what part of the total damages claimed could be ascribed to the other legitimate causes for recovery set up, it must be held insufficient. *Balsh v. Rathbun Co.*, 39 U. S. App. 297.

3. Damages Uncertain — Function of Jury. — *Gilbert v. Kennedy*, 22 Mich. 117; *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34. This is especially the case in actions for personal injuries. See *Birmingham v. Lewis*, 92 Ala. 352.

In *Alabama G. S. R. Co. v. Burgess*, 114

Ala. 587, the court charged the jury that "the impossibility of definitely measuring the damages by a money standard when pain is claimed as an element of damages is no ground for denying pecuniary relief." This charge was held unobjectionable.

Where There Is Some Proof of Substantial Damages, but the amount is entirely uncertain, the courts have sometimes directed the jury to allow the smallest amount which would satisfy the proof. *Strong, J., in Adams Express Co. v. Egbert*, 36 Pa. St. 360.

4. *Gilbert v. Kennedy*, 22 Mich. 117. In this case it is said that in actions of tort the principle is especially applicable that lack of an adequate rule for measuring damages should not result in depriving the injured party of all remedy, because he is not responsible for the lack of a certain measure, the whole case being made against his will by the wrongdoer. See also *Allison v. Chandler*, 11 Mich. 548.

On the other hand, it has been observed that in certain classes of contracts the difficulty in fixing a measure of damages "is not the fault of the law, but of the parties in not making proper provisions in the contract itself for the measure of damages." *Hudson v. Archer*, 9 S. Dak. 240.

Waiver of Tort and Suit on Contract. — Where the tort is waived and action brought for damages for the breach of an implied contract to pay the value of property taken, and the plaintiff cannot establish with certainty the value of the property taken, and the defendant does not, it has been held that reasonable doubts as to the value will be resolved in favor of the plaintiff. *Tea v. Gates*, 10 Ind. 164.

5. Loss of Profits Anticipated from Exhibit at Show. — *Simpson v. London, etc., R. Co.*, 1 Q. B. Div. 274, 3 Cent. L. J. 203; *Kennedy v. American Express Co.*, 22 Ont. App. 279. See also *Jameson v. Midland R. Co.*, 50 L. T. 426.

Conversion of Model Intended for Exhibit — Measure of Damages. — Where, on account of the wrongful conversion of the model of a patented machine intended for exhibit at a fair, the owner was compelled to manufacture another model, and, it not being completed in time, was unable to exhibit it, he was held to be entitled to recover from those who had converted the model, the cost of building the

and where the articles are intended to compete for a prize, may, according to some authorities, recover for his chance of obtaining a premium,¹ but this has been denied.²

5. Recoverability of Profits as Damages — *a. GENERAL PRINCIPLES.* — On account of the nature of the subject, profits have frequently come within the condemnation of the principle under discussion. A statement of frequent occurrence, therefore, is that prospective or anticipated profits are not recoverable, on account of their inherently uncertain and conjectural character.³

second machine rather than the cost of the materials used in the converted model. *Scattergood v. Wood*, 14 Hun (N. Y.) 269.

1. Chance of Prize at Competition. — *Adams Express Co. v. Egbert*, 36 Pa. St. 360. Here it was held, however, that, in the absence of proof of any probability of obtaining the prize, the owner could recover only nominal damages.

2. Watson v. Ambergate, etc., R. Co., 15 Jur. 448, where the court seems to have thought that the proper measure of damages was the value of the labor and materials expended in making the model intended to compete for the prize, and not the chance of obtaining the prize, which was too remote. This case is commented on with disapproval in *Adams Express Co. v. Egbert*, 36 Pa. St. 360.

In *Western Union Tel. Co. v. Crall*, 39 Kan. 580, which was an action against a telegraph company for inaccurate transmission of a message, the damages claimed being the loss of anticipated gains or profits based upon the probability of the plaintiff's horse being able to win a prize at a trotting match, it was held that such damages were too remote, contingent, and speculative. See also *Mizner v. Frazier*, 40 Mich. 592, 29 Am. Rep. 562; *Williamson v. Brandenburg*, 133 Ind. 594; and the title *CARRIERS OF GOODS*, vol. 5, p. 398.

3. Prospective Profits — *England.* — *Marlow v. Lajeunesse*, 18 L. Can. Jur. 188; *Ruthven Woollen Mfg. Co. v. Great Western R. Co.*, 18 U. C. C. P. 316; *Wilson v. Lancashire, etc., R. Co.*, 9 C. B. N. S. 632, 99 E. C. L. 632, 30 L. J. C. P. 232, 7 Jur. N. S. 862, 3 L. T. 859, 9 W. R. 635; *Fitzgerald v. Leonard*, 32 L. R. Ir. 675; *Priestley v. Maclean*, 2 F. & F. 288.

United States. — *Gilpins v. Consequa, Pet.* (C. C.) 85; *Smith v. Condry*, 1 How. (U. S.) 28; *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680; *Foster v. Cleveland, etc., R. Co.*, 56 Fed. Rep. 434; *La Amistad de Rues*, 5 Wheat. (U. S.) 385; *The Amiable Nancy*, 3 Wheat. (U. S.) 546; *Phillips, etc., Constr. Co. v. Seymour*, 91 U. S. 646; *Howard v. Stillwell, etc., Mfg. Co.*, 139 U. S. 199; *The Apollon*, 9 Wheat. (U. S.) 362. And see *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. Rep. 553; *Dusar v. Murgatroyd*, 1 Wash. (U. S.) 13.

Alabama. — *Reed Lumber Co. v. Lewis*, 94 Ala. 626; *Gunter v. Beard*, 93 Ala. 227.

Arkansas. — *Goodell v. Bluff City Lumber Co.*, 57 Ark. 203. And see *Daniels v. Brodie*, 54 Ark. 216.

California. — *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151; *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534; *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93; *Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313; *Yonge v. Pacific Mail Steamship Co.*, 1 Cal. 353; *Giac-*

comini v. Bulkeley, 51 Cal. 261; *Friend, etc., Lumber Co. v. Miller*, 67 Cal. 464.

Colorado. — *Jones v. Nathrop*, 7 Colo. 1.

Connecticut. — *Lewis v. Hartford Dredging Co.*, 68 Conn. 221.

Georgia. — *Cooper v. Young*, 22 Ga. 269, 68 Am. Dec. 502; *Red v. Augusta*, 25 Ga. 386; *Sturgis v. Frost*, 56 Ga. 188; *Lightfoot v. West*, 98 Ga. 546.

Illinois. — *Koch v. Merk*, 43 Ill. App. 26; *Haven v. Wakefield*, 39 Ill. 509; *Moline Water Power Co. v. Waters*, 10 Ill. App. 159; *Strawn v. Cogswell*, 28 Ill. 457; *Frazer v. Smith*, 60 Ill. 145; *Olmstead v. Burke*, 25 Ill. 86; *Chicago, etc., R. Co. v. Ward*, 16 Ill. 522. And see *Miller v. White*, 80 Ill. 580.

Indiana. — *Western Gravel Road Co. v. Cox*, 39 Ind. 260; *Singer v. Farnsworth*, 2 Ind. 597; *Glass v. Garber*, 55 Ind. 336.

Iowa. — *Winne v. Kelley*, 34 Iowa 339; *Howe Mach. Co. v. Bryson*, 44 Iowa 159, 24 Am. Rep. 735; *McCormick v. Vanatta*, 43 Iowa 389.

Kansas. — *Sherman Center Town Co. v. Leonard*, 46 Kan. 354, 26 Am. St. Rep. 101; *Missouri, etc., R. Co. v. Fort Scott*, 15 Kan. 435.

Kentucky. — *Koch v. Godshaw*, 12 Bush (Ky.) 318; *Smith v. Phillips*, (Ky. 1895) 29 S. W. Rep. 358.

Louisiana. — *Grant v. McDonogh*, 7 La. Ann. 447; *Minor v. Picayune*, 13 La. Ann. 564; *Bergen v. New Orleans*, 35 La. Ann. 523; *Blymer Ice Mach. Co. v. McDonald*, 48 La. Ann. 439. And see *Dennery v. Bisa*, 6 La. Ann. 365.

Maine. — *Winslow v. Lane*, 63 Me. 161.

Maryland. — *Shafer v. Wilson*, 44 Md. 268; *Lanahan v. Heaver*, 79 Md. 413.

Massachusetts. — *Waite v. Gilbert*, 10 Cush. (Mass.) 177; *Barnard v. Poor*, 21 Pick. (Mass.) 378; *Ballou v. Farnum*, 11 Allen (Mass.) 73; *Brown v. Smith*, 12 Cush. (Mass.) 366; *Boyd v. Brown*, 17 Pick. (Mass.) 453.

Michigan. — *Friedland v. McNeil*, 33 Mich. 40; *Allis v. McLean*, 48 Mich. 428.

Minnesota. — *Williams v. Wood*, 55 Minn. 323; *Doud v. Duluth Milling Co.*, 55 Minn. 53.

Mississippi. — *Wright v. Petrie*, 1 Smed. & M. Ch. (Miss.) 282.

Missouri. — *Taylor v. Maguire*, 12 Mo. 313, 13 Mo. 517; *Calloway Min., etc., Co. v. Clark*, 32 Mo. 305.

Nebraska. — *Denver, etc., R. Co. v. Hutchins*, 31 Neb. 572.

New York. — *Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Latini v. Davis*, Hill & D. Supp. (N. Y.) 9; *Manhattan Stamping Works v. Koehler*, 45 Hun (N. Y.) 150; *Havemeyer v. Havemeyer*,

Earlier Cases. — It has been said in this connection that the earlier cases, both English and American, generally concurred in the exclusion, in actions of tort as well as on contract, of profits which merely might have been realized had the injury not been done or the contract been performed; but that this early policy

45 N. Y. Super. Ct. 464; *Bennett v. Drew*, 3 Bosw. (N. Y.) 355; *Lincoln v. Saratoga*, etc., R. Co., 23 Wend. (N. Y.) 425; *Beals v. Terry*, 2 Sandf. (N. Y.) 127; *Scott v. Rogers*, 4 Abb. App. Dec. (N. Y.) 161, note; *Dewint v. Wiltsie*, 9 Wend. (N. Y.) 325; *Driggs v. Dwight*, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283; *Giles v. O'Toole*, 4 Barb. (N. Y.) 263; *Mitchell v. Cornell*, 44 N. Y. Super. Ct. 401; *Wehle v. Haviland*, 69 N. Y. 451; *Phyfe v. Manhattan R. Co.*, 30 Hun (N. Y.) 377; *Kelly v. Miles*, 58 N. Y. Super. Ct. 495; *Hunt v. Hoboken Land Imp. Co.*, 3 E. D. Smith (N. Y.) 144; *Van Ness v. Fisher*, 5 Lans. (N. Y.) 236; *Freeman v. Clute*, 3 Barb. (N. Y.) 427.

North Carolina. — *Boyle v. Reeder*, 1 Ired. L. (23 N. Car.) 607; *Fagan v. Newson*, 1 Dev. L. (12 N. Car.) 20.

Ohio. — *Davis v. Cincinnati*, etc., R. Co., 1 Disney (Ohio) 23; *Rhodes v. Baird*, 16 Ohio St. 573; *Cincinnati v. Evans*, 5 Ohio St. 594; *Knorr v. Reedy*, (Cinc. Super. Ct.) 27 Ohio L. J. 103.

Oregon. — *Drake v. Sears*, 8 Oregon 209.

Pennsylvania. — *McKnight v. Ratcliff*, 44 Pa. St. 156; *Fleming v. Beck*, 48 Pa. St. 309; *Pittsburg Coal Co. v. Foster*, 59 Pa. St. 365; *Rogers v. Bemus*, 69 Pa. St. 432. And see *Lentz v. Choteau*, 42 Pa. St. 435.

South Carolina. — *Sitton v. Macdonald*, 25 S. Car. 68, 60 Am. Rep. 484.

Tennessee. — *McWhirter v. Douglas*, 1 Coldw. (Tenn.) 591; *Porter v. Woods*, 3 Humph. (Tenn.) 56, 39 Am. Dec. 153.

Texas. — *Varner v. Dexter Gin*, etc., Co-operative Assoc., (Tex. Civ. App. 1896) 39 S. W. Rep. 206; *Houston*, etc., R. Co. v. Hill, 63 Tex. 381, 51 Am. Rep. 642; *De la Zorda v. Korn*, 25 Tex. Supp. 188; *Hamilton v. Schumacher*, 4 Tex. App. Civ. Cas., § 212; *Fraser v. Echo Min.*, etc., Co., 9 Tex. Civ. App. 210; *Holliday v. Brosig*, (Tex. Civ. App. 1895) 30 S. W. Rep. 841.

Vermont. — *Dennis v. Stoughton*, 55 Vt. 371.

West Virginia. — *James v. Adams*, 8 W. Va. 568.

Wisconsin. — *Wright v. Mulvaney*, 78 Wis. 89, 23 Am. St. Rep. 393; *Ramsey v. Holmes Electric Protective Co.*, 85 Wis. 174.

Profits Inherently Difficult of Accurate Estimate. — In the case of *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756, *Johnson, J.*, delivering the opinion of the court, said that "it is very true that there is great difficulty in making an accurate estimate of future profits. This difficulty is inherent in the nature of the inquiry."

"All the Authorities Agree," said *Johnson, J.*, in *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614, "that profits which are conjectural and cannot be measured by the usual rules of evidence to a reasonable degree of certainty, are not recoverable."

A plaintiff, it has been held, will not ordinarily be allowed to give evidence of or to recover profits or expected gains, for it is generally conjectural whether there would be any

profits or gains. *Riely, J.*, in *Burruss v. Hines*, 94 Va. 413.

Mere Speculative Profits Irrecoverable — Rule in Hadley v. Baxendale Considered. — "It must not be supposed," said *Depue, J.*, in *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438, "that under the principle of *Hadley v. Baxendale*, 9 Exch. 341, mere speculative profits, such as might be conjectured to have been the probable results of an adventure which was defeated by the breach of the contract sued on, the gains from which are entirely conjectural, with respect to which no means exist of ascertaining, even approximately, the probable results, can, under any circumstances, be brought within the range of damages recoverable. The cardinal principle in relation to the damages to be compensated for on the breach of a contract, that the plaintiff must establish the quantum of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty."

Possible and Even Probable Profits Irrecoverable. — In *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519, it is said: "What are termed speculative damages — that is, possible or even probable profits, that it is claimed could have been realized but for the tortious act or breach of contract charged against defendant — are too remote, and cannot be recovered." See also *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134; *Higgins v. Mansfield*, 62 Ala. 267; *Burton v. Holley*, 29 Ala. 318, 65 Am. Dec. 401; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *French v. Ramge*, 2 Neb. 254; *Olmstead v. Burke*, 25 Ill. 86.

Speculative Profits — Why Not Recoverable. — Speculative profits are too remote to be recoverable as damages, because they are not presumed to have been contemplated by the parties at the time of making the contract. *Tuck, J.*, in *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635.

Profits on Goods Lost at Sea. — *Selden, J.*, delivering the opinion of the court in *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, said: "In cases of illegal capture, or of the insurance of goods lost at sea, there can be no recovery for the probable loss of profits at the port of destination. The principal reason for the difference between these cases and that of the failure to transport goods upon land is that in the latter case the time when the goods should have been delivered, and consequently that when the market price is to be taken, can be ascertained with reasonable certainty; while in the former the fluctuation of the markets and the contingencies affecting the length of the voyage render every calculation of profits speculative and unsafe."

Loss of Dental Instruments — Earnings as Damages. — In the case of *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356, which was an action by

of the exclusion of profits has been considerably modified with reference to torts, and somewhat, though less so, in actions on contract.¹

Conflict of Authority. — However this may be, there is certainly much conflict in the decisions in the application of the principles, directly opposite results being observable in many cases of almost exact analogy as to facts.² One thing at least, however, may be regarded as now settled: there is no ground for excluding recovery of profits simply because profits.³ It is believed that in the main the general rules controlling other elements of damage are applicable without exception to profits,⁴ with only, perhaps, a greater conflict among the cases than in other branches of the subject.

Profits Dependent upon Fluctuation of Markets. — Profits which depend upon the fluctuation of the markets and the hazards and chances of business are considered too contingent and speculative to enter into a safe or reasonable estimate of damages.⁵ Thus any supposed successful operation the party might have made if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate of damages; for, besides the uncertain and contingent issue of such an operation in itself, it has no legal or necessary connection with the stipulations

a dentist for the loss of a set of instruments used in the practice of his profession, it was held that there could be no recovery for alleged profits and earnings which the plaintiff might have made if the loss had not occurred.

Future Public Performances of Vocalist. — The profits anticipated from the future public performances of a vocalist are too speculative and conjectural to form an element of damages in an action for breach of contract. *New York Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 234. But in the case of *Savery v. Ingersoll*, 46 Hun (N. Y.) 176, it was held that for breach of a contract by a lecturer to deliver a lecture, damages might be recovered by the complaining party for the loss of probable profits.

For Breach of a Contract to Form a Copartnership whereby the plaintiff sold out his business in the town in which he was located and bound himself not to resume it there, it was held that there might be a substantial recovery in damages for all which could be shown up to the date of the breach of the contract, but not for prospective profits. *Skinner v. Tinker*, 34 Barb. (N. Y.) 333.

1. *England.* — *Flureau v. Thornhill*, 2 W. Bl. 1078; *Robinson v. Harmon*, 1 Exch. 850.

United States. — *The Schooner Lively*, 1 Gall. (U. S.) 315; *Jennings v. The Brig Perseverance*, 3 Dall. (U. S.) 338; *The Anna Maria*, 2 Wheat. (U. S.) 327; *The Amiable Nancy*, 3 Wheat. (U. S.) 560; *The Josefa Segunda*, 5 Wheat. (U. S.) 358; *Smith v. Condry*, 1 How. (U. S.) 28.

Massachusetts. — *Weld v. Nichols*, 17 Pick. (Mass.) 543.

New Jersey. — *Depue, J., in Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438.

New York. — *Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250; *Freeman v. Clute*, 3 Barb. (N. Y.) 424.

Pennsylvania. — *Bitner v. Brough*, 11 Pa. St. 127.

Rule that Profits Are Not Recoverable Subject to Many Exceptions. — In the case of *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66, the court said: "Evidence as to profits, as a general rule, is rejected, because generally they

are uncertain and contingent, depending upon other circumstances than the injurious act of the defendants, and not the natural result of it. Nevertheless, the general rule is subject to many exceptions; and it will be seen from the cases upon this subject that wherever a loss of profits is the natural and necessary result of the act charged — such as the party probably would have made, not what by chance he might have made, but what any prudent man must naturally have made — evidence has been, if not always, most usually admitted as to them."

Statement of Texas Doctrine. — *Willie, C. J.*, delivering the opinion of the court in *Houston, etc., R. Co. v. Hill*, 63 Tex. 381, 51 Am. Rep. 642, said: "Our courts have not gone so far as some others in allowing uncertain profits as a measure of damages. We have not allowed the value of lumber that a mill could have sawed, *Stark v. Alford*, 49 Tex. 260; nor the amount of crop one could have raised, where his crop has been destroyed by the breach of contract or even tortious act of another, *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689, 61 Tex. 345, 48 Am. Rep. 280; *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 456; *Texas, etc., R. Co. v. Young*, 60 Tex. 201. Yet the amount of lumber that a mill could saw, or of crop that land would produce, might possibly be approximated from the past experience of many years."

2. **Conflict of Cases.** — See *Howard v. Stillwell, etc., Mfg. Co.*, 139 U. S. 199, *per Mr. Justice Lamar*.

3. See *infra*, this section, the next subdivision.

4. See *Brayton, J., in Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66.

5. *Nelson, C. J., in Masterson v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38.

Illustration — Anticipated Profits of Whaling Voyage. — "For instance," said *Depue, J., in Wolcott v. Mount*, 36 N. J. L. 271, 13 Am. Rep. 438, "profits expected to be made from a whaling voyage, the gains from which depend in a great measure upon chance, are too purely conjectural to be capable of entering into com-

between the parties, and cannot therefore be presumed to have entered into their consideration at the time of contracting.¹

For Breach of Contract by a Lessor by failure to repair, the lessee cannot recover damages for such profits as he might have made if the lessor had complied with his contract.² Nor, in an action against a lessor for refusing to deliver possession to the plaintiff, who had leased the demised premises for the purpose of conducting a millinery business, could there be, it was held, a recovery on the score of profits which would have been made in the business but for the refusal to deliver possession complained of.³

For Breach of Contract to Furnish, Deliver, or Repair Machinery for manufacturing purposes, profits anticipated from the use of such machinery cannot be allowed as damages.⁴

pensation for the nonperformance of a contract by reason of which the adventure was defeated." And see *La Amistad de Rues*, 5 Wheat. (U. S.) 385; *The Amiable Nancy*, 3 Wheat. (U. S.) 546.

1. *Nelson, C. J.*, in *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38. And see *Drake v. Sears*, 8 Oregon 209; *Howard v. Stillwell*, etc., Mfg. Co., 139 U. S. 199; *Ruthven Woollen Mfg. Co. v. Great Western R. Co.*, 18 U. C. C. P. 316.

Action for Conversion of Threshing Machine. — In an action for the conversion of a threshing machine it was held that profits which the mortgagors might have made from the performance of particular threshing contracts if the defendant and mortgagee had not deprived them of the use of the machine were too conjectural and uncertain to furnish a proper basis of damages for the conversion. *Cushing v. Seymour*, 30 Minn. 301. See also *Williams v. Wood*, 55 Minn. 323. Compare, however, the case of *Frazer v. Smith*, 60 Ill. 145, with reference to the effect of outstanding contracts to be performed by the machinery to be furnished.

Destruction by Fire of Standing Timber. — Where the plaintiffs had made a contract with the owners of standing timber to cut, purchase, and cart it away at a certain price per cord, and fire, the result of the defendant's negligence, destroyed the wood, in an action for damages it was held that the plaintiffs could not recover the profits they would have made on the standing timber had it not been destroyed. *Barnard v. Poor*, 21 Pick. (Mass.) 378.

2. **Breach by Lessor of Contract to Repair.** — *Lightfoot v. West*, 98 Ga. 546; *Winne v. Kelley*, 34 Iowa 339. And see also *Rogers v. Bemus*, 69 Pa. St. 432. But see the case of *Stewart v. Lanier House Co.*, 75 Ga. 582, where the lessee was allowed damages for the loss of patronage he might have received but for the lessor's breach of a contract to repair. See the title *LEASES*.

3. *Giles v. O'Toole*, 4 Barb. (N. Y.) 261. And see *Red v. Augusta*, 25 Ga. 386; *Alexander v. Bishop*, 59 Iowa 572; *Smith v. Phillips*, (Ky. 1895) 29 S. W. Rep. 358; *Kelly v. Miles*, 58 N. Y. Super. Ct. 495. Compare *Jaques v. Millar*, 6 Ch. Div. 153. See the title *LEASES*.

Breach of Contract to Lease Store — Evidence to Establish Measure of Damages. — In the case of *Dennery v. Bisa*, 6 La. Ann. 365, it was held that in a suit for damages for failure to lease a store according to agreement, evidence of what profits other persons made in the same

kind of business as that followed by the plaintiff was not sufficient *per se* to warrant a judgment for damages against the defendant for the loss of such profits.

4. **Breach of Contract to Furnish, Deliver, or Repair Machinery — England.** — *Marlow v. Lajeunesse*, 18 L. Can. Jur. 188; *Ruthven Woollen Mfg. Co. v. Great Western R. Co.*, 18 U. C. C. P. 316.

United States. — *Howard v. Stillwell*, etc., Mfg. Co., 139 U. S. 199.

Alabama. — *Reed Lumber Co. v. Lewis*, 94 Ala. 626.

Arkansas. — *Goodell v. Bluff City Lumber Co.*, 57 Ark. 203.

Illinois. — *Consumers' Pure Ice Co. v. Jenkins*, 58 Ill. App. 519; *Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626; *Chicago City R. Co. v. Howison*, 86 Ill. 215; *Frazer v. Smith*, 60 Ill. 145; *Benton v. Fay*, 64 Ill. 417; *Green v. Williams*, 45 Ill. 206; *Hair v. Barnes*, 26 Ill. App. 580.

Louisiana. — *Blymer Ice Mach. Co. v. McDonald*, 48 La. Ann. 439.

Massachusetts. — *Fox v. Harding*, 7 Cush. (Mass.) 516.

Michigan. — *Allis v. McLean*, 48 Mich. 428; *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458.

North Carolina. — *Boyle v. Reeder*, 1 Ired. L. (23 N. Car.) 607.

Pennsylvania. — See *Rogers v. Bemus*, 69 Pa. St. 432.

Contract to Repair Mill. — In an action for breach of a contract to repair mill machinery within the time agreed upon, estimated profits which it was alleged the mill would have made but for its enforced idleness are not recoverable as damages. *Coweta Falls Mfg. Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602.

Delay in Delivering Logs. — *Watson v. Kirby*, 112 Ala. 436. Compare *Boston v. Henderson*, 92 Mich. 606.

Loss of Profits on Mill Not Yet Built. — *Bridges v. Lanham*, 14 Neb. 369, 45 Am. Rep. 121. See also *Red v. Augusta*, 25 Ga. 386.

Defective Machinery for Boat — Marine Collisions and Seizures. — In an action for the price stipulated for the building of a steamboat the plaintiff is entitled to recover the full amount, without any deduction by way of recoupment of damages to the defendant in consequence of damage sustained by the latter for the loss of trips and the profits which could not be made by reason of defects and imperfections in the boat and its machinery. *Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250.

b. REQUISITES TO RECOVERY — (1) In General — Ground of Exclusion. — As has already been stated, there is no reason for the exclusion of profits because profits simply.¹ Where profits are spoken of as not the subject of damages it will be found that something contingent upon future bargains or speculations or conditions of the market is referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost.² And in one case it was declared, with reference to profits, that "when excluded it is on the ground that there are no criteria by which to estimate the amount with the certainty on which the adjudications of courts and the findings of juries should be based."³

It Follows, Therefore, as a General Rule, that if it is made to appear reasonably certain that profits would have been made or have been lost but for or by the act complained of, and sufficient evidence is given of the amount, there may be a recovery in damages therefor.⁴ And the same observation has been made

Nor, it was held in an action for damages for delay in the building of a boat hull, can there be a recovery of merely probable profits which might have been made during the period of delay. *Taylor v. Maguire*, 13 Mo. 517. Again, in an action for damages for a collision, it was held that there could be no recovery for the anticipated profits on the return trip, which the plaintiff's boat had been disabled from making on account of the collision. *Hunt v. Hoboken Land Imp. Co.*, 3 E. D. Smith (N. Y.) 141. And see also the case of *Callaway Min., etc., Co. v. Clark*, 32 Mo. 305, excluding the recovery of profits in a case of the illegal seizure and detention of a steamboat.

Machinery for Manufacture of Linseed Oil. — *Freeman v. Clute*, 3 Barb. (N. Y.) 427.

Damages for Breach of a Contract to Manufacture and Deliver a Carriage. — *Marlow v. Lajeunesse*, 18 L. Can. Jur. 188.

1. Rationale of Rule Excluding Profits. — "It is a well-established rule of the common law," said Selden, J., in *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, "that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should, *per se*, prevent their allowance."

In the case of *Brigham v. Carlisle*, 78 Ala. 249, 56 Am. Rep. 28, it was said, with reference to the exclusion of profits as damages in actions for breach of contract, that "when not allowed because speculative, contingent, and uncertain, their exclusion is founded by some on the ground of remoteness, and by others on the presumption that they are not in the legal contemplation of the parties."

With reference to the principle that damages which are speculative or conjectural cannot be recovered, *Montgomery, J.*, in *Fell v. Newberry*, 106 Mich. 542, said: "To this class belong profits that cannot be fairly established by proof, not because the loss of profits should not be compensated, but solely because of the inability to estimate or determine the amount." And see *Clopton, J.*, in *Brigham v. Carlisle*, 78 Ala. 249, 56 Am. Rep. 28; *Brayton, J.*, in *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66.

2. Philadelphia, etc., R. Co. v. Howard, 13 How. (U. S.) 344.

Statement of Rule. — The rule is thus tersely stated by Selden, J., in *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718: "Profits which would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not."

3. Clopton, J., in *Brigham v. Carlisle*, 78 Ala. 249, 56 Am. Rep. 28.

4. General Rule — Reasonable Evidence as to Amount — England. — *Waters v. Towers*, 20 Eng. L. & Eq. 410.

Canada. — *Turner v. Burns*, 24 Ont. Rep. 28.

United States. — *Cole v. U. S.*, 23 Ct. of Cl. 341; *Hitchcock v. Galveston*, 3 Woods (U. S.) 287; *Adams's Case*, 1 Ct. of Cl. 106; *Dean v. Mason*, 20 How. (U. S.) 198; *Moore v. Lawrence*, 16 Fed. Rep. 87; *Pittsburgh Bessemer Steel Rail Co. v. Hinckley*, 17 Fed. Rep. 584; *U. S. v. Behan*, 110 U. S. 338; *Schneider v. U. S.*, 19 Ct. of Cl. 547; *Field's Case*, 16 Ct. of Cl. 434; *Philadelphia, etc., R. Co. v. Howard*, 13 How. (U. S.) 307; *Fisher v. Newark City Ice Co.*, 17 U. S. App. 514; *Safety Insulated Wire, etc., Co. v. Baltimore*, 66 Fed. Rep. 140, 25 U. S. App. 166; *Howard v. Stillwell, etc., Mfg. Co.*, 139 U. S. 199; *Anvil Min. Co. v. Humble*, 153 U. S. 540; *Skelsey v. U. S.*, 23 Ct. of Cl. 61; *Western Union Tel. Co. v. Hall*, 124 U. S. 444.

Alabama. — *Brigham v. Carlisle*, 78 Ala. 249, 56 Am. Rep. 28; *Robinson v. Bullock*, 66 Ala. 548.

Arkansas. — *McDaniel v. Crabtree*, 21 Ark. 431.

California. — *Nightingale v. Scannell*, 18 Cal. 315; *Cox v. McLaughlin*, 54 Cal. 605.

Florida. — *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356.

Georgia. — *Rice v. Caudle*, 71 Ga. 605; *Smith v. Eubanks*, 72 Ga. 280; *Fontaine v. Baxley*, 90 Ga. 416.

Illinois. — *Alphin v. Working*, 32 Ill. App. 178; *Chicago v. Huenerbein*, 85 Ill. 594, 28 Am. Rep. 626.

Indiana. — *Shelbyville Lateral Branch R. Co. v. Lewark*, 4 Ind. 471; *Evans v. Elliott*, 20 Ind. 283, 83 Am. Dec. 319. And see *Jackson v. Stanfield*, 137 Ind. 592.

Kansas. — *Brown v. Hadley*, 43 Kan. 267.

Kentucky. — *Thompson v. Jackson*, 14 B. Mon. (Ky.) 92.

in this connection with reference to the recoverability of profits as to other elements of damage, — that it is not so much an uncertainty as to their value or extent as it is whether the profits claimed would have been derived at all which affects the right of recovery.¹

In the Case of Contracts, however, it seems in most cases at least, that whenever it can be shown that profits have been lost at all, the proof of their extent would not be a matter of difficulty.²

Natural and Probable Consequences. — What has been said, however, is not intended to exclude or obscure the requirement that the loss of profits must also be the natural or proximate consequence of the defendant's act, or, for considerations stated in another place, there can be no recovery.³

(2) *Rule in Case of Contracts* — (a) **Natural and Probable Consequence.** — As in the case with reference to other elements of damage, in order that profits lost may be recoverable, it must be shown that the loss was the natural and probable result of the breach of contract.⁴

Louisiana. — *Haven v. Hudson*, 12 La. Ann. 660; *Forrest v. Caldwell*, 5 La. Ann. 220; *Smith v. Thielen*, 17 La. Ann. 239.

Maryland. — *Abbott v. Gatch*, 13 Md. 314, 71 Am. Dec. 635.

Massachusetts. — *Fox v. Harding*, 7 Cush. (Mass.) 516.

Michigan. — *Lee v. Briggs*, 99 Mich. 487; *Dykema v. Minneapolis, etc., R. Co.*, 101 Mich. 47; *Leonard v. Beaudry*, 80 Mich. 163; *Atkinson v. Morse*, 63 Mich. 276; *Boston v. Henderson*, 92 Mich. 606; *Goodrich v. Hubbard*, 51 Mich. 63; *Allison v. Chandler*, 11 Mich. 542.

Minnesota. — *Fairchild v. Rogers*, 32 Minn. 260; *Lathrop v. O'Brien*, 44 Minn. 15; *Singer Mfg. Co. v. Potts*, 59 Minn. 240; *Cargill v. Thompson*, 57 Minn. 534.

Mississippi. — *Vicksburg, etc., R. Co. v. Ragsdale*, 46 Miss. 458.

Missouri. — *Stewart v. Patton*, 65 Mo. App. 21, 2 Mo. App. Rep. 1143; *Green v. Cole*, (Mo. 1894) 24 S. W. Rep. 1058; *Goldman v. Wolff*, 6 Mo. App. 490.

New York. — *Devlin v. New York*, 4 Misc. Rep. (N. Y. C. Pl.) 106; *Snow v. Pulitzer*, 66 Hun (N. Y.) 329; *Savery v. Ingersoll*, 46 Hun (N. Y.) 176; *Depew v. Ketchum*, 75 Hun (N. Y.) 227; *Dickinson v. Hart*, 66 Hun (N. Y.) 631, 50 N. Y. St. Rep. 504, 142 N. Y. 183; *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Skinner v. Dayton*, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Durkee v. Mott*, 8 Barb. (N. Y.) 423; *Lavens v. Lieb*, 12 N. Y. App. Div. 487; *Dart v. Laimbeer*, 107 N. Y. 664, 12 N. Y. St. Rep. 48.

North Carolina. — *Atkinson v. Pack*, 114 N. Car. 597; *Oldham v. Kerchner*, 79 N. Car. 106, 28 Am. Rep. 302; *Sledge v. Reid*, 73 N. Car. 440.

Oregon. — *Wisner v. Barber*, 10 Oregon 342.

Pennsylvania. — *Nixon v. Myers*, 141 Pa. St. 477; *Hoy v. Grenoble*, 34 Pa. St. 9, 75 Am. Dec. 628; *Imperial Coal Co. v. Port Royal Coal Co.*, 138 Pa. St. 45.

Rhode Island. — *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66.

Tennessee. — *Smith v. O'Donnell*, 8 Lea (Tenn.) 468.

Texas. — *Hearne v. Garrett*, 49 Tex. 619; *Equitable Mortg. Co. v. Weddington*, 2 Tex.

Civ. App. 373; *Yoakum v. Dunn*, 1 Tex. Civ. App. 524.

Utah. — *Hawley v. Corey*, 9 Utah 175.

Vermont. — *Morey v. King*, 49 Vt. 304.

Virginia. — *Burruss v. Hines*, 94 Va. 413; *Bolling v. Lersner*, 26 Gratt. (Va.) 36.

Washington. — *Watson v. Gray's Harbor Brick Co.*, 3 Wash. 283.

West Virginia. — *James v. Adams*, 8 W. Va. 568.

Wisconsin. — *Treat v. Hiles*, 81 Wis. 280; *Ramsey v. Holmes Electric Protective Co.*, 85 Wis. 174; *Tufts v. Weinfeld*, 88 Wis. 647; *Corbett v. Anderson*, 85 Wis. 218; *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318, 82 Am. Dec. 679.

1. *Clopton, J.*, in *Brigham v. Carlisle*, 78 Ala. 249, 56 Am. Rep. 28; *Montgomery, J.*, in *Fell v. Newberry*, 106 Mich. 542; *Taylor v. Bradley*, 4 Abb. App. Dec. (N. Y.) 363; *Brayton, J.*, in *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66; *Burruss v. Hines*, 94 Va. 413; *James v. Adams*, 8 W. Va. 568.

2. See *Brigham v. Carlisle*, 78 Ala. 248, 56 Am. Rep. 28, *per Clopton, J.*

3. See *supra*, this title, *Natural and Proximate Cause and Consequence*.

Loss of profits consequent upon a tort as well as upon a breach of contract are allowed, provided they are such as might naturally be expected to follow from a wrongful act, and are certain both in their nature and in respect to the cause from which they proceed. *Marquart v. La Farge*, 5 Duer (N. Y.) 565; *Schile v. Brokhahus*, 80 N. Y. 614.

4. **Natural and Probable Consequence** — *England.* — *Wilson v. Lancashire, etc., R. Co.*, 9 C. B. N. S. 632, 99 E. C. L. 632.

United States. — *Safety Insulated Wire, etc., Co. v. Baltimore*, 66 Fed. Rep. 140, 25 U. S. App. 168.

Georgia. — *Cooper v. Young*, 22 Ga. 269, 68 Am. Dec. 502.

Kansas. — *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614.

New Jersey. — *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425.

New York. — *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Messmore v. New York Shot, etc., Co.*, 40 N. Y. 422; *White v. Miller*, 7 Hun (N. Y.) 427, 71 N. Y. 133, 27 Am. Rep. 13.

(b) **Where Profits the Very Object of the Contract.**—In many cases, profits are the very object of and inducement to the contract and so understood by both parties, and then, therefore, they are not only recoverable but constitute the true and exclusive measure of damages to the extent to which they may be ascertained.¹ Thus where two parties enter into a contract by which one

Oregon.—*Wisner v. Barber*, 10 *Oregon* 342.
See also *supra*, this title, *Natural and Probable Cause and Consequence*.

1. Where Profits Object of Contract—England.
—*Richardson v. Mellish*, 2 *Bing.* 229, 9 *E. C. L.* 391.

United States.—*Adams's Case*, 1 *Ct. of Cl.* 106; *Philadelphia, etc., R. Co. v. Howard*, 13 *How. (U. S.)* 344; *Fisher v. Newark City Ice Co.*, 17 *U. S. App.* 514; *Moore v. Lawrence*, 16 *Fed. Rep.* 87; *Pittsburgh Bessemer Steel Rail Co. v. Hinkley*, 17 *Fed. Rep.* 584; *U. S. v. Behan*, 110 *U. S.* 338; *Schneider v. U. S.*, 19 *Ct. of Cl.* 547; *Field's Case*, 16 *Ct. of Cl.* 434; *Cook v. Hamilton County*, 6 *McLean (U. S.)* 612.

Alabama.—*Robinson v. Bullock*, 66 *Ala.* 548.

California.—*Cox v. McLaughlin*, 54 *Cal.* 605; *Stoddard v. Treadwell*, 26 *Cal.* 307.

Colorado.—*Goldhammer v. Dyer*, 7 *Colo.* App. 29.

Georgia.—*Smith v. Eubanks*, 72 *Ga.* 280; *Rice v. Caudle*, 71 *Ga.* 605; *Stewart v. Lanier House Co.*, 75 *Ga.* 582. And see *Fontaine v. Baxley*, 90 *Ga.* 416.

Illinois.—*Allphin v. Working*, 32 *Ill. App.* 178; *Christian County v. Overholt*, 18 *Ill.* 223; *Palm v. Ohio, etc., R. Co.*, 18 *Ill.* 217.

Indiana.—See *Jackson v. Stanfield*, 137 *Ind.* 592.

Kansas.—See *Brown v. Hadley*, 43 *Kan.* 267.
Kentucky.—*Thompson v. Jackson*, 14 *B. Mon. (Ky.)* 92.

Massachusetts.—*Cutting v. Grand Trunk R. Co.*, 13 *Allen (Mass.)* 385; *Fox v. Harding*, 7 *Cush. (Mass.)* 523; *Somers v. Wright*, 115 *Mass.* 298.

Michigan.—*Lee v. Briggs*, 99 *Mich.* 487; *Leonard v. Beaudry*, 80 *Mich.* 163, 68 *Mich.* 312; *Atkinson v. Morse*, 63 *Mich.* 276; *Goodrich v. Hubbard*, 51 *Mich.* 63; *Fell v. Newberry*, 106 *Mich.* 542; *Burrell v. New York, etc., Solar Salt Co.*, 14 *Mich.* 34; *Cuddy v. Major*, 12 *Mich.* 368; *Clark v. Moore*, 3 *Mich.* 55.

Minnesota.—*Singer Mfg. Co. v. Potts*, 59 *Minn.* 240; *Dickinson, J., in Fairchild v. Rogers*, 32 *Minn.* 269; *Silberstein v. Duluth News-Tribune Co.*, (*Minn.* 1897) 71 *N. W. Rep.* 622. And see *Cargill v. Thompson*, 57 *Minn.* 534.

Missouri.—*Goldman v. Wolff*, 6 *Mo. App.* 499; *Green v. Cole*, (*Mo.* 1894) 24 *S. W. Rep.* 1058.

Nebraska.—*Kreamer v. Irwin*, 46 *Neb.* 827.
New York.—*Dillon v. Anderson*, 43 *N. Y.* 237; *Devlin v. New York*, 4 *Misc. Rep. (N. Y. C. Pl.)* 106; *Savery v. Ingersoll*, 46 *Hun (N. Y.)* 176; *Depew v. Ketchum*, 75 *Hun (N. Y.)* 227; *Durkee v. Mott*, 8 *Barb. (N. Y.)* 423; *Bagley v. Smith*, 10 *N. Y.* 489, 61 *Am. Dec.* 756, 19 *How. Pr. (N. Y.)* 5; *Taylor v. Bradlev*, 39 *N. Y.* 129, 100 *Am. Dec.* 415; *Davis v. Talcott*, 14 *Barb. (N. Y.)* 624; *Griffin v. Colver*,

22 *Barb. (N. Y.)* 590; *Masterton v. Brooklyn*, 7 *Hill (N. Y.)* 61, 42 *Am. Dec.* 38; *St. John v. New York*, 6 *Duer (N. Y.)* 322; *Heineman v. Heard*, 2 *Hun (N. Y.)* 332; *Jones v. Judd*, 4 *N. Y.* 414; *White v. Miller*, 71 *N. Y.* 133, 27 *Am. Rep.* 13; *Earl, J., in Wakeman v. Wheeler, etc., Mfg. Co.*, 101 *N. Y.* 209, 54 *Am. Rep.* 676. And see *Lydecker v. Valentine*, 71 *Hun (N. Y.)* 194; *Crane v. Powell, (C. Pl.)* 19 *N. Y. Supp.* 220; *Dickinson v. Hart*, 66 *Hun (N. Y.)* 631, 50 *N. Y. St. Rep.* 504.

North Carolina.—*Oldham v. Kerchner*, 79 *N. Car.* 106, 28 *Am. Rep.* 302; *Atkinson v. Pack*, 114 *N. Car.* 597.

Pennsylvania.—*Hoy v. Gronoble*, 34 *Pa. St.* 9, 75 *Am. Dec.* 628; *Nixon v. Myers*, 141 *Pa. St.* 477; *Imperial Coal Co. v. Port Royal Coal Co.*, 138 *Pa. St.* 45; *Pennypacker v. Jones*, 106 *Pa. St.* 237.

Tennessee.—*Smith v. O'Donnell*, 8 *Lea (Tenn.)* 468.

Texas.—*Equitable Mortg. Co. v. Weddington*, 2 *Tex. Civ. App.* 373.

Utah.—*Hawley v. Corey*, 9 *Utah* 175.

Vermont.—*Morey v. King*, 49 *Vt.* 304.

Virginia.—*Kendall Bank Note Co. v. Sink-ing Fund Com'rs*, 79 *Va.* 573.

Wisconsin.—*Tufts v. Weinfeld*, 88 *Wis.* 647; *Treat v. Hiles*, 81 *Wis.* 280; *Corbett v. Anderson*, 85 *Wis.* 218.

Illustrations.—The rule stated above has been applied in the following cases:

Contract to Let Farm on Shares.—*Wolf v. Studebaker*, 65 *Pa. St.* 461; *Hoy v. Gronoble*, 34 *Pa. St.* 9, 75 *Am. Dec.* 628; *Taylor v. Bradley*, 39 *N. Y.* 129, 100 *Am. Dec.* 415. And see *Depew v. Ketchum*, 75 *Hun (N. Y.)* 227.

Cultivation of Fruit on Shares.—*Shoemaker v. Acker*, 116 *Cal.* 239. *Compare*, however, *Rhodes v. Baird*, 16 *Ohio St.* 573.

Contract to Work Quarry on Shares.—*Treat v. Hiles*, 81 *Wis.* 280.

Management of Hotel on Shares.—*Crittenden v. Johnston*, 7 *N. Y. App. Div.* 258.

See also the case of *Goldhammer v. Dyer*, 7 *Colo. App.* 29, where the plaintiff, a boarding-house keeper, was, in an action for breach of a contract to furnish groceries on credit, permitted to prove loss of profits. Evidence of the capacity of the house and the cost of running it was admitted in this connection. But a mere sub-lessee of a boarding-house with no rights thereto surviving the original term cannot recover damages for expulsion from the premises on process in a cause to which he is not a party, beyond the actual injury done to his property in its removal from the premises. *Miller v. White*, 80 *Ill.* 580.

Contract to Grind Corn.—*Oldham v. Kerchner*, 79 *N. Car.* 106, 28 *Am. Dec.* 302.

Contract to Deliver Hogs for Slaughter.—*Thompson v. Jackson*, 14 *B. Mon. (Ky.)* 92.

Contract to Ship Crop to Factor.—*Haven v. Hudson*, 12 *La. Ann.* 660; *Moore v. Lawrence*, 16 *Fed. Rep.* 87.

undertakes to do certain work for the other, and the latter refuses to permit the contract to be performed, there may be a recovery in damages of such an amount as the former would have made out of fulfilment.¹

(c) **Profits on Collateral Contracts and Undertakings.** — Profits on collateral contracts or undertakings, however certain as to computation, are never recoverable unless

Contract to Furnish Water Power for Mill. — *Cargill v. Thompson*, 57 Minn. 534.

Contract to Deliver Lecture. — By an application of the rule under discussion a plaintiff was permitted to recover damages against a lecturer for breach of contract to deliver a lecture, for the loss of profits which would probably have been realized but for the breach of contract. *Savery v. Ingersoll*, 46 Hun (N. Y.) 176.

The case of *Gale v. Leckie*, 2 Stark. 107, 3 E. C. L. 337, resembles somewhat the foregoing case. In the latter case the defendant, an author, agreed to furnish a manuscript work to the plaintiffs to be published by them at their expense and the profits to be equally divided. The defendant failed to fulfil, and an action was brought to recover damages arising from the breach. The plaintiffs gave evidence tending to show that they would probably have made a profit on the publication, and it was submitted to the jury to fix the amount of such profits and to assess the amount of the plaintiff's damages on that basis.

1. Contract of Employment — *United States*. — *Philadelphia, etc., R. Co. v. Howard*, 13 How. (U. S.) 307; *Schneider v. U. S.*, 19 Ct. of Cl. 547; *U. S. v. Behan*, 110 U. S. 338; *Pittsburgh Bessemer Steel Rail Co. v. Hinkley*, 17 Fed. Rep. 584; *Adams's Case*, 1 Ct. of Cl. 106.

Alabama. — *Tennessee, etc., R. Co. v. Danforth*, 112 Ala. 80. See also *Robinson v. Bullock*, 66 Ala. 548.

California. — *Cox v. McLaughlin*, 54 Cal. 605.

Georgia. — *Rice v. Caudle*, 71 Ga. 605.

Illinois. — *Allphin v. Working*, 32 Ill. App. 178.

Indiana. — See *Jackson v. Stanfield*, 137 Ind. 592.

Iowa. — *Richmond v. Dubuque, etc., R. Co.*, 33 Iowa 422.

Michigan. — *Atkinson v. Morse*, 63 Mich. 276; *Leonard v. Beaudry*, 68 Mich. 312; *Fell v. Newberry*, 106 Mich. 542. See *Talcott v. Crippen*, 52 Mich. 633.

Nebraska. — *Kreamer v. Irwin*, 46 Neb. 827.

New York. — *Durkee v. Mott*, 8 Barb. (N. Y.) 423; *Devlin v. New York*, 4 Misc. Rep. (N. Y. C. Pl.) 106.

Pennsylvania. — *Lentz v. Choteau*, 42 Pa. St. 435; *Nixon v. Myers*, 141 Pa. St. 477.

Tennessee. — *Smith v. O'Donnell*, 8 Lea (Tenn.) 468.

Vermont. — *Morey v. King*, 49 Vt. 304.

Washington. — *Watson v. Gray's Harbor Brick Co.*, 3 Wash. 283.

Where a Party Is Wrongfully Prevented from Performing His Contract by the other party thereto, the former may recover as damages the profits which he would have made had he been permitted to complete the contract. *Brandt v. Schuchmann*, 60 Mo. App. 70.

Such Loss Direct Consequence of Breach. — Where the performance of a special contract requires the furnishing of both material and labor,

and the contract is entire and the breach total, loss of such profits as would have accrued from the contract as the direct result of its fulfilment may be recovered in an action for the breach thereof. *Start, C. J.*, in *Silberstein v. Duluth News-Tribune Co.*, (Minn. 1897) 71 N. W. Rep. 622. And if the contractor does not elect to regard the contract as broken before the time for full performance has expired, before which time the cost for doing the work has become less, there may be a recovery, notwithstanding, of profits estimated with reference to the reduced cost price. *Goodrich v. Hubbard*, 51 Mich. 63.

Necessity for Evidence upon Which to Base Calculation of Profits Lost. — Where there is no evidence to show that the plaintiffs suffered loss by being prevented from completing their contract, nor data upon which the extent of the loss may be estimated, an instruction to the jury in effect excluding consideration of loss of profits is not improper. *Lentz v. Choteau*, 42 Pa. St. 435. In such actions evidence that the fulfilment of the contract would have cost the plaintiff more than he was to receive from the defendant, and hence that there would have been no profits, is always admissible. *Durkee v. Mott*, 8 Barb. (N. Y.) 423.

Contract to Manufacture Goods — Cost of Manufacture. — Where a plaintiff has a contract with the defendant to manufacture goods at a fixed price, the loss of profits is ascertainable by deducting therefrom the reasonable cost of manufacture. *Leonard v. Beaudry*, 68 Mich. 322; *Fell v. Newberry*, 106 Mich. 542; *Barrett v. Grand Rapids Veneer Works*, (Mich. 1896) 67 N. W. Rep. 976.

Circumstances to Be Considered in Estimating Cost of Manufacture. — In an action for damages for refusing to permit the plaintiff to complete a contract, whereby he lost the profits thereof, it has been held that the jury, in order to estimate the cost of doing the work, should consider the various circumstances which the proof might show it would be necessary to include in order to estimate accurately the cost of doing the work. For instance, such as good or bad weather, sickness of hands, accidents by explosions and damages resulting therefrom. They should give due and proper weight and effect to all contingencies, uncertainties, or accidents, which the proof might show would or might affect or increase the cost at which the plaintiffs could have done the work. *Tennessee, etc., R. Co. v. Danforth*, 112 Ala. 82.

With reference to the allowance of future profits where the plaintiff's time and labor constitute an element in the production of such profits, there should be a deduction for the value of such time and labor in assessing damages. There should also be some allowance for the uncertainty and contingency of such profits. *Goodsell v. Western Union Tel. Co.*, 53 N. Y. Super. Ct. 46.

within the contemplation of the contracting parties or arising naturally and probably from the breach of the particular contract.¹ Where, however, property is bought to fulfil contracts already made, which fact is known to both parties to the particular contract, there may in general be a recovery of profits on the collateral contracts, such profits, indeed, being the subject of almost exact mathematical computation.²

(d) **Breach of Contract of Agency — Commissions on Sales.** — It has been held that profits which might have been realized by an agent under a contract to sell goods on commission are too uncertain to be recoverable.³

The Opinion of an Agent selling on commission, as to what sales he could probably have made but for the breach of contract complained of, does not afford sufficient certainty for damages.⁴

Commissions on Sales Perfected. — There may, of course, be a recovery of commissions on all sales perfected at the time of the breach of such a contract.⁵ And in addition to this there may be a recovery of commissions on sales negotiated and so far complete as to make it apparent with reasonable certainty not only

1. **Collateral Contracts.** — Nelson, C. J., in *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Clare v. Maynard*, 6 Ad. & El. 519, 33 E. C. L. 137; *Cox v. Walker*, 33 E. C. L. 139, note a; *Borries v. Hutchinson*, 18 C. B. N. S. 445, 114 E. C. L. 445, 34 L. J. C. P. 169; *Walker v. Moore*, 10 B. & C. 416, 21 E. C. L. 100; *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534; *Wappoo Mills v. Commercial Guano Co.*, 91 Ga. 396; *Fox v. Harding*, 7 Cush. (Mass.) 516; *Fairchild v. Rogers*, 32 Minn. 269; *Cary v. Gruman*, 4 Hill (N. Y.) 627, 40 Am. Dec. 299. And see *Trigg v. Clay*, 88 Va. 330, 29 Am. St. Rep. 723; *Yoakum v. Dunn*, 1 Tex. Civ. App. 524. See also *supra*, this title, *Natural and Proximate Cause and Consequence — Damages for Losses on Collateral Contracts and Transactions.*

Loss of Profits in Collateral Undertaking. — In the case of *Krom v. Levy*, 48 N. Y. 680, which was an action on an account, the defendant set up a counterclaim for breach, on the part of the plaintiffs, of a contract to prepare a plate to print the backs of cards. The defendant was permitted to prove as damages the loss of profits sustained by being deprived of the plate for several months in his business, which was, however, held to be error, according to the rule laid down in *Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250.

2. *Brewer, J.*, in *Stewart v. Power*, 12 Kan. 600. See also *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. Div. 670; *Borries v. Hutchinson*, 18 C. B. N. S. 445, 114 E. C. L. 445; *Wappo Mills v. Commercial Guano Co.*, 91 Ga. 396; *Johnson v. Mathews*, 5 Kan. 122; *Morrison v. Lovejoy*, 6 Minn. 319; *Trigg v. Clay*, 88 Va. 330, 29 Am. St. Rep. 723.

3. **Contract of Agency — Sales on Commission.** — *Clark v. National Ben., etc., Co.*, 67 Fed. Rep. 222; *Cincinnati, etc., Gas Illuminating Co. v. Western, etc., Co.*, 152 U. S. 209; *Union Refining Co. v. Barton*, 77 Ala. 148; *Beck v. West*, 87 Ala. 213; *Howe Mach. Co. v. Bryson*, 44 Iowa 159, 24 Am. Rep. 735; *Stern v. Rosenheim*, 67 Md. 503; *Washburn v. Hubbard*, 6 Lans. (N. Y.) 11. And see *Hair v. Barnes*, 26 Ill. App. 580; *French v. Ramge*, 2 Neb. 254; *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756. Compare *Carr v. Hills Archimedean Lawn Mower Co.*, 12 Daly (N. Y.) 332.

Illustrations. — Thus in an action for the breach of a contract to continue the plaintiff as the defendant's agent for the sale of car springs, the plaintiff to have a commission on sales, it was held that damages based upon a calculation of the probable amount of sales during the remainder of the term were not recoverable. *Washburn v. Hubbard*, 6 Lans. (N. Y.) 11. And see *French v. Ramge*, 2 Neb. 254; *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756.

And for an alleged breach of a contract to solicit advertisements for the plaintiff during a stipulated period, it was held that an estimate of probable profits for the remainder of the term, based on proof of the profits accruing before the breach, was too speculative and uncertain to afford a basis for the estimate for damages. *Hair v. Barnes*, 26 Ill. App. 580. And see *Ramsey v. Holmes Electric Protective Co.*, 85 Wis. 174.

But where the employment is merely to make a sale of certain property, the agent to be compensated by a commission on the price, there may be a recovery in damages for the commissions lost upon a breach of the contract by the principal if they would have been made but for such breach. *Green v. Cole*, 127 Mo. 587; *Bannatyne v. Florence Milling, etc., Co.*, 77 Hun (N. Y.) 289; *Lyon v. Valentine*, 33 Barb. (N. Y.) 271; *Atkinson v. Pack*, 114 N. Car. 597. And see *Lathrop v. O'Brien*, 44 Minn. 15; *Equitable Mortg. Co. v. Weddington*, 2 Tex. Civ. App. 373. And where an agent is employed to perform stipulated services, to be compensated for by a share of the profits made in the enterprise in connection with which the services are rendered, but dies before full completion of the contract, there may also be a recovery of profits, and in the proportionate amount of services rendered, in the absence of evidence that the profits made were not evenly distributed as to time. *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189, reversing *Clark v. Gilbert*, 32 Barb. (N. Y.) 576.

4. **Opinion of Agent.** — *Beck v. West*, 87 Ala. 213. See also *Union Refining Co. v. Barton*, 77 Ala. 148.

5. *Beck v. West*, 87 Ala. 213. See the title AGENCY, vol. 1, p. 930.

that they would be made, but the amount of them;¹ but mere expectations, doubtful offers, and other vague and indefinite assurances of intention to purchase, without specification of quantity or terms, are too speculative and uncertain to be taken into consideration.²

Contrary Doctrine. — On the other hand, it has been held that the measure of damages for the breach of a contract by which the plaintiff was made sole agent in a certain territory for the sale of mineral water, of which the defendant was the sole proprietor, and which the latter agreed to furnish the plaintiff at a stipulated price, was the profits which the plaintiff might have realized on sales if the defendant had performed the contract.³ And it was decided in the same case that evidence of the amount of the water sold by the firm to whom the defendant had transferred the agency in violation of contract was competent to go to the jury on the question of damages, as well as evidence of any special effort made by the firm to whom the agency had been given, in the introduction of or promotion of the sale of the commodity.⁴

(3) *Rule in the Case of Torts* — *Damages for Interruption of Business.* — Where the natural and direct result of a tort is the interruption of or an injury to an established business, there may be a recovery of profits lost during the period of enforced suspension or by reason of the tortious act.⁵

1. Commissions on Sales Negotiated. — *Beck v. West*, 87 Ala. 213. And see *Fontaine v. Baxley*, 90 Ga. 416; *Shadbolt, etc., Iron Co. v. Topliff*, 85 Wis. 513.

2. Beck v. West, 87 Ala. 213.

Illustration — What Profits Recoverable and What Not. — In the case of *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28, the cases of *Ætna L. Ins. Co. v. Nexsen*, 84 Ind. 347, and *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534, are referred to as serving to illustrate the difference between profits recoverable and not recoverable. In the first of these cases an insurance agent who had been discharged without cause before the expiration of his contract was allowed to include in his recovery the probable value of renewals on policies previously obtained by him, upon which future premiums would, in the usual course of business, be received by the company, on the ground that the amount of compensation due on such renewals could be ascertained with the requisite certainty by the use of actuary's life-tables and comparisons, and that the basis of the right to damages existed, and was not to be built in the future. In the second case, which is cited with approval in the first, the same rule as to the probable value of renewals was held, but it was also held that an estimate of the probable earnings of the agent thereafter, derived from proof of the amount of his collections and commissions before the breach of the contract, in the absence of other proof, was too speculative to be admissible.

3. Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390. And see *Loud v. Campbell*, 26 Mich. 239; *Leonard v. Beaudry*, 68 Mich. 312; *Blair v. Lafin*, 127 Mass. 518; *Carr v. Hills Archimedean Lawn Mower Co.*, 12 Daly (N. Y.) 332; *Dr. Harter Medicine Co. v. Hopkins*, 83 Wis. 309.

Where Agent's Loss Established with Reasonable Certainty. — In the case of *Russell v. Horn, etc., Mfg. Co.*, 41 Neb. 567, damages were claimed for the breach of a contract by the defendants, which entitled the plaintiffs within the designated territory to the exclusive

right to sell the defendant's manufactured products. It was held that there might be a recovery for the loss of such profits as could be established with reasonable certainty.

4. Mueller v. Bethesda Mineral Spring Co., 88 Mich. 390.

5. Torts — Damage to Business — England. — See *Tarleton v. M'Gawley*, 1 Peake N. P. (ed. 1795) 205.

United States. — *Longyear, J.*, in *The Mayflower*, 1 Brown Adm. 387.

Alabama. — *Donnell v. Jones*, 17 Ala. 689, 52 Am. Dec. 194.

California. — *Stoddard v. Treadwell*, 26 Cal. 307.

Georgia. — *Sturgis v. Frost*, 56 Ga. 188; *Averett v. Brady*, 20 Ga. 523.

Indiana. — *Terre Haute v. Hudnut*, 112 Ind. 542.

Iowa. — *Gibson v. Fischer*, 68 Iowa 29.

Kansas. — *Western News Co. v. Wilmarth*, 33 Kan. 510.

Maryland. — *Lawson v. Price*, 45 Md. 123. And see *Shafer v. Wilson*, 44 Md. 268.

Massachusetts. — *French v. Connecticut River Lumber Co.*, 145 Mass. 261; *White v. Moseley*, 8 Pick. (Mass.) 356.

Michigan. — *Oliver v. Perkins*, 92 Mich. 304; *Allison v. Chandler*, 11 Mich. 548.

New Hampshire. — *Taylor v. Dustin*, 43 N. H. 493; *Crawford v. Parsons*, 63 N. H. 438; *Holden v. Winnipiseogee Lake Cotton, etc., Mfg. Co.*, 53 N. H. 552.

New Jersey. — *Depue, J.*, in *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438.

New York. — *Langan v. Potter*, 8 Misc. Rep. (N. Y. City Ct.) 541; *Lacour v. New York, 3 Duer* (N. Y.) 420; *Schile v. Brokhahus*, 80 N. Y. 614; *Snow v. Pulitzer*, 66 Hun (N. Y.) 329; *Marquart v. La Farge*, 5 Duer (N. Y.) 559. And see *Capel v. Lyons*, 3 Misc. Rep. (N. Y. C. Pl.) 73.

Pennsylvania. — *Spigelmoyer v. Walter*, 3 W. & S. (Pa.) 540.

Texas. — *San Antonio v. Royal*, (Tex. 1891) 16 S. W. Rep. 1101.

Illustrations. — Among the cases in which

Evidence of Past Profits — Nature and Extent of Business. — In estimating damages for the loss of profits in an established business, proof of the nature and magnitude of the plaintiff's business, together with the profits accruing prior to the injury, is admissible.¹ And where a business has not been entirely interrupted, but its volume merely impaired, the rule is the same, and it is competent to prove the amount of business previously done and the diminution in sales as com-

the rule has been applied may be mentioned the following:

Negligent Drainage by Municipal Corporation. — *Terre Haute v. Hudnut*, 112 Ind. 542; *Lacour v. New York*, 3 Duer (N. Y.) 420. See the title MUNICIPAL CORPORATIONS.

Tearing Down Party Wall. — *Schile v. Brokhahus*, 80 N. Y. 614.

Diminished Capacity of Mill. — *Holden v. Winnipiseogee Lake Cotton, etc., Mfg. Co.*, 53 N. H. 552.

Conversion of Logs. — *Bucknam v. Nash*, 12 Me. 474.

Conversion of Wine — Profits on Contemplated Resale. — *France v. Gaudet*, L. R. 6 Q. B. 199.

Damages to Expressman's Wagon. — *Shelbyville Lateral Branch R. Co. v. Lewark*, 4 Ind. 471.

Marine Torts — Probable Future Earnings. — It has been held that probable future earnings are allowable as damages in cases of marine tort. *Jolly v. Terre Haute Draw-Bridge Co.*, 6 McLean (U. S.) 238; *The Steamboat Cayuga*, 2 Ben. (U. S.) 125. And see opinion of Mr. Justice Nelson in *The R. L. Maybey*, 4 Blatchf. (U. S.) 439; *Sturgis v. Clough*, 1 Wall. (U. S.) 260.

Demurrage, While a Proper Element of Damage, is only recoverable when profits have actually been or may be reasonably supposed to have been lost, and the amount of such profits is proved with reasonable certainty. *The Conqueror*, 166 U. S. 110; *The Clarence*, 3 Rob. Adm. 283. See the title DEMURRAGE.

Profits as Measure of Damages. — In the case of *Allison v. Chandler*, 11 Mich. 548, it was said that generally in an action purely of tort, where the amount of profits lost by the injury can be shown with reasonable certainty, such profits are not only admissible in evidence, but constitute to such extent a safe measure of damages.

Should Be Certain as to Source, Extent, and Probability of Realization. — *Longyear, J.*, in *The Mayflower*, 1 Brown Adm. 387, said: "The subject of future profits as a basis of damages in cases of tort has undergone a vast amount of judicial discussion and decision in the law courts. A broad if not well-defined distinction between actions *ex contractu* and actions *ex delicto* is recognized in this regard, wherever it has been drawn in question. In actions *ex delicto* it is the almost if not quite the unanimous voice of those courts that such profits are recoverable as damages. Not speculative and merely possible profits. Those are never allowed. In order to be recoverable, 'its source must be ascertained and its extent defined, and its realization must appear to have been reasonably certain.' And I am willing to go further and say its source must be the direct and immediate use or service of the thing injured, or the prosecution of the business interrupted."

Interruption of Illegal Business. — No damages will be allowed for loss of anticipated profits by the interruption of an illegal business. *Kane v. Johnston*, 9 Bosw. (N. Y.) 154.

1. Evidence of Nature and Magnitude of Business — Former Profits — England. — *Wilkes v. Hungerford Market Co.*, 2 Bing. N. Cas. 281, 29 E. C. L. 336; *Ingram v. Lawson*, 6 Bing. N. Cas. 212, 37 E. C. L. 350.

Georgia. — *Sturgis v. Frost*, 56 Ga. 188.

Illinois. — *Chapman v. Kirby*, 49 Ill. 211.

Maryland. — *Shafer v. Wilson*, 44 Md. 268; *Brown v. Werner*, 40 Md. 15.

Michigan. — *Allison v. Chandler*, 11 Mich. 542.

Minnesota. — *Goebel v. Hough*, 26 Minn. 252. And see *Berry, J.*, in *Cushing v. Seymour*, 30 Minn. 305.

New Hampshire. — *Taylor v. Dustin*, 43 N. H. 493.

New York. — *Lacour v. New York*, 3 Duer (N. Y.) 406; *Driggs v. Dwight*, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283; *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756; *Marquart v. La Farge*, 5 Duer (N. Y.) 559; *Alfaro v. Davidson*, 40 N. Y. Super. Ct. 87; *Lavens v. Lieb*, 12 N. Y. App. Div. 487. See also *Dart v. Laimbeer*, 107 N. Y. 664, 12 N. Y. St. Rep. 48; *Dickinson v. Hart*, 142 N. Y. 183.

Pennsylvania. — *Pennsylvania R. Co. v. Dale*, 76 Pa. St. 47.

Texas. — *Houston, etc., R. Co. v. Hill*, 63 Tex. 381, 51 Am. Rep. 642.

Virginia. — *Peshine v. Shepperson*, 17 Gratt. (Va.) 472, 94 Am. Dec. 468.

Wisconsin. — *Treat v. Hiles*, 81 Wis. 280. And see *Ramsey v. Holmes Electric Protection Co.*, 85 Wis. 174.

Impairment of Earning Capacity — Past Earnings. — In an action against a municipal corporation for damages resulting from a defective bridge, the plaintiff, who was a physician, was permitted to prove the amount of his professional earnings before and after the injury, under a special allegation of damages for loss of business. Such evidence, however, cannot be regarded as establishing a measure of damages, but is admissible to aid the jury in the exercise of their discretion in estimating the compensation. *Logansport v. Justice*, 74 Ind. 386, 39 Am. Rep. 79.

The case of *New Jersey Express Co. v. Nichols*, 33 N. J. L. 434, was an action for damages for personal injuries received by the plaintiff from a wagon of the defendant, negligently backed on the sidewalk by one of its drivers. The plaintiff was an architect, and as a guide to the jury in assessing damages, evidence was allowed of the nature and extent of the plaintiff's business, and the general rate of profit realized therefrom, said business having been interrupted for a time by the injuries received.

pared with the corresponding period the previous year.¹

Not Strict Measure of Damages, but a Guide to Jury. — Such evidence, however, is not regarded as giving the measure of damages strictly, but as merely affording a guide to the jury in estimating and assessing damages in the exercise of a sound judgment.² Nor, indeed, do past profits afford even a safe element for consideration unless it can be shown that there is reason to suppose that conditions would have remained unchanged but for the defendant's act.³

In Case of New Enterprises. — It has been said that there is a distinction between the recoverability of profits as an element of damages where they would have resulted from an established business and where they are claimed as the prevented result of new enterprises.⁴ Certainly in the latter instance the standard or guide of past profits would not be available, and in the absence of such criterion it is not easy to see by what measure profits alleged to have been prevented could be assessed; for evidence of profits made in similar enterprises by others would not, it is believed, be competent.⁵

V. MEASURE OF DAMAGES AND ELEMENTS OF RECOVERY — 1. In General. — As has already been seen, compensation is the basic principle of the law of damages, the measure thereof being limited and controlled, and the elements of recovery primarily determined, by this fundamental consideration. All the rules which have been laid down and applied by the courts in this connection have been formulated and adopted with the view of compensating in money a

1. *Brown v. Werner*, 40 Md. 15; *Schile v. Brokhahus*, 80 N. Y. 614; *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756.

2. *England*. — *Wilkes v. Hungerford Market Co.*, 2 Bing. N. Cas. 281, 29 E. C. L. 336; *Ingram v. Lawson*, 6 Bing. N. Cas. 212, 37 E. C. L. 350.

United States. — *Wade v. Leroy*, 20 How. (U. S.) 34.

Alabama. — *Donnell v. Jones*, 17 Ala. 689, 52 Am. Dec. 194.

Georgia. — *Sturgis v. Frost*, 56 Ga. 188.

Indiana. — *Logansport v. Justice*, 74 Ind. 386, 39 Am. Rep. 79. And see *Fultz v. Wycoff*, 25 Ind. 321; *Jackson v. Stanfield*, 137 Ind. 592.

Michigan. — *Allison v. Chandler*, 11 Mich. 543.

New Hampshire. — *Taylor v. Dustin*, 43 N. H. 493.

New Jersey. — *New Jersey Express Co. v. Nichols*, 33 N. J. L. 434.

New York. — *Lincoln v. Saratoga, etc., R. Co.*, 23 Wend. (N. Y.) 425; *Driggs v. Dwight*, 17 Wend. (N. Y.) 71, 31 Am. Dec. 283.

Rhode Island. — *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66.

Virginia. — *Peshine v. Shepperson*, 17 Gratt. (Va.) 472, 94 Am. Dec. 468.

Damages for Wrongful Attachment. — In an action for damages for the wrongful suing out of an attachment, the jury may consider as elements of damage the loss of mercantile credit, interruption of business, and prevention of sales caused by the wrongful levy. *Donell v. Jones*, 17 Ala. 689, 52 Am. Dec. 194. In this case the court observed that while they did not mean to say that the jury should make the supposed profits which had been lost the measure of damages, that evidence tending to establish such losses as a consequence of the levy of the attachment might properly go to the jury to serve as some guide for them in the exercise of their discretion in estimating the

loss. See also *Langan v. Potter*, 8 Misc. Rep. (N. Y. City Ct.) 541; *Western News Co. v. Wilmarth*, 33 Kan. 510.

Past Profits Not Exact Measure of Future Profits. — Past profits cannot be taken as the exact measure of future profits, but all the various contingencies by which such profits would probably be affected should be taken into consideration by the jury and allowed such weight as they, in the exercise of good sense and sound discretion, think them entitled to. Past profits, where a business has been continued for some length of time, would constitute a very material aid to the jury in arriving at a fair probable estimate of the future profits of the business interrupted, had the business still continued without the interruption. *Allison v. Chandler*, 11 Mich. 548.

3. See *Union Refining Co. v. Barton*, 77 Ala. 148; *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28; *Hair v. Barnes*, 26 Ill. App. 580; *Lord v. Owen*, 35 Ill. App. 382; *Stern v. Rosenheim*, 67 Md. 503; *Washburn v. Hubbard*, 6 Lans. (N. Y.) 11.

4. See *Berry, J.*, in *Cushing v. Seymour*, 30 Minn. 305. And see *Goebel v. Hough*, 26 Minn. 252; *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614.

In the case of *Houston, etc., R. Co. v. Hill*, 63 Tex. 381, 51 Am. Rep. 642, *Willie, C. J.*, delivering the opinion of the court, said: "If a man has been engaged in business for any length of time he can form some estimate from his past earnings what its profits will be in the future. In such cases, if deprived of the faculty of pursuing the business, at least by the tortious act of another, it has been held that he can estimate his damages with something like certainty. *Pennsylvania R. Co. v. Dale*, 76 Pa. St. 47."

5. *Dennery v. Bisa*, 6 La. Ann. 365; *Grant v. McDonogh*, 7 La. Ann. 447. And see also *O'Grady v. Julian*, 34 Ala. 88.

party injured by the wrong of another, as fully as a just consideration of the rights of the latter will permit.

Difficulty of General Rules. — There is much difficulty in laying down general rules in regard to the measure of damages.¹

In Some Cases of Contract, it is true, the parties themselves fix the measure of compensation,² but in others there is afforded no standard of measurement, and it is impossible to prescribe any general rule which will in all cases give to a plaintiff an equivalent for what he would have enjoyed if the contract had not been violated.³

In the Case of Torts there are frequently elements involved so wholly insusceptible of money valuation that the measure of recovery must be left largely if not entirely to the discretion of the jury.⁴ This is noticeably the case in actions for damages for personal injuries where physical suffering has resulted, and likewise where mental distress has been a consequence of the defendant's act.⁵

Damages Which Are Not Susceptible of Estimate by Any Pecuniary Standard have been regarded by some as partaking of a punitive or vindictive character, but they may more properly be considered as actual damages for which compensation is the rule, although the measure of compensation is a matter of discretion simply and not possible of regulation by any fixed standards of value.⁶

2. Excessive and Inadequate Damages — *a.* IN GENERAL. — Where damages are susceptible of pecuniary estimate, and can be assessed with reference to or even limited by fixed standards and established values, the question of their

1. Subject One Wherein Definite Rules Not Easily Laid Down. — In *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28, Clopton, J., said: "Owing to the ever-occurring differences in the circumstances, and in the special conditions of the contracting parties, it has been found difficult, if not impossible, to lay down general and definite rules as to the measure of damages applicable to all cases of a class." Similar remarks have been made in many cases. See *Allison v. Chandler*, 11 Mich. 548; *Leonard v. New York, etc., Electro Magnetic Tel. Co.*, 41 N. Y. 566, 1 Am. Rep. 446; *Hoy v. Gronoble*, 34 Pa. St. 9, 75 Am. Dec. 628.

Difficulty in Measure of Damages — Specific Performance. — In *Adderley v. Dixon*, 1 Sim. & S. 607, it was held that the difficulty of making a just assessment of damages for breach of the contract was a sufficient ground for decreeing specific performance.

2. See the title LIQUIDATED DAMAGES.

3. Strong, J., in Hoy v. Gronoble, 34 Pa. St. 9, 75 Am. Dec. 628.

4. Where There Is No Legal Measure of Damages, the amount is ordinarily left to the sound discretion of the jury. *Aldrich v. Palmer*, 24 Cal. 513; *Little v. Tingle*, 26 Ind. 168; *Morris v. Chicago, etc., R. Co.*, 45 Iowa 29; *Choppin v. New Orleans, etc., R. Co.*, 17 La. Ann. 19; *Frank v. New Orleans, etc., R. Co.*, 20 La. Ann. 25; *Leland v. Stone*, 10 Mass. 459; *Weld v. Bartlett*, 10 Mass. 470; *Ballou v. Farnum*, 11 Allen (Mass.) 73; *Campbell, J., in Welch v. Ware*, 32 Mich. 77; *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367; *St. Joseph, etc., R. Co. v. Hedge*, 44 Neb. 448; *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60.

5. Actions for Personal Injuries. — *Aldrich v. Palmer*, 24 Cal. 513; *Morris v. Chicago, etc., R. Co.*, 45 Iowa 29; *Campbell v. Portland*

Sugar Co., 62 Me. 552, 16 Am. Rep. 503; *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367; *St. Joseph, etc., R. Co. v. Hedge*, 44 Neb. 448.

6. Damages Insusceptible of Pecuniary Estimate. — *Campbell, J., in Welch v. Ware*, 32 Mich. 77, said: "If actual damage is not confined to pecuniary consequences and cannot be measured by a money standard, all redress in damages must partake of a punitive character to some extent, and the line between actual and what are called exemplary damages cannot be drawn with much nicety. In every such case the jury are compelled to determine from their own sense of justice and their knowledge of human nature what the amount of damages should be. When the amount to be recovered must in all cases rest in their fair and deliberate discretion, the law can give them no precise instructions. It aims to do justice by directing them to distinguish between provoked grievances and those which are unprovoked, or for which the provocation is in great disproportion to the wrong, making adequate compensation in all cases, but giving heavier damages in all cases where the wrong is aggravated by bad motives or malice."

Damages for Inconvenience and Annoyance — Not Vindictive or Punitive. — In *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318, 82 Am. Dec. 679, which was an action for damages against a gas light company for wrongfully refusing to furnish plaintiff's premises with gas for lighting purposes, the court said that the inconvenience and annoyance caused directly by the wrongful act or refusal of the defendant are always legitimate items in estimating the damages in actions of this kind. Damages for such items are not vindictive or punitive. And see *McMillan v. Union Press-Brick Works*, 6 Mo. App. 434.

excessiveness or inadequateness is not usually one of difficulty.¹ But where the damages cannot be estimated in this way the question is not so easily decided. As the *quantum* of damages is in such cases a matter of discretion for the jury, the trial court will not set aside a verdict for damages merely because, in its opinion, the jury gave too much or too little.² And where the trial court has refused to disturb a verdict on account of the amount of recovery, the appellate court is very reluctant to substitute its judgment for that of the jury and court below.³ To such an extent is the measure of recovery where not susceptible of pecuniary estimate deemed a matter of discretion for the jury, that the universal rule is that a judgment will not be reversed on this ground alone, unless the amount is so excessive or so grossly inadequate as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury,⁴ or, as it is said in some cases, in addition to the fore-

1. Damages Susceptible of Pecuniary Estimates — Adequacy. — *Bailey v. Jeffords*, 2 Spears L. (S. Car.) 271. And see *Jacksonville, etc., R. Co. v. Roberts*, 22 Fla. 324; *Thompson v. Evans*, 49 Ill. App. 289; *Wilson v. Troy*, 60 Hun (N. Y.) 183; *Gulf, etc., R. Co. v. Hudson*, 77 Tex. 494.

Illustrations — Damages for Wrongful Attachment. — In an action involving only compensatory damages, a verdict for one hundred and seventeen dollars for the wrongful attachment of property costing only fifty-one dollars ten years before is excessive. *Kelly v. McDonald*, 39 Ark. 387.

Damages for Killing Stock. — Where the amount of damages assessed against a railroad company for the killing of a cow exceeds the value of the animal as established by the plaintiff and his witnesses the verdict will be set aside. *Jacksonville, etc., R. Co. v. Garrison*, 30 Fla. 431.

Contract to Pay for Services in Corporate Stock. — And in an action for damages for breach of a contract to pay the plaintiff a certain quantity of stock for assisting in the organization of a certain corporation, a verdict for the par value of the stock was held erroneous where it appeared from the plaintiff's own testimony that if the defendant had not broken the contract by preventing the formation of the company the actual value of the stock would only have been about fifty per cent. of its par value. *Pitt v. Kellogg*, 58 Hun (N. Y.) 603, 33 N. Y. St. Rep. 894.

2. Damages Discretionary with Jury — Court Not Ready to Disturb Verdict. — *Lee v. Southern Pac. R. Co.*, 101 Cal. 118; *Howland v. Oakland Consol. St. R. Co.*, 110 Cal. 513; *Atchison, etc., R. Co. v. Stewart*, 55 Kan. 667; *Brewing v. Berryman*, 15 New Bruns. 515.

3. Ordinarily Appellate Court Will Not Interfere. — *Bryant v. Omaha, etc., R., etc., Co.*, 98 Iowa 483. And see cases cited in next note.

4. Court Will Interfere Only When Amount Indicates Abuse of Discretion on Part of Jury — Englund. — *Gilbert v. Burtenshaw*, Loft 771, Cowp. 230; *Lambkin v. South Eastern R. Co.*, L. R. 5 App. 352, 28 W. R. 837.

Ireland. — *Corkery v. Hickson*, 10 Ir. R. C. L. 174; *McGrath v. Bourne*, 10 Ir. R. C. L. 160.

United States. — *Engler v. Western Union Tel. Co.*, 60 Fed. Rep. 185; *Lowry v. Mt. Adams, etc., Incline Plane R. Co.*, 68 Fed. Rep. 827; *Dwyer v. St. Louis, etc., R. Co.*, 52

Fed. Rep. 87; *Berry v. Lake Erie, etc., R. Co.*, 72 Fed. Rep. 488.

Alabama. — *Alabama G. S. R. Co. v. Bailey*, 112 Ala. 167; *Kansas City, etc., R. Co. v. Lackey*, 114 Ala. 152.

California. — *Aldrich v. Palmer*, 24 Cal. 513; *Wheaton v. North Beach, etc., R. Co.*, 36 Cal. 590; *Mariani v. Dougherty*, 46 Cal. 27; *Lee v. Southern Pac. R. Co.*, 101 Cal. 118; *Howland v. Oakland Consol. St. R. Co.*, 110 Cal. 513.

Georgia. — *Western, etc., R. Co. v. Lewis*, 84 Ga. 211.

Illinois. — *Illinois Cent. R. Co. v. Robinson*, 58 Ill. App. 181; *North Chicago St. R. Co. v. Broms*, 62 Ill. App. 127; *Chicago v. Colman*, 33 Ill. App. 557; *Lovett v. Chicago*, 35 Ill. App. 570; *Harrison v. Ely*, 120 Ill. 83.

Indian Territory. — *Missouri, etc., R. Co. v. Turley*, (Indian Ter. 1896) 37 S. W. Rep. 52; *Kansas, etc., Coal Co. v. Reid*, (Indian Ter. 1897) 40 S. W. Rep. 898.

Indiana. — *Elkhart, etc., R. Co. v. Waldorf*, 17 Ind. App. 29; *Michigan City v. Ballance*, 123 Ind. 334.

Iowa. — *Garlick v. Pella*, 53 Iowa 646; *Bryant v. Omaha, etc., R., etc., Co.*, 98 Iowa 483.

Kansas. — *Atchison, etc., R. Co. v. Stewart*, 55 Kan. 667; *Southern Kansas R. Co. v. Walsh*, 45 Kan. 653.

Kentucky. — *Louisville, etc., R. Co. v. Mattingly*, (Ky. 1897) 38 S. W. Rep. 686; *Louisville, etc., R. Co. v. Eanks*, (Ky. 1896) 33 S. W. Rep. 627; *Louisville Southern R. Co. v. Minogue*, 90 Ky. 369, 29 Am. St. Rep. 378.

Louisiana. — *Redwitz v. Waggaman*, 33 La. Ann. 26; *Lampkins v. Vicksburg, etc., R. Co.*, 42 La. Ann. 997.

Minnesota. — *Howe v. Minneapolis, etc., R. Co.*, 62 Minn. 71.

Missouri. — *Merrill v. St. Louis*, 12 Mo. App. 466; *Brown v. Hannibal, etc., R. Co.*, 99 Mo. 310; *Dowd v. Westinghouse Air Brake Co.*, 132 Mo. 579; *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 669, 22 Am. St. Rep. 800; *Klutts v. St. Louis, etc., R. Co.*, 75 Mo. 642; *Manget v. O'Neill*, 51 Mo. App. 35; *Lemoine v. Cook*, 36 Mo. App. 193; *Dimmitt v. Hannibal, etc., R. Co.*, 40 Mo. App. 654; *Honeycutt v. St. Louis, etc., R. Co.*, 40 Mo. App. 674.

New York. — *Egan v. Dry Dock, etc., R. Co.*, 12 N. Y. App. Div. 556; *Howe v. Boorum, etc., Co.*, 20 Misc. Rep. (N. Y. Supreme Ct.) 345; *Mayer v. Liebmann*, 16 N. Y. App. Div.

going grounds for interference, unless there appears to have been some oversight, mistake, or misconception of the merits of the case;¹ as where the jury have taken into consideration elements of damage not within the scope of the action, or, in matters which admit of definite estimate, where they have extravagantly or through prejudice exceeded such measure.² In this regard a verdict for inadequate damages stands upon the same ground as one for an excessive amount.³

The Real Question in All These Cases is not whether the amount of the damages awarded by the jury is more or less than is, in the opinion of the court, proper, but whether it is shown that the jury have abused the discretion vested in them.

b. IN PERSONAL INJURY CASES. — In no other class of cases does the amount of damages rest necessarily so largely in the discretion of the jury as in those

54; *Thomas v. Union R. Co.*, 18 N. Y. App. Div. 185; *Smith v. Third Ave. R. Co.*, 10 N. Y. App. Div. 409; *Quinn v. O'Keeffe*, 9 N. Y. App. Div. 68; *Kilbane v. Westchester Electric R. Co.*, 19 Misc. Rep. (N. Y. Supreme Ct.) 184; *Chapman v. Atlantic Ave. R. Co.*, 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 384; *Ferguson v. Ehret*, 14 Misc. Rep. (N. Y. City Ct.) 454; *Wynne v. Atlantic Ave. R. Co.*, 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 394.

Ohio. — *Toledo Electric St. R. Co. v. Tucker*, 13 Ohio Cir. Ct. Rep. 411, 7 Ohio Dec. 169.

Oklahoma Territory. — *Oklahoma City v. Welsh*, 3 Okla. 288.

Tennessee. — *West Memphis Packet Co. v. White*, (Tenn. 1897) 41 S. W. Rep. 583.

Texas. — *Chicago, etc., R. Co. v. Yarbrough*, (Tex. Civ. App. 1896) 35 S. W. Rep. 422; *Missouri, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1896) 37 S. W. Rep. 771; *Mexican Cent. R. Co. v. Mitten*, 13 Tex. Civ. App. 653; *Missouri, etc., R. Co. v. Cook*, 12 Tex. Civ. App. 203; *Howard Oil Co. v. Davis*, 76 Tex. 630; *Texas, etc., R. Co. v. Brown*, 78 Tex. 397; *International, etc., R. Co. v. Brett*, 61 Tex. 483.

Utah. — *Daniels v. Union Pac. R. Co.*, 6 Utah 357.

Virginia. — *Norfolk v. Johnakin*, 94 Va. 285; *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108; *Farish v. Reigle*, 11 Gratt. (Va.) 607, 62 Am. Dec. 666; *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34; *Richmond R., etc., Co. v. Garthright*, 92 Va. 627.

Washington. — *Ogle v. Jones*, 16 Wash. 319; *Lorence v. Ellensburgh*, 13 Wash. 341.

Wisconsin. — *Whitney v. Milwaukee*, 65 Wis. 409.

In order to warrant the reversal of a judgment for damages for excessiveness, the amount should be such that no reasonable proportion exists between it and the circumstances of the case. *M'Grath v. Bourne*, 10 Ir. R. C. L. 160.

1. Where There Has Been Mistake or Misconception — *England*. — *Gilbert v. Burtenshaw*, Lofft 771, Cowp. 230.

United States. — *Berry v. Lake Erie, etc., R. Co.*, 72 Fed. Rep. 488.

New York. — *Ferguson v. Ehret*, 14 Misc. Rep. (N. Y. City Ct.) 454; *Wynne v. Atlantic Ave. R. Co.*, 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 394.

Oklahoma Territory. — *Oklahoma City v. Welsh*, 3 Okla. 288.

Texas. — *Missouri, etc., R. Co. v. Cook*, 12 Tex. Civ. App. 203.

Virginia. — *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108; *Farish v. Reigle*, 11 Gratt. (Va.) 607, 62 Am. Dec. 666; *Norfolk, etc., R. Co. v. Shott*, 92 Va. 34; *Richmond R., etc., Co. v. Garthright*, 92 Va. 627.

2. Gilbert v. Burtenshaw, Lofft 771, Cowp. 230.

3. Grossly Inadequate Damages — *England*. — *Phillips v. London, etc., R. Co.*, 5 Q. B. Div. 78, 49 L. J. Q. B. 233, 41 L. T. 121, 28 W. R. 10; *Falvey v. Stanford*, L. R. 10 Q. B. 54, 44 L. J. Q. B. 7, 31 L. T. 677, 23 W. R. 162.

Ireland. — *Beattie v. Moore*, 2 Ir. L. R. 28.

Canada. — *Church v. Ottawa*, 25 Ont. Rep. 298. *California*. — *Townsend v. Briggs*, 88 Cal. 230; *Mariani v. Dougherty*, 46 Cal. 27.

Minnesota. — *Henderson v. St. Paul, etc., R. Co.*, 52 Minn. 479.

Mississippi. — *Moseley v. Jamison*, 68 Miss. 336.

Missouri. — *Bogges v. Metropolitan St. R. Co.*, 118 Mo. 328.

New York. — *McDonald v. Walter*, 40 N. Y. 551; *Smith v. Dittman*, 16 Daly (N. Y.) 427; *Kelly v. Rochester*, (Supreme Ct.) 15 N. Y. Supp. 29.

Texas. — *Chicago, etc., R. Co. v. Yarbrough*, (Tex. Civ. App. 1896) 35 S. W. Rep. 422; *Traylor v. Evertson*, (Tex. Civ. App. 1894) 26 S. W. Rep. 637; *Michalke v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1894) 27 S. W. Rep. 164.

Wisconsin. — *Whitney v. Milwaukee*, 65 Wis. 409; *Robinson v. Waupaca*, 77 Wis. 544.

Illustrations — *Deceit in the Sale of Horse*. — Where the evidence shows that a horse sold would, if as fraudulently represented, have been worth two hundred dollars, a verdict for one cent damages should be set aside. *Traylor v. Evertson*, (Tex. Civ. App. 1894) 26 S. W. Rep. 637.

Nominal Damages for Personal Injuries. — Where the evidence in a personal injury case shows conclusively that actual substantial damages have been suffered, a verdict for nominal damages will be set aside as inadequate. *Moseley v. Jamison*, 68 Miss. 336.

Compensation for Work and Labor. — Where there is undisputed evidence that the plaintiff rendered thirteen days' services in the doing of certain work, and that the value of his labor was two dollars per day, a verdict for only sixteen dollars is erroneous. *Fagan v. Whitcomb*, (Tex. App. 1889) 14 S. W. Rep. 1018.

involving a recovery for the infliction of personal injuries, and the courts are very loath to interfere with a verdict in such cases in the absence of plain evidence that the jury have abused the discretion vested in them. In the notes will be found a number of cases wherein particular verdicts in certain classes of cases have been considered with reference to the charge that the recovery was inadequate or excessive.¹

1. Damages Held Not Excessive — Injuries Producing Permanent and Total or Practically Total Disability — California. — *Smith v. Whittier*, 95 Cal. 279 (\$30,000); *Morgan v. Southern Pac. Co.*, 95 Cal. 501 (\$15,000, plaintiff a woman).

Illinois. — *Chicago, etc., R. Co. v. Holland*, 18 Ill. App. 418 (\$25,000); *Wabash Western R. Co. v. Friedman*, 41 Ill. App. 270 (\$30,000); *Chicago v. Leseth*, 43 Ill. App. 480 (\$15,000, plaintiff a woman, womb displaced and permanent injuries to health).

Minnesota. — *Hall v. Chicago, etc., R. Co.*, 46 Minn. 439 (\$25,000, young healthy man, a permanent cripple); *Galloway v. Chicago, etc., R. Co.*, 56 Minn. 346, 45 Am. St. Rep. 468 (\$10,000, plaintiff a woman).

New York. — *Harrold v. New York El. R. Co.*, 24 Hun (N. Y.) 184 (\$30,000); *Alberti v. New York, etc., R. Co.*, 43 Hun (N. Y.) 421 (\$25,000); *Cannon v. Brooklyn City R. Co.*, 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 400 (\$10,000, plaintiff a woman).

Pennsylvania. — *Mattis v. Philadelphia Traction Co.*, 6 Pa. Dist. Rep. 94 (\$10,000, plaintiff a woman).

Texas. — *International, etc., R. Co. v. Brazzil*, 78 Tex. 314 (\$20,000); *Sabine, etc., R. Co. v. Ewing*, 7 Tex. Civ. App. 8 (\$20,000); *Gulf, etc., R. Co. v. Higby*, (Tex. Civ. App. 1894) 26 S. W. Rep. 737 (\$12,000, plaintiff a woman).

Washington. — *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227 (\$15,000, plaintiff a woman).

Spinal Disease. — *Bennett v. New York Cent., etc., R. Co.*, 61 Hun (N. Y.) 623, 40 N. Y. St. Rep. 948, 133 N. Y. 563 (\$8,000, curvature of spine); *International, etc., R. Co. v. Mulliken*, 10 Tex. Civ. App. 663 (\$4,000, incurable spinal disease).

Paralysis of One-half of Body. — *Osborne v. Detroit*, 32 Fed. Rep. 36 (\$10,000); *Bishop v. St. Paul City R. Co.*, 48 Minn. 26 (\$15,000); *Atchison, etc., R. Co. v. Click*, (Tex. Civ. App. 1895) 32 S. W. Rep. 226 (\$6,500, partial paralysis of one-half of body); *McMahon v. Eau Claire Water Works Co.*, 95 Wis. 640 (\$5,000, injuries causing paresis or progressive paralysis).

Displacement and Enlargement of Heart. — *Georgia Pac. R. Co. v. Dooley*, 86 Ga. 294 (\$16,000).

Injury Very Severe, but Not Necessarily Permanent. — *Dieffenbach v. New York, etc., R. Co.*, 5 N. Y. App. Div. 91 (\$25,000 to young man earning more than \$4,000 a year).

Impairment of Muscular Sense. — *The Pioneer*, 78 Fed. Rep. 600 (\$5,000, impairment of muscular sense, feeling, and partial loss of hearing).

Loss of Eyes or Impairment of Vision. — *Stearns v. Reidy*, 33 Ill. App. 246, affirmed in 135 Ill. 119 (\$9,000, total loss of vision); *Jones v. St. Louis Southwestern R. Co.*, 125 Mo. 666 (\$3,000, loss of eye); *Wallace v. Vacuum Oil*

Co., 59 Hun (N. Y.) 616, 35 N. Y. St. Rep. 697 (\$14,000, loss of eye, and other serious injuries); *Dunlap v. Ross*, 63 Hun (N. Y.) 626, 43 N. Y. St. Rep. 509 (\$100 for a "black eye"); *Missouri, etc., R. Co. v. Huff*, (Tex. Civ. App. 1895) 32 S. W. Rep. 551 (\$5,000, impairment of eyesight); *Texas, etc., R. Co. v. Bowlin*, (Tex. Civ. App. 1895) 32 S. W. Rep. 918 (\$5,000, loss of eye).

Loss of Legs — United States. — *The William Branfoot*, 52 Fed. Rep. 390 (\$2,300 not inadequate).

Arizona. — *Hobson v. New Mexico, etc., R. Co.*, (Arizona 1886) 11 Pac. Rep. 545 (\$15,000, loss of both legs).

Colorado. — *Colorado Midland R. Co. v. O'Brien*, 16 Colo. 219 (\$13,000, loss of both legs).

Illinois. — *Chicago, etc., R. Co. v. Holland*, 18 Ill. App. 418 (\$25,000, loss of both legs); *Chicago, etc., R. Co. v. Fisher*, 38 Ill. App. 33 (\$16,000, permanent loss of leg by paralysis); *Chicago City R. Co. v. Wilcox*, 33 Ill. App. 453 (\$15,000).

Kansas. — *Atchison, etc., R. Co. v. Moore*, 31 Kan. 197 (\$10,000).

Missouri. — *Hollenbeck v. Missouri Pac. R. Co.*, (Mo. 1896) 34 S. W. Rep. 494 (\$10,000); *Oglesby v. Missouri Pac. R. Co.*, (Mo. 1896) 37 S. W. Rep. 829 (\$15,000).

New York. — *Ehrman v. Brooklyn City R. Co.*, 131 N. Y. 576 (\$25,000, plaintiff a young child); *Murray v. Brooklyn City R. Co.*, (Brooklyn City Ct.) 7 N. Y. Supp. 900 (\$18,000, loss of leg and of use of arm); *Akersloot v. Second Ave. R. Co.*, 59 N. Y. Super Ct. 555 (\$12,000, plaintiff a young child); *Alberti v. New York, etc., R. Co.*, 43 Hun (N. Y.) 421 (\$25,000, loss of both legs); *Richmond v. Second Ave. R. Co.*, 76 Hun (N. Y.) 233 (\$9,000); *Garoni v. Compagnie Nationale, etc.*, (C. Pl.) 14 N. Y. Supp. 797 (\$10,000).

Texas. — *Gulf, etc., R. Co. v. Styron*, 66 Tex. 421 (\$8,000); *Ft. Worth, etc., R. Co. v. Robertson*, (Tex. 1891) 16 S. W. Rep. 1093 (\$10,000); *Texas, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1896) 34 S. W. Rep. 186 (\$12,500, loss of leg and use of arm).

Washington. — *Roth v. Union Depot Co.*, 13 Wash. 525 (\$15,000).

Wisconsin. — *Berg v. Chicago, etc., R. Co.*, 50 Wis. 419 (\$11,000); *Hinton v. Cream City R. Co.*, 65 Wis. 323 (\$5,000, plaintiff an elderly woman); *Heddles v. Chicago, etc., R. Co.*, 77 Wis. 228, 20 Am. St. Rep. 106 (\$18,500, plaintiff a child, who lost both legs and was otherwise injured); *Nadav v. White River Lumber Co.*, 76 Wis. 120, 20 Am. St. Rep. 29 (\$9,000).

Injuries to Leg — Illinois. — *Chicago City R. Co. v. Mumford*, 97 Ill. 560 (\$5,000, fracture); *Chicago v. Crooker*, 2 Ill. App. 279 (\$4,000, fracture of patella, inducing permanent disability); *Chicago v. Chase*, 33 Ill. App. 551 (\$2,000, fracture).

Iowa. — *Funston v. Chicago, etc., R. Co.*, 61

3. Damages in Actions for Breach of Contract — a. IN GENERAL — Compensation the Fundamental Principle. — As has been said more than once, the fundamental principle of damages is compensation to the injured party. This rule in the

Iowa 452 (\$8,000, fracture resulting in shortening and stiffness).

Kansas. — *Topeka v. Bradshaw*, (Kan. App. 1897) 48 Pac. Rep. 751 (\$2,000, fracture).

Kentucky. — *Chesapeake, etc., R. Co. v. Friel*, (Ky. 1897) 39 S. W. Rep. 704 (\$1,650, sprained ankle).

Minnesota. — *Rogers v. Chicago Great Western R. Co.*, 65 Minn. 308 (\$3,000, injury resulting in chronic inflammation of knee).

Missouri. — *Dimmitt v. Hannibal, etc., R. Co.*, 40 Mo. App. 654 (\$2,000 for a sprained ankle); *Dowd v. Westinghouse Air Brake Co.*, 132 Mo. 579 (\$100, compound fracture, not inadequate).

Nebraska. — *Lincoln v. Staley*, 32 Neb. 63 (\$1,250, permanent stiffening of knee).

New York. — *Selleck v. J. Langdon Co.*, 59 Hun (N. Y.) 627, 37 N. Y. St. Rep. 511 (\$6,000, fracture with permanent results); *Beltz v. Yonkers*, 74 Hun (N. Y.) 73 (\$5,000, fracture); *McCoey v. Forty-second St. Ferry R. Co.*, 79 Hun (N. Y.) 255 (\$1,500, street car running over foot); *Stapleton v. Newburgh*, 9 N. Y. App. Div. 39 (\$1,100, fracture); *Fitch v. Broadway, etc., R. Co.*, 58 N. Y. Super. Ct. 575 (\$7,000, fracture of neck of femur); *Mitchell v. Broadway, etc., R. Co.*, 70 Hun (N. Y.) 387 (\$15,000, fracture inducing shortening and permanent stiffness); *Vail v. Broadway R. Co.*, 31 Abb. N. Cas. (Brooklyn City Ct.) 56, 6 Misc. Rep. (N. Y.) 20 (\$7,500, fracture, shortening and stiffening limb); *Thomas v. Union R. Co.*, 18 N. Y. App. Div. 185 (\$7,500, fracture, shortening and stiffening limb).

Texas. — *Gulf, etc., R. Co. v. Norfleet*, 78 Tex. 321 (\$3,000, leg bruised and bone affected); *Texas, etc., R. Co. v. Echols*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1087 (\$9,000, fracture with permanent injurious results).

Virginia. — *Danville, etc., R. Co. v. Brown*, 90 Va. 340 (\$7,500, thigh crushed, leg shortened); *Richmond R., etc., Co. v. Garthright*, 92 Va. 627 (\$1,000, legs cut and bruised, inducing temporary disability).

Wisconsin. — *Houfe v. Fulton*, 34 Wis. 608, 17 Am. Rep. 463 (\$2,700, dislocation of hip and fracture of vertebrae).

Loss of Foot. — *Georgia R., etc., Co. v. Keating*, 99 Ga. 308 (\$9,000); *Jordan v. New York, etc., R. Co.*, 16 Daly (N. Y.) 130 (\$11,000); *Commerford v. Atlantic Ave. R. Co.*, 8 N. Y. Misc. Rep. (Brooklyn City Ct.) 599 (\$3,500, loss of several toes); *Manley v. New York Cent., etc., R. Co.*, 18 Misc. Rep. (N. Y. Supreme Ct.) 502 (\$9,000); *Elliott v. Newport St. R. Co.*, 18 R. I. 707 (\$6,950); *Texas Pac. R. Co. v. Overheiser*, 76 Tex. 437 (\$7,500); *Bowers v. Union Pac. R. Co.*, 4 Utah 215 (\$10,000); *Chipman v. Union Pac. R. Co.*, 12 Utah 68 (\$10,500, plaintiff a female child).

Loss of Arm — United States. — *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 41 Fed. Rep. 316 (\$4,500).

Arkansas. — *Little Rock, etc., R. Co. v. Cagle*, 53 Ark. 347 (\$5,000); *Little Rock, etc., R. Co. v. Harkey*, (Ark. 1891) 15 S. W. Rep. 456 (\$2,000).

Illinois. — *Anglo-American Packing, etc., Co. v. Baier*, 31 Ill. App. 653 (\$8,000, the loss of left arm, and deafness in one ear); *Pennsylvania Co. v. Backes*, 35 Ill. App. 375 (\$6,000).

Indiana. — *Clanin v. Fagan*, 124 Ind. 304 (\$500, temporary loss of use of arm).

Iowa. — *Van Winter v. Henry County*, 61 Iowa 684 (\$4,000).

Louisiana. — *Ketchum v. Texas, etc., R. Co.*, 38 La. Ann. 777 (\$10,000).

New York. — *Vredenburg v. New York Cent., etc., R. Co.*, 58 Hun (N. Y.) 607, 34 N. Y. St. Rep. 953 (\$6,500); *Wilson v. Broadway, etc., R. Co.*, 8 Misc. Rep. (N. Y. Super. Ct.) 450 (\$3,250).

Pennsylvania. — *Musser v. Lancaster City St. R. Co.*, (Pa. C. Pl.) 15 Pa. Co. Ct. Rep. 430 (\$18,000).

Texas. — *Missouri, etc., R. Co. v. Kirkland*, 11 Tex. Civ. App. 528 (\$9,119).

Virginia. — *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108 (\$3,500).

Wisconsin. — *Baltzer v. Chicago, etc., R. Co.*, 89 Wis. 257 (\$10,000); *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56 (\$1,000).

Fracture of Arm. — *New Orleans, etc., R. Co. v. Schneider*, 60 Fed. Rep. 210, 13 U. S. App. 655 (\$2,000); *Western, etc., R. Co. v. Drysdale*, 51 Ga. 644 (\$3,000); *Northeastern R. Co. v. Chandler*, 84 Ga. 37 (\$2,000); *Chicago v. Jones*, 66 Ill. 349 (\$1,000, breaking of wrist); *Texas, etc., R. Co. v. Lowry*, 61 Tex. 149 (\$2,000); *Sherman v. Nairey*, 77 Tex. 291 (\$700, fracture of wrist).

Loss of Hand. — *Central R. Co. v. De Bray*, 71 Ga. 406 (\$4,700); *McGehee v. Claridy*, 96 Ga. 755 (\$3,850); *Sprague v. Atlee*, 81 Iowa 1 (\$7,500); *Newport News, etc., R. Co. v. Campbell*, (Ky. 1894) 25 S. W. Rep. 267 (\$5,000, loss of use of hand); *McMillan v. Union Press-Brick Works*, 6 Mo. App. 434 (\$1,000); *Wooster v. Western New York, etc., R. Co.*, 61 Hun (N. Y.) 623, 40 N. Y. St. Rep. 844 (\$6,500); *Missouri Pac. R. Co. v. Jones*, 75 Tex. 151, 16 Am. St. Rep. 879 (\$6,000); *Fort Worth, etc., R. Co. v. Bell*, 5 Tex. Civ. App. 28 (\$1,250, running over hand); *Schultz v. Chicago, etc., R. Co.*, 48 Wis. 375 (\$4,500).

Loss of Fingers. — *Bolden v. Jensen*, 70 Fed. Rep. 505 (\$4,500, disablement of fingers); *Savannah, etc., R. Co. v. Howard*, 91 Ga. 99 (\$2,400, three fingers); *Lake Shore, etc., R. Co. v. Hundt*, 41 Ill. App. 220 (\$7,500, four fingers lost); *Haynes v. Erk*, 6 Ind. App. 332 (\$2,750, loss of fingers on left hand); *Strong v. Iowa Cent. R. Co.*, 94 Iowa 380 (\$1,500, loss of finger); *Barg v. Bousfield*, 65 Minn. 355 (\$4,000, loss of three fingers); *Gahagan v. Aermotor Co.*, 67 Minn. 252 (\$1,800, loss of two fingers); *Honeycutt v. St. Louis, etc., R. Co.*, 40 Mo. App. 674 (\$2,250, fingers disabled); *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270 (\$8,500, all the fingers of one hand disabled); *Eldridge v. Atlas Steamship Co.*, 58 Hun (N. Y.) 36 (\$3,750, three fingers); *Campbell v. McCoy*, 3 Tex. Civ. App. 295 (\$2,500, loss of two fingers); *Missouri, etc., R. Co. v. Hauer*, (Tex. Civ. App. 1895) 33 S. W.

present connection is simply the application of the principle stated to contracts — that is, the measure of damages in such cases is the value of the bargain to the complaining party, or the loss which a fulfilment of the contract would have prevented or the breach of it has entailed.¹ Or, as it has been said, the

Rep. 1010 (\$7,500, loss of four fingers); Chapman v. Southern Pac. Co., 12 Utah 30 (\$3,300); Neilon v. Marinette, etc., Paper Co., 75 Wis. 579 (\$3,000, three fingers).

Jaw Broken and Teeth Knocked Out. — Myers v. Moore, 3 Ind. App. 226 (\$1,000, action for a battery).

Damages Held to Be Excessive. — Sabine, etc., R. Co. v. Ewing, 1 Tex. Civ. App. 531 (\$30,000, for injuries not permanent or total); De Wardener v. Metropolitan St. R. Co., 1 N. Y. App. Div. 240 (\$25,000, for severe injuries to arm and loss of general health, where \$3,400 has been expended in medical treatment).

Loss of, or Injury to, Leg — Georgia. — Southwestern R. Co. v. Singleton, 66 Ga. 252 (\$14,833, fracture of leg).

Illinois. — Chicago West Div. R. Co. v. Haviland, 12 Ill. App. 561 (\$10,000, fracture of leg, producing permanent shortening, plaintiff an aged man).

Iowa. — Lombard v. Chicago, etc., R. Co., 47 Iowa 494 (\$4,000, for broken leg); Kroener v. Chicago, etc., R. Co., 88 Iowa 16 (\$12,000, for loss of foot).

Minnesota. — Slette v. Great Northern R. Co., 53 Minn. 341 (\$4,100, for broken leg); Kennedy v. St. Paul City R. Co., 59 Minn. 45 (\$3,000, foot bruised, no bones broken); Johnson v. St. Paul City R. Co., 67 Minn. 260 (\$4,000, fracture of ankle).

Montana. — Kennon v. Gilmer, 5 Mont. 257, 51 Am. Rep. 45 (\$20,750, loss of foot).

New York. — Pfeiffer v. Buffalo R. Co., 4 N. Y. Misc. Rep. (Buffalo Super Ct.) 465 (\$20,000, for loss of foot); Bailey v. Rome, etc., R. Co., 80 Hun (N. Y.) 4 (\$16,000, for loss of leg); Shortsleeves v. New York Cent., etc., R. Co., (Supreme Ct.) 40 N. Y. Supp. 1105 (\$3,500, for permanent lameness); Corcoran v. Ulster, etc., R. Co., (Supreme Ct.) 40 N. Y. Supp. 1117 (\$1,000, for sprained ankle); Tully v. New York, etc., Steamship Co., 10 N. Y. App. Div. 463 (\$25,000, for loss of leg); Bronson v. Forty-Second St., etc., R. Co., 67 Hun (N. Y.) 649, 50 N. Y. St. Rep. 740 (\$11,000, for broken leg); Peri v. New York Cent., etc., R. Co., 87 Hun (N. Y.) 499 (\$10,000, for loss of foot).

Wyoming. — Union Pac. R. Co. v. House, 1 Wyoming 27 (\$10,000, for broken leg).

Injuries to Arm and Hand. — Illinois Cent. R. Co. v. Welch, 52 Ill. 183, 4 Am. Rep. 593 (\$10,000, for loss of arm); Kansas Pac. R. Co. v. Peavey, 34 Kan. 472 (\$6,500, for loss of thumb and forefinger); Louisville, etc., R. Co. v. Foley, 94 Ky. 220 (\$5,000, for loss of two fingers); Louisville, etc., R. Co. v. Law, (Ky. 1893) 21 S. W. Rep. 648 (\$2,000, for loss of thumb); Borgeson v. U. S. Projectile Co., 2 N. Y. App. Div. 57 (\$3,000, for partial disablement of fingers); Brown v. Southern Pac. Co., 7 Utah 288 (\$10,000, for loss of hand).

Injuries to Eyes and Vision. — Deep Min., etc., Co. v. Fitzgerald, 21 Colo. 533 (\$37,500, for total blindness); Tinney v. New Jersey Steamboat Co., 5 Lans. (N. Y.) 507 (\$5,000, for temporary partial loss of sight).

Nose and Cheek Bone Broken. — Chicago Anderson Pressed Brick Co. v. Sobkowiak, 34 Ill. App. 312 (\$6,000).

Damages Held to Be Inadequate. — In Phillips v. London, etc., R. Co., 5 Q. B. Div. 78, 29 Moak 177, a verdict for £7,000 for injuries sustained by the plaintiff through the negligence of the defendant was set aside as inadequate, on the ground that the jury must have omitted to take into consideration some of the elements of damage. The plaintiff, who was a physician in the prime of life, having a practice worth £6,000 or £7,000 per annum, was reduced by the injury to a condition of "powerless helplessness, with every enjoyment of life destroyed, and with the prospect of a speedy death."

In Miller v. Delaware, etc., R. Co., 58 N. J. L. 428, a verdict for six cents damage was set aside as inadequate where it appeared that the plaintiff was seriously and permanently injured by the defendant's negligence, and the jury found the defendant "guilty as charged."

In Brown v. Foster, 1 N. Y. App. Div. 578, a verdict for the mere amount of the plaintiff's medical expenses consequent upon an injury due to the defendant's negligence, was set aside as inadequate, where it appeared that the plaintiff, who was regularly employed at the time of the injury at twenty-five dollars a week, was rendered unable to work for several weeks, suffering the pain which necessarily accompanied the injury.

1. General Rule — Measure of Damages for Breach of Contract. — *England.* — South African Territories v. Wallington, 66 L. J. Q. B. 551, (1897) 1 Q. B. 692, 76 L. T. 520, 45 W. R. 467; Smith v. McGuire, 3 H. & N. 554.

United States. — Head v. Green, 5 Biss. (U. S.) 311; Boland v. Northwestern Fuel Co., 34 Fed. Rep. 523; Wicker v. Hoppock, 6 Wall. (U. S.) 94; Tinsley v. Jemison, 74 Fed. Rep. 177.

Alabama. — Hogan v. Thorington, 8 Port. (Ala.) 428.

California. — Baldwin v. Bennett, 4 Cal. 392; Coffee v. Meiggs, 9 Cal. 363.

Illinois. — Chicago, etc., R. Co. v. Ward, 16 Ill. 522; Illinois Cent. R. Co. v. Cobb, 64 Ill. 143.

Indiana. — Indiana Cent. R. Co. v. Moore, 23 Ind. 14; Williams v. Jones, 12 Ind. 561; Nelson v. Masterton, 2 Ind. App. 524.

Iowa. — Moorehead v. Hyde, 38 Iowa 382; Sadler v. Bean, 37 Iowa 439; Chesmore v. Barker, 101 Iowa 576.

Kansas. — Osborne v. Stassen, 25 Kan. 736.

Kentucky. — Colvin v. Jones, 3 Dana (Ky.) 576.

Louisiana. — D'Armand v. Pullin, 16 La. Ann. 243; Gauthier v. Green, 14 La. Ann. 802; Vidalet v. New Orleans, 43 La. Ann. 1121. And see Reading v. Donovan, 6 La. Ann. 491.

Maryland. — McHenry v. Marr, 39 Md. 510.

Massachusetts. — Brigham v. Evans, 113 Mass. 538; Meserve v. Ammidon, 109 Mass. 415; Hodges v. Thayer, 110 Mass. 286; Mars-

general intent of the law which gives damages in actions for breach of contract is to put the injured party, so far as it can be done by money, in the same position as if the contract had been performed.¹ According to this principle the meas-

ton *v. Singapore Rattan Co.*, 163 Mass. 296; *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Eaton v. Mellus*, 7 Gray (Mass.) 566.

Michigan. — *Lee v. Burrell*, 51 Mich. 132.

Minnesota. — *Longfellow v. McGregor*, 61 Minn. 494.

Mississippi. — *Jamison v. Moon*, 43 Miss. 598; *Cain v. Kelly*, 57 Miss. 830. And see *New Orleans, etc., R. Co. v. Moore*, 40 Miss. 39.

Missouri. — *Bowman v. Branson*, 111 Mo. 343; *Burrow v. Pound*, 29 Mo. 435.

New Hampshire. — *Chartier v. Marshall*, 56 N. H. 478.

New Jersey. — *Lehneis v. Egg Harbor Commercial Bank*, (N. J. 1893) 26 Atl. Rep. 797.

New York. — *Brusie v. Peck*, 62 Hun (N. Y.) 620, 42 N. Y. St. Rep. 801; *Matthews v. Matthews*, 62 Hun (N. Y.) 110; *Shannon v. Comstock*, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262; *Wright v. Chapin*, 87 Hun (N. Y.) 144; *Leonard v. New York, etc., Electro Magnetic Tel. Co.*, 41 N. Y. 568, 1 Am. Rep. 446; *Gallup v. Miller*, 25 Hun (N. Y.) 298; *Devlin v. New York*, 63 N. Y. 26; *U. S. Trust Co. v. O'Brien*, 61 N. Y. Super. Ct. 1; *Crist v. Armour*, 34 Barb. (N. Y.) 378; *De Lavallette v. Wendt*, 75 N. Y. 579, 31 Am. Rep. 494; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Dickinson v. Hart*, 142 N. Y. 183; *Speer v. Phoenix Mut. L. Ins. Co.*, 36 Hun (N. Y.) 322.

Ohio. — *Doolittle v. McCullough*, 12 Ohio St. 360; *Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 21 Am. St. Rep. 846; *Burckhardt v. Burckhardt*, 42 Ohio St. 474, 51 Am. Rep. 842.

Pennsylvania. — *Westfall v. Mapes*, 3 Grant's Cas. (Pa.) 198; *Hoy v. Grenoble*, 34 Pa. St. 9, 75 Am. Dec. 628; *Garsed v. Turner*, 71 Pa. St. 56.

Rhode Island. — *Brayton, J.*, in *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66.

South Carolina. — *Millar v. Hilliard*, Cheves L. (S. Car.) 149.

Tennessee. — *Williams v. Brasfield*, 9 Yerg. (Tenn.) 270; *Murry v. M'Mackin*, 4 Yerg. (Tenn.) 41; *Toomey v. Atyoe*, 95 Tenn. 373.

Texas. — *Gulf, etc., R. Co. v. Dunman*, 85 Tex. 176; *Young v. Dalton*, 83 Tex. 497; *Gulf, etc., R. Co. v. Dunman*, (Tex. Civ. App. 1895) 31 S. W. Rep. 1070; *Gordon v. Sanborn*, (Tex. Civ. App. 1896) 35 S. W. Rep. 291; *Fox v. Elston*, (Tex. Civ. App. 1896) 33 S. W. Rep. 749; *Houston, etc., R. Co. v. Hill*, 63 Tex. 381; *Brightman v. Reeves*, 21 Tex. 70.

Utah. — *Lashus v. Chamberlain*, 5 Utah 140.

Virginia. — *James v. Kibler*, 94 Va. 165.

Washington. — *Graham v. McCoy*, 17 Wash. 63; *Skagit R., etc., Co. v. Cole*, 2 Wash. 57.

Wisconsin. — *Gordon v. Brewster*, 7 Wis. 355.

Damages for Injury to Credit. — In the case of *Blair v. Kinch*, 10 L. R. Ir. 234, it was held that damages were recoverable for breach of a contract between two merchants by which one of them agreed with the other that he would not take judgment against the latter in a cer-

tain transaction, except upon the happening of a stipulated condition, the reason being that the latter was desirous of avoiding publication of the fact of the judgment in a certain commercial journal, for fear that it might injure his credit. Upon breach of the agreement and publication made, it was held that such damages to the plaintiff's credit as were proved to have resulted from the publication might be recovered.

It has been held, however, that loss of commercial credit cannot be assessed as an element of damages for breach of a contract, unless it immediately connects itself with some tangible pecuniary loss of which it was the cause. *Eckel v. Murphey*, 15 Pa. St. 488, 53 Am. Dec. 607. And see *Gilbert v. Campbell*, 12 New Bruns. 474.

Where Substantial but Not Literal Performance Shown. — The measure of damages for breach of a contract where substantial performance is shown, is simply the loss, if any, which the opposite party has sustained by reason of the failure of the defendant to perform literally. *Shires v. O'Connor*, 4 Pa. Super. Ct. Rep. 465; *Morton v. Harrison*, 52 N. Y. Super. Ct. 305. And see *Crookshank v. Mallory*, 2 Greene (Iowa) 257; *Haysler v. Owen*, 61 Mo. 270; *Sticker v. Overpeck*, 127 Pa. St. 446; *Gallagher v. Sharpless*, 134 Pa. St. 134.

What Law Controls. — The case of *Meyer v. Estes*, 164 Mass. 457, was an action for damages for breach of a contract with reference to the use of certain electrotype plates belonging to the plaintiff. It appeared that the contract had been signed in Massachusetts and then sent to the plaintiff at Leipzig, Saxony. The plaintiff notified the defendants of his acceptance of it by cable dispatch sent to them at Boston. The contract related to the use of the electrotype plates in the United States, and the defendants were described 'therein as "of Boston, Mass., U. S. A."' The contract was also dated in Boston. The court held in this case, that the contract must be regarded as a contract to be performed in Massachusetts, and that the law of Massachusetts, which was also the law of the forum, must determine the measure of damages to be recovered.

"The rule of damages," said Thomas, J., in *Lodge v. Spooner*, 8 Gray (Mass.) 166, "is the rule of the forum where the remedy is sought."

Exemplary or Punitive Damages are not as a general rule recoverable in actions for the breach of contracts. *Gordon v. Brewster*, 7 Wis. 355. And see *Jones v. Van Patten*, 3 Ind. 107. See also the title EXEMPLARY DAMAGES.

1. *Jordan v. Patterson*, 67 Conn. 473; *Jones v. Van Patten*, 3 Ind. 107; *Black, J.*, in *Wilkinson v. Ferree*, 24 Pa. St. 190.

Faulty Construction of Stove Flues. — Thus, it has been held, the measure of damages for the faulty construction of stove flues cannot be limited to the cost of putting in ventilators, which, though they might remedy the failure of the flues to operate properly, might at the same time injure the appearance of the build-

ure of damages for breach of a contract is not, as a general rule, the consideration paid, but rather the value of the thing contracted for;¹ unless, indeed, the plaintiff has, under the circumstances, a right to disaffirm the contract, and sues to recover the consideration paid.²

ing or be undesirable for other reasons. *Larimore v. Comanche County*, (Tex. Civ. App. 1895) 32 S. W. Rep. 367.

Loss of Property by Carrier — Cost of Replacement with Interest. — In the case of *British Columbia, etc., Lumber, etc., Co. v. Nettleship*, L. R. 3 C. P. 499, the plaintiffs delivered to the defendant's servants on the quay at Glasgow, for shipment on board the defendant's vessel which lay alongside, several cases containing machinery which was intended for the erection of a sawmill at Vancouver's Island. The master gave a bill of lading for them, describing the cases as containing "merchandise." The defendant knew generally of what the machinery consisted. On the arrival at their destination, one of the cases which contained machinery, without which the mill could not be erected, could not be found on board, and the plaintiffs were obliged to send to England to replace the lost articles. It was held in this case that the measure of damages for a breach of the contract was the cost of replacing the lost articles in Vancouver's Island, with interest at five per cent. upon the amount until judgment.

Breach of Trust Agreement. — Notes secured by a vendor's lien had been assigned as collateral security for a debt of the assignor, the assignee agreeing to foreclose, and buy in the property and hold it as trustee for the assignor. The lien was foreclosed, and the property bought in by the assignee of the notes, but the purchaser repudiated his agreement as to the trust. In an action for damages the proper measure of recovery was held to be the difference between the amount paid for the property, which had been credited on the debt of the assignor of the notes, and the market value of the property purchased. *Gordon v. Sanborn*, (Tex. Civ. App. 1896) 35 S. W. Rep. 291. See also *Bush v. Haeussler*, 31 Mo. App. 47; *Triggs v. Jones*, 46 Minn. 277; *Boothe v. Fiest*, 80 Tex. 141.

Contract to Sell Property to Best Advantage. — The measure of damages in an action for the breach of contract to sell the plaintiff's property to the best advantage and pay the proceeds to him, where the defendant sold the property and appropriated the proceeds, is not of course limited to the amount which the defendant actually received, if it can be shown that he did not sell to the best advantage, but on the other hand sacrificed the property. The measure of damages in such a case is only limited by what the defendant should have received for the property. *Rockwell v. Peck*, (Supreme Ct.) 43 N. Y. Supp. 196. And see *Harris v. Ogg*, 1 J. J. Marsh. (Ky.) 408.

Contract Not to Foreclose Mortgage — Assignment of Mortgage Unconditionally — Foreclosure by Assignee. — Where after the commencement of an action of foreclosure on a mortgage of the plaintiff's dower interest in certain property, the defendant agreed for a valuable consideration to procure an assignment of the

mortgage to him and then to forbear to prosecute the action of foreclosure to a sale for a certain period of time in order to give the mortgagor an opportunity to save the property, but in violation of this contract the defendant assigned the mortgage to another unconditionally, whereby the mortgaged premises were sold and the plaintiff deprived of her dower interest therein, it was held that the defendant was liable to the plaintiff in damages for the value thereof. *Gallup v. Miller*, 25 Hun (N. Y.) 298.

Delay in Delivering Telegram — Increase in Market Price of Property Ordered Purchased. — Where a telegraph company undertakes to transmit a message accepting an offer to sell certain goods for a certain price, but the sender fails to complete the purchase by reason of the negligence of the company in delivering it, the company is liable in damages for the difference in price which, by the message, the sender agreed to pay, and the market value of the goods intended to be purchased. *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157.

Mistake in Transmission. — Where a telegraph company, through mistake in transmitting a message, caused the plaintiff to ship a lot of salt from New York to Chicago, where it could only be disposed of at a loss, the measure of damages was held to be the difference between the market value of the salt in New York and the price for which it was sold in Chicago, with the cost of transportation added. *Leonard v. New York, etc., Electro Magnetic Tel. Co.*, 41 N. Y. 568, 1 Am. Rep. 446. See the title TELEGRAPHS AND TELEPHONES.

1. *Rayner v. Jones*, 90 Cal. 78; *Goodpastor v. Porter*, 11 Iowa 161; *Browne v. St. Paul Plow Works*, 62 Minn. 90; *Fenton v. Perkins*, 3 Mo. 23; *Rutan v. Hinchman*, 29 N. J. L. 112. And see *Courcier v. Graham*, 1 Ohio 330; *Wilson v. Graham*, 14 Tex. 222.

For Breach of a Contract to Exchange Property the measure of damages is the difference in the value of that which the plaintiff was to part with and that which he was to receive. *Montelius v. Atherton*, 6 Colo. 224; *Laraway v. Perkins*, 10 N. Y. 371. And see *Bicknell v. Waterman*, 5 R. I. 43.

The case of *Tinsley v. Jemison*, 74 Fed. Rep. 177, was an action for breach of a contract to exchange for certain five per cent. bonds, other stocks and securities which the plaintiff expected to exchange in turn for six per cent. bonds of the same character. It was held in this case that the plaintiff, in order to show a right of recovery at all, must show that if the defendant had complied with his contract the exchange for the bonds drawing a higher rate of interest could have been made, and that then the measure of damages was the difference in the market value of the five per cent. and six per cent. bonds.

2. *Wilkinson v. Ferree*, 24 Pa. St. 190. And see *Browne v. St. Paul Plow Works*, 62 Minn. 90; *Camp v. Pulver*, 5 Den. (N. Y.) 48.

But a Plaintiff Is Not to Be Put in a Better Position by a recovery in damages for the breach of a contract than if there had been performance.¹

b. WHERE MEASURE LIMITED BY PARTIES TO CONTRACT. — If the parties to a contract themselves limit the damages by stipulations in the contract itself, the measure of damages will be thereby controlled and determined.² Thus, in an action on a written contract for a stipulated amount, the contract itself furnishes the measure of damages.³ And where work is done under a

1. *Knowles v. Leggett*, 7 Colo. App. 265; *Fontaine v. Baxley*, 90 Ga. 416; *Bates v. Diamond Crystal Salt Co.*, 36 Neb. 900; *O'Connor v. Smith*, 84 Tex. 232; *Fox v. Elston*, (Tex. Civ. App. 1896) 33 S. W. Rep. 749; *Hawley v. Corey*, 9 Utah 175.

Breach of Contract to Furnish Water for Irrigation. — Where a landlord was sued upon breach of a contract to furnish water for irrigation, by reason whereof injury resulted to the tenant's crops, evidence as to the crops that could probably have been produced but for the want of water, and the market value thereof, is insufficient to warrant a recovery in such amount in the absence of evidence of the cost of raising, harvesting, and transporting the crops to market. *Knowles v. Leggett*, 7 Colo. App. 265.

Breach of Contract to Cultivate Farm on Shares — Profits Less Expenses. — In the case of *Hoy v. Gronoble*, 34 Pa. St. 9, 75 Am. Dec. 628, where the action was for damages for breach of contract to employ the plaintiff to cultivate a farm on shares, the jury were instructed that the plaintiff's damages were to be measured by what he could have made on the farm, which was held to be no error. Said the court in this case: "We cannot say that the jury were misled in this case by being told that the damages of the plaintiff would be measured by what he could have made on the farm. This was but another mode of saying that he was entitled to the value of his bargain. The worth of that was what it would have yielded, deducting, of course, the value of the labor necessary to be bestowed."

In an Action Against the Charterer of a Vessel for not loading a cargo, the freight she would have earned under the charter-party, less expenses and the freight actually received for services during the period over which the charter extended, was held to be the proper measure of damages. *Smith v. McGuire*, 3 H. & N. 554. See the title *CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTIES*, vol. 7, p. 156.

Contract for Board and Lodging. — In an action by a boarding-house keeper for breach of a contract to take board and lodging the measure of damages is not what was contracted to be paid for such accommodations, but what the plaintiff would have made out of the transaction. *Strakosch v. Wray*, 6 Misc. Rep. (N. Y. City Ct.) 207; *Lydecker v. Valentine*, 71 Hun (N. Y.) 194.

Property Lost by Carrier — Factor's Commissions. — It has been held, however, that for damages for cotton lost by a common carrier there need be no deduction of factor's commissions. *Kyle v. Laurens R. Co.*, 10 Rich. L. (S. Car.) 382, 70 Am. Dec. 231.

2. Stipulation as to Damages. — *Evans v. Blakeney*, 1 Cranch (C. C.) 126, 2 Cranch (U. S.) 185; *Brown v. Maulsby*, 17 Ind. 101; *Web-*

ber v. Randall, 89 Mich. 531; *Whitfield v. Levy*, 35 N. J. L. 151; *Thomson-Houston Electric Co. v. Durant Land Imp. Co.*, 144 N. Y. 34; *Lisk v. Sherman*, 25 Barb. (N. Y.) 433; *Courcier v. Graham*, 1 Ohio 330; *Louis v. Brown*, 7 Oregon 326; *Dunham v. Haggerty*, 110 Pa. St. 560. And see *Goodpaster v. Porter*, 11 Iowa 161; *Drown v. Smith*, 3 N. H. 299; *Marquand v. New York Mfg. Co.*, 17 Johns. (N. Y.) 525. Compare *Hahn v. Horstman*, 12 Bush (Ky.) 249. See the title *LIQUIDATED DAMAGES*.

Contract Regulates Measure of Recovery. — It was laid down by *Williams, C. J.*, in delivering the opinion of the court in *Bush v. Chapman*, 2 Greene (Iowa) 551, that "if a plaintiff sue on a written or special contract so as to make it the basis of his action, it must regulate his right to recover, as well as the amount."

Upon the Sale of a Machine the vendor warranted the article sold as a combined reaper and mower, to be a good grain-cutting machine and a good mowing machine. It was also added: "Should the machine fail to do as warranted, then, and in that case, we are to be notified and given time to make the machine work. Should we fail to make the machine work, then we agree to take it back." Upon suit being brought on one of the notes given for the purchase money, the defendant pleaded the warranty and breach and made a counterclaim for loss of time for himself, two hands, and a team, loss of grain out of crop caused by delay in harvesting, for being compelled to hire extra help and a new machine to harvest said grain, and for money paid on said machine. In the trial court there was a verdict and judgment for the defendant for one hundred dollars. On error, however, it was held that by the last clause of the warranty the vendee's damages were limited to the recovery of the money actually paid on the contract. *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210. See also *Main v. King*, 10 Barb. (N. Y.) 59.

Damages for Personal Injuries — Contract of Release. — Where the plaintiff injured by the defendant's negligence made a contract of settlement with the latter, in an action for a breach of the contract a recovery will be limited according to the measure fixed in the release, and it is error, therefore, to admit evidence of the nature and extent of the injuries. *Kentucky, etc., Cement Co. v. Cleveland*, 4 Ind. App. 171.

3. *Tyler v. Marsh*, 1 Day (Conn.) 1; *Brigham v. Hawley*, 17 Ill. 38; *Folliott v. Hunt*, 21 Ill. 654; *McClelland v. Snider*, 18 Ill. 58; *Street v. Swain*, 21 Ind. 203; *Brown v. Maulsby*, 17 Ind. 101; *Leland v. Stone*, 10 Mass. 462; *Knapp v. Maltby*, 13 Wend. (N. Y.) 587; *Niver v. Rossman*, 18 Barb. (N. Y.) 50; *Murray v. Gale*, 52 Barb. (N. Y.) 427; *Gillies v. Manhattan Beach*

contract fixing the price to be paid therefor, the contract price will in general be taken to furnish the measure of damages, though the contract has been only partially performed,¹ as where a party sues on a *quantum meruit*.² And a contract to convey certain land for services to be performed may be regarded as establishing the measure of damages though the contract be void by the statute of frauds.³

Fraud. — Where, however, the measure fixed is unconscionable or the contract was procured by fraud, the measure so set up will be disregarded by the court.⁴

c. PARTICULAR CLASSES OF CONTRACTS. — A discussion of the measure of damages for the breach of particular contracts does not find a proper place in an article dealing with general principles simply. The subject, accordingly, has been reserved for treatment under specific titles, to which reference is here made.⁵

d. EXPENSES INCURRED BY INJURED PARTY. — Where by reason of the breach of a contract expenses have been incurred by the injured party, they are, in general, recoverable in an action for damages.⁶ So, likewise, are

Imp. Co., 73 Hun (N. Y.) 507; Sessions v. Richmond, 1 R. I. 298. And see Compton v. Compton, 5 La. Ann. 618.

1. McClelland v. Snider, 18 Ill. 58; Brigham v. Hawley, 17 Ill. 38; Folliott v. Hunt, 21 Ill. 654; Street v. Swain, 21 Ind. 203; Gillies v. Manhattan Beach Imp. Co., 73 Hun (N. Y.) 507.

2. Gillies v. Manhattan Beach Imp. Co., 73 Hun (N. Y.) 507.

3. Lisk v. Sherman, 25 Barb. (N. Y.) 433. And see Kentucky, etc., Cement Co. v. Cleveland, 4 Ind. App. 171.

4. Wambaugh v. Bimer, 25 Ind. 368; Baxter v. Wales, 12 Mass. 365; Cutler v. How, 8 Mass. 257; Camp v. Pulver, 5 Den. (N. Y.) 48. And see Courcier v. Graham, 1 Ohio 330; Cutler v. Johnson, 8 Mass. 266.

Rent of Chattel for Single Day — Unintentional Retention for Considerable Period. — Where a plaintiff rented a canvas cover to be spread over flour on a canal boat for a day and night, for the customary charge, one dollar, but through an oversight the canvas was not returned for several weeks, there cannot be a recovery for the *per diem* price fixed for each day the canvas was retained. A recovery in such case will be limited to the fair value of the use during the whole period of detention. Russell v. Roberts, 3 E. D. Smith (N. Y.) 318.

5. Contracts with Reference to Real Property. — See such titles as COVENANTS, *ante*, p. 43; LANDLORD AND TENANT; VENDOR AND PURCHASER.

Contracts with Reference to Personal Property. — See such titles as BAILMENTS, vol. 3, p. 732; CONTRACTS OF HIRE (LAW OF BAILMENTS), vol. 7, p. 299; SALES.

Contracts of Carriage and Transportation. — See such titles as CARRIERS OF GOODS, vol. 5, p. 154; CARRIERS OF LIVE STOCK, vol. 5, p. 427; CARRIERS OF PASSENGERS, vol. 5, p. 474; CONTRACTS OF AFFREIGHTMENT AND CHARTERPARTIES, vol. 7, p. 156.

Contracts of Employment or for the Performance of Specific Services. — See such titles as AGENCY, vol. 1, p. 930; MASTER AND SERVANT; WORKING CONTRACTS.

6. Expenses Incurred in Consequence of Breach of Contract Recoverable — *England.* — Le Blanche

v. London, etc., R. Co., 1 C. P. Div. 286, 45 L. J. C. P. 521, 34 L. T. N. S. 667, 24 W. R. 808; Prior v. Wilson, 2 L. T. N. S. 549, 8 W. R. 260; Mandia v. McMahon, 17 Ont. App. 34; Walker v. Moore, 10 B. & C. 416, 21 E. C. L. 100; Blasdale v. Babcock, 1 Johns. (N. Y.) 518.

Canada. — Morrison v. European, etc., R. Co., 15 New Bruns. 295; Monteith v. Merchants' Despatch, etc., Co., 1 Ont. Rep. 47.

United States. — Sherwood v. Sutton, 5 Mason (U. S.) 1; Cole v. U. S., 23 Ct. of Cl. 341; Andrews v. Miller, 65 Fed. Rep. 897.

Alabama. — See Benziger v. Miller, 50 Ala. 206.

California. — Gay v. Dare, 103 Cal. 454; Kenyon v. Goodall, 3 Cal. 257; Cedarberg v. Robinson, 100 Cal. 93.

Colorado. — Cannon Coal Co. v. Taggart, 1 Colo. App. 60.

Connecticut. — Jordan v. Patterson, 67 Conn. 473.

Florida. — Robinson v. Hyer, 35 Fla. 544.

Georgia. — Lewis v. Bracken, 97 Ga. 337; Savannah, etc., R. Co. v. Pritchard, 77 Ga. 412, 4 Am. St. Rep. 92.

Illinois. — Sangamon, etc., R. Co. v. Henry, 14 Ill. 156; Burk v. Dunn, 55 Ill. App. 25.

Indiana. — Williams v. Frybarger, 9 Ind. App. 558. And see Williamson v. Brandenburg, 133 Ind. 594.

Iowa. — Wilson Sewing Mach. Co. v. Sloan, 50 Iowa 367; Novelty Iron Works v. Capital City Oatmeal Co., 88 Iowa 524; Brownell v. Chapman, 84 Iowa 504, 35 Am. St. Rep. 326.

Louisiana. — Hale v. New Orleans, 18 La. Ann. 321; Peterkin v. Martin, 30 La. Ann. 894; Schleider v. Dielman, 44 La. Ann. 462.

Maine. — Watson v. Lisbon Bridge, 14 Me. 205; Springer v. Berry, 47 Me. 330.

Massachusetts. — Reggio v. Braggiotti, 7 Cush. (Mass.) 166; Smith v. Sherman, 4 Cush. (Mass.) 408; Hayden v. Cabot, 17 Mass. 169; Pond v. Harris, 113 Mass. 114; Johnson v. Arnold 2 Cush. (Mass.) 46; Waite v. Gilbert, 10 Cush. (Mass.) 177.

Michigan. — Harrow Spring Co. v. Whipple Harrow Co., 90 Mich. 147, 30 Am. St. Rep.

expenditures made in anticipation of or preparation for the performance of a contract in which default is made or fulfilment prevented.¹

421; *Peters v. Cooper*, 95 Mich. 191; *Murphy v. McGraw*, 74 Mich. 318.

Missouri. — *Armstrong v. Missouri Pac. R. Co.*, 17 Mo. App. 403; *Rankin v. Pacific R. Co.*, 55 Mo. 167; *Gardner v. Armstrong*, 31 Mo. 535; *B. F. Myers Tailoring Co. v. Keeley*, 58 Mo. App. 491; *Athletic Baseball Assoc. v. St. Louis Sportsman's Park, etc., Assoc.*, 67 Mo. App. 653.

New Hampshire. — *Kennison v. Taylor*, 18 N. H. 220.

New York. — *Briggs v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 515; *New York v. Second Ave. R. Co.*, 102 N. Y. 572, 55 Am. Rep. 839; *Compton v. Heissenbuttl*, (City Ct.) 13 N. Y. Supp. 594; *Fagen v. Davison*, 2 Duer (N. Y.) 153; *Maguire v. Woodside*, 2 Hilt. (N. Y.) 59; *Freeman v. Clute*, 3 Barb. (N. Y.) 424; *Armstrong v. Percy*, 5 Wend. (N. Y.) 535; *Myers v. Burns*, 33 Barb. (N. Y.) 401; *Reed v. McConnell*, 62 Hun (N. Y.) 153; *Bernstein v. Meech*, 130 N. Y. 354; *Nason Mfg. Co. v. Stephens*, 127 N. Y. 602; *Eagle Tube Co. v. Edward Barr Co.*, 16 Daly (N. Y.) 212.

Ohio. — *Somerby v. Tappan, Wright (Ohio)* 570; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489.

Oregon. — *Drake v. Sears*, 8 Oregon 209.

Pennsylvania. — *Dixon-Woods Co. v. Phillips Glass Co.*, 169 Pa. St. 167; *Collins v. Baumgardner*, 52 Pa. St. 461; *Dumars v. Miller*, 34 Pa. St. 319.

South Carolina. — *Nettles v. South Carolina R. Co.*, 7 Rich. L. (S. Car.) 190, 62 Am. Dec. 409.

South Dakota. — *Gleckler v. Slavens*, 5 S. Dak. 364.

Tennessee. — *Walker v. Ellis*, 1 Sneed (Tenn.) 515; *Doak v. Snapp*, 1 Coldw. (Tenn.) 180; *Nashville v. Sutherland*, 94 Tenn. 356.

Texas. — *Gulf, etc., R. Co. v. Loonie*, 84 Tex. 259; *Gulf, etc., R. Co. v. Hume*, 87 Tex. 211; *Westfall v. Perry*, (Tex. Civ. App. 1893) 23 S. W. Rep. 740; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608; *Osborne v. Ayers*, (Tex. Civ. App. 1895) 32 S. W. Rep. 73; *Watkins v. Junker*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1129; *D. A. Tompkins Co. v. Galveston St. R. Co.*, 4 Tex. Civ. App. 1.

Vermont. — *Keyes v. Western Vermont Slate Co.*, 34 Vt. 81; *Hathaway v. Sabin*, 63 Vt. 527; *Eureka Marble Co. v. Windsor Mfg. Co.*, 51 Vt. 170.

Washington. — *Adamant Plaster Mfg. Co. v. National Bank of Commerce*, 5 Wash. 232; *Skagit R., etc., Co. v. Cole*, 2 Wash. 57.

Wisconsin. — *Poposkey v. Munkwitz*, 68 Wis. 322, 60 Am. Rep. 858; *Hinckley v. Beckwith*, 17 Wis. 413; *Ayres v. Chicago, etc., R. Co.*, 75 Wis. 215.

Breach of Warranty — Sale of Diseased Horses. — In an action for the breach of warranty as to soundness of horses sold by the defendant's agent to the plaintiff, a livery man, the former representing them to be healthy and sound, whereas they were in fact affected with a dangerous and contagious disease, it was held that the plaintiff might recover in addition to the value of such of the horses purchased as died from the disease with which they were

affected, the value of such of his other horses as contracted the disease and died by reason of the horses purchased having been put with them, also the expenses of removing others of his horses to another stable to prevent the further spread of the disease, the rent of the stable to which they were removed, the expenses of taking care of, feeding, and treating the diseased horses, the removal and burial of the horses which died, the expenses of fumigating and whitewashing the plaintiff's stable for the purpose of eradicating the disease, and the amount of profits in his business which the plaintiff lost in consequence. *Lewis v. Bracken*, 97 Ga. 337.

1. Expenses in Anticipation of Performance. — *Cedarberg v. Robinson*, 100 Cal. 93; *Novelty Iron Works v. Capital City Oatmeal Co.*, 88 Iowa 524; *Hammond v. Beeson*, 112 Mo. 190; *Bryant v. Barton*, 32 Neb. 613; *Abbey v. Mace*, (C. Pl.) 19 N. Y. Supp. 375; *Reed v. McConnell*, 62 Hun (N. Y.) 153; *Bernstein v. Meech*, 130 N. Y. 354; *Hathaway v. Sabin*, 63 Vt. 527. And see *Hawley v. Corey*, 9 Utah 175. Compare *Stevens v. Lyford*, 7 N. H. 360.

For Breach of a Contract to Furnish Dredge Boats, by reason of which the party for whom they were to be furnished was unable to complete his contract for dredging, the party who was to furnish the dredge boats, knowing of the other party's contract for dredging and knowing that the boats were indispensable to enable him to perform his contract, is liable for all the expenses of the latter incurred in connection with the work undertaken. *Watkins v. Junker*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1129.

Breach of Contract of Marriage. — Loss of time and expenses incurred in preparing for a marriage which by reason of defendant's default never takes place, are recoverable in an action for damages for breach of contract. *Smith v. Sherman*, 4 Cush. (Mass.) 408.

Breach of Contract to Sell Timber on Land. — In an action for breach of a contract to sell timber on land, the purchaser also being given by the contract a right of way to the timber, the cost of constructing a road to the timber is not an element of damages where the plaintiff is also allowed the difference between the contract price and the market value of the timber standing when the breach of contract arose. *Mackey v. Olsen*, 12 Oregon 429.

For Breach of a Contract to Play an Exhibition Baseball Game with the plaintiffs, on which occasion the plaintiffs were to have a stipulated proportion of the gate receipts, it was held that there might be a recovery for the preparatory expenses incurred by the plaintiffs. *Athletic Baseball Assoc. v. St. Louis Sportsman's Park, etc., Assoc.*, 67 Mo. App. 653.

The Expenses of Investigating Title may be recovered upon the breach of a contract for the exchange of lands. *Fagen v. Davison*, 2 Duer (N. Y.) 153. And see *Dumars v. Miller*, 34 Pa. St. 319. And such expenses may be recovered for breach of warranty as to title in a contract to convey lands. *Walker v. Moore*, 10 B. & C. 416, 21 E. C. L. 100.

Contract to Submit to Arbitration. — In an action for the breach of a contract to submit a cause to arbitration it was held that there might be a recovery in damages for the plaintiff's reasonable costs and expenses in preparing for a hearing before the arbitrators.¹

Expenditures Must Be Reasonable in Amount and Object. — Such expenditures must, however, be reasonable in amount and in object,² and must have been the natural result of the defendant's breach of contract.³ Nor does it affect the right to recover that the object intended was not accomplished, provided the expenses were reasonably and prudently incurred. Thus where, after endeavoring to cure and incurring expenses in the treatment of a diseased horse warranted sound, the horse died, whereby the vendee lost not only the value of the animal, but the money paid out in attempting its cure; in such a case there may be a recovery for such latter amount, in addition to the value of the horse.⁴

e. MOTIVE AND INTENT OF DEFAULTING PARTY. — In actions for the breach of contracts the motive or intent of the defendant will not, in general, be considered,⁵ unless, indeed, the circumstances give rise to a claim for exemplary damages,⁶ a subject which will receive consideration in a subsequent volume.

1. *Pond v. Harris*, 113 Mass. 114.

2. **Expenses Must Be Reasonable.** — *Cole v. U. S.*, 23 Ct. of Cl. 341; *St. Louis, etc., R. Co. v. Beard*, 56 Ark. 309; *Watson v. Lisbon Bridge*, 14 Me. 205; *Pond v. Harris*, 113 Mass. 114; *Hayden v. Cabot*, 17 Mass. 169; *Murphy v. McGraw*, 74 Mich. 318; *Walker v. Ellis*, 1 Sneed (Tenn.) 515; *Hinckley v. Beckwith*, 17 Wis. 413; *Morrison v. European, etc., R. Co.*, 15 New Bruns. 295. And see *Colton v. Good*, 11 U. C. Q. B. 153.

In an Action for Damages for Failure to Deliver Possession under a contract of lease, because occupied by a tenant of an unexpired term, it was held that such expenses as the plaintiff had incurred in preparing to occupy the premises after he had been informed that the tenant in possession refused to surrender them, could not be recovered. *Cohn v. Norton*, 57 Conn. 480.

In an Action by the Owner of a Crop to recover damages against a railroad company for failing to construct and maintain proper and sufficient cattle guards, the plaintiff was held entitled to compensation not only for the crop actually destroyed, but also to reasonable compensation for the time and labor necessarily expended in reasonable efforts to protect his crop and to prevent further additional damages thereto. *St. Louis, etc., R. Co. v. Ritz*, 33 Kan. 404. And see *St. Louis, etc., R. Co. v. Sharp*, 27 Kan. 134.

Provided, however, the compensation so claimed does not exceed the damage or loss which might have ensued had no such efforts been made. *St. Louis, etc., R. Co. v. Ritz*, 33 Kan. 404.

3. **Expenditures Must Have Resulted Naturally.** — *Dwyer v. Tulane Educational Fund*, 47 La. Ann. 1232; *Hayden v. Cabot*, 17 Mass. 169; *Stevens v. Lyford*, 7 N. H. 360; *Rochester Lantern Co. v. Stiles, etc., Press Co.*, 135 N. Y. 209; *Engelsdorf v. Sire*, 64 Hun (N. Y.) 209; *Steers v. Laird*, 3 Misc. Rep. (N. Y. Super. Ct.) 408; *Walker v. Ellis*, 1 Sneed (Tenn.) 515; *Slaughter v. Denmead*, 88 Va. 1019; *Brayton v. Chase*, 3 Wis. 456; *Colton v. Good*, 11 U. C. Q. B. 153.

4. **Recovery of Expenses Incurred in Addition to Value of Property.** — *Watson v. Lisbon Bridge*, 14 Me. 205.

5. **Motive or Intent Not to Be Inquired Into.** — In the case of *Brown v. Chicago, etc., R. Co.*, 54 Wis. 342, Taylor, J., delivering the opinion of the court, said, with reference to the measure of damages in actions for the breach of contract: "In such cases the wilfulness of the party in refusing to fulfil the contract does not in any way change the rule of damages. The rule as to damages in actions upon contract is the same whether the breach be by mistake, pure accident, or inability to perform it, or whether it be wilful and malicious. The motives of the party breaking the contract are not to be inquired into."

Compensation for breach of contract in relation to the payment of money or in relation to property, ordinarily involves no element of motive. In the first case the failure to pay as agreed is measured absolutely by the sum and interest, no matter what vicious purpose induced the failure; in the second, compensation is the injured party's right, that is, to be placed in the same position where he would have been had the defaulting party performed his contract. And the same rule obtains, no matter what the intent or motive of the defaulting party may have been. *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398. And see *Cordon v. Brewster*, 7 Wis. 355.

No Damages for "Violation of Faith." — In the case of *Hoy v. Gronoble*, 34 Pa. St. 9, 75 Am. Dec. 628, which was an action for breach of contract, the trial court charged the jury that, in addition to other items of damage, they might assess damages for the defendant's "violation of faith." This was held to be error. "This is something more than compensation," said the court in this case. "It is an allowance of vindictive damages, which is not permitted in actions for a breach of contract, with very rare exceptions, perhaps in none except the single case of breach of promise of marriage."

6. *Spear, J.*, in *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398.

An Exception to the General Rule is, however, found in actions for the breach of contract of marriage, in which it has been held that the motives of the defendant may be looked to.¹

In the Case of Contracts for the Sale of Realty, it has been held that a vendor who attempts to sell in good faith, but is unable to comply with his contract, is liable only for the consideration paid and interest, whereas if the transaction is fraudulent or the breach wilful, or the conveyance made with knowledge on the part of the vendor that he had no title, there may be a recovery in damages by the vendee for the value of the loss of his bargain.²

4. Damages in Actions of Tort — *a. IN GENERAL.* — In actions for damages for tortious injuries the rule of compensation to the injured party is generally held to control the measure of damages.³ In this class of cases, however, there is a notable exception to the principle of compensation, in the rule of punitive, exemplary, or vindictive damages, which is discussed in a subsequent volume.⁴

Evidence of Financial Condition of Parties. — The general rule is that in actions for tortious injuries, where compensatory damages only are recoverable, evidence of the financial condition of the plaintiff or defendant is inadmissible.⁵ But where the rule of exemplary damages is applicable the jury may take into consideration the ability of the defendant to pay.⁶

1. Breach of Promise of Marriage. — *Duche v. Wilson*, 37 Hun (N. Y.) 519; *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125. See generally the title BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 882.

2. See the title VENDOR AND PURCHASER.

3. Damages in Actions of Tort — Compensation the Rule — *England.* — *Harvey v. Pocock*, 11 M. & W. 740.

United States. — *The Steamboat New-Jersey*, 101 U. S. 444; *The Rebecca*, B. & H. Adm. 347; *The Ann Caroline*, 2 Wall. (U. S.) 538; *Walker v. Smith*, 1 Wash. (U. S.) 154.

Indiana. — *Ohio, etc., R. Co. v. Trapp*, 4 Ind. App. 69.

Maryland. — *Baltimore v. Poultney*, 25 Md. 107.

Massachusetts. — *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145; *Handforth v. Maynard*, 154 Mass. 414.

Michigan. — *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

Nebraska. — *Pope v. Benster*, 42 Neb. 304, 47 Am. St. Rep. 703.

Pennsylvania. — *McKnight v. Ratcliff*, 44 Pa. St. 168; *Douty v. Bird*, 60 Pa. St. 48; *Forsyth v. Palmer*, 14 Pa. St. 98, 53 Am. Dec. 519; *Hart v. Evans*, 8 Pa. St. 22; *Seely v. Alden*, 61 Pa. St. 302, 100 Am. Dec. 642; *Pennsylvania Co. v. Philadelphia, etc., R. Co.*, 11 Pa. Co. Ct. Rep. 482; *Bussey v. Donaldson*, 4 Dall. (Pa.) 206.

Texas. — *Galveston, etc., R. Co. v. Matula*, (Tex. 1892) 19 S. W. Rep. 376; *De la Zerda v. Korn*, 25 Tex. Supp. 188; *Baker v. Ashe*, 80 Tex. 356.

4. See the title EXEMPLARY DAMAGES.

5. Financial Condition of Parties. — *Shea v. Potrero, etc., R. Co.*, 44 Cal. 414; *La Salle v. Thorndike*, 7 Ill. App. 282; *Hunt v. Chicago, etc., R. Co.*, 26 Iowa 363; *Van Dusen v. Letellier*, 78 Mich. 492; *Missouri Pac. R. Co. v. Lyde*, 57 Tex. 505; *Belknap v. Boston, etc., R. Co.*, 49 N. H. 358; *Roach v. Caldbeck*, 64

Vt. 593. And see *Chicago City R. Co. v. Henry*, 62 Ill. 142.

Poverty of Plaintiff as a Result of Personal Injuries. — It has been said, however, that the introduction of evidence by a woman injured by an obstruction on a sidewalk, that by reason of the injuries she had to sell her house and lot to get money to live on, was not improper. *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269. This was *dictum*, inasmuch as the objection to the evidence was general, and such therefore as the court was not bound to notice.

In an Action for Damages for Personal Injuries by the employee of a railroad corporation against the railroad, it was held that evidence was admissible that the plaintiff "had no means or property to subsist upon, and that he was entirely dependent upon his labor for his support," only to show, however, the nature of the plaintiff's business and value of his services. *Hunt v. Chicago, etc., R. Co.*, 26 Iowa 363.

6. Exemplary Damages — Defendant's Financial Ability — *Illinois.* — *Peters v. Lake*, 66 Ill. 206, 16 Am. Rep. 593; *Grable v. Margrove*, 4 Ill. 372, 38 Am. Dec. 88; *McNamara v. King*, 7 Ill. 432; *Cochran v. Ammon*, 16 Ill. 316; *Jones v. Jones*, 71 Ill. 562; *Smith v. Wunderlich*, 70 Ill. 426.

Minnesota. — *McCarthy v. Niskern*, 22 Minn. 90.

Mississippi. — *Whitfield v. Westbrook*, 40 Miss. 311.

Missouri. — *Clark v. Fairley*, 30 Mo. App. 335; *Beck v. Dowell*, 111 Mo. 506, 33 Am. St. Rep. 547; *Buckley v. Knapp*, 48 Mo. 152.

New Hampshire. — *Belknap v. Boston, etc., R. Co.*, 49 N. H. 358.

South Carolina. — *Rowe v. Moses*, 9 Rich. L. (S. Car.) 423, 67 Am. Dec. 560.

Wisconsin. — *Birchard v. Booth*, 4 Wis. 67; *Winn v. Peckham*, 42 Wis. 493.

Evidence of Lack of Means by Defendant. — Where the plaintiff would be permitted to in-

Double and Treble Damages. — By statute in some jurisdictions double or treble damages are allowed in certain classes of cases.¹ For example, against a railroad company for killing stock where its road is unfenced;² for the negligent setting out of fires;³ for the wrongful cutting of timber;⁴ certain injuries on highways,⁵ and certain other tortious wrongs the nature of which has been deemed to warrant such provisions.⁶

b. IN PARTICULAR CLASSES OF TORTS — (1) *Scope of Section.* — The measure of damages in the various classes of specific wrongs, and the elements to be considered in estimating the amount of the recovery in such cases, are fully treated under particular titles in this work. It would serve no good purpose to insert here matter which must be discussed in detail elsewhere, and the reader is therefore referred to the titles dealing with particular torts or collecting authorities with reference to specific classes of rights or things.⁷ With regard to a peculiar species of wrongs, namely, torts to the person, a different course has been followed, and the subsequent sections will treat in detail the elements and measure of damages in such cases.

(2) *Torts to the Person* — (a) *In General.* — The measure of damages for torts to the person presents difficulty on account of the fact that the elements of recovery in such cases are not all susceptible of ascertainment by any standards of established value.⁸ Exact compensation, therefore, in the usual sense

introduce evidence as to the financial condition or ability of the defendant to enhance the damages it is equally competent for the latter to show a lack of pecuniary means to diminish them. Nor can the defendant, it has been held, be deprived of this right by the omission of the plaintiff to offer any such proof. *Johnson v. Smith*, 64 Me. 553.

But where, over the plaintiff's objection, the defendant in an action for damages gave evidence of his bankruptcy at the time of the trial, which was several years after the injury, the admission of the evidence was held to have been error. *Peters v. Lake*, 66 Ill. 206, 16 Am. Rep. 593.

In Iowa the rule is different, and even where exemplary damages may be recovered, it has been held that evidence of the financial ability of the defendant is not admissible. *Hunt v. Chicago, etc.*, R. Co., 26 Iowa 364; *Guenerech v. Smith*, 34 Iowa 348. And see *Dunlavy v. Watson*, 38 Iowa 400; *Perrine v. Winter*, 73 Iowa 645; *Bailey v. Bailey*, 94 Iowa 606.

1. **Double and Treble Damages** — *England.* — *Atty.-Gen. v. Hatton*, M'Clel. 214, 13 Price 476; *Buckle v. Bewes*, 6 D. & R. 1, 4 B. & C. 154, 10 E. C. L. 298, 1 Chit. 137, 141.

United States. — *Cross v. U. S.*, 1 Gall. (U. S.) 26; *Whitemore v. Cutter*, 1 Gall. (U. S.) 478.

California. — *Galvin v. Gualala Mill Co.*, 98 Cal. 268.

Connecticut. — *Hart v. Brown*, 2 Root (Conn.) 301; *Bill v. Lyme*, 2 Root (Conn.) 213; *Broschart v. Tuttle*, 59 Conn. 1.

Iowa. — *Hopper v. Chicago, etc.*, R. Co., 91 Iowa 639.

Kentucky. — *Stovall v. Smith*, 4 B. Mon. (Ky.) 378.

Maine. — *Quimby v. Carter*, 20 Me. 218.

Massachusetts. — *Clark v. Worthington*, 12 Pick. (Mass.) 571; *Lobdell v. New Bedford*, 1 Mass. 153.

Michigan. — *Wallace v. Finch*, 24 Mich. 255; *Clark v. Field*, 42 Mich. 342; *Kilgann v. Jenkinson*, 57 Mich. 325.

Minnesota. — *Bagley v. Sternberg*, 34 Minn. 470.

Mississippi. — *Terrel v. Ligon*, Walk. (Miss.) 170.

Missouri. — *Walther v. Warner*, 26 Mo. 143; *Herron v. Hornback*, 24 Mo. 492; *Young v. Kansas City, etc.*, R. Co., 52 Mo. App. 530; *Brewster v. Link*, 28 Mo. 147; *Withington v. Hildebrand*, 1 Mo. 280.

New York. — Anonymous, 4 Wend. (N. Y.) 216; *Pharis v. Gere*, 31 Hun (N. Y.) 443; *Starkweather v. Quigley*, 7 Hun (N. Y.) 26.

2. *Young v. Kansas City, etc.*, R. Co., 52 Mo. App. 530.

3. *Galvin v. Gualala Mill Co.*, 98 Cal. 268.

4. *Clark v. Field*, 42 Mich. 342.

5. *Bill v. Lyme*, 2 Root (Conn.) 213; *Broschart v. Tuttle*, 59 Conn. 1.

6. **These Statutes Will Be More Particularly Referred to** in connection with the causes of action to which they apply. See the titles FIRES, HIGHWAYS; RAILROADS; TRESPASS, etc.

7. See such titles as ABDUCTION, vol. 1, p. 162; ASSAULT AND BATTERY, vol. 2, p. 952; BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 882; CIVIL DAMAGE ACTS, vol. 6, p. 36; CONFUSION OF GOODS, vol. 6, p. 592; CRIMINAL CONVERSATION, ante, p. 260; DEATH BY WRONGFUL ACT, post; DECEIT; FALSE IMPRISONMENT; FRAUD; LATERAL AND SUBJACENT SUPPORT; MALICIOUS PROSECUTION; NEGLIGENCE; NUISANCE; SEDUCTION; TRESPASS; TROVER AND CONVERSION; WASTE; also titles dealing with particular subject-matters, such as ANIMALS, vol. 2, p. 341; COPYRIGHT, vol. 7, p. 508; CROPS, ante, p. 301; EXPLOSIVES; FENCES; FIRES; MALPRACTICE; MASTER AND SERVANT; MINES AND MINING; MUNICIPAL CORPORATIONS; PATENTS; PUBLIC OFFICERS; SHERIFFS; STOCK-BROKERS; TREES; WATERS AND WATER-COURSES. For maritime torts, see the titles NAVIGATION; SEAMEN; SHIPS AND SHIPPING.

8. **Torts to the Person.** — *Lee v. Southern Pac. R. Co.*, 101 Cal. 118; *Howland v. Oakland Consol. St. R. Co.*, 110 Cal. 513; *Chicago, etc.*, R. Co. v. *Adamick*, 33 Ill. App. 412; *Pitts-*

of the term, is impossible,¹ a reasonably fair and just compensation being the best that can be hoped for,² the measure of which is determined by the jury in the exercise of a sound discretion.³

Elements Susceptible of Pecuniary Measurement. — Some of the usual elements of recovery are, however, susceptible of pecuniary measurement, and where this is the case a pecuniary standard will, of course, be adopted.⁴ An illustration of this is amounts paid for medical attendance and nursing, where personal injuries are of such a nature as to require them.⁵ Other elements, however, are wholly insusceptible of such measurement, so entirely so that a jury is not even permitted to attempt to fix a money equivalent therefor.⁶

burg, etc., R. Co. v. Story, 63 Ill. App. 239; Illinois Cent. R. Co. v. Robinson, 58 Ill. App. 181; Goodhart v. Pennsylvania R. Co., 177 Pa. St. 1; Owens v. People's Pass. R. Co., 155 Pa. St. 334; Norfolk, etc., R. Co. v. Ampey, 93 Va. 108.

No Fixed Measure of Compensation. — In *The City of Panama*, 101 U. S. 453, the court said that the amount of damages must depend very much upon the facts and circumstances proved at the trial. When a suit is brought by a party for personal injuries, "there cannot be any fixed measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted."

1. *The City of Panama*, 101 U. S. 453; *Lee v. Southern Pac. R. Co.*, 101 Cal. 118; *Howland v. Oakland Consol. St. R. Co.*, 110 Cal. 513; *Chicago, etc., R. Co. v. Adamick*, 33 Ill. App. 412; *Pittsburg, etc., R. Co. v. Story*, 63 Ill. App. 239.

2. *Campbell, J., in Deep Min., etc., Co. v. Fitzgerald*, 21 Colo. 533; *Chicago, etc., R. Co. v. Adamick*, 33 Ill. App. 412; *Pittsburg, etc., R. Co. v. Story*, 63 Ill. App. 239; *Purcell v. St. Paul City R. Co.*, 48 Minn. 134; *Fremont, etc., R. Co. v. French*, 48 Neb. 638.

3. **Province of Jury — United States.** — *The City of Panama*, 101 U. S. 453.

Alabama. — *Montgomery, etc., R. Co. v. Mallette*, 92 Ala. 209.

California. — *Aldrich v. Palmer*, 24 Cal. 513; *Lee v. Southern Pac. R. Co.*, 101 Cal. 118; *Howland v. Oakland Consol. St. R. Co.*, 110 Cal. 513.

Colorado. — *Deep Min., etc., Co. v. Fitzgerald*, 21 Colo. 533.

Georgia. — *Southern Bell Telephone, etc., Co. v. Jordan*, 87 Ga. 69; *Richmond, etc., R. Co. v. Allison*, 86 Ga. 145.

Illinois. — *Pittsburg, etc., R. Co. v. Story*, 63 Ill. App. 239; *Chicago, etc., R. Co. v. Adamick*, 33 Ill. App. 412; *Lovington v. Baughens*, 34 Ill. App. 544.

Indiana. — *Little v. Tingle*, 26 Ind. 168.

Iowa. — *Morris v. Chicago, etc., R. Co.*, 45 Iowa 29. And see *Hendrickson v. Kingsbury*, 21 Iowa 379.

Louisiana. — *Choppin v. New Orleans, etc., R. Co.*, 17 La. Ann. 19; *Frank v. New Orleans, etc., R. Co.*, 20 La. Ann. 25.

Massachusetts. — *Leland v. Stone*, 10 Mass. 459; *Weld v. Bartlett*, 10 Mass. 470.

Mississippi. — *Southern, etc., R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

Missouri. — *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367; *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 669, 22 Am. St. Rep. 800.

Nebraska. — *St. Joseph, etc., R. Co. v. Hedge*, 44 Neb. 448.

Discretion to Be Exercised in the Light of the Evidence. — This discretion, however, must be exercised in the light of the evidence, and the amount of damages assessed with reference thereto. *Chicago, etc., R. Co. v. Adamick*, 33 Ill. App. 412; *Pittsburg, etc., R. Co. v. Story*, 63 Ill. App. 239.

Erroneous Charge to Jury. — It is erroneous to charge a jury that they may find actual damages in any amount they may think proper, without any instructions as to the proper mode of estimating the damages. *Gulf, etc., R. Co. v. Head*, (Tex. App. 1891) 15 S. W. Rep. 504.

"Compensation" in Personal Injury Cases. — "Compensation in its legal signification," said *Williams, J.*, in *Parker v. Jenkins*, 3 Bush (Ky.) 587, "consists in remuneration for loss of time, necessary expenditures, and for permanent disability, if such be the result, and the court should have so informed the jury instead of leaving to them to determine the legal import of the true damages sustained by the plaintiff."

4. **In an Action for Personal Injuries** the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attention and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning, by the wrongful act of the defendant. *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 546.

5. See *infra*, this subdivision, *Physician's Fees, Medical Attendance, and Nursing*.

Future Pecuniary Loss. — In the case of *Smith v. East Mauch Chunk*, 3 Pa. Super. Ct. Rep. 495, a charge of the trial court to the effect that the plaintiff in an action for damages for personal injuries might recover for the pecuniary loss she sustained and was "likely to sustain" during the remainder of her life by reason of such injuries, was affirmed.

6. **Loss of Eyesight.** — In actions for personal injuries, such, for instance, as the loss of eyesight, the jury are not permitted to attempt to ascertain and render a money equivalent for the consequences of the injuries. *Campbell, J., in Deep Min., etc., Co. v. Fitzgerald*, 21 Colo. 533; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

(b) **Recovery for Future Consequences.** — Where the injuries are of a permanent nature there may be a recovery for consequences which have not yet actually ensued,¹ if reasonably certain to follow.²

(c) **Evidence Admissible** — *aa.* **EVIDENCE OF DOMESTIC RELATIONS.** — In an action for personal injuries, evidence that the plaintiff is married and has a large family dependent upon him for support has been held incompetent.³ Likewise it has been held error to admit evidence of the age and number of the plaintiff's children.⁴

There Can Be No Proof in Money of the extent of the injury suffered from physical or mental pain. *Montgomery, etc., R. Co. v. Mallette*, 92 Ala. 209.

1. Permanent Injuries — Future Consequences — United States. — *Davidson v. Southern Pac. R. Co.*, 44 Fed. Rep. 476; *Saldana v. Galveston, etc., R. Co.*, 43 Fed. Rep. 862.

Alabama. — *South, etc., Alabama R. Co. v. McLendon*, 63 Ala. 266.

Arkansas. — *St. Louis, etc., R. Co. v. Blackburn*, (Ark. 1891) 15 S. W. Rep. 469.

Delaware. — *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529.

District of Columbia. — See *Johnson v. Baltimore, etc., R. Co.*, 6 Mackey (D. C.) 232.

Illinois. — *North Chicago City R. Co. v. Gastka*, 128 Ill. 613; *Lake Shore, etc., R. Co. v. Johnsen*, 135 Ill. 641; *Frink v. Schroyer*, 18 Ill. 416; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *North Chicago City R. Co. v. Gastka*, 27 Ill. App. 518, *affirmed* 128 Ill. 613.

Indiana. — *Stewart v. Maddox*, 63 Ind. 51; *Elkhart v. Ritter*, 66 Ind. 136; *Stafford v. Oskaloosa*, 64 Iowa 251.

Michigan. — *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374.

Missouri. — *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270; *Haniford v. Kansas City*, 103 Mo. 172; *Gorham v. Kansas City, etc., R. Co.*, 113 Mo. 408.

New Jersey. — *Klein v. Jewett*, 26 N. J. Eq. 474.

New York. — *Moylan v. Second Ave. R. Co.*, 59 Hun (N. Y.) 619, 35 N. Y. St. Rep. 644; *Koetter v. Manhattan R. Co.*, 59 Hun (N. Y.) 623, 36 N. Y. St. Rep. 611; *Bateman v. New York Cent., etc., R. Co.*, 47 Hun (N. Y.) 429; *Strohm v. New York, etc., R. Co.*, 96 N. Y. 305; *Dieffenbach v. New York, etc., R. Co.*, 5 N. Y. App. Div. 91.

North Carolina. — *Wallace v. Western North Carolina R. Co.*, 104 N. Car. 442.

Pennsylvania. — *Scott Tp. v. Montgomery*, 95 Pa. St. 444; *Smith v. East Mauch Chunk*, 3 Pa. Super. Ct. Rep. 495.

Texas. — *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443; *Gulf, etc., R. Co. v. Harriett*, 80 Tex. 73; *San Antonio, etc., R. Co. v. Keller*, 11 Tex. Civ. App. 569.

Vermont. — *Fulsome v. Concord*, 46 Vt. 135.

2. Illinois. — *North Chicago City R. Co. v. Gastka*, 27 Ill. App. 518, *affirmed* 128 Ill. 613.

Iowa. — *Stafford v. Oskaloosa*, 64 Iowa 251.

Michigan. — *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374.

New York. — *Strohm v. New York, etc., R. Co.*, 96 N. Y. 305; *Dieffenbach v. New York, etc., R. Co.*, 5 N. Y. App. Div. 91; *Gregory v. New York, etc., R. Co.*, 55 Hun (N. Y.) 303; *Crawford v. Delaware, etc., R. Co.*, 55 N. Y.

Super. Ct. 255; *Bateman v. New York Cent., etc., R. Co.*, 47 Hun (N. Y.) 429.

No Qualification of Rule Permitted. — In the case of *Kansas City, etc., R. Co. v. Stoner*, 49 Fed. Rep. 209, where the rule as stated was that there might be a recovery for such future consequences as were reasonably certain to happen, but not for "merely possible or even probable future effects not now apparent," the qualifying phrase was held to constitute error on the part of the trial court, as tending to mislead and confuse the jury.

Reasonable Certainty as Affecting Rule of Reasonable Doubt. — It has been held that it is only necessary that the jury in awarding damages for future consequences should be satisfied beyond a reasonable doubt, and that, therefore, an instruction that it must be reasonably certain that such consequences should ensue was properly refused. *Gulf, etc., R. Co. v. Harriett*, 80 Tex. 73.

3. Evidence of Domestic Relations of Plaintiff. — *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Louisville, etc., R. Co. v. Binion*, 107 Ala. 645; *Chicago v. O'Brennan*, 65 Ill. 160; *Pittsburg, etc., R. Co. v. Powers*, 74 Ill. 341; *Shaw v. Boston, etc., R. Corp.*, 8 Gray (Mass.) 45; *Dayharsh v. Hannibal, etc., R. Co.*, 103 Mo. 570, 23 Am. St. Rep. 900; *Galion v. Lauer*, 55 Ohio St. 392.

Private Nuisance. — But in an action for the recovery of damages sustained by reason of a private nuisance, there may be a recovery for injuries to the family of the plaintiff, for whose support the plaintiff is liable. *Pierce v. Wagner*, 29 Minn. 355.

Cases Where Such Evidence Has Been Admitted. — Although the rule is that in actions for personal injuries brought by the person injured, evidence that the plaintiff had a family dependent upon him for support is not admissible, in not a few cases such proof seems to have crept into the record with no question made as to its admissibility. Thus in *Georgia R., etc., Co. v. Keating*, 99 Ga. 308, the court comments on the fact that the plaintiff had a wife and six or seven children whom he supported by his labor; and in *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, the court observes that the plaintiff when injured was, besides supporting himself, taking care of his widowed mother with nine children, and further, that the plaintiff had no resources for this end except his personal labor.

Evidence of Appearance. — Where the question was whether subsequent sickness was caused by the injury complained of, it was held that evidence of the appearance of the plaintiff before and after the injury was competent. *West Chicago St. R. Co. v. Cahill*, 165 Ill. 496.

4. Dayharsh v. Hannibal, etc., R. Co., 103 Mo. 570, 23 Am. St. Rep. 900.

On the Contrary, in an action against a carrier for personal injuries, the admission of evidence as to the number and character of the plaintiff's family was held not to have been error, especially, it was said, in an action in which the jury were at liberty to award punitive damages.¹

bb. PROBABLE DURATION OF LIFE. — In cases of permanent injury, evidence of the probable duration of the life of the injured party is admissible,² to ascertain which mortality tables may be introduced.³ And where the evidence is conflicting as to whether the injuries are of a permanent nature or not, mortality tables may be received in evidence to aid the jury in the event that they conclude that the injuries are permanent.⁴ And it has been held that mortality tables are admissible in evidence to prove the plaintiff's life expectancy, although his condition and health are below the average, and he is not an insurable risk, where the jury are instructed to consider the tables as qualified by the evidence as to the plaintiff's physical condition.⁵ But unless the jury

But a remark of the plaintiff's counsel in argument, to the effect that his client had a widowed mother to support, will not be a reversible error where the verdict is not excessive. *Gulf, etc., R. Co. v. Norfleet*, 78 Tex. 321.

1. *Johns v. Charlotte, etc., R. Co.*, 39 S. Car. 162, 39 Am. St. Rep. 709. In this case the plaintiff was allowed to testify, over the objection of the defendant, how many persons he had to care for and of whom they consisted. In this connection the appellate court said: "If the testimony had gone further in the line indicated it might have become error; but as it stopped simply at the number and character of his family, we think it was wholly immaterial and could not affect the result, especially as the judge charged as follows: 'Now in a case where the railroad company was guilty of any gross and reckless disregard of the lives and persons of people, juries are allowed to give what you call "punitive damages" — go beyond actual damages, and give damages by way of punishment.'"

In *Alberti v. New York, etc., R. Co.*, 43 Hun (N. Y.) 421, which was an action for damages for personal injuries, evidence was admitted to the effect that the plaintiff supported himself and his wife solely by his own earnings, and the admission of this evidence was held by the appellate court to have been proper.

2. **Probable Duration of Life.** — *Arkansas Midland R. Co. v. Griffith*, 63 Ark. 491; *Northeastern R. Co. v. Chandler*, 84 Ga. 37; *Columbus v. Sims*, 94 Ga. 483; *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124, 96 Am. Dec. 114; *Blair v. Madison County*, 81 Iowa 313; *Greer v. Louisville, etc., R. Co.*, 94 Ky. 169, 42 Am. St. Rep. 345; *Friend v. Ingersoll*, 39 Neb. 717; *Lincoln v. Smith*, 28 Neb. 762; *Missouri, etc., R. Co. v. McGlamory*, (Tex. Civ. App. 1896) 34 S. W. Rep. 359; *Texas Mexican R. Co. v. Douglass*, 69 Tex. 699; *Galveston, etc., R. Co. v. Cooper*, 85 Tex. 431.

3. **Mortality Tables.** — *Alabama.* — *Birmingham Mineral R. Co. v. Wilmer*, 97 Ala. 165; *Louisville, etc., R. Co. v. Mothershed*, 97 Ala. 261; *Richmond, etc., R. Co. v. Hissong*, 97 Ala. 187; *Louisville, etc., R. Co. v. Hurt*, 101 Ala. 34.

Arkansas. — *Arkansas Midland R. Co. v. Griffith*, 63 Ark. 491.

Georgia. — *Atlanta Consol. St. R. Co. v. Beauchamp*, 93 Ga. 6; *Richmond, etc., R. Co.*

v. Garner, 91 Ga. 27; *Northeastern R. Co. v. Chandler*, 84 Ga. 37; *Atlanta, etc., R. Co. v. Jonson*, 66 Ga. 259; *Columbus v. Sims*, 94 Ga. 483.

Indiana. — *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533.

Iowa. — *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124, 96 Am. Dec. 114; *Simonson v. Chicago, etc., R. Co.*, 49 Iowa 87; *Blair v. Madison County*, 81 Iowa 313.

Kentucky. — *Greer v. Louisville, etc., R. Co.*, 94 Ky. 169, 42 Am. St. Rep. 345.

Michigan. — *Denman v. Johnston*, 85 Mich. 387.

Nebraska. — *Friend v. Ingersoll*, 39 Neb. 717; *Lincoln v. Smith*, 28 Neb. 762.

Oregon. — *Morrison v. McAtee*, 23 Oregon 530.

Texas. — *Gulf, etc., R. Co. v. Smith*, (Tex. Civ. App. 1894) 26 S. W. Rep. 644.

See generally the title MORTALITY TABLES.

Mortuary Tables Are Not Conclusive Evidence on the probable duration of life, and, it has been held, it is erroneous to confine the jury to such evidence. *Morrison v. McAtee*, 23 Oregon 530. And see *Friend v. Ingersoll*, 39 Neb. 717.

Not Admissible Until After Age Proven. — Mortality tables, it has been held, are not admissible until proof of the plaintiff's age is given. *Atlanta Consol. St. R. Co. v. Beauchamp*, 93 Ga. 6.

The Carlisle and American Tables of Mortality seem to be the ones chiefly used in evidence on the question of the probable duration of life. The use of the former was approved in the following cases. *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533; *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124, 96 Am. Dec. 114; *Blair v. Madison County*, 81 Iowa 313; *Friend v. Ingersoll*, 39 Neb. 717; *Lincoln v. Smith*, 28 Neb. 762; and the latter in *Birmingham Mineral R. Co. v. Wilmer*, 97 Ala. 165; *Mary Lee Coal, etc., Co. v. Chambliss*, 97 Ala. 171; *Louisville, etc., R. Co. v. Mothershed*, 97 Ala. 261; *Richmond, etc., R. Co. v. Hissong*, 99 Ala. 187; *Louisville, etc., R. Co. v. Hurt*, 101 Ala. 34; *Greer v. Louisville, etc., R. Co.*, 94 Ky. 169, 42 Am. St. Rep. 345. See generally the title MORTALITY TABLES.

4. *Richmond, etc., R. Co. v. Garner*, 91 Ga. 27; *Blair v. Madison County*, 81 Iowa 313.

5. *Arkansas Midland R. Co. v. Griffith*, 63 Ark. 491.

are so instructed, a verdict for damages assessed with reference to the expectancy of life of a normal person will be erroneous.¹

cc. EVIDENCE OF MORAL CHARACTER. — There is a conflict of opinion upon the question whether or not evidence of the moral character of the plaintiff is admissible in an action for damages for personal injuries. It has been held, on the one hand, that evidence of this character may be considered by the jury,² but a contrary view has been maintained by other courts.³

(d) *Physician's Fees, Medical Attendance, and Nursing* — *aa. IN GENERAL.* — There may be a recovery in damages for expenses which an injured person has incurred in the way of physician's or surgeon's fees, medicines, medical attendance, and nursing, rendered necessary by personal injuries wrongfully inflicted by another.⁴ And the same principle applies whether the injuries are inflicted

And mortality tables may be received in evidence though the plaintiff be engaged in a more hazardous occupation than persons with reference to whom the tables were compiled. *Birmingham Mineral R. Co. v. Wilmer*, 97 Ala. 165. See generally the title MORTALITY TABLES.

1. *Denman v. Johnston*, 85 Mich. 387.

2. *Abbot v. Tolliver*, 71 Wis. 64.

3. *Hardy v. Minneapolis, etc.*, R. Co., 36 Fed. Rep. 657; *Joliet St. R. Co. v. Call*, 42 Ill. App. 41; *Johnson v. Wells, etc., Co.*, 6 Nev. 224, 3 Am. Rep. 245.

4. *Recovery for Physician's Fees, etc.* — *England.* — *Theobald v. Railway Pass. Assur. Co.*, 10 Exch. 45, 2 C. L. R. 1034, 23 L. J. Exch. 249, 18 Jur. 583.

United States. — *The Ferryboat D. S. Gregory*, 2 Ben. (U. S.) 226; *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476; *The Alijandro*, 36 Fed. Rep. 621; *Bowas v. Pioneer Tow Line*, 2 Sawy. (U. S.) 21; *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 546.

Alabama. — *South, etc., Alabama R. Co. v. McLendon*, 63 Ala. 266.

Arkansas. — *St. Louis, etc., R. Co. v. Blackburn*, (Ark. 1891) 15 S. W. Rep. 469.

Connecticut. — *Seger v. Barkhamsted*, 22 Conn. 290; *Ashcraft v. Chapman*, 38 Conn. 230.

Delaware. — *Robinson v. Simpson*, 8 Houst. (Del.) 398; *Warner v. Chamberlain*, 7 Houst. (Del.) 18; *Ford v. Charles Warner Co.*, (Del. 1893) 37 Atl. Rep. 39.

Georgia. — *Smith v. Overby*, 30 Ga. 241.

Illinois. — *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235, 71 Am. Dec. 263; *LaSalle v. Porterfield*, 138 Ill. 114; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Toledo, etc., R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Illinois Cent. R. Co. v. Cole*, 62 Ill. App. 480.

Indiana. — *Nappanee v. Ruckman*, 7 Ind. App. 361.

Iowa. — *McKinley v. Chicago, etc., R. Co.*, 44 Iowa 314, 24 Am. Rep. 748; *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462; *Lucas v. Flinn*, 35 Iowa 9; *Moore v. Central R. Co.*, 47 Iowa 688.

Kansas. — *Abilene v. Wright*, 4 Kan. App. 708.

Maine. — *Blackman v. Gardiner, etc.*, Bridge, 73 Me. 214; *Mason v. Ellsworth*, 32 Me. 271.

Maryland. — *Pittsburg, etc., R. Co. v. Andrews*, 39 Md. 329.

Massachusetts. — *Johnson v. Holyoke*, 105 Mass. 80; *Bailou v. Farnum*, 11 Allen (Mass.) 73; *Smith v. Holcomb*, 99 Mass. 552.

Michigan. — *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374; *Welch v. Ware*, 32 Mich. 77; *Lacas v. Detroit City R. Co.*, 92 Mich. 412; *Kinney v. Folkerts*, 84 Mich. 616.

Mississippi. — *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699.

Missouri. — *Steiner v. Moran*, 2 Mo. App. 47; *West v. Forrest*, 22 Mo. 344; *Whalen v. St. Louis, etc., R. Co.*, 60 Mo. 323; *Chartrand v. Southern R. Co.*, 57 Mo. App. 425. And see *Duke v. Missouri Pac. R. Co.*, 99 Mo. 347.

Nebraska. — *Friend v. Ingersoll*, 39 Neb. 717.

Nevada. — *Johnson v. Wells, etc., Co.*, 6 Nev. 224, 3 Am. Rep. 245.

New Hampshire. — *Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287; *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541; *Leighton v. Sargent*, 31 N. H. 119, 64 Am. Dec. 323.

New York. — *Filer v. New York Cent. R. Co.*, 49 N. Y. 42, 10 Am. Rep. 327; *Morse v. Auburn, etc., R. Co.*, 10 Barb. (N. Y.) 621; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Morsemann v. Manhattan R. Co.*, 16 Daly (N. Y.) 249; *Reynolds v. Niagara Falls*, 81 Hun (N. Y.) 353; *Ford v. Jones*, 62 Barb. (N. Y.) 484.

North Carolina. — *Wallace v. Western North Carolina R. Co.*, 104 N. Car. 442.

Pennsylvania. — *McLaughlin v. Corry*, 77 Pa. St. 109, 18 Am. Rep. 432; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *Breary v. Philadelphia Traction Co.*, 5 Pa. Dist. Rep. 95; *Pennsylvania, etc., Canal Co. v. Graham*, 63 Pa. St. 290, 3 Am. Rep. 549; *Smith v. East Mauch Chunk*, 3 Pa. Super. Ct. Rep. 495.

South Carolina. — *Parker v. South Carolina, etc., R. Co.*, 48 S. Car. 364.

Texas. — *International, etc., R. Co. v. Terry*, 62 Tex. 384, 50 Am. Rep. 529; *San Antonio, etc., R. Co. v. Keller*, 11 Tex. Civ. App. 569; *Galveston, etc., R. Co. v. Waldo*, (Tex. Civ. App. 1895) 32 S. W. Rep. 783; *San Antonio, etc., R. Co. v. Gwynn*, 4 Tex. App. Civ. Cas., § 219; *Chicago, etc., R. Co. v. Boyles*, 11 Tex. Civ. App. 522. And see *Houston City St. R. Co. v. Reichart*, 87 Tex. 539; *Houston v. Bryan*, 2 Tex. Civ. App. 553.

Utah. — *Giblin v. McIntyre*, 2 Utah 384.

Vermont. — *Nones v. Northouse*, 46 Vt. 587; *Bovee v. Danville*, 53 Vt. 183.

Wisconsin. — *Stewart v. Ripon*, 38 Wis. 584; *Hulehan v. Green Bay, etc., R. Co.*, 68 Wis. 520; *Ripon v. Bittel*, 30 Wis. 614; *Kliegel v. Aitken*, 94 Wis. 432.

upon the person actually expending the money for such purposes, or upon some one for whom the former is legally responsible, as in the case of expenses incurred by a husband or parent on account of injuries to a wife or child.¹ Under this rule it has been also held that there might be a recovery of traveling expenses on trips undertaken for the benefit of health.²

Rationale of Rule.—It has been said with reference to the recovery of expenses for medical treatment in actions for personal injuries, that "the rule whereby such expenditures are recovered is based upon the doctrine of avoidable consequences. It is the duty of the person injured to exercise reasonable precautions in order to render the injury as slight as possible. Failing to perform that duty, he cannot recover for consequences which might thereby have been avoided. Therefore, he is entitled to recover the expenses reasonably by him incurred by reason of such precautions."³

Reasonableness of Such Expenditures.—Such expenses in order to be recoverable, however, must have been reasonably made, and be reasonable in amount.⁴ In other words, the measure of damages in such cases is not the sum actually expended, but a reasonable amount for such purpose.⁵ It has been therefore held that proof simply of the amount paid for medical attendance is not sufficient to warrant a recovery in damages for such expenditures, unless it is also established that such expenses were reasonably incurred.⁶ And in the absence of evidence of the incurrence of such expenses, and their amount, no allowance therefor can be made,⁷ although it appears that the plaintiff required medical attention and actually had physicians in attendance for a considerable period, as a result of the injuries complained of.⁸

Future Expenditures.—The jury may, in assessing damages, consider the cir-

Additional Expenses Where Person Injured Already Ill.—Though a person injured by another's negligence is already ill, there may be a recovery for additional expenses caused by the injury. *Emery v. Boston, etc., R. Co.*, (N. H. 1893) 36 Atl. Rep. 367.

Such Expenditures Are General Damages, it has been held, and therefore need not be specially alleged. *Folsom v. Underhill*, 36 Vt. 580.

1. *Union Pac. R. Co. v. Jones*, 21 Colo. 340; *Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287; *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *Lutcher, etc., Lumber Co. v. Dyson*, (Tex. Civ. App. 1895) 30 S. W. Rep. 61; *San Antonio, etc., R. Co. v. Gwynn*, 4 Tex. App. Civ. Cas., § 219. And see *Houston City St. R. Co. v. Reichart*, 87 Tex. 539.

2. **Evidence of Expenditures Incurred by the Plaintiff** in making trips to so-called health resorts in aid of recovery from injuries received is competent, the necessity and reasonableness of such expenditures to be determined by the jury. *Hart v. Charlotte, etc., R. Co.*, 33 S. Car. 427. And where the plaintiff on the advice of her local physician went to a distant city for special treatment on account of physical conditions produced by the injuries, it was held that expenses so incurred might be recovered. *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374.

3. *Irvine, C., in Golder v. Lund*, 50 Neb. 867.

4. **Expenditures Must Be Reasonable.**—*Hewitt v. Eisenbart*, 36 Neb. 794; *Reynolds v. Niagara Falls*, 81 Hun (N. Y.) 353; *Hart v. Charlotte, etc., R. Co.*, 33 S. Car. 427; *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174.

In cases of personal injuries, in order to recover for medical attendance and similar items it is necessary for the plaintiff to show

two facts: First, what expenses he has actually incurred; second, that such expenses were reasonably incurred. It is not the reasonable charge for medical services which he may recover, but the expense to him of such services not to exceed their reasonable value. *Irvine, C., in Golder v. Lund*, 50 Neb. 867.

5. *Golder v. Lund*, 50 Neb. 867; *Hewitt v. Eisenbart*, 36 Neb. 794; *Friend v. Ingersoll*, 39 Neb. 717; *Gulf, etc., R. Co. v. Campbell*, 76 Tex. 174.

On the Question of the Reasonable Value of Medical Services Rendered, evidence of physicians living in the vicinity of the plaintiff's residence is competent to show what the services of the attending physician were worth. *Atchison v. Rose*, 43 Kan. 605.

6. *Hewitt v. Eisenbart*, 36 Neb. 794; *Friend v. Ingersoll*, 39 Neb. 717; *Golder v. Lund*, 50 Neb. 867. And see *Gumb v. Twenty-third St. R. Co.*, 114 N. Y. 411. But *compare*, in this connection, *Colwell v. Manhattan R. Co.*, 57 Hun (N. Y.) 452; *Morsemann v. Manhattan R. Co.*, 16 Daly (N. Y.) 249.

7. *Joliet v. Henry*, 11 Ill. App. 154; *Culbertson v. Chicago, etc., R. Co.*, 50 Mo. App. 556; *Duke v. Missouri Pac. R. Co.*, 99 Mo. 347; *Norton v. St. Louis, etc., R. Co.*, 40 Mo. App. 642; *Rhodes v. Nevada City*, 47 Mo. App. 499; *Hunter v. Mexico City*, 49 Mo. App. 17; *Galveston, etc., R. Co. v. Thornsberry*, (Tex. 1891) 17 S. W. Rep. 521; *Fry v. Hillan*, (Tex. Civ. App. 1896) 37 S. W. Rep. 359. And see *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236, 20 Am. St. Rep. 601; *Gumb v. Twenty-third St. R. Co.*, 114 N. Y. 411.

8. *Fry v. Hillan*, (Tex. Civ. App. 1896) 37 S. W. Rep. 359; *Galveston, etc., R. Co. v. Thornsberry*, (Tex. 1891) 17 S. W. Rep. 521.

cumstance that in the future the plaintiff will be subjected to expenses for doctor's bills, nursing, and attendance,¹ and if the condition of the person is such that further outlays for medical or surgical treatment or nursing and attendance will be required, they may give damages for such prospective expenses.²

bb. NOT NECESSARY THAT AMOUNTS SHOULD HAVE BEEN ACTUALLY PAID. — It is not necessary that such amounts should have been actually paid, provided the plaintiff has rendered himself liable to pay the same.³

Statute of Limitations. — And this is true although the debt due the physician has been barred by the statute of limitations, as a party, it has been said, cannot be required to set up the statute of limitations as a bar to an honest debt.⁴

Whether Physician a Licensed Practitioner. — And it has also been held not to be necessary, in order to enable a plaintiff in an action for damages for personal injuries to recover for expenses for medical treatment, to show affirmatively that the attending physician was a licensed practitioner, and as such entitled to maintain an action against the plaintiff for his bill.⁵

Where the Plaintiff Is a Minor, he cannot recover for expenses incurred for medi-

1. Future Expenditures. — *South, etc., Alabama R. Co. v. McLendon*, 63 Ala. 266; *St. Louis, etc., R. Co. v. Blackburn*, (Ark. 1891) 15 S. W. Rep. 469; *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529; *Nappanee v. Ruckman*, 7 Ind. App. 361; *Turner v. Boston, etc., R. Co.*, 158 Mass. 261; *Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287; *Williams, J., in Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1; *Baker v. Hagey*, 177 Pa. St. 128.

Where Person Who Had Lost One Arm Loses Other. — In *Baker v. Hagey*, 177 Pa. St. 128, which was an action for personal injuries whereby the plaintiff lost an arm, it was held that the jury might consider, in making an estimate of the probable future expenses for nursing and attention to which the plaintiff would be subjected, the fact that the plaintiff before the time of the injury only had one arm, having lost the other some years previous.

2. Turner v. Boston, etc., R. Co., 158 Mass. 261; *Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287. And see also cases cited in preceding note.

3. Payment Need Not Have Been Made — *Englund*, — *Dixon v. Bell*, 1 Stark. 287, 2 E. C. L. 114.

Illinois. — *Consolidated Coal Co. v. Scheiber*, 65 Ill. App. 304; *Chicago v. Honey*, 10 Ill. App. 538; *Mueller v. Kuhn*, 59 Ill. App. 353.

Iowa. — *Varnham v. Council Bluffs*, 52 Iowa 698.

Kansas. — *Abilene v. Wright*, 4 Kan. App. 708.

Michigan. — *Lacas v. Detroit City R. Co.*, 92 Mich. 412.

Nebraska. — *Minneapolis Threshing-Mach. Co. v. Regier*, 51 Neb. 402; *Friend v. Ingersoll*, 39 Neb. 717.

New York. — *Reynolds v. Niagara Falls*, 81 Hun (N. Y.) 353.

North Dakota. — *Chacey v. Fargo*, 5 N. Dak. 173.

Texas. — *Lutcher, etc., Lumber Co. v. Lyson*, (Tex. Civ. App. 1895) 30 S. W. Rep. 61.

Utah. — *Wilson v. Southern Pac. Co.*, 13 Utah 352.

Nursing by Members of Plaintiff's Family. —

The plaintiff in an action for damages for personal injuries cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. The care of his wife and minor children in ministering to his needs involves only, it is said, the performance of the ordinary offices of affection which is their duty. Such services involve no liability on the part of the plaintiff, and, therefore, afford no basis for a claim against the defendant, as for expenses incurred. A man may hire his own adult children to nurse him in an illness caused by personal injuries, or to treat him therefor, in the same manner and with the same effect that he may hire other persons, but in the absence of an express contract the law will not presume one, so long as the family relation continues. *Williams, J., in Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1. And see *Peoria, etc., R. Co. v. Johns*, 43 Ill. App. 83.

4. Mueller v. Kuhn, 59 Ill. App. 353. See the title LIMITATION OF ACTIONS.

5. Licensed Practitioner. — *Goldner v. Lund*, 50 Neb. 867. The court said that "proof that he practiced as a physician raises the presumption that he was qualified to do so."

Evidence by Defendant that Physician Not Licensed Practitioner. — In the case of *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443, the trial court excluded evidence tending to show that a physician to whom it was alleged that fees were due was not a licensed practitioner, and hence could maintain no action for his services. This was held to have been error, the court saying: "If it could have been shown, as defendant attempted to prove, that the medical and surgical services rendered plaintiff's daughter were performed in violation of law by a person not qualified to render them, no liability would rest upon the plaintiff for their payment; and if the party rendering such services could not recover their value from the plaintiff, he should not be permitted to recover it from the defendant, because it is not an expense actually incurred, and to hold defendant liable for it would not be in the nature of compensation, but a gratuity." See also *Chicago v. Honey*, 10 Ill. App. 535.

cal attendance unless he has actually paid them,¹ nor can he recover at all for a medical bill paid by his father,² nor where, under the circumstances of the case, the parents of the minor are primarily liable for the bill.³

Married Women. — In the case of an action for damages by a married woman there can in general be no recovery for medical expenses for which the husband is liable.⁴ But if the plaintiff herself has, on her separate account, become liable for such items, then there may be a recovery.⁵

cc. **WHERE SERVICES GRATUITOUSLY RENDERED.** — One line of cases holds that there may be a recovery of a reasonable amount for doctor's bills and nursing though the services may have been gratuitously rendered;⁶ such services, when so rendered, having been performed for the benefit of the injured person, and not for that of the wrongdoer.⁷

Expenses Defrayed by Third Person. — And the same rule has been applied where the plaintiff's medical expenses have been paid by a third person, though under such circumstances as to give the latter no right of recovery against the person injured.⁸

Contrary Rule. — As has been seen, however, the authorities are conflicting on this point, the contrary decisions holding that there must have been an incurrence of liability for or actual payment of the amounts sought to be recovered.⁹

(e) **Loss of Time.** — Where as a result of the injuries complained of the plaintiff has been disabled from the pursuit of his ordinary business for a certain period, there may be a recovery for the value of the time so lost.¹⁰

1. Where Plaintiff a Minor. — *Tompkins v. West*, 56 Conn. 478.

But in the case of *Forbes v. Loftin*, 50 Ala. 396, it was held that there might be a recovery in an action for damages by a minor for medical attendance during her illness, whether the physician's bill had been paid or not, because minority, if a defense at all to an action for such services by the physician, is a personal one, which might or might not be taken advantage of by the minor.

2. *Kliegel v. Aitken*, 94 Wis. 432.

3. *Newbury v. Getchel*, etc., *Lumber*, etc., Co., 100 Iowa 441.

4. Married Women. — *Atchison*, etc., R. Co. v. *McGinnis*, 46 Kan. 109; *Belyea v. Minneapolis*, etc., R. Co., 61 Minn. 224; *Mount Adams*, etc., R. Co. v. *Wysong*, 8 Ohio Cir. Ct. Rep. 211. See generally the title HUSBAND AND WIFE.

5. *Columbus v. Strassner*, 138 Ind. 301; *Shelby County v. Castetter*, 7 Ind. App. 309; *Lacas v. Detroit City R. Co.*, 92 Mich. 412. See generally the titles HUSBAND AND WIFE; SEPARATE PROPERTY (OF MARRIED WOMEN).

6. Gratuitous Services. — *The Ferryboat D. S. Gregory*, 2 Ben. (U. S.) 226; *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Brosnan v. Sweetser*, 127 Ind. 1; *Indianapolis v. Gaston*, 58 Ind. 227. And see *Denver*, etc., R. Co. v. *Lorentzen*, 49 U. S. App. 81; *Forbes v. Loftin*, 50 Ala. 396; *Klein v. Thompson*, 19 Ohio St. 569.

7. *Pennsylvania Co. v. Marion*, 104 Ind. 239.

8. Expenses in Treatment of Injuries for Assault — Payment by Trustees of Township. — *Klein v. Thompson*, 19 Ohio St. 569. Compare *Peppercorn v. Black River Falls*, 89 Wis. 38, 46 Am. St. Rep. 818.

9. *Irvine, C.*, in *Golder v. Lund*, 50 Neb. 867; *Fry v. Hillan*, (Tex. Civ. App. 1896) 37 S. W. Rep. 359; *Peppercorn v. Black River Falls*, 89 Wis. 38, 46 Am. St. Rep. 818. See also cases cited in foregoing notes.

10. Recovery for Loss of Time — England. — *Potter v. Metropolitan R. Co.*, 28 L. T. N. S. 735.

United States. — *Wade v. Leroy*, 20 How. (U. S.) 34; *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476; *The Alijandro v. Wallace*, 56 Fed. Rep. 621, 15 U. S. App. 98; *Illinois Cent. R. Co. v. Davidson*, 76 Fed. Rep. 517. And see *Hawker's Case*, 4 Ct. of Cl. 551; *The Normania*, 62 Fed. Rep. 469.

Alabama. — *South*, etc., *Alabama R. Co. v. McLendon*, 63 Ala. 266. And see *Richmond*, etc., R. Co. v. *Farmer*, 97 Ala. 141.

Delaware. — *Ford v. Charles Warner Co.*, (Del. 1893) 37 Atl. Rep. 39.

Georgia. — *Broyles v. Prisock*, 97 Ga. 643.

Illinois. — *La Salle v. Porterfield*, 138 Ill. 114; *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 236, 71 Am. Dec. 263; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Illinois Cent. R. Co. v. Cole*, 62 Ill. App. 480.

Indiana. — *Blackwell v. Acton*, 38 Ind. 425; *Stewart v. Maddox*, 63 Ind. 51.

Kansas. — *Abilene v. Wright*, 4 Kan. App. 708.

Kentucky. — See *Kemper v. Louisville*, 14 Bush (Ky.) 87.

Maryland. — See *Gaither v. Blowers*, 11 Md. 536.

Massachusetts. — *Harmon v. Old Colony R. Co.*, 168 Mass. 377; *Morgan v. Curley*, 142 Mass. 107.

Michigan. — *Geveke v. Grand Rapids*, etc., R. Co., 57 Mich. 589; *Kinney v. Folkerts*, 84 Mich. 616.

New York. — *Wynne v. Atlantic Ave. R. Co.*, 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 394; *Niendorff v. Manhattan R. Co.*, 4 N. Y. App. Div. 46; *Carles v. New York*, etc., R. Co., 16 N. Y. App. Div. 158; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Ward v. Vanderbilt*, 4 Abb. App. Dec. (N. Y.) 521; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Pill v.*

Plaintiff Receiving Salary. — Thus where the plaintiff, occupying a salaried position, was unable to perform his duties for three months and thereby lost his salary for that time, it was held that evidence of such circumstances was admissible and that there might be a recovery accordingly.¹ It has been said, however, that the amount of wages lost by a party by reason of personal injuries is not recoverable as wages lost *eo nomine*,² nor indeed is the amount received by the plaintiff for his services at the time of his injury conclusive evidence of their value;³ but such an amount will in general be regarded as

Brooklyn Heights R. Co., 6 N. Y. Misc. Rep. (Brooklyn City Ct.) 267; *Grant v. Brooklyn*, 41 Barb. (N. Y.) 385; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; *Nash v. Sharpe*, 19 Hun (N. Y.) 366; *Kessel v. Bulter*, 53 N. Y. 612; *Ehrgott v. New York*, 96 N. Y. 276, 48 Am. Rep. 622; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260; *Grinnell v. Taylor*, 85 Hun (N. Y.) 85. And see *Hubert v. Bedell*, 66 Hun (N. Y.) 631, 50 N. Y. St. Rep. 251.

Pennsylvania. — *Owens v. People's Pass. R. Co.*, 155 Pa. St. 334.

Texas. — *Gulf, etc., R. Co. v. Brown*, (Tex. Civ. App. 1897) 40 S. W. Rep. 608; *Galveston, etc., R. Co. v. Waldo*, (Tex. Civ. App. 1895) 32 S. W. Rep. 783; *San Antonio, etc., R. Co. v. Keller*, 11 Tex. Civ. App. 569; *Jackson v. Wells*, 13 Tex. Civ. App. 275.

Vermont. — *Nones v. Northouse*, 46 Vt. 587.

Virginia. — *Parsons v. Harper*, 16 Gratt. (Va.) 64.

Washington. — *Turner v. Great Northern R. Co.*, 15 Wash. 213.

Wisconsin. — *Kliegel v. Aitken*, 94 Wis. 432.

Loss of time, it has been said, is more properly referable to a loss which has accrued at the time of the trial; loss of time to accrue subsequently is more aptly termed "diminished earning capacity." *Houston City St. R. Co. v. Reichart*, 87 Tex. 539.

Exposure to Contagious Diseases — Loss of Time in Consequent Illness. — In an action for damages resulting to the plaintiff by reason of his having contracted a contagious disease to which he was exposed by the defendant while in his employ, it was held that there might be a recovery for loss of time while ill and medical expenses incurred during such illness. *Kliegel v. Aitken*, 94 Wis. 432.

Market Value of Time Lost. — With reference to the recovery of damages for loss of time, it has been contended that the true measure is the market value of the time lost according to the average wages of a man of the plaintiff's capacity working in the same employment. See *Braithwaite v. Hall*, 168 Mass. 38.

Disease Not Due to Injury — Loss of Time — Death of Injured Party. — In an action to recover damages for injuries claimed to have been sustained by reason of the negligence of an employee of the defendant, the plaintiff died before the trial, from a disease, however, in no way connected with the injury for which the suit was brought. The action was revived and prosecuted in the name of the plaintiff's personal representative, and it was shown that the disease which produced the death of the party necessarily disabled him from work for a certain period prior to his death. It was held in this case that the jury could not include in the damages awarded an allowance for loss of wages during the period when the disease

would necessarily have prevented the decedent from work. *Atchison, etc., R. Co. v. Rowe*, 56 Kan. 411.

No Recovery for Loss of Time in Addition to Wages Which Might Have Been Earned. — *Gulf, etc., R. Co. v. Wilson*, 79 Tex. 371. This, as will be apparent, would be double compensation.

Recovery by Husband for Loss of His Own Time While Attending Wife. — It has been held that for injuries to a wife there may be a recovery by a husband for the loss of his own time in attendance and nursing during his wife's illness. *Pullman Palace Car Co. v. Smith*, 79 Tex. 468, 23 Am. St. Rep. 356; *Salida v. McKinna*, 16 Colo. 523; *Hazard Powder Co. v. Volger*, 58 Fed. Rep. 152. But the value of the husband's time while so engaged is determinable with reference to its value as a nurse, and not what he might have earned in other employment or what he lost in his trade. *Salida v. McKinna*, 16 Colo. 523; *Hazard Powder Co. v. Volger*, 58 Fed. Rep. 152. And see *Lutcher, etc., Lumber Co. v. Dyson*, (Tex. Civ. App. 1895) 30 S. W. Rep. 61, where the same principle was applied in case of loss of time by a parent in nursing a child.

1. Plaintiff Occupying Salaried Position. — *Broyles v. Prisco*, 97 Ga. 643. And see *Palmer v. Conant*, 58 Hun (N. Y.) 333; *Grant v. Brooklyn*, 41 Barb. (N. Y.) 381.

Where Wages Are Paid During Disability. — It has been held that a person injured cannot recover for loss of time, where he continues to receive his wages during the period of disability. *Montgomery, etc., R. Co. v. Mallette*, 92 Ala. 209; *Ephland v. Missouri Pac. R. Co.*, 57 Mo. App. 147; *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375.

On the contrary, however, it has been decided that the fact that the plaintiff's employer did not deduct his salary during the time he was disabled would not, in an action against a third party, mitigate the damages to which the plaintiff was entitled. *Ohio, etc., R. Co. v. Dickerson*, 59 Ind. 317.

2. Braithwaite v. Hall, 168 Mass. 38.

Wages Lost Not Recoverable as Such. — With reference to loss of time as an element of damage, *Holmes, J.*, in *Braithwaite v. Hall*, 168 Mass. 38, said: "When a man is allowed to prove his average earnings or the wages actually lost by him, they are proved as a measure of the value of the time and power to labor of which he has been deprived, not as themselves recoverable *eo nomine*."

3. It does not follow as a necessary conclusion that the services of a plaintiff before the time of his injury were worth no more than the salary that he was actually receiving for them. But the fact that he accepted service at that price is an important one, and persuasive

the best measure of the value of the plaintiff's time during the period of disability.¹

Where the Plaintiff Does Not Receive a Stated Sum for his services his average earnings prior to the injury may be considered,² or the nature of the plaintiff's business, its extent, and the necessity for and value of his personal attention thereto.³

Opinions as to Value of Plaintiff's Time in Occupations in Which He Had Never Engaged. — When assessing the value of time lost by a party on account of injuries inflicted by another, the mere opinions of witnesses as to what the plaintiff would be capable of earning at vocations in which he had never been

though not conclusive evidence that the price received was considered by him as a fair valuation. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

1. *Braithwaite v. Hall*, 168 Mass. 38; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

In Fixing the Value of Time Lost by a Decedent from the date of his injury until his death, it is proper for the jury to consider his age, occupation, and the wages which he had earned in the past in the capacity in which he was employed. *Atchison, etc., R. Co. v. Chance*, 57 Kan. 40.

2. **Average Earnings.** — *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 30 Am. St. Rep. 28; *Rio Grande Western R. Co. v. Rubenstein*, 5 Colo. App. 121; *Murdock v. New York, etc., Despatch Express Co.* 167 Mass. 549; *New Jersey Express Co. v. Nichols*, 32 N. J. L. 166; *McIntyre v. N. Y. Cent. R. Co.*, 37 N. Y. 287; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396.

Evidence of Earnings Prior to Injury. — In *Grant v. Brooklyn*, 41 Barb. (N. Y.) 381, Brown, J., delivering the opinion of the court, said: "Indeed, where the damages are for loss of services, I see no evidence so unobjectionable and so reliable as that which shows how much the party was earning from his business, or realizing from fixed wages, at the time to which the loss refers."

In *Kessel v. Bulter*, 53 N. Y. 612, a witness was asked "how much money he made prior to the injury from work at his trade," and objections to it were overruled, and it was held that no error was committed.

Loss of Time by Attorney. — In an action for damages for loss of time by an attorney, consequent upon a delay, the result of the negligence of the carrier transporting him, the proper measure of damages is ascertainable with reference to the earnings of the plaintiff before or after the breach or delay, and not by evidence in general as to the value of the time of practicing attorneys. *Turner v. Great Northern R. Co.*, 15 Wash. 213.

Loss of Time by Physician — Where Not Entitled to Sue for His Services. — The case of *Holmes v. Halde*, 74 Me. 28, 43 Am. Rep. 567, was an action for damages for personal injuries sustained through the defendant's negligence, the plaintiff being a person practicing medicine by profession, but having no such medical degree as would, under the laws of the state, entitle him to maintain an action for his services rendered. A recovery was sought for loss of business as a physician, and the defendant's contention was that, for the reason indicated, there could be no recovery on this account.

The question arose in the appellate court on the propriety of an instruction that there might, as a matter of law, be such a recovery, and the instruction was held correct. And see *Luck v. Ripon*, 52 Wis. 196.

Expense of Employment of Assistants. — Where the plaintiff, a butcher, incapacitated from attending to his business by reason of the injuries complained of, found it necessary to employ two men to do the work which he himself had done prior to the injury, it was held that the amount paid for such purpose was properly admissible in evidence. *Gumb v. Twenty-third St. R. Co.*, 58 N. Y. Super. Ct. 1. 559. But the plaintiff cannot, to enhance the value of his time lost, show that his profits in his business were greater than the ordinary, because he did the work of three men himself. *Pueblo v. Griffin*, 10 Colo. 366. And see also the case of *Silsby v. Michigan Car Co.*, 95 Mich. 204, holding that there could be no recovery of profits lost by the plaintiff in his business by reason of his incapacity, the measure of damages being the value of the plaintiff's services in conducting the business.

3. *Nebraska City v. Campbell*, 2 Black (U. S.) 590; *Prindle v. Campbell*, 18 D. C. 598; *Wynne v. Atlantic Ave. R. Co.*, 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 394; *Lincoln v. Saratoga, etc., R. Co.*, 23 Wend. (N. Y.) 425; *Clifford v. Dam*, 44 N. Y. Super. Ct. 391; *Nash v. Sharpe*, 19 Hun (N. Y.) 366; *Fisher, C. J.*, in *Missouri, etc., R. Co. v. Vance*, (Tex. Civ. App. (1897) 41 S. W. Rep. 167; *Missouri Pac. R. Co. v. Lyde*, 57 Tex. 505; *Kinney v. Crocker*, 18 Wis. 74. And see *Silsby v. Michigan Car Co.*, 95 Mich. 204.

Where the Plaintiff's Services Had a Market Value in the business in which she was engaged, such market value might be proven before the jury as a fact which they might consider in determining the amount of damages to be awarded to her, although she had never actually worked for others, but was engaged in business on her own account. *Harmon v. Old Colony R. Co.*, 168 Mass. 377. And see *Potter v. Metropolitan R. Co.*, 28 L. T. N. S. 735.

It has been said that where a plaintiff is engaged in such a business that the value of time lost from it cannot be well ascertained by reason of the non-existence of any rules to measure it by, the jury, from all the facts before them, may, in their discretion, award him an amount sufficient as reasonable compensation for the time lost. *Fisher, C. J.*, in *Missouri, etc., R. Co. v. Vance*, (Tex. Civ. App. 1897) 41 S. W. Rep. 167.

employed, have been held inadmissible.¹ The general rule seems to be, that in order to warrant a recovery for time lost, there must be some evidence from which its value may, at least, be inferred.²

Loss of Time During Minority. — A plaintiff cannot recover as an element of damages, for loss of time occurring during minority.³

Loss of Time by Married Woman. — Where a married woman lives with her husband and is engaged in no business for herself she cannot recover for the alleged value of time lost as a result of personal injuries.⁴ But where, in such case, the plaintiff is engaged in labor or employment on her own account and receiving or entitled to receive the compensation or wages therefor, there may be a recovery.⁵

Loss of Time Occasioned by Loss of Property is held not to be a proper element of damage; the measure in such case being the value of the property with interest.⁶

(f) **Loss or Diminution of Earning Power** — *aa. IN GENERAL.* — In an action for damages for personal injuries, if such injuries are permanent and will disable the party from labor and diminish his capacity to earn money in the future, there may be a recovery of such an amount as will be a fair compensation for the plaintiff's future diminished capacity to labor and earn money.⁷

1. Atlanta, etc., R. Co. v. Newton, 85 Ga. 517; Atchison, etc., R. Co. v. Chance, 57 Kan. 40.

2. O'Brien v. Loomis, 43 Mo. App. 29; Wood v. Watertown, 58 Hun (N. Y.) 298; Klein v. Second Ave. R. Co., 54 N. Y. Super. Ct. 164; Galveston, etc., R. Co. v. Thornsberry, (Tex. 1891) 17 S. W. Rep. 521.

3. Kliegel v. Aitken, 94 Wis. 432. And see Louisville, etc., R. Co. v. Davis, 99 Ala. 593.

4. Blaehinska v. Howard Mission, etc., 130 N. Y. 497; Atchison, etc., R. Co. v. McGinnis, 46 Kan. 109. And see Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 670.

5. Smith v. Chicago, etc., R. Co., 119 Mo. 246; Minick v. Troy, 19 Hun (N. Y.) 253; Brooks v. Schwerin, 54 N. Y. 343.

6. Churchman v. Kansas City, 44 Mo. App. 669. And see Smith v. Jones, 11 Tex. Civ. App. 187; Breton v. Grand Trunk R. Co., 2 Rev. Critique 37.

7. **Loss or Diminution of Earning Power** — *England.* — Phillips v. London, etc., R. Co., 5 Q. B. Div. 78, 41 L. T. N. S. 121, 28 W. R. 10; Fair v. London, etc., R. Co., 21 L. T. N. S. 326, 18 W. R. 66.

United States. — Vicksburg, etc., R. Co. v. Putnam, 118 U. S. 546; The Parra, 56 Fed. Rep. 241; Saldana v. Galveston, etc., R. Co., 43 Fed. Rep. 862; Illinois Cent. R. Co. v. Davidson, 76 Fed. Rep. 517. And see Davidson v. Southern Pac. Co., 44 Fed. Rep. 476.

Alabama. — Barbour County v. Horn, 48 Ala. 567; South, etc., Alabama R. Co. v. McLendon, 63 Ala. 266.

Georgia. — Central R., etc., Co. v. Passmore, 90 Ga. 203.

Illinois. — Illinois Cent. R. Co. v. Parks, 88 Ill. 373; Lake Erie, etc., R. Co. v. Wills, 39 Ill. App. 649; La Salle v. Porterfield, 38 Ill. App. 553; Consolidated Coal Co. v. Haenni, 146 Ill. 614; Illinois Cent. R. Co. v. Cole, 62 Ill. App. 480; Fisher v. Jansen, 128 Ill. 549; Breese, J., in Peoria Bridge Assoc. v. Loomis, 20 Ill. 236, 71 Am. Dec. 263; Toledo, etc., R. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71.

Indiana. — Indianapolis v. Gaston, 58 Ind.

224; Wabash, etc., R. Co. v. Morgan, 132 Ind. 430; Carthage Turnpike Co. v. Andrews, 102 Ind. 138, 52 Am. Rep. 653; Chicago, etc., R. Co. v. Butler, 10 Ind. App. 244; Richmond Gas Co. v. Baker, 146 Ind. 600.

Iowa. — McKinley v. Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748; Knapp v. Sioux City, etc., R. Co., 71 Iowa 41; Wesley v. Chicago, etc., R. Co., 84 Iowa 441; Baxter v. Chicago, etc., R. Co., 87 Iowa 488; Morris v. Chicago, etc., R. Co., 45 Iowa 29.

Kansas. — Abilene v. Wright, 4 Kan. App. 708.

Maryland. — Pittsburg, etc., R. Co. v. Andrews, 39 Md. 329.

Massachusetts. — Howes v. Ashfield, 99 Mass. 540.

Michigan. — Kinney v. Folkerts, 84 Mich. 616; Sherwood v. Chicago, etc., R. Co., 82 Mich. 374; Welch v. Ware, 32 Mich. 77.

Missouri. — Whalen v. St. Louis, etc., R. Co., 60 Mo. 323.

New Hampshire. — Perley, C. J., in Hopkins v. Atlantic, etc., R. Co., 36 N. H. 9, 72 Am. Dec. 287.

New Jersey. — New Jersey Express Co. v. Nichols, 33 N. J. L. 435, 97 Am. Dec. 722.

New York. — Walker v. Erie R. Co., 63 Barb. (N. Y.) 260; Ward v. Vanderbilt, 4 Abb. App. Dec. (N. Y.) 521; Baker v. Manhattan R. Co., 54 N. Y. Super. Ct. 394.

North Carolina. — Wallace v. Western North Carolina R. Co., 104 N. Car. 442.

Pennsylvania. — Goodhart v. Pennsylvania R. Co., 177 Pa. St. 1; Pennsylvania R. Co. v. Dale, 76 Pa. St. 47; Malone v. Pittsburgh, etc., R. Co., 152 Pa. St. 390; Pennsylvania R. Co. v. Books, 57 Pa. St. 339, 98 Am. Dec. 229.

Texas. — Gulf, etc., R. Co. v. Brown, (Tex. Civ. App. 1897) 40 S. W. Rep. 608; Missouri, etc., R. Co. v. McElree, (Tex. Civ. App. 1897) 41 S. W. Rep. 843; Campbell v. Fisher (Tex. Civ. App. 1893) 24 S. W. Rep. 661; International, etc., R. Co. v. Irvine, 64 Tex. 529; Mexican Cent. R. Co. v. Mitten, 13 Tex. Civ. App. 653; Missouri, etc., R. Co. v. McGlamory, (Tex. Civ. App. 1896) 34 S. W. Rep. 359;

bb. EVIDENCE ADMISSIBLE — Comparison of Earnings Before and After Injury. — To recover damages for loss of earning capacity, evidence of the earnings of the plaintiff before and after the injury is admissible for the purpose of comparison,¹ the

Fordyce v. Withers, 1 Tex. Civ. App. 540; *Texas, etc., R. Co. v. Davidson*, 3 Tex. Civ. App. 542; *Galveston, etc., R. Co. v. Waldo*, (Tex. Civ. App. 1895) 32 S. W. Rep. 783.

Burden of Proof. — In an action for personal injuries the burden of proof is on the plaintiff to show that his capacity for earning a living has been diminished. *Louisville, etc., R. Co. v. Binion*, 107 Ala. 645.

Recovery After Death of Person Injured, for Diminution of Earning Power. — Though the person injured by the negligence of another has died from the injuries inflicted, there may be, where the action has survived to and is prosecuted by the personal representative, a recovery for mental and physical suffering to the time of the death, and for diminution of earning power, not only for the period of disablement prior to his death, but for also such a time as the decedent would probably have lived but for the injuries sustained. *Maher v. Philadelphia Traction Co.*, 181 Pa. St. 391. But see *Atchison, etc., R. Co. v. Chance*, 57 Kan. 40.

Dissolution of Partnership. — Where the plaintiff has by the personal injuries complained of been compelled to dissolve a partnership, it has been held that evidence of such circumstances was admissible. *International, etc., R. Co. v. Irvine*, 64 Tex. 529.

To What Extent Amount of Damages a Matter of Discretion with the Jury. — In the case of *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, the trial court charged the jury that if the injury impaired the plaintiff's power to earn money in the future, the amount of compensation "was from necessity left to the sound discretion of the jury not to exceed the amount claimed in the complaint." In this connection, *Coleman, J.*, said, in delivering the opinion of the appellate court: "Whether an employee's wages will be increased or diminished in the future, or whether he will certainly die sooner or later, is not a fact of positive proof; but no sound rule of right and justice will permit a jury in assessing damages to be paid by one person to another as compensation for a pecuniary loss, to reach a conclusion of the amount to be paid from mere conjectures or without regard to proper data furnished as evidence."

A Married Woman who lives with her husband and is engaged in no business pursuit cannot recover for impaired earning capacity. *Atchison, etc., R. Co. v. McGinnis*, 46 Kan. 109; *Hall v. Manson*, 90 Iowa 585.

Injuries to Minor. — Unless there is evidence that a minor has been emancipated, there can be no recovery by him for diminution of earning power during minority. *Atlanta, etc., R. Co. v. Smith*, 94 Ga. 107; *Texas, etc., R. Co. v. Morin*, 66 Tex. 225; *Peppercorn v. Black River Falls*, 89 Wis. 38, 46 Am. St. Rep. 818. And see *Fort Worth, etc., R. Co. v. Measles*, 81 Tex. 474.

But there may be a recovery by an infant plaintiff for loss of earning power after majority; that is, in an action for damages brought

by a minor, the jury may consider as an element of damages to the minor the value of his capacity to earn money, and the loss of it, which, however, as to him will not accrue until after his majority is attained. *Ft. Worth, etc., R. Co. v. Robertson*, (Tex. 1891) 16 S. W. Rep. 1093; *Schmitz v. St. Louis, etc., R. Co.*, 119 Mo. 256.

Recovery for Loss of Earnings where No Definite Sum Fixed. — In an action for personal injuries, there may be a recovery for loss of earnings, though no definite sum is fixed by the plaintiff. *Feinstein v. Jacobs*, 15 Misc. Rep. (N. Y. City Ct.) 474. And in the case of *Fisher v. Jansen*, 128 Ill. 549, it was held that the jury might consider the amount of "future inability to labor or transact business," though there was no evidence what the plaintiff's loss in such respect would be. See also *Bartley v. Trorlicht*, 49 Mo. App. 214; *Rosenkranz v. Lindell R. Co.*, 108 Mo. 9, 32 Am. St. Rep. 588.

But in the case of *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378, *Coleman, J.*, said, with reference to the necessity for evidence upon the question of future loss from diminished earning capacity, that "the law fixes the burden upon him who claims damages from another as a compensation for a pecuniary loss, to furnish the facts necessary to ascertain the extent of his loss with reasonable certainty, and, failing in this, he is entitled to no more than nominal damages." And see *Britton v. Grand Rapids St. R. Co.*, 90 Mich. 159.

The plaintiff in an action for personal injuries may testify as to the value of his services as a farmer, without showing that he or any one else within his knowledge has ever hired farm labor, where he states the amount necessary to make a living for himself, implying that he has made such an amount. *Arkansas Midland R. Co. v. Griffith*, 63 Ark. 491.

1. Evidence of Earnings Before and After Injury. — *Illinois Cent. R. Co. v. Davidson*, 76 Fed. Rep. 517; *Chicago, etc., R. Co. v. Meech*, 163 Ill. 305; *Linton Coal, etc., Co. v. Persons*, 15 Ind. App. 69; *Knapp v. Sioux City, etc., R. Co.*, 71 Iowa 41; *Nash v. Sharpe*, 19 Hun (N. Y.) 365; *Texas, etc., R. Co. v. Davidson*, 3 Tex. Civ. App. 542; *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42; *Campbell v. Fisher*, (Tex. Civ. App. 1893) 24 S. W. Rep. 661; *Bagley v. Mason*, 69 Vt. 175.

What Inquiry as to Loss of Earning Power Involves. — The loss of earning power is not always easy of calculation. It involves an inquiry into the value of the labor, physical or intellectual, of the person injured, before the accident happened to him, and the ability of the same person to earn money by labor, physical or intellectual, after the injury was received. *Williams, J.*, in *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

The Measure of Damages in Such Cases is the difference between the earning capacity of the injured party before and after the injury as indicated, not by what has been actually earned

measure of damages being fixed with reference to the difference between the plaintiff's earning capacity before and after the injury complained of.¹ Accordingly, in an action for damages for personal injuries sustained by a physician, where a recovery is sought for loss of time and impairment of capacity to earn money in the practice of his profession, it was held that the jury might consider proof of the average aggregate yearly fees received before the injury.²

Evidence of Ordinary Pursuits — How Far Prevented from Following Same. — All evidence tending to show the character of the plaintiff's ordinary pursuits and the extent to which the injury complained of has prevented him from following those pursuits, is competent.³

What Plaintiff Able to Earn Since Injury. — The jury should take into consideration what the plaintiff has been able to earn since the injury complained of,⁴

since the injuries were received, but by that which the plaintiff might have earned or is capable of earning. *Gulf, etc., R. Co. v. Abbott*, (Tex. Civ. App. 1893) 24 S. W. Rep. 299. And see *Winter v. Central Iowa R. Co.*, 80 Iowa 443; *Campbell v. Fisher*, (Tex. Civ. App. 1893) 24 S. W. Rep. 661.

Expert Testimony. — The value of earning power is not one to be settled by expert testimony. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1. "An expert in banking or merchandising," said Williams, J., in this case, "might form an opinion about what a man possessing given business qualifications ought to be able to earn, but this is not the question the jury is to determine. They are interested only in knowing what he did actually earn or what his services were reasonably worth prior to the time of his injury. In settling this question, they should consider not only his past earnings or the fair value of services such as he was able to render, but his age, state of health, business habits, and manner of living." And see *McHugh v. Schlosser*, 159 Pa. St. 480, 39 Am. St. Rep. 699. See the title EXPERT AND OPINION EVIDENCE.

Mortuary Tables in Evidence. — Where damages are sought for injuries permanently diminishing the earning capacity, mortuary tables are admissible in evidence to show the probable duration of life. *Coleman, J.*, in *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378; *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42. See *supra*, this section, *Probable Duration of Life*.

But such tables are not proper evidence on the question of damages for prospective earnings, unless there is also some proof as to the value of the plaintiff's services or capacity to earn money. *Macon, etc., R. Co. v. Moore*, 99 Ga. 229. See generally the title MORTALITY TABLES.

1. *Gulf, etc., R. Co. v. Abbott*, (Tex. Civ. App. 1893) 24 S. W. Rep. 299; *Campbell v. Fisher*, (Tex. Civ. App. 1893) 24 S. W. Rep. 661.

2. **In Case of Physician.** — *Gulf, etc., R. Co. v. Brown*, (Tex. Civ. App. 1897) 40 S. W. Rep. 608. And see *Nash v. Sharpe*, 19 Hun (N. Y.) 365; *District of Columbia v. Woodbury*, 136 U. S. 450.

Evidence of Special Fees or Gratuities. — In the case of *Phillips v. London, etc., R. Co.*, 42 L. T. N. S. 6, the plaintiff was a physician and brought his action for a permanent injury by

which he was incapacitated from attending to his business. At the trial he proved that before the injury he had been receiving large special fees in the nature of gratuities from wealthy parties, which with his regular charges gave him an income of about five thousand pounds a year. The jury rendered a verdict for the plaintiff for sixteen thousand pounds. The case was taken to the court of appeals, and one of the questions was whether the jury were properly permitted to consider the special fees in estimating the value of the plaintiff's business. The court held it to be a proper matter for their consideration.

3. *District of Columbia v. Woodbury*, 136 U. S. 450; *Simonson v. Chicago, etc., R. Co.*, 49 Iowa 87; *Wallace v. Western North Carolina R. Co.*, 104 N. Car. 442; *Luck v. Ripon*, 52 Wis. 196. And see *Corrigan v. Dry Dock, etc., R. Co.*, 14 Daly (N. Y.) 120; *Pennsylvania R. Co. v. Dale*, 76 Pa. St. 47.

What Occupation Is, and Emoluments Therefrom. — To recover damages for disability by reason of personal injuries to follow the plaintiff's usual and ordinary occupation, evidence of what such occupation is and the emoluments received therefrom, is admissible. *Bloomington v. Chamberlain*, 104 Ill. 268.

Musician — Loss of Ability to Blow Wind Instrument. — In the case of *Consolidated Kansas City Smelting, etc., Co. v. Tinchert*, 5 Kan. App. 130, the plaintiff in an action for personal injuries was allowed to show that he was a musician, and by reason of the injuries complained of had sustained a loss in not thereafter being able to blow the wind instrument which he had been in the habit theretofore of using.

Evidence of Monthly Savings. — In *Louisville, etc., R. Co. v. Woods*, 105 Ala. 561, it was held to have been error to admit evidence as to what the plaintiff saved from month to month out of his wages earned before the injury. The court said that what the plaintiff was receiving for his services before the injury was the legitimate consideration, whether he spent all or none of his earnings.

Evidence that Plaintiff's Profession Is Unlawful. — Where the plaintiff sought to recover damages from alleged disablement in the practice of his profession as a physician, it was held that the defendants might show that his practice was an unlawful one. *Jacques v. Bridgeport Horse R. Co.*, 41 Conn. 61.

4. *Linton Coal, etc., Co. v. Persons*, 15 Ind.

whether in the same or in another occupation than that followed before the injury,¹ or what he might have been able to earn but for the injury in any employment for which he was fitted.²

Likelihood of Promotion. — But evidence is incompetent to show that the plaintiff was in the line of promotion in his calling, and that if promoted his earnings would have been increased.³ It has been held, however, that the jury may consider the power which the plaintiff would have had, but for the injury, to acquire a capacity for more profitable employment in the future.⁴ And where the plaintiff, acting as engineer, was injured, he was permitted to testify on the question of loss of earning capacity, that while not a skilful engineer when injured, he intended to become one, and to continue such occupation permanently.⁵

Where a Plaintiff Has Been Able to Earn as Much Since the Injury as before, the jury should not consider the item of impairment of earning capacity in assessing damages.⁶

The Profits of a Business with which one is connected cannot be regarded as a measure of his earning power. Evidence of such fact may tend to show the possession of business qualifications, but it does not fix their value, nor are profits derived from an investment earnings, or the measure of earning power.⁷ But where a partnership of which the plaintiff was a member simply employed the personal services of the parties, its earnings in no way proceeding from the use of capital or subject to the ordinary hazards of business ventures, it was held competent for the plaintiff to show what his share of the proceeds of the partnership business amounted to per month, and to what extent the injuries received impaired his usefulness in the performance of his duties.⁸

cc. **HOW DAMAGES FOR LOSS OF EARNING POWER COMPUTED.** — It has been held that an instruction to the jury that they should give 'the plaintiff such an amount as would purchase him a life annuity equal to the difference between the amount he would have earned each year if he had not been injured and that which he could earn each year in his injured condition, prescribed a measure

App. 69; *Knapp v. Sioux City, etc., R. Co.*, 71 Iowa 41; *Moore v. Kalamazoo*, (Mich. 1896) 66 N. W. Rep. 1089; *Texas, etc., R. Co. v. Davidson*, 3 Tex. Civ. App. 542.

1. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

2. *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378; *Chicago v. Edson*, 43 Ill. App. 417; *Grimmelman v. Union Pac. R. Co.*, 101 Iowa 74. And see *Helton v. Alabama Midland R. Co.*, 97 Ala. 275.

The Plaintiff May Show His Impaired Capacity in the employment in which he was engaged at the time of the injury, or in any other occupation for which he is fitted. *Seaboard Mfg. Co. v. Woodson*, 98 Ala. 378; *Chicago v. Edson*, 43 Ill. App. 417.

In an action for damages for the death of the plaintiff's intestate, employed as an engine wiper at the time of the injury, evidence of the wages which the decedent was able to make in other occupations was held to be admissible. *Grimmelman v. Union Pac. R. Co.*, 101 Iowa 74. And see *Rayburn v. Central Iowa R. Co.*, 74 Iowa 643.

In assessing damages for personal injuries to the plaintiff, who was a coal miner, it was held to have been the duty of the jury to take into consideration, among other things, the plaintiff's ability to earn money, not alone in the occupation of a coal miner, but in any other business or occupation. *Linton Coal,*

etc., Co. v. Persons, 15 Ind. App. 69.

Injuries while Engaged in Temporary Employment. — Where, when disabled, the plaintiff was temporarily engaged in work other than his regular occupation, there may nevertheless be evidence of the plaintiff's average earnings in his ordinary employment. *Galesburg v. Hall*, 45 Ill. App. 290.

3. *Richmond, etc., R. Co. v. Elliott*, 149 U. S. 266; *Brown v. Chicago, etc., R. Co.*, 64 Iowa 652.

4. *Houston, etc., R. Co. v. Boehm*, 57 Tex. 152.

5. *Howard-Oil Co. v. Davis*, 76 Tex. 630.

6. *Kane v. Savannah, etc., R. Co.*, 85 Ga. 858; *Mexican Cent. R. Co. v. Mitten*, 13 Tex. Civ. App. 653.

7. *Marks v. Long Island R. Co.*, 14 Daly (N. Y.) 61; *Williams, J., in Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1. And see *Boston, etc., R. Co. v. O'Reilly*, 158 U. S. 334; *Malone v. Pittsburgh, etc., R. Co.*, 152 Pa. St. 390.

Evidence that since the accident the plaintiff has not been able to do work in the boarding house kept by her is admissible to show loss of earning capacity in her business of keeping a boarding house. Such evidence is not objectionable as an effort to show loss of profits. *Malone v. Pittsburgh, etc., R. Co.*, 152 Pa. St. 390.

8. *Thomas v. Union R. Co.*, 13 N. Y. App. Div. 185.

of damages which was "technically accurate."¹ But other cases have maintained that it is proper to take into consideration the probable diminution of the plaintiff's earning capacity with advancing years.² The measure of damages in such cases is not a sum, the income from which would be equal to the difference between the amounts the plaintiff could have earned injured and uninjured, for this would be a perpetuity.³

(g) **Physical Pain and Suffering** — *aa. IN GENERAL.* — An important element of damage in actions for personal injuries is the physical or bodily pain and suffering endured by the injured party in consequence thereof.⁴ And there

1. **Life Annuity.** — *Baltimore, etc., R. Co. v. Henthorne*, 73 Fed. Rep. 634. And see *Houston, etc., R. Co. v. Willie*, 53 Tex. 318, 37 Am. Rep. 756.

When Damages for Future Loss by reason of diminished earning power are given and capitalized in a verdict, a plaintiff is entitled only to their present worth. *Kinney v. Folkerts*, 84 Mich. 616; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1; *Fulsome v. Concord*, 46 Vt. 135.

2. *East Tennessee, etc., R. Co. v. McClure*, 94 Ga. 658; *Western, etc., R. Co. v. Moore*, 94 Ga. 457; *Savannah, etc., R. Co. v. McLeod*, 94 Ga. 530; *Central R., etc., Co. v. Dottenheim*, 92 Ga. 425.

3. *Kinney v. Folkerts*, 78 Mich. 687; *Morrison v. Long Island R. Co.*, 3 N. Y. App. Div. 205; *Gregory v. New York, etc., R. Co.*, 55 Hun (N. Y.) 303; *Houston, etc., R. Co. v. Burke*, (Tex. 1882) 9 Am. & Eng. R. Cas. 369; *Houston, etc., R. Co. v. Willie*, 53 Tex. 318, 37 Am. Rep. 756.

4. **Bodily Pain and Suffering** — *England.* — *Lynch v. Knight*, 9 H. L. Cas. 577; *Phillips v. London, etc., R. Co.*, 5 Q. B. Div. 78.

United States. — *The Ferryboat D. S. Gregory*, 2 Ben. (U. S.) 226; *Saldana v. Galveston, etc., R. Co.*, 43 Fed. Rep. 862; *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476; *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 546; *Union Pac. R. Co. v. Jones*, 49 Fed. Rep. 343; *Eddy v. Wallace*, 49 Fed. Rep. 801; *Bowas v. Pioneer Tow Line*, 2 Sawy. (U. S.) 21.

Alabama. — *South, etc., Alabama R. Co. v. McLendon*, 63 Ala. 266; *Birmingham v. Lewis*, 92 Ala. 352; *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 30 Am. St. Rep. 65; *Louisville, etc., R. Co. v. Binion*, 107 Ala. 645; *Alabama G. S. R. Co. v. Burgess*, (Ala. 1897) 22 So. Rep. 169.

Arkansas. — *St. Louis, etc., R. Co. v. Blackburn*, (Ark. 1891) 15 S. W. Rep. 469; *St. Louis Southwestern R. Co. v. Dobbins*, 60 Ark. 481.

Connecticut. — *Ashcroft v. Chapman*, 38 Conn. 230; *Seger v. Barkhamsted*, 22 Conn. 290.

Delaware. — *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529; *Ford v. Charles Warner Co.*, (Del. 1893) 37 Atl. Rep. 39.

Georgia. — *Ball v. Mabry*, 91 Ga. 781; *Richmond, etc., R. Co. v. Williams*, 88 Ga. 16; *Smith v. Overby*, 30 Ga. 241.

Illinois. — *Lake Shore, etc., R. Co. v. Johnson*, 135 Ill. 641; *Ottawa v. Sweely*, 65 Ill. 434; *Chicago v. Langlass*, 66 Ill. 361; *La Salle v. Porterfield*, 138 Ill. 114; *Chicago v. McLean*, 133 Ill. 148; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Slater v. Rink*, 18 Ill. 527; *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 236, 71 Am.

Dec. 263; *Chicago, etc., R. Co. v. Fisher*, 38 Ill. App. 33; *Lincoln Ice Co. v. Johnson*, 37 Ill. App. 453; *Sandwich v. Dolan*, 141 Ill. 430; *Central R. Co. v. Serfass*, 153 Ill. 379, *affirmed* 53 Ill. App. 448; *Toledo, etc., R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Illinois Cent. R. Co. v. Cole*, 62 Ill. App. 480.

Indiana. — *Terre Haute, etc., R. Co. v. Brunner*, 128 Ind. 542; *Stewart v. Maddox*, 63 Ind. 51; *Cincinnati, etc., R. Co. v. Claire*, 6 Ind. App. 390; *Ohio, etc., R. Co. v. Dickerson*, 59 Ind. 317.

Iowa. — *Morris v. Chicago, etc., R. Co.*, 45 Iowa 29; *Deppe v. Chicago, etc., R. Co.*, 38 Iowa 592; *McKinley v. Chicago, etc., R. Co.*, 44 Iowa 314, 24 Am. Rep. 748; *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462; *Lucas v. Flinn*, 35 Iowa 9; *Moore v. Central R. Co.*, 47 Iowa 688.

Kansas. — *Abiline v. Wright*, 4 Kan. App. 708.

Louisiana. — *Donnell v. Sandford*, 11 La. Ann. 645.

Maine. — *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Mason v. Ellsworth*, 32 Me. 271; *Blackman v. Gardiner, etc., Bridge*, 75 Me. 214.

Maryland. — *Bannon v. Baltimore, etc., R. Co.*, 24 Md. 108; *Pittsburg, etc., R. Co. v. Andrews*, 39 Md. 329.

Massachusetts. — *Smith v. Holcomb*, 99 Mass. 552; *Ballou v. Farnum*, 11 Allen (Mass.) 73; *Johnson v. Holyoke*, 105 Mass. 80.

Michigan. — *Kinney v. Folkerts*, 84 Mich. 616; *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374; *Welch v. Ware*, 32 Mich. 77.

Minnesota. — *Johnson v. Northern Pac. R. Co.*, 47 Minn. 430.

Mississippi. — *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699.

Missouri. — *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367; *Haniford v. Kansas City*, 103 Mo. 172; *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270; *McMillan v. Union Press-Brick Works*, 6 Mo. App. 434; *Burdoin v. Trenton*, 116 Mo. 358; *Whalen v. St. Louis, etc., R. Co.*, 60 Mo. 323; *West v. Forrest*, 22 Mo. 344; *Steiner v. Moran*, 2 Mo. App. 47.

Montana. — *Hamilton v. Great Falls St. R. Co.*, 17 Mont. 334.

Nevada. — *Johnson v. Wells, etc., Co.*, 6 Nev. 224, 3 Am. Rep. 245.

New Hampshire. — *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541.

New Jersey. — *Klein v. Jewett*, 26 N. J. Eq. 474.

New York. — *Koetter v. Manhattan R. Co.*, 59 Hun (N. Y.) 623, 36 N. Y. St. Rep. 611; *O'Neil v. Dry Dock, etc., R. Co.*, 59 N. Y. Super. Ct. 123; *Miller v. Fort Lee Park, etc.,*

may also be a recovery on the score of physical suffering which the evidence shows the injured party will endure in the future.¹ But in order that the jury may consider as an element of damages future pain and suffering, it should be reasonably certain that the plaintiff will be actually subjected thereto.² There

Co., 73 Hun (N. Y.) 150; *Curtiss v. Rochester*, etc., R. Co., 20 Barb. (N. Y.) 282; *Ransom v. New York*, etc., R. Co., 15 N. Y. 415; *Kane v. New York*, etc., R. Co., 132 N. Y. 160; *Larkin v. New York*, etc., R. Co., (C. Pl.) 19 N. Y. Supp. 479; *Swarthout v. New Jersey Steamboat Co.*, 46 Barb. (N. Y.) 222; *Ward v. Vanderbilt*, 4 Abb. App. Dec. (N. Y.) 521; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260; *Morse v. Auburn*, etc., R. Co., 10 Barb. (N. Y.) 621; *Filer v. New York Cent. R. Co.*, 49 N. Y. 42, 10 Am. Rep. 327; *Ford v. Jones*, 62 Barb. (N. Y.) 484; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Niendorff v. Manhattan R. Co.*, 4 N. Y. App. Div. 46.

North Carolina. — *Wallace v. Western North Carolina R. Co.*, 104 N. Car. 442.

Pennsylvania. — *Pittsburg*, etc., Pass. R. Co. v. *Donahue*, 70 Pa. St. 119; *Wilson v. Pennsylvania R. Co.*, 132 Pa. St. 27; *McLaughlin v. Corry*, 77 Pa. St. 109, 18 Am. Rep. 432; *Pennsylvania R. Co. v. Allen*, 53 Pa. St. 276; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *Scott Tp. v. Montgomery*, 95 Pa. St. 444; *Breary v. Philadelphia Traction Co.*, 5 Pa. Dist. Rep. 95; *Pennsylvania*, etc., Canal Co. v. *Graham*, 63 Pa. St. 290, 3 Am. Rep. 549.

Texas. — *Fort Worth v. Johnson*, 84 Tex. 137; *Gulf*, etc., R. Co. v. *Glenk*, 9 Tex. Civ. App. 599; *Gulf*, etc., R. Co. v. *Brown*, (Tex. Civ. App. 1897) 40 S. W. Rep. 608; *Missouri*, etc., R. Co. v. *McElree*, (Tex. Civ. App. 1897) 41 S. W. Rep. 843; *San Antonio*, etc., R. Co. v. *Keller*, 11 Tex. Civ. App. 569; *Galveston*, etc., R. Co. v. *Waldo*, (Tex. Civ. App. 1895) 32 S. W. Rep. 783; *Mexican Cent. R. Co. v. Mitten*, 13 Tex. Civ. App. 653.

Utah. — *Giblin v. McIntyre*, 2 Utah 384.

Vermont. — *Nones v. Northouse*, 46 Vt. 587; *Bovee v. Daniel*, 53 Vt. 183.

Washington. — *Cogwell v. West St.*, etc., Electric R. Co., 5 Wash. 46.

Wisconsin. — *Propsom v. Leatham*, 80 Wis. 608; *Waterman v. Chicago*, etc., R. Co., 82 Wis. 613; *Heddles v. Chicago*, etc., R. Co., 77 Wis. 228, 20 Am. St. Rep. 106; *Stewart v. Ripon*, 38 Wis. 584; *Ripon v. Bittel*, 30 Wis. 614; *Nichols v. Brabazon*, 94 Wis. 549.

Physical Pain and Suffering General Damages. — Where physical pain and suffering are a natural consequence of the injuries received, they are general damages, and as such need not be specifically set forth. *Texas*, etc., R. Co. v. *Curry*, 64 Tex. 85.

1. Future Pain and Suffering — *United States*. — *Washington*, etc., R. Co. v. *Harmon*, 147 U. S. 571; *Union Pac. R. Co. v. Jones*, 49 Fed. Rep. 343; *Eddy v. Wallace*, 49 Fed. Rep. 801; *Illinois Cent. R. Co. v. Davidson*, 76 Fed. Rep. 517.

Alabama. — See *South*, etc., Alabama R. Co. v. *McLendon*, 63 Ala. 266.

Arkansas. — *St. Louis Southwestern R. Co. v. Dobbins*, 60 Ark. 481.

Delaware. — *Wallace v. Wilmington*, etc., R. Co., 8 Houst. (Del.) 529.

Georgia. — *Ball v. Mabry*, 91 Ga. 781; *Atlanta*, etc., R. Co. v. *Johnson*, 66 Ga. 259.

Illinois. — *Sandwich v. Dolan*, 141 Ill. 430; *Lake Shore*, etc., R. Co. v. *Johnsen*, 135 Ill. 641; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614; *Illinois Cent. R. Co. v. Cole*, 62 Ill. App. 480.

Michigan. — *Sherwood v. Chicago*, etc., R. Co., 82 Mich. 374.

Minnesota. — *Johnson v. Northern Pac. R. Co.*, 47 Minn. 430.

Missouri. — See *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367.

New York. — *Miller v. Fort Lee Park*, etc., Co., 73 Hun (N. Y.) 150; *Curtiss v. Rochester*, etc., R. Co., 20 Barb. (N. Y.) 282; *Kane v. New York*, etc., R. Co., 132 N. Y. 160; *Koetter v. Manhattan R. Co.*, 59 Hun (N. Y.) 623, 36 N. Y. St. Rep. 611.

Pennsylvania. — *Smith v. East Mauch Chunk*, 3 Pa. Super. Ct. Rep. 495.

Texas. — *Mexican Cent. R. Co. v. Mitten*, 13 Tex. Civ. App. 653.

Wisconsin. — *Propsom v. Leatham*, 80 Wis. 608; *Kliegel v. Aitken*, 94 Wis. 432; *Heddles v. Chicago*, etc., R. Co., 77 Wis. 228, 20 Am. St. Rep. 106; *Nichols v. Brabazon*, 94 Wis. 549.

Evidence of Necessity of Subsequent Operations.

— Where by reason of injuries to a leg its amputation has been rendered necessary, but a second amputation will have to be made, it has been held that evidence of such fact is competent. *Cumming v. Brooklyn City R. Co.*, 38 Hun (N. Y.) 362.

Probable Duration of Life. — In assessing damages for future physical pain and suffering the jury may consider the probable length of the plaintiff's life. *Waterman v. Chicago*, etc., R. Co., 82 Wis. 613.

2. Future Suffering Must Be Reasonably Certain

— *United States*. — *Illinois Cent. R. Co. v. Davidson*, 76 Fed. Rep. 517; *Union Pac. R. Co. v. Jones*, 49 Fed. Rep. 343.

Missouri. — *Ross v. Kansas City*, 48 Mo. App. 440.

New York. — *Koetter v. Manhattan R. Co.*, 59 Hun (N. Y.) 623, 36 N. Y. St. Rep. 611.

Wisconsin. — *Raymond v. Keseberg*, 91 Wis. 195; *White v. Milwaukee City R. Co.*, 61 Wis. 536, 50 Am. Rep. 154; *Hardy v. Milwaukee St. R. Co.*, 89 Wis. 187; *Block v. Milwaukee St. R. Co.*, 89 Wis. 371, 46 Am. St. Rep. 849; *Smith v. Milwaukee Builders*, etc., Exch. 91 Wis. 368; *Nichols v. Brabazon*, 94 Wis. 549; *Kucera v. Merrill Lumber Co.*, 91 Wis. 637; *Kleigel v. Aitken*, 94 Wis. 432.

See also *Smith v. East Mauch Chunk*, 3 Pa. Super. Ct. Rep. 495.

Charge as to Reasonable Certainty of Future Pain and Suffering. — In the case of *Illinois Cent. R. Co. v. Davidson*, 76 Fed. Rep. 517, the court charged the jury that if they found that the plaintiff's injuries were permanent, they might, in determining the amount of damages, consider "the physical pain and suffering which the plaintiff may have endured

may, however, be a recovery for future pain and suffering where it is reasonably certain to be endured, though it is not shown how long it will probably continue.¹

Recovery for Pain and Suffering, After Death of Injured Person. — Where the person injured institutes an action therefor, pending trial of which he dies, it has been held, under statutes by which the action survives to the personal administrator, that there may be a recovery for the physical pain and suffering of the decedent.² Reference is made to a subsequent article for a consideration of the question to what extent the mental and physical sufferings of a person killed by the wrongful act of another constitute an element of damages in an action brought under a statute giving a right of recovery for death by wrongful act.³

bb. **PECUNIARY COMPENSATION FOR PHYSICAL PAIN AND SUFFERING.** — As has already been stated, there can be no measure of pecuniary compensation for pain and suffering. There is no market price for this item of damages.⁴ Indeed, an instruction which leads a jury to regard compensation for pain and suffering as an independent item of damages is not only inexact, but erroneous.⁵ It can only be said that such damages should be estimated in a fair and reasonable

in the past and is likely under the evidence, if you so find, to endure in the future," and also "the time lost by him in the past or that may be lost in the future, if any." Exceptions were taken to these instructions on the ground that by the use of the words "likely" and "may" the jury were not restricted to the consideration of such pain and loss of time as were reasonably certain to occur. But the court said: "We are not able to believe that the jury were led to think that they could go outside of the evidence to infer consequences which were conjectural and unwarranted. Things which under the evidence are likely to happen, are reasonably certain to happen, * * * and the word 'may,' used as it was in the same connection, was probably understood in the same way. Greater accuracy of expression is, of course, always desirable." See also *Scott Tp. v. Montgomery*, 95 Pa. St. 444.

It was charged, in an action for damages for personal injuries, that the plaintiff might recover for pain endured in the past and which she "may have to endure in the future," but in order to assess damages for the future the jury "must be satisfied to a reasonable extent from the evidence that she will continue to suffer;" it was held that such an instruction was not violative of the rule that in order that damages for future disability may be recovered they must be such as are reasonably certain to result, and not such as may result. *Kleigel v. Aitken*, 94 Wis. 432.

But in the case of *Hardy v. Milwaukee St. R. Co.*, 89 Wis. 183, it was held that an instruction which permitted the jury to assess damages for the physical suffering which the plaintiff "may endure hereafter" was erroneous.

Jury Not to Act upon Mere Conjecture. — The jury, it has been held, cannot act upon conjecture as to the prospective condition of the plaintiff. *Curtiss v. Rochester, etc., R. Co.*, 20 Barb. (N. Y.) 282.

1. *Union Pac. R. Co. v. Jones*, 49 Fed. Rep. 343.

2. *Murphy v. New York, etc., R. Co.*, 29

Conn. 496; *Atchison, etc., R. Co. v. Rowe*, 56 Kan. 411; *Maher v. Philadelphia Traction Co.*, 181 Pa. St. 391.

Recovery for Pain and Suffering, After Death of Injured Person. — In the case of *Atchison, etc., R. Company v. Rowe*, 56 Kan. 411, which was an action for personal injuries revived after the death of the plaintiff in the name of his personal representative, in which damages were recovered for pain and suffering, it was insisted in this case that although the action for the injury survived the death of the person injured, the element of damages for pain and suffering resulting from it did not survive, but was personal to and died with the person injured. It was held, however, that the right to recover damages for such an element of injury did survive to the representative of decedent. See also *Holton v. Daly*, 106 Ill. 131; *Chicago, etc., R. Co. v. O'Connor*, 119 Ill. 586. And compare *Cregin v. Brooklyn Crosstown R. Co.*, 83 N. Y. 595, 38 Am. Rep. 474.

3. See *post*, the title DEATH BY WRONGFUL ACT, section, *Elements to Be Considered in Estimating Damages — Physical and Mental Suffering of Deceased*.

4. **Exact Pecuniary Compensation Not Possible.** — *Morgan v. Southern Pac. Co.*, 95 Cal. 501; *Atlanta, etc., R. Co. v. Johnson*, 66 Ga. 259; *Morris v. Chicago, etc., R. Co.*, 45 Iowa 29; *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367; *Baker v. Pennsylvania Co.*, 142 Pa. St. 503; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1; *Richmond R., etc., Co. v. Garthright*, 92 Va. 627.

It has been held not a reversible error for a court to instruct a jury that "money is an inadequate recompense for pain." *Morgan v. Southern Pac. Co.*, 95 Cal. 501.

5. **The Word "Compensation" in the Phrase "Compensation for Pain and Suffering,"** is not to be understood as meaning price or value, but as deserving an allowance looking towards recompense for or made because of the suffering consequent upon the injury. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1. And see *Baker v. Pennsylvania Co.*, 142 Pa. St. 503.

manner, and not by any sentimental or fanciful standard.¹

5. **Mental Pain and Suffering** — *a.* IN GENERAL. — The authorities, it is believed, all agree in holding that mental injuries may constitute an element of damages,² a person's mind, it has been said, being no less a part of his per-

1. **Estimate Must Be Fair and Reasonable.** — *Morris v. Chicago*, etc., R. Co., 45 Iowa 29; *Bannon v. Baltimore*, etc., R. Co., 24 Md. 108; *Haniford v. Kansas City*, 103 Mo. 172; *Bigelow v. Metropolitan St. R. Co.*, 48 Mo. App. 367; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

The measure of damages for physical pain and suffering is not such an amount as might induce a person to undergo the injuries suffered. *Deep Min.*, etc., Co. v. *Fitzgerald*, 21 Colo. 533; *Louisville*, etc., R. Co. v. *Fox*, 11 Bush (Ky.) 495; *Tully v. New York*, etc., Steamship Co., 10 N. Y. App. Div. 463.

2. **General Rule as to Mental Pain and Suffering** — *England.* — *Lynch v. Knight*, 9 H. L. Cas. 577.

United States. — *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476; *Bowas v. Pioneer Tow Line*, 2 Sawy. (U. S.) 21; *The Ferryboat D. S. Gregory*, 2 Ben. (U. S.) 226; *Saldana v. Galveston*, etc., R. Co., 43 Fed. Rep. 862.

Alabama. — *South*, etc., Alabama R. Co. v. *McLendon*, 63 Ala. 266; *Louisville*, etc., R. Co. v. *Whitman*, 79 Ala. 328.

Arkansas. — *St. Louis*, etc., R. Co. v. *Blackburn*, (Ark. 1891) 15 S. W. Rep. 469.

Connecticut. — *Seger v. Barkhamsted*, 22 Conn. 290; *Masters v. Warren*, 27 Conn. 293; *Ashcraft v. Chapman*, 38 Conn. 230.

Delaware. — *Warner v. Chamberlain*, 7 Houst. (Del.) 18; *Ford v. Warner Co.*, (Del. 1893) 37 Atl. Rep. 39.

Georgia. — *Smith v. Overby*, 30 Ga. 241; *Head v. Georgia Pac. R. Co.*, 79 Ga. 358, 11 Am. St. Rep. 434; *Bray v. Latham*, 81 Ga. 640.

Illinois. — *Toledo*, etc., R. Co. v. *Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Chicago v. McLean*, 133 Ill. 148; *Pittsburg*, etc., R. Co. v. *Story*, 63 Ill. App. 239.

Indiana. — *Wright v. Compton*, 53 Ind. 337; *Stewart v. Maddox*, 63 Ind. 51; *Wolf v. Trinkle*, 103 Ind. 355; *Moyer v. Gordon*, 113 Ind. 282; *Terre Haute*, etc., R. Co. v. *Brunker*, 128 Ind. 542.

Iowa. — *Lucas v. Flinn*, 35 Iowa 9; *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462; *McKinley v. Chicago*, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748; *Moore v. Central R. Co.*, 47 Iowa 688.

Kansas. — *Parsons v. Lindsay*, 26 Kan. 426; *Salina v. Trosper*, 27 Kan. 544; *West v. Western Union Tel. Co.*, 39 Kan. 93.

Louisiana. — *Donnell v. Sandford*, 11 La. Ann. 645.

Maine. — *Mason v. Ellsworth*, 32 Me. 271; *Blackman v. Gardiner*, etc., Bridge, 75 Me. 214.

Maryland. — *Pittsburg*, etc., R. Co. v. *Andrews*, 39 Md. 329, 17 Am. Rep. 568.

Massachusetts. — *Smith v. Holcomb*, 99 Mass. 552; *Johnson v. Holyoke*, 105 Mass. 80; *Tyler v. Pomeroy*, 8 Allen (Mass.) 480; *Ballou v. Farnum*, 11 Allen (Mass.) 73.

Michigan. — *Welch v. Ware*, 32 Mich. 77; *Sherwood v. Chicago*, etc., R. Co., 82 Mich. 374.

Mississippi. — *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332; *Memphis*, etc., R. Co. v. *Whitfield*, 44 Miss. 466, 7 Am. Rep. 699.

Missouri. — *West v. Forrest*, 22 Mo. 344; *Freidenheit v. Edmundson*, 36 Mo. 226; *Ahern v. Collins*, 39 Mo. 145; *Whalen v. St. Louis*, etc., R. Co., 60 Mo. 323; *Haniford v. Kansas City*, 103 Mo. 172; *Steiner v. Moran*, 2 Mo. App. 47; *McMillan v. Union Press-Brick Works*, 6 Mo. App. 434; *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270.

Nevada. — *Johnson v. Wells*, 6 Nev. 224, 3 Am. Rep. 245.

New Hampshire. — *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541.

New York. — *Filer v. New York Cent. R. Co.*, 49 N. Y. 42; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Morse v. Auburn*, etc., R. Co., 10 Barb. (N. Y.) 621; *Ford v. Jones*, 62 Barb. (N. Y.) 484; *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260; *Ward v. Vanderbilt*, 4 Abb. App. Dec. (N. Y.) 521.

North Carolina. — *Wallace v. Western North Carolina R. Co.*, 104 N. Car. 442.

Pennsylvania. — *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *Pennsylvania*, etc., Canal Co. v. *Graham*, 63 Pa. St. 290, 3 Am. Rep. 549; *Scott Tp. v. Montgomery*, 95 Pa. St. 444.

Tennessee. — *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864.

Texas. — *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; *Galveston*, etc., R. Co. v. *Thornsberry*, (Tex. 1891) 17 S. W. Rep. 521; *Campbell v. Harris*, 4 Tex. Civ. App. 636; *Galveston*, etc., R. Co. v. *McMonigal*, (Tex. Civ. App. 1893) 25 S. W. Rep. 341; *Allen v. Texas*, etc., R. Co., (Tex. Civ. App. 1894) 27 S. W. Rep. 943; *Yoakum v. Kroeger*, (Tex. Civ. App. 1894) 27 S. W. Rep. 953; *Galveston*, etc., R. Co. v. *Waldo*, (Tex. Civ. App. 1895) 32 S. W. Rep. 783; *San Antonio*, etc., R. Co. v. *Keller*, 11 Tex. Civ. App. 569; *Wells*, etc., *Express v. Fuller*, 13 Tex. Civ. App. 610; *Mexican Cent. R. Co. v. Mitten*, 13 Tex. Civ. App. 653; *Missouri*, etc., R. Co. v. *Warren*, (Tex. Civ. App. 1897) 39 S. W. Rep. 652; *Gulf*, etc., R. Co. v. *Brown*, (Tex. Civ. App. 1897) 40 S. W. Rep. 608; *Missouri*, etc., R. Co. v. *McElree*, (Tex. Civ. App. 1897) 41 S. W. Rep. 843.

Utah. — *Giblin v. McIntyre*, 2 Utah 384.

Vermont. — *Nones v. Northouse*, 46 Vt. 587; *Bovee v. Danville*, 53 Vt. 183; *Newell v. Whitcher*, 53 Vt. 589, 38 Am. Rep. 703.

Wisconsin. — *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Ripon v. Bittel*, 30 Wis. 614; *Stewart v. Ripon*, 38 Wis. 584; *Stutz v. Chicago*, etc., R. Co., 73 Wis. 147, 9 Am. St. Rep. 769; *Heddles v. Chicago*, etc., R. Co., 77 Wis. 228, 20 Am. St. Rep. 106; *Reinke v. Bentley*, 90 Wis. 457.

And see *Kepler v. Hyer*, 48 Ind. 499; *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462; *International*, etc., R. Co. v. *Smith*, (Tex. 1886) 1 S. W. Rep. 565.

son than his body; and indeed the sufferings of the former are oftentimes more acute and lasting than those of the latter.¹

The Extent of the Damages in Such Cases must be determined by the jury in the exercise of a sound and intelligent discretion.²

Where, in Trespass, Aggravating Circumstances existed in both the act and the intention, the jury, it was held, would not be confined to actual damages, but might give an additional sum to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiffs. *Smith v. Goodman*, 75 Ga. 198. But though the court in this case referred to damages for compensation for the wounded feelings of the plaintiff, as if they were the same thing as damages given to punish the offender, they are not so, as will be seen hereafter.

False Return of Subpoena — Arrest on Capias. — The case of *Gibney v. Lewis*, 68 Conn. 392, was an action to recover damages for the defendant's false return of service of a subpoena upon the plaintiff and her subsequent arrest on a capias. It was held that, in this case, there might be a recovery for mental suffering, as the natural and proximate consequence of the wrong complained of.

Evidence Admissible. — In the case of *Heddles v. Chicago, etc.*, R. Co., 77 Wis. 228, 20 Am. St. Rep. 106, which was an action for damages for personal injuries involving mental pain and anguish, past and future, it was held that evidence that the plaintiff, a boy seven years old, was, before the injury, of a bright and cheerful disposition, but afterwards irritable, easily excited, and when excited uncontrollable, was admissible as showing the boy's mental condition before and after the injury.

Vexation, Inconvenience, "Lack of Enjoyment," etc. — It has been held, in one case, that the jury cannot take into consideration mere "lack of personal enjoyment" occasioned by the injury. *Columbus v. Strassner*, 124 Ind. 482. Yet in another case an instruction that the jury might consider the plaintiff's deprivation of the "pleasure and satisfaction in life that those only can enjoy who are possessed of a sound body and of the free use of all its members," was held unobjectionable. *American Strawboard Co. v. Foust*, 12 Ind. App. 421. It has also been held that compensation should not be allowed for "inconvenience" in addition to damages for the personal injuries suffered. *Jenson v. Chicago, etc.*, R. Co., 86 Wis. 589. On the contrary, in a statutory action for damages for failing to enter satisfaction of a judgment which had been paid it was held that there might be a recovery by the plaintiff for the vexation and inconvenience to which he had been subjected. *Allen v. Conrad*, 51 Pa. St. 487. And see *Henry v. Sims*, 1 Whart. (Pa.) 187. In actions for damages for wrongful attachment it has been held that damages for annoyance and vexation were recoverable. *Byrne v. Gardner*, 33 La. Ann. 6. And it has also been held that, in the assessment of damages in an action of trespass by taking away goods, the jury may consider such circumstances accompanying the wrongs as may have occasioned special inconvenience and injury to the plaintiff. *Snively v. Fahnestock*, 18 Md. 391.

Disappointment Without Real Physical Inconvenience. — "For the mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot recover damages. That is purely sentimental." *Mellor, J.*, in *Hobbs v. London, etc.*, R. Co., L. R. 10 Q. B. 111.

1. *Storrs, J.*, in *Seger v. Barkhamsted*, 22 Conn. 290, in which case it was also observed that the sufferings of the mind and body each frequently, if not usually, act reciprocally on the other. The dismay and the consequent shock to the feelings thus produced by the danger attending a personal injury not only aggravate it, but are frequently so appalling as to suspend the reason and disable a person from warding it off; and to say that the mental suffering does not enter into the character and extent of the actual injury and form a part of it would be an affront to good sense.

Difficulty of Measuring Damages for Mental Suffering No Bar to Recovery. — In all actions in which damages for mental suffering or loss of mental capacity are sought to be recovered, the difficulty of furnishing by evidence the means of measuring the extent of the injury, so that the jury may be able to award with certainty a pecuniary equivalent therefor, is at once apparent; but the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree. *Ballou v. Farnum*, 11 Allen (Mass.) 73.

In the case of *Young v. Western Union Tel. Co.*, 107 N. Car. 370, 22 Am. St. Rep. 883, the court said: "The difficulty of measuring damages to the feelings is very great, but * * * it is better that it should be left to them [the jury] under the wise supervision of the presiding judge, with his power to set aside excessive verdicts, than, on account of such difficulty, to require parties injured in their feelings by the negligence, the malice, or wantonness of others, to go without remedy." And to the same effect see *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 605, 6 Am. St. Rep. 864, in which *Caldwell, J.*, delivering the opinion of the court, said: "That the amount of damages allowable in such a case as this is not capable of easy and accurate mathematical computation is freely conceded; but that should not be a sufficient reason for refusing or defeating the right of action altogether; for the same objection may be urged with the same force in all cases where mental and bodily suffering are treated as proper elements of damage."

2. **Question for Jury.** — *Montgomery, etc.*, R. Co. v. *Mallette*, 92 Ala. 209; *Sloane v. Southern California R. Co.*, 111 Cal. 668. And see *Haniford v. Kansas City*, 103 Mo. 172.

Necessity for Evidence to Aid Jury in Estimating Damages for Mental Anguish. — It seems that there need be no evidence to enable the jury to estimate damages for mental suffering. *St. Louis, etc.*, R. Co. v. *Trimble*, 54 Ark. 354;

b. FUTURE MENTAL SUFFERING. — The jury may also take into consideration mental suffering to be endured in the future.¹ But, it has been held, there can be no recovery of damages for future mental anguish which might be suffered by the plaintiff from a contemplation of what merely might occur.²

Loss of Intellectual Capacity. — It has been held that there may be a recovery for loss of intellectual capacity and mental vigor.³ Damages on this ground are

Stowe v. Heywood, 7 Allen (Mass.) 118; *Boldt v. Budwig*, 19 Neb. 739; *Galveston, etc., R. Co. v. Thornsberry*, (Tex. 1891) 17 S. W. Rep. 521; *Western Union Tel. Co. v. McLeod*, (Tex. Civ. App. 1893) 22 S. W. Rep. 988; *Western Union Tel. Co. v. Porter*, (Tex. Civ. App. 1894) 26 S. W. Rep. 866.

But though such evidence is not necessary, its admission will not be deemed error. *Western Union Tel. Co. v. Adams*, 75 Tex. 531. And see *Western Union Tel. Co. v. Henderson*, 89 Ala. 510; *Western Union Tel. Co. v. Carter*, 2 Tex. Civ. App. 624.

In *Western Union Tel. Co. v. Adams*, 75 Tex. 531, Henry, J., delivering the opinion of the court, said: "As juries may, from their own knowledge and experience of human nature, estimate damage proceeding from that cause without any evidence, it is not important to produce it, and when produced it ought not, as a general rule, to have a controlling effect; and yet we are not able to see why the fact that mental anguish was felt and was exhibited by speech or otherwise may not be proved for what it may be worth."

The General Rule is that mental suffering and its extent are to be inferred rather from the nature of the injury itself than from evidence of the plaintiff's appearance, conduct, or declarations. See *Stowe v. Heywood*, 7 Allen (Mass.) 118; *Western Union Tel. Co. v. Adams*, 75 Tex. 531; *Western Union Tel. Co. v. McLeod*, (Tex. Civ. App. 1893) 22 S. W. Rep. 988; *Western Union Tel. Co. v. Porter*, (Tex. Civ. App. 1894) 26 S. W. Rep. 866.

1. Future Mental Suffering — *United States*. — *Campbell v. Pullman Palace Car Co.*, 42 Fed. Rep. 484.

Alabama. — *South, etc., Alabama R. Co. v. McLendon*, 63 Ala. 266.

Delaware. — *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529.

Iowa. — *Kendall v. Albia*, 73 Iowa 241.

Michigan. — *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374.

Mississippi. — *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699.

New York. — *Matteson v. New York Cent. R. Co.*, 62 Barb. (N. Y.) 364.

Pennsylvania. — *Smith v. Mauch Chunk*, 3 Pa. Super. Ct. Rep. 495.

Texas. — *Mexican Cent. R. Co. v. Mitten*, 13 Tex. Civ. App. 653.

Wisconsin. — *Spicer v. Chicago, etc., R. Co.*, 29 Wis. 580; *Stewart v. Ripon*, 38 Wis. 584; *Sheel v. Appleton*, 49 Wis. 125; *Heddles v. Chicago, etc., R. Co.*, 77 Wis. 228, 20 Am. St. Rep. 106; *Nichols v. Brabazon*, 94 Wis. 549.

In the case of *Kendall v. Albia*, 73 Iowa 241, the court said: "It is also objected that the court instructed the jury that the plaintiff could recover for future mental anguish, and that no case can be found which so holds; nor has counsel cited us to a case which holds that

such a recovery cannot be had. If the future mental anguish is caused by the injury, we are unable to see why the plaintiff should not be compensated therefor, for the same reason that damages may be recovered for such anguish suffered up to the time of the trial. If any damages in the future may be recovered, we see no reason why mental anguish caused by the future condition of the injury should not be considered."

2. Illinois Cent. R. Co. v. Cole, 165 Ill. 334.

3. Loss of Intellectual Capacity. — *Wade v. Leroy*, 20 How. (U. S.) 43; *Ballou v. Farnum*, 11 Allen (Mass.) 73; *Wallace v. Western North Carolina R. Co.*, 104 N. Car. 442.

Evidence Admissible. — In *Ballou v. Farnum*, 11 Allen (Mass.) 73, the plaintiff was permitted to prove, over the defendant's objection, that he (the plaintiff) had, before the injury complained of, been engaged in business as a manufacturer; the nature of the duties he was accustomed to perform; and that since the accident he had been able to do very little that required mental application or physical labor. It was argued that if the jury were permitted to take into consideration as an element of damage the loss of intellectual power and capacity of the plaintiff for business, the injury must of necessity include an estimate of the future profits of the business in which the plaintiff was or might thereafter be engaged, and that such an estimate could furnish no safe basis for fixing the compensation, as it must at best be conjectural and uncertain. In considering this objection, the court said: "In general, the profits of a future business are indeed too remote and uncertain to be relied on as an element in the estimate of damages. It does not follow that superior education, experience, or ability in the management of business insures pecuniary success. The uncertainty of the continuance of health and life, with the taste and disposition for such pursuits, and especially the proverbial uncertainty of trade, preclude the making of any estimate which can have weight beyond the merest conjecture. If this evidence had been offered by the plaintiff with a view of increasing the damages on account of his wealth or peculiar skill as a manufacturer, or the large profits he would be able to realize in his future business, and it had been admitted for that purpose, the argument of the defendant would be entitled to further consideration. But it was offered only to show the extent of the personal injury by reason of the loss of mental vigor and endurance thereby occasioned. The diminution, whatever it was, could only be shown by evidence of strength before and weakness afterwards, as manifested in the ordinary pursuits of the plaintiff. The presiding judge admitted it only for this restricted purpose, and carefully instructed the jury that it was admissible

recoverable on principles analogous to those permitting a recovery for loss or diminution of earning capacity.¹

c. RECOVERY FOR MENTAL SUFFERING AFTER DEATH OF INJURED PARTY. — Where a party institutes an action for personal injuries involving also the element of mental suffering, there may, though the original plaintiff has since died, be a recovery on such account by the personal representative to whom the suit has survived.² It has been held, however, that there can be no recovery in such case for mental suffering on account of the circumstances or conditions of others, as where a decedent suffered mental distress prior to his death on account of his apprehension that he would leave his family in a dependent and helpless condition.³

d. RECOVERY FOR MENTAL SUFFERING COMPENSATORY DAMAGES. — Injury to the feelings is an element of actual damages, and not punitive or vindictive.⁴

e. MOTIVE OF WRONGDOER. — In this connection the motive of the wrongdoer is a material consideration, though affecting the question of compensatory damages simply.⁵ The reason for this is that if the wrong is committed wilfully, wantonly, or maliciously, it is likely to be more trying and aggravating

only in order to enable them to judge of the injury to his capacity, and that the action was for an injury to the man, and not for interfering with his business. * * * Upon the whole, then, upon principle we can see no error in the admission of the evidence with the accompanying instructions."

1. See *supra*, this section, *Loss or Diminution of Earning Power*.

2. *After Death of Injured Party.* — *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462; *Moe v. Smiley*, 125 Pa. St. 141; *Maher v. Philadelphia Traction Co.*, 181 Pa. St. 391.

No Recovery for Mental Suffering of Survivors under Statute. — In the case of *Blake v. Midland R. Co.*, 10 Eng. L. & Eq. 437, the action was brought for damages for the death of a party under the English statute of 9 & 10 Vict., c. 93, providing that "whenever the death of a person shall be caused by the wrongful act, neglect, or default of another," there might be a recovery of damages therefor. In this case it was held that in assessing the damages the jury are to be confined to injuries of which a pecuniary estimate can be made, but cannot take into consideration the mental suffering occasioned to the survivors by the death, and that nothing could be allowed as *solatium*, that being incapable of a pecuniary estimate, nor for the suffering of the injured party.

Damages for Mental Suffering for Injuries Causing Death — Thirty-five Hundred Dollars Held Excessive. — The case of *The Robert Graham Dun*, 33 U. S. App. 297, was a libel against the owners of a vessel for damages caused by collision with another vessel, and also for causing the death of three whalers on board the schooner Captain John, with which the former vessel had come in collision. Nothing was awarded the administrators of the three men for the death of the men, but in each case the sum of thirty-five hundred dollars was awarded by the commissioner for their mental and physical suffering while they remained in the water and before their death by drowning. This award the court held to be excessive, and the amount was reduced to three hundred and fifty dollars in each case.

3. *Atchison, etc., R. Co. v. Chance*, 57 Kan. 40.

4. **Compensatory Damages.** — *Smith v. Overby*, 30 Ga. 241; *Parkhurst v. Masteller*, 57 Iowa 474; *Dirmeyer v. O'Hern*, 39 La. Ann. 961; *American Water-Works Co. v. Dougherty*, 37 Neb. 373; *Johnson v. Wells*, 6 Nev. 224, 3 Am. Rep. 245; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Ives v. Humphreys*, 1 E. D. Smith (N. Y.) 201; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; *Western Union Tel. Co. v. Berdine*, 2 Tex. Civ. App. 517.

Injury to Feelings Actual Damages. — "Wounding a man's feelings," said Bleckley, C. J., in *Head v. Georgia Pac. R. Co.*, 79 Ga. 358, 11 Am. St. Rep. 434, "is as much actual damage as breaking his limbs. The difference is that one is internal and the other external; one mental, the other physical; in either case the damage is not measurable with exactness. There can be a closer approximation in estimating the damage to a limb than to the feelings, but at the last the amount is indefinite."

5. **Motive of Wrongdoer.** — *Pollock, C. B.*, in *Emblen v. Myers*, 6 H. & N. 54; *Pacific Ins. Co. v. Conard, Baldw.* (U. S.) 142; *Schindel v. Schindel*, 12 Md. 108; *Hawes v. Knowles*, 114 Mass. 519, 19 Am. Rep. 383; *Welch v. Ware*, 32 Mich. 77; *Ives v. Humphreys*, 1 E. D. Smith (N. Y.) 201.

In the case of *Emblen v. Myers*, 6 H. & N. 54, *Pollock, C. B.*, said: "It is universally felt, by all persons who have had occasion to consider the question of compensation, that there is a difference between an injury which is the mere result of such negligence as amounts to little more than accident, and an injury, wilful or negligent, which is accompanied with expressions of insolence. I do not say that in actions of negligence there should be vindictive damages, such as are sometimes given in actions of trespass, but the measure of damage should be different, according to the nature of the injury and the circumstances with which it is accompanied."

In *Ives v. Humphreys*, 1 E. D. Smith (N. Y.) 196, the court said: "Even if the plaintiff be confined strictly to compensation for the injury sustained by him, the jury are to deter-

in its mental effect than if such elements are lacking.¹ But there may, nevertheless, be a recovery for mental suffering though the act from which such condition results is unintentionally and only recklessly or negligently done.²

f. VARIOUS KINDS OF MENTAL SUFFERING—(1) *Mental Suffering in Cases of Bodily Injury*—(a) *In General*.—The most familiar class of cases in which a recovery has been allowed for mental suffering is that in which there have been physical injuries to the person, accompanied by mental suffering as a natural consequence.³

mine the extent of the injury and the equivalent damages in view of all the circumstances of injury, insult, invasion of the privacy, and interference with the comfort of the plaintiff and his family." And again: "For an involuntary trespass, or a trespass committed under an honest mistake, without intent to injure, the damages should be confined strictly to compensation for the injury sustained by the plaintiff, and in estimating the amount of such damages all the particulars wherein the plaintiff is aggrieved may be considered, whether of pecuniary loss, or pain, or insult, or inconvenience."

1. *In an Action of Tort for a Wilful Injury to the Person*, the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages, for though the physical injury is the same, it may be more aggravating in its effect upon the mind if it is done in wanton disregard of the rights and feelings of the plaintiff than if it is the result of mere carelessness. *Hawes v. Knowles*, 114 Mass. 519, 19 Am. Rep. 383.

Campbell, J., in *Welch v. Ware*, 32 Mich. 77, said: "The common sense of mankind has never failed to see that the injury done by a wilful wrong to person or reputation, and in some cases to property, cannot be measured by the consequent loss in money. A person assaulted may not be disabled or even disturbed in his business, and may not be put to any outlay in repairs or medical services. He may not be made poorer in money, directly or consequentially. He may incur no pecuniary damage whatever. * * * When the law gives an action for wilful wrongs, it does it on the ground that the injured person ought to receive pecuniary amends from the wrongdoer. It assumes that every such wrong brings damage upon the sufferer, and that the principal damage is mental, and not physical. And it assumes further that this is actual and not metaphysical damage, and deserves compensation. When this is once recognized, it is just as clear that the wilfulness and wickedness of the act must constitute an important element in the computation, for the plain reason that we all feel our indignation excited in direct proportion with the malice of the offender, and that the wrong is aggravated by it."

In the case of *Pacific Ins. Co. v. Conard*, *Baldw.* (U. S.) 138, *Baldwin, J.*, delivering the opinion of the court, said: "When a trespass is committed in a wanton, rude, and aggravated manner, indicating malice, or a desire to injure, a jury ought to be liberal in compensating the party injured in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation."

2. *Injuries Unintentionally Inflicted*.—*McIntyre v. Giblin*, 100 U. S. (25 L. ed.) 572; *Lake Erie, etc., R. Co. v. Christison*, 39 Ill. App. 495; *West v. Forrest*, 22 Mo. 344; *Porter v. Hannibal, etc., R. Co.*, 71 Mo. 66, 36 Am. Rep. 454; *American Water-Works Co. v. Dougherty*, 37 Neb. 373.

The defendant beat a negroess whom he had hired from her mistress, the plaintiff. The negroess ran to her mistress for protection; the defendant pursued her and continued the beating. The woman caught her mistress around the waist and clung to her, and the defendant continued to strike at her with a cowhide, unintentionally but recklessly inflicting several blows upon the mistress. It was held that the damages for this battery were not to be confined to the actual wrong to her person, but the jury might take into consideration the anguish and wounded feelings of the plaintiff. *West v. Forrest*, 22 Mo. 344.

3. *Mental Suffering in Case of Bodily Injury*—*England*.—*Phillips v. South Western R. Co.*, 4 Q. B. Div. 406.

United States.—*Larmon v. District of Columbia*, 5 Mackey (D. C.) 330; *Wade v. Leroy*, 20 How. (U. S.) 34; *McIntyre v. Giblin*, 131 U. S. clxxiv, appendix; *Hanson v. Fowle*, 1 Sawy. (U. S.) 539; *Boyle v. Case*, 9 Sawy. (U. S.) 386; *Carpenter v. Mexican Nat. R. Co.*, 39 Fed. Rep. 315; *Van de Venter v. Chicago City R. Co.*, 26 Fed. Rep. 32; *Anthony v. Louisville, etc., R. Co.*, 27 Fed. Rep. 724; *Robertson v. Cornelison*, 34 Fed. Rep. 716; *The Queen*, 40 Fed. Rep. 694; *Saldana v. Galveston, etc., R. Co.*, 43 Fed. Rep. 862; *Davidson v. Southern Pac. Co.*, 44 Fed. Rep. 476; *Ware v. St. Paul Water Co.*, 1 Dill. (U. S.) 465.

Alabama.—*Montgomery, etc., R. Co. v. Mallette*, 92 Ala. 209; *South, etc., Alabama R. Co. v. McLendon*, 63 Ala. 266.

California.—*Fairchild v. California Stage Co.*, 13 Cal. 599; *Townsend v. Briggs*, 99 Cal. 481; *Jones v. The Cortes*, 17 Cal. 487; *Malone v. Hawley*, 46 Cal. 409.

Colorado.—*Wall v. Cameron*, 6 Colo. 275.

Connecticut.—*Seger v. Barkhamsted*, 22 Conn. 290; *Masters v. Warren*, 27 Conn. 293; *Lawrence v. Housatonic R. Co.*, 29 Conn. 390.

Delaware.—*Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529.

Georgia.—*Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638; *Smith v. Overby*, 30 Ga. 241; *City, etc., R. Co. v. Findley*, 76 Ga. 311.

Illinois.—*Pierce v. Millay*, 44 Ill. 189; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Chicago v. Jones*, 66 Ill. 349; *Chicago v. Langlass*, 66 Ill. 361; *Chicago v. Elzeman*, 71 Ill. 131; *Sorgenfrei v. Schroeder*, 75 Ill. 397; *Hannibal, etc., R. Co. v. Martin*, 111 Ill. 219; *Sheridan v. Hibbard*, 119 Ill. 307; *Toledo, etc., R. Co. v. Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235, 71

(b) **Mental Suffering as an Incident of Bodily Injuries.** — Where there have been physical injuries to the person, mental suffering is regarded as a natural incident thereof,¹ in which case, however, it is difficult if not impossible to draw the line between the physical and the mental pain.² Indeed, it has been held in such cases that it is erroneous to instruct the jury that they may regard mental suffering as an element of damages distinct from physical pain.³

Am. Dec. 263; *Chicago v. McLean*, 133 Ill. 148, 35 Ill. App. 273.

Indiana. — *Taber v. Hutson*, 5 Ind. 322; *Nossaman v. Rickert*, 18 Ind. 350; *Wright v. Compton*, 53 Ind. 337; *Indianapolis v. Gaston*, 58 Ind. 224; *Pittsburg, etc., R. Co. v. Sponier*, 85 Ind. 165; *Wabash, etc., R. Co. v. Morgan*, 132 Ind. 430; *Nappanee v. Ruckman*, 7 Ind. App. 361.

Iowa. — *Muldrow v. Illinois Cent. R. Co.*, 36 Iowa 462; *McKinley v. Chicago, etc., R. Co.*, 44 Iowa 314, 24 Am. Rep. 748; *Ferguson v. Davis County*, 57 Iowa 601; *Gronan v. Kukkuck*, 59 Iowa 18; *Stafford v. Oskaloosa*, 64 Iowa 251; *Kendall v. Albion*, 73 Iowa 241; *Weber v. Creston*, 75 Iowa 16; *Fleming v. Shenandoah*, 71 Iowa 456.

Kansas. — *Salina v. Trospier*, 27 Kan. 544; *Kansas Pac. R. Co. v. Pointer*, 9 Kan. 620; *Missouri, etc., R. Co. v. Weaver*, 16 Kan. 456.

Kentucky. — *Alexander v. Humber*, 86 Ky. 565; *Kentucky Cent. R. Co. v. Ackley*, 87 Ky. 278, 12 Am. St. Rep. 480.

Maryland. — *Stockton v. Frey*, 4 Gill (Md.) 406, 45 Am. Dec. 138; *McMahon v. Northern Cent. R. Co.*, 39 Md. 438.

Massachusetts. — *Ballou v. Farnum*, 11 Allen (Mass.) 73; *Tyler v. Pomeroy*, 8 Allen (Mass.) 480; *Smith v. Holcomb*, 99 Mass. 552.

Michigan. — *Kinney v. Folkerts*, 84 Mich. 616.

Mississippi. — *Memphis, etc., R. Co. v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699.

Missouri. — *McMillan v. Union Press-Brick Works*, 6 Mo. App. 434; *West v. Forrest*, 22 Mo. 344; *Porter v. Hannibal, etc., R. Co.*, 71 Mo. 66; *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270; *Sidekum v. Wabash, etc., R. Co.*, 93 Mo. 400.

New Hampshire. — *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541; *Clark v. Manchester*, 64 N. H. 471.

New York. — *O'Neil v. Dry Dock, etc., R. Co.*, 59 N. Y. Super. Ct. 123; *Caldwell v. Central Park, etc., R. Co.*, 7 Misc. Rep. (N. Y. C. Pl.) 67; *Demann v. Eighth Ave. R. Co.*, 10 Misc. Rep. (N. Y. C. Pl.) 191; *Drinkwater v. Dinsmore*, 16 Hun (N. Y.) 250; *Matteson v. New York Cent. R. Co.*, 62 Barb. (N. Y.) 364; *Brignoli v. Chicago, etc., R. Co.*, 4 Daly (N. Y.) 182.

North Carolina. — *Wallace v. Western North Carolina R. Co.*, 104 N. Car. 442.

Pennsylvania. — *Scott Tp. v. Montgomery*, 95 Pa. St. 444; *Pennsylvania, etc., Canal Co. v. Graham*, 63 Pa. St. 290; *McLaughlin v. Corry*, 77 Pa. St. 109, 18 Am. Rep. 432.

Texas. — *San Antonio, etc., R. Co. v. Corley*, (Tex. Civ. App. 1894) 26 S. W. Rep. 903; *Houston, etc., R. Co. v. Boehm*, 57 Tex. 152; *Texas, etc., R. Co. v. Curry*, 64 Tex. 85; *Houston, etc., R. Co. v. Randall*, 50 Tex. 254; *Gallagher v. Bowie*, 66 Tex. 265; *Texas Mexican R. Co. v. Douglas*, 73 Tex. 325.

Utah. — *Giblin v. McIntyre*, 2 Utah 384.

Vermont. — *Bovee v. Danville*, 53 Vt. 183.

Virginia. — *Richmond, etc., R. Co. v. Norment*, 84 Va. 167, 10 Am. St. Rep. 827.

West Virginia. — *Vinal v. Core*, 18 W. Va. 1; *Riley v. West Virginia, etc., R. Co.*, 27 W. Va. 145.

Wisconsin. — *Reinke v. Bentley*, 90 Wis. 457; *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56; *Goodno v. Oshkosh*, 28 Wis. 300; *Stewart v. Ripon*, 38 Wis. 584.

1. **Mental Suffering as an Incident of Bodily Injury.** — *Hannibal, etc., R. Co. v. Martin*, 111 Ill. 219; *Chicago v. McLean*, 133 Ill. 148; *Atchison, etc., R. Co. v. Midgett*, 1 Kan. App. 138; *Demann v. Eighth Ave. R. Co.*, 10 Misc. Rep. (N. Y. C. Pl.) 191; *Caldwell v. Central Park, etc., R. Co.*, 7 Misc. Rep. (N. Y. C. Pl.) 67; *Brown v. Sullivan*, 71 Tex. 470; *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56.

Mental Suffering as General Damages. — Mental suffering which is merely incidental to physical injuries is general damages, and therefore need not be pleaded or specially proved. *Chicago v. McLean*, 133 Ill. 148; *Caldwell v. Central Park, etc., R. Co.*, 7 Misc. Rep. (N. Y. C. Pl.) 67; *McCoy v. Milwaukee, etc., R. Co.*, 88 Wis. 56.

Presumption of Mental Suffering. — Where it is shown that the plaintiff sustained permanent injuries and suffered great physical pain, mental suffering will be presumed. *Fry v. Hillan*, (Tex. Civ. App. 1896) 37 S. W. Rep. 359; *Brown v. Sullivan*, 71 Tex. 470. And see *Gulf, etc., R. Co. v. Silliphant*, 70 Tex. 624.

2. *Cooper, J.*, in *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300.

Physical Injuries to the Person — Effects upon Body and Mind Not Separable. — In the case of *Chicago v. McLean*, 133 Ill. 148, *Magruder, J.*, delivering the opinion of the court, said that "the body and mind are so intimately connected that the mind is very often directly and necessarily affected by physical injury. There cannot be severe physical pain without a certain amount of mental suffering. The mind, unless it is so overpowered that consciousness is destroyed, takes cognizance of physical pain and must be more or less affected thereby."

Injury to the Person Includes Effect upon Mind. — "The allowance of damages for wounded feelings when they are the concomitant or result of physical injury is placed rightfully on the ground that the mind is as much a part of the body as the bones and muscles, and an injury to the body included the whole, and its effects were not separable." *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 38 Am. St. Rep. 575.

3. *Kenyon v. Gilmer*, 131 U. S. 22; *Joch v. Dankwardt*, 85 Ill. 331; *Salina v. Trospier*, 27 Kan. 564; *Johnson v. Wells*, 6 Nev. 224, 3 Am. Rep. 245; *Galveston, etc., R. Co. v. Porfett*, 72 Tex. 344. And see *Hall v. Manson*, 90 Iowa 585; *Giblin v. McIntyre*, 2 Utah 384.

(c) **Mental Suffering for Disfigurement of Person.** — It has been held that there might be a recovery for such mental anguish as results from the consciousness and contemplation of one's disfigurement of person.¹ But, on the other hand, this has been denied on the ground that the mental anguish in such cases is wholly sentimental, vague, and incapable of estimate.²

(d) **Mental Suffering for Physical Injuries of Another.** — As a general rule, the right of recovery for mental suffering resulting from bodily injuries is restricted to the person who has suffered the bodily hurt.³ Mental distress caused by sympathy for another's suffering is not a recoverable element of damages.⁴ A parent cannot recover for mental distress and anxiety on account of physical injury sustained by a child,⁵ nor can a parent recover damages for anxiety for the safety of his or her child placed in peril by the negligence of another.⁶ Sim-

1. Disfigurement of Person. — St. Louis Southwestern R. Co. v. Dobbins, 60 Ark. 481; Newbury v. Getchel, etc., Lumber, etc., Co., 100 Iowa 441; Power v. Harlow, 57 Mich. 107; Nichols v. Brabazon, 94 Wis. 549; Heddles v. Chicago, etc., R. Co., 77 Wis. 228, 20 Am. St. Rep. 106. And see Western, etc., R. Co. v. Young, 81 Ga. 397, 12 Am. St. Rep. 320; Stewart v. Maddox, 63 Ind. 51; Cameron v. Bryan, 89 Iowa 214; Sherwood v. Chicago, etc., R. Co., 82 Mich. 374; Schmitz v. St. Louis, etc., R. Co., 119 Mo. 256.

Disfigurement of Person by Loss of Legs. — In the case of Heddles v. Chicago, etc., R. Co., 77 Wis. 228, 20 Am. St. Rep. 106, which was an action for injuries to a boy seven years old which necessitated the amputation of both legs, the jury were instructed that in assessing damages they should give adequate compensation for the plaintiff's physical pain and mental suffering, past and future, occasioned by his injuries; also for the mortification and anguish of mind which he had suffered and would in the future suffer by reason of the mutilation of his body, and the fact that he might become an object of curiosity or ridicule among his fellows. This charge was held not to have been error. In support of this instruction the court cited Wilson v. Young, 31 Wis. 574; Craker v. Chicago, etc., R. Co., 36 Wis. 657; Power v. Harlow, 57 Mich. 107; The Oriflamme, 3 Sawy. (U. S.) 397; Atlanta, etc., Air-Line R. Co. v. Wood, 48 Ga. 565; Toledo, etc., R. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71; Ballou v. Farnum, 11 Allen (Mass.) 73; Western, etc., R. Co. v. Young, 81 Ga. 397, 12 Am. St. Rep. 320; McMahon v. Northern Cent. R. Co., 39 Md. 438.

2. Chicago, etc., R. Co. v. Caulfield, 63 Fed. Rep. 396; Chicago, etc., R. Co. v. Hines, 45 Ill. App. 299.

3. Mental Suffering for Physical Injury of Another — England. — Flemmington v. Smithers, 2 C. & P. 292, 12 E. C. L. 131.

Indiana. — Western Union Tel. Co. v. Strate-meier, 6 Ind. App. 125; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72.

Louisiana. — Black v. Carrollton R. Co., 10 La. Ann. 33, 63 Am. Dec. 586.

Maine. — Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303.

Michigan. — Hyatt v. Adams, 16 Mich. 180.

Minnesota. — Keyes v. Minneapolis, etc., R. Co., 36 Minn. 290.

New York. — Whitney v. Hitchcock, 4 Den. (N. Y.) 461; Cowden v. Wright, 24 Wend. (N. Y.) 429, 35 Am. Dec. 633.

Pennsylvania. — Pennsylvania R. Co. v. Kelly, 31 Pa. St. 372; Oakland R. Co. v. Fielding, 48 Pa. St. 320.

Texas. — Pacific Express Co. v. Black, 8 Tex. Civ. App. 363; Chicago, etc., R. Co. v. Boyles, 11 Tex. Civ. App. 522; Western Union Tel. Co. v. Cooper, 71 Tex. 507, 10 Am. St. Rep. 772; Gulf, etc., R. Co. v. Box, 81 Tex. 670; Pullman Palace Car Co. v. Trimble, 8 Tex. Civ. App. 335; Missouri Pac. R. Co. v. Martino, 2 Tex. Civ. App. 634. And see Gulf, etc., R. Co. v. Box, 81 Tex. 670.

"Where the Action Is by the Husband, or Master, or Parent, for their individual losses respectively, occasioned by tortious acts towards the wife, infant child, or servant, the individual suffering of the immediate subject of the wrongful act cannot be taken into account in the assignment of damages." Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72.

4. Flemmington v. Smithers, 2 C. & P. 292, 12 E. C. L. 131; Hyatt v. Adams, 16 Mich. 180; Western Union Tel. Co. v. Cooper, 71 Tex. 507, 10 Am. St. Rep. 772; Pacific Express Co. v. Black, 8 Tex. Civ. App. 363; Pullman Palace Car Co. v. Trimble, 8 Tex. Civ. App. 335.

Apprehension by Injured Person that He Would Leave His Family Without Support. — A recovery may be had for mental suffering or anguish of mind resulting from physical pain and suffering endured by the injured party, but it is improper to admit evidence as to mental suffering on account of the circumstances or conditions of others. It was held in an action against a railroad company for fatal injuries inflicted upon the plaintiff's intestate, where evidence was sought to be introduced of the mental distress of the decedent prior to his death on account of his apprehension that he would leave his wife and child in a dependent and helpless condition. Atchison, etc., R. Co. v. Chance, 57 Kan. 40.

5. Parent — Child. — Flemmington v. Smithers, 2 C. & P. 292, 12 E. C. L. 131; Black v. Carrollton R. Co., 10 La. Ann. 33, 63 Am. Dec. 586; Cowden v. Wright, 24 Wend. (N. Y.) 429, 35 Am. Dec. 633; Whitney v. Hitchcock, 4 Den. (N. Y.) 461; Pennsylvania R. Co. v. Kelly, 31 Pa. St. 372; Oakland R. Co. v. Fielding, 48 Pa. St. 320. Compare Trimble v. Spiller, 7 T. B. Mon. (Ky.) 394, 18 Am. Dec. 189.

6. Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303. And see Pullman Palace Car Co. v. Trimble, 8 Tex. Civ. App. 335; Keyes v. Minneapolis, etc., R. Co., 36 Minn. 290.

ilarly, it has been held that a husband's mental suffering caused by his wife's condition cannot be shown to increase the amount of damages.¹

(2) *Suffering in Apprehension of Bodily Injury*—(a) *Necessity for Bodily Injury*.—On this point there is much conflict in the cases. The weight of authority seems to be that in cases of negligence merely, where some actual damage must be shown to constitute a cause of action, the mere fear or nervous apprehension of physical injuries which are never, in fact, received is not such damage as will support the action,² even though actual physical injury follows as a consequence of the mental disturbance.³ By some cases this

1. *Husband—Wife*.—Hyatt *v.* Adams, 16 Mich. 180; Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 10 Am. St. Rep. 772; Pacific Express Co. *v.* Black, 8 Tex. Civ. App. 363; Gulf, etc., R. Co. *v.* Box, 81 Tex. 670; Missouri Pac. R. Co. *v.* Martino, 2 Tex. Civ. App. 634.

2. *Necessity for Bodily Injury—England*.—Lynch *v.* Knight, 9 H. L. Cas. 577; Victorian R. Com'rs *v.* Coultas, L. R. 13 App. 222. And see Allsop *v.* Allsop, 5 H. & N. 534.

United States.—Wilcox *v.* Richmond, etc., R. Co., 52 Fed. Rep. 264; The Queen, 40 Fed. Rep. 694. And see Tyler *v.* Western Union Tel. Co., 54 Fed. Rep. 634; Crawson *v.* Western Union Tel. Co., 47 Fed. Rep. 544; Chase *v.* Western Union Tel. Co., 44 Fed. Rep. 554; Western Union Tel. Co. *v.* Wood, 57 Fed. Rep. 471.

Dakota.—See Russell *v.* Western Union Tel. Co., 3 Dakota 315.

Georgia.—See Chapman *v.* Western Union Tel. Co., 88 Ga. 763, 30 Am. St. Rep. 183.

Illinois.—Indianapolis, etc., R. Co. *v.* Stables, 62 Ill. 313.

Indiana.—Terre Haute, etc., R. Co. *v.* Brunker, 128 Ind. 542.

Kansas.—Atchison, etc., R. Co. *v.* McGinnis, 46 Kan. 109.

Maine.—Wyman *v.* Leavitt, 71 Me. 227, 36 Am. Rep. 303.

Massachusetts.—Spade *v.* Lynn, etc., R. Co., 168 Mass. 285; Canning *v.* Williamstown, 1 Cush. (Mass.) 451.

Minnesota.—See Renner *v.* Canfield, 36 Minn. 90.

Mississippi.—See Western Union Tel. Co. *v.* Rogers, 68 Miss. 748, 24 Am. St. Rep. 300; Dorrah *v.* Illinois Cent. R. Co., 65 Miss. 14, 7 Am. St. Rep. 629.

Missouri.—Strange *v.* Missouri Pac. R. Co., 1 Mo. App. Rep. 209. And see Trigg *v.* St. Louis, etc., R. Co., 74 Mo. 147, 41 Am. Rep. 305.

Nevada.—Johnson *v.* Wells, 6 Nev. 224, 3 Am. Rep. 245.

New York.—Lehman *v.* Brooklyn City R. Co., 47 Hun (N. Y.) 355; Mitchell *v.* Rochester R. Co., 151 N. Y. 107.

Texas.—Gulf, etc., R. Co. *v.* Trott, (Tex. Civ. App. 1894) 25 S. W. Rep. 431, 86 Tex. 412; Southern Pac. R. Co. *v.* Ammons, (Tex. Civ. App. 1894) 26 S. W. Rep. 135; Ft. Worth, etc., R. Co. *v.* Burton, (Tex. App. 1891) 15 S. W. Rep. 197.

Washington.—See Hawkins *v.* Front St. Cable R. Co., 3 Wash. 592.

Apprehension of Injury from Defects in Highway.—In Canning *v.* Williamstown, 1 Cush. (Mass.) 451, which was an action against a

town to recover damages for an injury sustained by the plaintiff in consequence of a defective bridge, it was held that the plaintiff could not recover if he sustained no injury in his person, but merely incurred risk and peril which caused fright and mental suffering.

Insanity from Fright and Nervous Apprehension.—The case of Haile *v.* Texas, etc., R. Co., 23 U. S. App. 80, was an action for damages instituted by the curator of a lunatic, alleging that the latter had been made insane by the consequent hardship and suffering resulting from an accident caused by the defendant's negligence, seeking to recover for the pain, anxiety, loss of life, and expenses incurred therefrom. It appeared that the plaintiff's ward had received no bodily injury from the accident. The court held that there could be no recovery, since insanity was not the usual or probable result of a railroad accident.

In Actions for Slander, where the words spoken are not actionable *per se*, it has been held that special damage cannot be made out by showing mental injuries, or even physical injuries resulting from the effect upon the mind. Allsop *v.* Allsop, 5 H. & N. 534. See the title LIEBEL AND SLANDER.

Fright from Negligent Blasting.—In the case of Fox *v.* Borkey, 126 Pa. St. 164, in which damages were claimed for fright from blasting, though no personal injury had been suffered, Mitchell, J., said: "The injury was not the natural or proximate result of the act complained of."

3. Victorian R. Com'rs *v.* Coultas, L. R. 13 App. 222; Spade *v.* Lynn, etc., R. Co., 168 Mass. 285; Canning *v.* Williamstown, 1 Cush. (Mass.) 451; Mitchell *v.* Rochester R. Co., 151 N. Y. 107; Lehman *v.* Brooklyn City R. Co., 47 Hun (N. Y.) 355. And see Tyler *v.* Western Union Tel. Co., 54 Fed. Rep. 634.

Miscarriage from Fright and Nervous Apprehension.—In the case of Mitchell *v.* Rochester R. Co., 151 N. Y. 107, it was held that a miscarriage resulting from mere temporary fright and nervous apprehension from an act of the defendant's negligence could not be regarded as the natural and proximate result of such negligence.

No Recovery for Fright—None for Its Consequences.—"If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even

principle is held to exclude recovery in all cases of mental distress or nervous shock resulting from negligence where there is no bodily injury contemporaneous therewith.¹ Damages, therefore, for the result of a nervous shock or mental distress caused by apprehension of injury from an impending collision which did not occur were held, according to this doctrine, not recoverable;² such consequences, it has been held, resulting rather from the condition and circumstances of the individual than the act of the defendant.³

(b) **What Constitutes Bodily Injury.** — In order to constitute such a physical injury to the person that damages for fright and nervous apprehension resulting therefrom or contemporaneous therewith may be recovered, it is not necessary that there should be a bruise or wound or physical pain, or even impact with the person.⁴ Thus, where the plaintiff was in a wagon which was struck by one of the defendant's cars going at great speed, the car carrying the wagon along for some distance before it could be stopped, it was held that there was an actual injury done to the person of the plaintiff, and therefore that there might be a recovery in damages for the plaintiff's fright.⁵ And where a person in terror and alarm at the prospect of a threatened danger makes efforts to escape therefrom, in doing which he is injured, there may be a recovery both for the fright and for the nervous shock and the physical injuries resulting therefrom.⁶

a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, there can be no recovery, no matter how grave or serious the consequences." *Martin, J.*, in *Mitchell v. Rochester R. Co.*, 151 N. Y. 107.

1. *Western Union Tel. Co. v. Wood*, 57 Fed. Rep. 471; *Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554; *Crawson v. Western Union Tel. Co.*, 47 Fed. Rep. 544; *Tyler v. Western Union Tel. Co.*, 54 Fed. Rep. 634; *Russell v. Western Union Tel. Co.*, 3 Dakota 315; *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 30 Am. St. Rep. 183; *West v. Western Union Tel. Co.*, 39 Kan. 93, 7 Am. St. Rep. 530; *Renner v. Canfield*, 36 Minn. 90; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300; *Trigg v. St. Louis, etc., R. Co.*, 74 Mo. 147, 41 Am. Rep. 305. And see *Strange v. Missouri Pac. R. Co.*, 1 Mo. App. Rep. 209.

2. *Victorian R. Com'rs v. Coultas*, L. R. 13 App. 222.

Mere Fright Produced by a Collision, causing permanent injury to the nervous system, is a result too remote to be recoverable in damages against the person responsible for the collision. **Ewing v. Pittsburg, etc., R. Co.*, 147 Pa. St. 40. No well-considered case, it was here said, has held that fright alone, not resulting from or accompanied by some physical injury to the person, will sustain an action for negligence.

3. *Victorian R. Com'rs v. Coultas*, L. R. 13 App. 222. And see *Spade v. Lynn, etc., R. Co.*, 168 Mass. 285.

4. **What Constitutes Bodily Injury.** — *Warren v. Boston, etc., R. Co.*, 163 Mass. 484; *Consolidated Traction Co. v. Lambertson*, 59 N. J. L. 297.

Plaintiff Thrown from Wagon. — In *Warren v. Boston, etc., R. Co.*, 163 Mass. 484, the evi-

dence tended to show that the defendant's train struck the carriage of the plaintiff, thereby throwing him out upon the ground, though not doing him any actual physical hurt; but it was held to be a physical injury for a person to be thrown out of a wagon, even though the harm consisted mainly of nervous shock. It was not, therefore, it was held, a case of mere fright. In this case the court said that it would be a physical injury to the person to be thrown out of a wagon, or even to be compelled to jump out to avoid physical hurt, citing *Canning v. Williamstown, 1 Cush. (Mass.) 451*; *Victorian R. Com'rs v. Coultas*, L. R. 13 App. 222; *Bell v. Great Northern R. Co.*, 26 L. R. Ir. 428; *Seger v. Barkhamsted*, 22 Conn. 290.

Dodging to Avoid Injury. — In the case of *Buchanan v. West Jersey R. Co.*, 52 N. J. L. 265, it appeared that a woman rightfully on the platform of a railroad station was obliged to throw herself prostrate in order to escape being struck by a piece of timber projecting from a car in motion. The proof was that by reason of the shock to her nervous system occasioned by this peril, her health had been seriously impaired, and it was held that there might be a recovery.

Though a Bodily Injury May Have Been Very Insignificant, yet if it is a ground of action and caused mental suffering to the plaintiff, that suffering may be considered a part of the injury for which a recovery may be had. *Canning v. Williamstown, 1 Cush. (Mass.) 451*. See, however, *The Queen*, 40 Fed. Rep. 694, where it was held that in the absence of actual physical injuries resulting in incapacity for work or some expense incurred, a person thrown from a boat into the water as the result of a collision could not recover damages for fright alone.

5. *Consolidated Traction Co. v. Lambertson*, 59 N. J. L. 297. And see *Warren v. Boston, etc., R. Co.*, 163 Mass. 484.

6. *Smith v. St. Paul, etc., R. Co.*, 30 Minn. 169; *Buchanan v. West Jersey R. Co.*, 52 N. J. L. 265. And see *Mark v. St. Paul, etc., R.*

Physical Injury to Property. — It seems that an actual physical injury to property is not sufficient upon which to found a claim for damages for fright, although such a condition may have in fact resulted.¹

(c) **Policy and Rationale of Rule as to Necessity for Bodily Injury.** — The adoption of the rule as given has been ascribed to the opportunities for fraud which would result in the absence of the requirement indicated and the injustice of holding a person merely negligent bound to anticipate and provide against fright and its consequences, which in so many cases depend upon and vary with the peculiarities of the mental organism of different persons.²

(d) **Limitation of Rule as to Necessity for Bodily Injury.** — It has been said that the rule requiring bodily injury in order to warrant a recovery for mental suffering in cases of negligence has no application to wanton or intentional wrongs³ or

Co., 30 Minn. 493; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147.

1. Physical Injury to Property. — Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; White v. Sander, 168 Mass. 296; Ewing v. Pittsburgh, etc., R. Co., 147 Pa. St. 40; Gulf, etc., R. Co. v. Trott, 86 Tex. 412.

Negligent Blasting on Adjoining Premises. — In the case of Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303, a contractor of a railroad was blasting rock within the right of way of the road. The blast threw rocks upon the plaintiff's land, and in addition to the damage to the land the plaintiff claimed damages for fright caused by apprehension of personal injury; but it was held that there could be no recovery therefor.

Car Running Off Track and Against Plaintiff's Dwelling. — The fact that by a collision on the defendant's railroad from the negligence of the defendant's employees the cars were derailed and thrown against the plaintiff's dwelling, subjecting her to fright and nervous excitement, permanently weakening and disabling her, does not give the latter a cause of action. Ewing v. Pittsburgh, etc., R. Co., 147 Pa. St. 40. Compare, however, Yoakum v. Kroeger, (Tex. Civ. App. 1894) 27 S. W. Rep. 953, where it was held that a railroad company which negligently ran its cars off a switch into the plaintiff's yard and within a few feet of her house was liable for the nervous shock and physical injuries thereby resulting, though the plaintiff was not actually touched.

Throwing Stone Against House. — There can be no recovery for fright and mental anxiety where the defendant, on account of ill will towards the plaintiff's father, wilfully threw against the house of the latter, in which the plaintiff was, a stone which burst through the blinds into the house. There was no evidence that the defendant knew that the plaintiff was in the room into which the stone was thrown, or that he had any purpose either to strike her or frighten her, or to injure her or her property. "These elements being absent," said the court, "the defendant was not responsible in damages for her fright or the consequent injury to her health." White v. Sander, 168 Mass. 296.

2. Policy of Rule. — Allen, J., in Spade v. Lynn, etc., R. Co., 168 Mass. 285; Johnson v. Wells, 6 Nev. 224, 3 Am. Rep. 245; Mitchell v. Rochester R. Co., 151 N. Y. 107. And see Victorian R. Com'n's v. Coultas, L. R. 13 App. 222; The Notting Hill, 9 Prob. Div. 105; Huxley v. Berg, 1 Stark. 98, 2 E. C. L. 46.

With reference to the recovery of damages for mere fright or physical injuries resulting from fright, Martin, J., delivering the opinion of the court in Mitchell v. Rochester R. Co., 151 N. Y. 107, said: "If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury in determining whether they exist, and if so whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy."

In the case of Johnson v. Wells, 6 Nev. 224, 3 Am. Rep. 245, after a very elaborate examination it was held that pain of mind, aside and distinct from bodily suffering, cannot be considered in estimating damages in an action against a common carrier of passengers. If the law were otherwise, it would seem that not only every passenger on a train who was personally injured, but every one who was frightened by a collision or by the trains leaving the track, could maintain an action against the company.

3. Wanton and Intentional Wrongs — Seduction, Slander, Malicious Prosecution, etc. — The rules announced by Allen, J., in Spade v. Lynn, etc., R. Co., 168 Mass. 285, are expressly limited to cases where the fright is simply caused by the negligence of another. The learned jurist thus limits the application of the principles announced: "It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as for example in cases of seduction, slander, malicious prosecution, or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind." Citing Fillebrown v. Hoar, 124 Mass. 580; Lombard v. Lennox, 155 Mass. 70, 31 Am. St. Rep. 528; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759.

Malicious Assault. — In the case of Barbee v. Reese, 60 Miss. 906, it appeared that the plaintiff, a married woman far advanced in pregnancy, was sitting quietly in her house near

where the mental distress was incident to or a natural consequence of some actionable wrong.¹

(e) *Doctrine that Bodily Injury Unnecessary.* — The rule that there must be an actual physical injury to the person at the time of the mental disturbance caused by negligence, in order to warrant a recovery for the consequences of mental suffering, has not received universal approval by the authorities, some cases holding that if physical injuries are a natural and proximate result of a nervous condition which is a natural and proximate consequence of the defendant's negligence, there may be a recovery in damages accordingly, irrespective of bodily hurt at the time of the mental shock.²

(3) *Humiliation, Indignity, and Insult.* — No distinction, as an element of damages, is made between other forms of mental suffering and that which consists of a sense of wrong or insult.³ The jury may consider not only such

an open window when the defendant, in a state of intoxication, approached her, cursing and threatening to shoot, and entered her house, still continuing his curses and threats. The plaintiff's husband was absent from the house at the time, and the plaintiff in fright and terror fled from her home to avoid the threatened injury. Three days afterwards she was delivered, at great danger to her life and after excruciating suffering, of a dead child. The evidence showed almost beyond doubt that the premature delivery and death of the foetus were the results of the defendant's conduct, and it was held that there might be recovery of substantial damages for the injury done.

In the case of *Huxley v. Berg*, 1 Stark. 98, 2 E. C. L. 46, which was trespass for breaking and entering the plaintiff's dwelling house and for a battery, the plaintiff was allowed to give in evidence that his wife was so terrified by the conduct of the defendant that she was immediately taken sick and soon thereafter died; but this was held to be admissible for the purpose only of showing how outrageous and violent the conduct of the defendant had been, and not as a substantive ground of damages.

1. See *infra*, this section, *Mental Suffering Where Connected with Recognized Cause of Action.*

2. *Cases Permitting Recovery.* — *Bell v. Great Northern R. Co.*, 26 L. R. Ir. 428; *Fitzpatrick v. Great Western R. Co.*, 12 U. C. Q. B. 645; *Sloane v. Southern California R. Co.*, 111 Cal. 683; *Razzo v. Varni*, 81 Cal. 289; *Purcell v. St. Paul City R. Co.*, 48 Minn. 134; *Yoakum v. Kroeger*, (Tex. Civ. App. 1894) 27 S. W. Rep. 953.

Physical Injuries from Mental Disturbance. — With reference to physical injuries to passengers resulting from fright which is caused by the carrier's negligence, the court, in *Sloane v. Southern California R. Co.*, 111 Cal. 683, said: "If it can be established that the bodily harm is the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury."

3. *Humiliation — Insult — England.* — *Coppin v. Braithwaite*, 8 Jur. 875.

United States. — *Quigley v. Central Pac. R.*

Co., 5 Sawy. (U. S.) 107; *Boyle v. Case*, 9 Sawy. 386.

Alabama. — *Lunsford v. Dietrich*, 86 Ala. 250, 11 Am. St. Rep. 37; *Louisville, etc. R. Co. v. Whitman*, 79 Ala. 328.

Arkansas. — *Ward v. Blackwood*, 48 Ark. 396.

Connecticut. — *Swift v. Dickerman*, 31 Conn. 285.

Georgia. — *Head v. Georgia Pac. R. Co.*, 79 Ga. 358, 11 Am. St. Rep. 434.

Illinois. — *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133; *Chicago, etc., R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 541; *Chicago, etc., R. Co. v. Chisholm*, 79 Ill. 584; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; *Lake Erie, etc., R. Co. v. Christison*, 39 Ill. App. 495; *Adams v. Smith*, 58 Ill. 418.

Indiana. — *Lake Erie, etc., R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Moyer v. Gordon*, 113 Ind. 282; *Wolf v. Trinkle*, 103 Ind. 355.

Iowa. — *Shepard v. Chicago, etc., R. Co.*, 77 Iowa 54; *Parkhurst v. Masteller*, 57 Iowa 474; *Prime v. Eastwood*, 45 Iowa 640.

Kansas. — *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 5 Am. St. Rep. 766.

Louisiana. — *Miller v. Roy*, 10 La. Ann. 231; *Dufort v. Abadie*, 23 La. Ann. 280.

Maine. — *Wadsworth v. Treat*, 43 Me. 163; *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475.

Maryland. — *Blumhardt v. Rohr*, 70 Md. 328.

Massachusetts. — *Chesley v. Thompson*, 137 Mass. 136; *Mahoney v. Belford*, 132 Mass. 393; *Hastings v. Stetson*, 130 Mass. 76; *Morgan v. Curley*, 142 Mass. 107; *Smith v. Holcomb*, 99 Mass. 552.

Michigan. — *Ross v. Leggett*, 61 Mich. 445; *Scripps v. Reilly*, 38 Mich. 10; *Newman v. Skein*, 75 Mich. 402; *Fay v. Swan*, 44 Mich. 544. And see *De May v. Roberts*, 46 Mich. 160, 41 Am. Rep. 154.

New Hampshire. — *Barnes v. Campbell*, 60 N. H. 27.

New York. — *Ford v. Jones*, 62 Barb (N. Y.) 484.

Ohio. — *Smith v. Pittsburg, etc., R. Co.*, 23 Ohio St. 10.

Texas. — *Hays v. Creary*, 60 Tex. 445.

Vermont. — *Alexander v. Blodgett*, 44 Vt. 476.

West Virginia. — *Vinal v. Core*, 18 W. Va. 1.

Wisconsin. — *Stutz v. Chicago, etc., R. Co.*, 73 Wis. 147, 9 Am. St. Rep. 769; *Nichols v. Brabazon*, 94 Wis. 549; *Craker v. Chicago*.

mental suffering as is a direct result of the physical injuries, but also that condition of mind caused by the insults and indignities suffered.¹ A passenger, therefore, who is wrongfully ejected from a train may recover in actual damages for circumstances of insult and indignity,² and there may be a recovery for the insult and indignity attendant upon an assault, though no physical injuries be inflicted.³

(4) *Mental Suffering Where Connected with Recognized Cause of Action.* — Mental suffering, though not itself a cause of action, it has been said, is a recoverable element of damages when a consequence of some recognized cause of action.⁴ But the fact that mental suffering, distress, or anxiety is merely

etc., R. Co., 36 Wis. 657; *Robinson v. Superior Rapid Transit R. Co.*, 94 Wis. 345; *Fenelon v. Butts*, 53 Wis. 344; *Grace v. Dempsey*, 75 Wis. 323; *Reinke v. Bentley*, 90 Wis. 459. And see *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 143.

Illegal Arrest. — In an action for an assault and battery committed in arresting the plaintiff illegally, he is entitled to recover compensation for the indignity suffered by him. *Morgan v. Curley*, 142 Mass. 107.

1. *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475; *Wadsworth v. Treat*, 43 Me. 163; *Virgin, J.*, in *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Smith v. Holcomb*, 99 Mass. 552.

Damages for Assault by Spitting in Plaintiff's Face. — In an action for damages for assault by spitting in a female plaintiff's face, it has been held that a verdict for one thousand two hundred dollars was not so excessive as to warrant judicial interference. *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 143.

Mere Rudeness and Incivility. — In an action for damages for personal injuries, evidence that the examination of the plaintiff after the injuries complained of was conducted with rudeness or incivility, or in an unnecessarily harsh and annoying manner, by physicians employed by the defendant, cannot be considered for the purpose of enhancing the damages. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

Subjection to Ridicule. — In an action for damages for the consequences of a fall from a train, evidence that the plaintiff was laughed at by the other passengers is inadmissible. *Campbell v. Alston*, (Tex. Civ. App. 1893) 23 S. W. Rep. 33.

Ejection of Passenger — Necessity of Borrowing Funds to Complete Journey. — Where a female plaintiff, wrongfully ejected from a train, was compelled to borrow funds to complete her journey, it was held that there could be no recovery for the embarrassment incident to the application for pecuniary assistance. *Missouri, etc., R. Co. v. Armstrong*, (Tex. Civ. App. 1896) 38 S. W. Rep. 368.

2. *Sloane v. Southern California R. Co.*, 111 Ca. 668; *Lake Erie, etc., R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. Rep. 757; *Smith v. Pittsburg, etc., R. Co.*, 23 Ohio St. 10; *Hays v. Houston, etc., R. Co.*, 46 Tex. 272. See the title CARRIERS OF PASSENGERS, vol. 5, p. 474.

3. *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 365, 42 Am. Dec. 133; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Virgin, J.*, in

Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; *Ford v. Jones*, 62 Barb. (N. Y.) 484; *Smith v. Pittsburg, etc., R. Co.*, 23 Ohio St. 10; *Leach v. Leach*, 11 Tex. Civ. App. 699. And see *McKinley v. Chicago, etc., R. Co.*, 44 Iowa 314, 24 Am. Rep. 748; *Beach v. Hancock*, 27 N. H. 223; *Craker v. Chicago, etc., R. Co.*, 36 Wis. 657.

Damages for Mental Suffering Where Assault but No Battery. — In the case of *Leach v. Leach*, 11 Tex. Civ. App. 699, the jury were instructed that in assessing the damages they might take into consideration the humiliation and distress suffered by the plaintiff by reason of an unlawful assault, although not accompanied with any battery. The charge was held to be a proper one.

4. **Where Mental Suffering a Consequence of Recognized Cause of Action — England.** — *Lynch v. Knight*, 9 H. L. Cas. 577.

United States. — *Barbour v. Stephenson*, 32 Fed. Rep. 66.

Connecticut. — *Swift v. Dickerman*, 31 Conn. 285; *Torrance, J.*, in *Gibney v. Lewis*, 68 Conn. 392.

Indiana. — *Simons v. Busby*, 119 Ind. 13; *Cox v. Vanderkleed*, 21 Ind. 164.

Iowa. — *Hampton v. Jones*, 58 Iowa 317.

Kentucky. — *Chapman v. Western Union Tel. Co.*, 90 Ky. 265.

Massachusetts. — *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Hatch v. Fuller*, 131 Mass. 574; *Canning v. Williamstown*, 1 Cush. (Mass.) 451.

Minnesota. — *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370; *Russell v. Chambers*, 31 Minn. 54.

Mississippi. — *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300.

Missouri. — *Melcher v. Scruggs*, 72 Mo. 407; *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599; *Trigg v. St. Louis, etc., R. Co.*, 74 Mo. 147, 41 Am. Rep. 305.

New Hampshire. — *Lunt v. Philbrick*, 59 N. H. 59.

Oregon. — *Breon v. Henkle*, 14 Oregon 494.

Rhode Island. — *Vogel v. McAuliffe*, 18 R. I. 791.

Texas. — *Allen v. Texas, etc., R. Co.*, (Tex. Civ. App. 1894) 27 S. W. Rep. 943; *Yoakum v. Kroeger*, (Tex. Civ. App. 1894) 27 S. W. Rep. 953.

Vermont. — *Newell v. Whitcher*, 53 Vt. 589, 38 Am. Rep. 703.

West Virginia. — *Riddle v. McGinnis*, 22 W. Va. 253.

Wisconsin. — *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1; *Giese v. Schultz*, 53 Wis. 462.

connected with or has resulted from circumstances constituting a recognized cause of action is not sufficient to warrant a recovery therefor unless such condition is also a natural or proximate consequence thereof.¹

Damages for Destruction of Furnace — Mental Suffering by Reason of Illness of Child. — In an action for damages for the wrongful destruction of a furnace on premises occupied by the plaintiff, necessary for the proper heating of the house, evidence that the plaintiff's infant child was ill with bronchitis at the time and by reason of the destruction of the furnace had to be removed to another room, not so convenient or suitable as the one previously occupied, is admissible as a basis for damages for mental suffering and anxiety on the plaintiff's part, though the child suffered no injury by the change. *Vogel v. McAuliffe*, 18 R. I. 791.

Where the Employees of a Railroad Company wrongfully dumped earth and stone into and against the plaintiff's house, it was held proper to allow a recovery in damages for the insults and indignities offered by such employees, and for the illness of the plaintiff's wife resulting therefrom. *Ft. Worth, etc., R. Co. v. Smith*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1032. But in an action against a railroad company for wrongfully loading and unloading its cars on the street adjacent to the plaintiff's dwelling house, there can be no recovery on the ground of the profane and obscene language used by persons who congregate, attracted by the loading and unloading of the cars, where it is not shown that they were employed by the defendant and under its control. *Neitzey v. Baltimore, etc., R. Co.*, 5 Mackey (D. C.) 34.

1. Natural and Proximate Consequence. — *United States*. — *Haile v. Texas, etc., R. Co.*, 60 Fed. Rep. 557.

Georgia. — *Augusta, etc., R. Co. v. Randall*, 85 Ga. 297.

Illinois. — *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313.

Indiana. — *Fisher v. Hamilton*, 40 Ind. 341.

Kansas. — *Atchison, etc., R. Co. v. McGinnis*, 46 Kan. 109; *Salina v. Trosper*, 27 Kan. 544.

Kentucky. — *Shields v. Louisville, etc., R. Co.*, 97 Ky. 103.

Minnesota. — *Renner v. Canfield*, 36 Minn. 30.

Pennsylvania. — *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372.

Texas. — *Chicago, etc., R. Co. v. Boyles*, 11 Tex. Civ. App. 522; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772; *Donahoo v. Scott*, (Tex. Civ. App. 1895) 30 S. W. Rep. 385.

Vermont. — *Ellis v. Cleveland*, 55 Vt. 358; *Bovee v. Danville*, 53 Vt. 190. And see *Newell v. Whitcher*, 53 Vt. 589, 38 Am. Rep. 703.

In Actions for Damages for Personal Injuries, while mental suffering is in general an element of recovery in damages, mental suffering not connected with the bodily injury, but caused by some conception arising from a different source, may not be considered. *Chicago v. McLean*, 133 Ill. 148; *Pittsburg, etc., R. Co. v. Story*, 63 Ill. App. 239.

One's apprehension that by reason of his injuries he may not be able to support his

family is not an element of damages for which recovery can be had. *Texas Mexican R. Co. v. Douglass*, 69 Tex. 694. And see *Atchison, etc., R. Co. v. Chance*, 57 Kan. 40.

Damages for Bite of Dog — Fear of Hydrophobia. — It has been held, however, that a person bitten by a dog was entitled to recover for mental suffering caused by fear of hydrophobia. *Warner v. Chamberlain*, 7 Houst. (Del.) 18.

And Though a Person of Ordinary Nerve and Courage might not have been affected by the defendant's acts, there may be a recovery for injuries to health from fright and nervous shock, where the defendant entered the plaintiff's sleeping apartment and solicited her to have sexual intercourse with him. *Newell v. Whitcher*, 53 Vt. 589, 38 Am. Rep. 703.

Where the Plaintiff's Wife Was Prematurely Delivered of twin living children as a result of the personal injuries, it was held that any physical or mental suffering attending the miscarriage was a proper subject of compensation, but that such injury to the feelings as merely followed the miscarriage, and was not connected with the physical pain and suffering naturally dependent upon it, was too remote to be considered as an element of damage. *Bovee v. Danville*, 53 Vt. 190. And see *Augusta, etc., R. Co. v. Randall*, 85 Ga. 297; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772.

Though a Railroad Company Wrongfully Obstructs a Highway by permitting its trains to stop across it, thereby detaining a female traveler on the highway for a considerable time, it is not liable for injuries to her feelings caused by the rude and insulting conduct of drunken passengers on the train. *Shields v. Louisville, etc., R. Co.*, 97 Ky. 103.

Mental Sufferings of Wife Overhearing Quarrel with Husband. — The case of *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607, was an action brought by one M. P. against the defendant H. D., charging him with unlawfully entering the house of the plaintiff, and violently and abusively conducting himself, whereby the plaintiff became terrified, so that she was immediately taken with premature labor, the result of which was the birth of a dead child and great suffering to the plaintiff. It appeared that the fright was occasioned by a quarrel between the defendant and the plaintiff's husband and another, within the plaintiff's hearing, but out of her sight; but it was not shown that the defendant knew either of her condition or that she overheard the quarrel. The court said, in this case: "The result complained of was not such a consequence as, in the ordinary course of things, would flow from defendant's conduct. He had no reason to apprehend that what took place * * * would occasion danger to some third person, who was not present, through fright. The injury in question not being one which the defendant could reasonably be expected to anticipate as likely to ensue from his conduct, we cannot regard it as the natural conse-

Illustrations. — Thus while in actions for false imprisonment¹ and malicious prosecution² there may be a recovery for the mental suffering of the injured party, and for the seduction or abduction of a child the parent may recover for the consequent anguish of mind,³ and likewise in an action of *quare clausum* for disinterring and removing the remains of a deceased child,⁴ yet in an action by a father for damages for the loss of an infant son's services by reason of personal injuries the jury are not at liberty to consider, in addition to the actual damages suffered, the distress of mind and disappointed hopes of the parent.⁵ And in an action for damages for the value of cows killed and wounded by the defendant by shooting, no recovery can be had for the fright and nervous apprehension of the plaintiff's wife, because of her fear of personal violence.⁶

(5) *Mental Suffering Alone as a Cause of Action.* — Some cases, as has already been stated, announce the rule that mental suffering alone is not a cause of action.⁷ But this means nothing more, it is apprehended, than that where actual or special damage is necessary to the maintenance of an action, distress of mind will not be so regarded.⁸

(6) *Mental Suffering for Injuries to Property.* — As a general rule, there may be no recovery for injuries to the feelings in cases of torts to property.⁹ Thus there can be no recovery on the score of mental anguish because the defendant raised the height of a division fence.¹⁰ The reason of this is believed to be because mental distress is not, in general, a natural and probable consequence of torts to property. So where the manner of commission of a tort to property is such as naturally to cause mental suffering, there can, it seems, be a recovery in damages therefor.¹¹

quence thereof, for which defendant is legally responsible."

Mental Suffering of Wife from Sale of Intoxicating Liquors to Husband. — Under a statute relating to the recovery of damages by a wife for the sale of intoxicating liquors to her husband, there can be no recovery, it has been held, for the mental suffering of the wife. The statute only contemplates, it is held, a recovery for injury sustained by her in person, property, or means of support. *Meidel v. Anthis*, 71 Ill. 241.

1. *Stewart v. Maddox*, 63 Ind. 51. See the title FALSE IMPRISONMENT.

2. *Fisher v. Hamilton*, 49 Ind. 341; *Parkhurst v. Masteller*, 57 Iowa 474. See the title MALICIOUS PROSECUTION.

3. *Barbour v. Stephenson*, 32 Fed. Rep. 66; *Phillips v. Hoyle*, 4 Gray (Mass.) 568; *Virgin, J.*, in *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Stowe v. Heywood*, 7 Allen (Mass.) 118; *Comer v. Taylor*, 82 Mo. 341; *Lunt v. Philbrick*, 59 N. H. 59; *Magee v. Holland*, 27 N. J. L. 86, 72 Am. Dec. 341. See the title SEDUCTION.

4. *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759. And see *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370.

5. *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372.

6. *Donahoo v. Scott*, (Tex. Civ. App. 1895) 30 S. W. Rep. 385.

7. See *Torrance, J.*, in *Gibney v. Lewis*, 68 Conn. 392. And see *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1; *Gulf, etc., R. Co. v. Trott*, 86 Tex. 412.

In *Lynch v. Knight*, 9 H. L. Cas. 577, Lord Wensleydale said: "Mental pain or anxiety the law cannot value and does not pretend

to redress when the unlawful act complained of causes that alone."

8. Thus in Actions for Damages for Slander, where the words spoken are not actionable *per se* there may be no recovery for mere mental disturbance and distress as a result of the slander, though physical illness and inability to labor result therefrom. *Terwilliger v. Wands*, 17 N. Y. 54. And where the defamatory words were not actionable in themselves, it has been held that a husband could not maintain an action for the loss of his wife's services from illness consequent upon mental depression resulting from the slander. *Wilson v. Goit*, 17 N. Y. 442. And see *Olmsted v. Brown*, 12 Barb. (N. Y.) 657. See generally the title LIBEL AND SLANDER.

9. **Torts to Property.** — *Anderson v. Taylor*, 56 Cal. 131, 38 Am. Rep. 52; *Wolf v. Stewart*, 48 La. Ann. 1431; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Smith v. Grant*, 56 Me. 255; *White v. Dresser*, 135 Mass. 150, 46 Am. Rep. 454; *B. C. Evans Co. v. Kingsbury*, (Tex. Civ. App. 1894) 25 S. W. Rep. 729.

10. *Wolf v. Stewart*, 48 La. Ann. 1431.

11. **In Various Torts to Property Alone**, it has been said, when the tortfeasor has been actuated by wantonness and malice or a wilful disregard of the plaintiff's rights therein, the injury to the feelings of the plaintiff resulting from such conduct of the defendant may properly be considered by the jury in fixing the amount of their verdict. *Moyer v. Gordon*, 113 Ind. 282; *Virgin, J.*, in *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Kimball v. Holmes*, 60 N. H. 163. And see *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Byrne v. Gardner*, 33 La. Ann.

(7) *Mental Suffering in Actions on Contract.* — Though it has been held generally that damages for mental suffering or injury to the feelings are not recoverable in actions for the breach of contracts,¹ authorities are not wanting in which the contrary conclusion has been reached.² The true principle, it would seem, is not an arbitrary exclusion of damages for mental suffering in actions on contract, but the recoverability of damages for such element being made to depend upon whether or not mental pain and suffering are natural and probable consequences of the breach of contract. When such is the case, damages for mental suffering should be allowed,³ but not when the mental suffering is, as a consequence of the breach, unnatural or remote.⁴ But damages for mental suffering in actions for the breach of contract cannot be recovered by one with whom there is no privity, or, in other words, such damages to one not a party to the contract will be deemed too remote, and not a natural and

6; *Fillebrown v. Hoar*, 124 Mass. 580; *Bonelli v. Bowen*, 70 Miss. 142; *Melcher v. Scruggs*, 72 Mo. 406; *Ft. Worth, etc., R. Co. v. Smith*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1032. See also *supra*, this subdivision, *Mental Suffering Where Connected with Recognized Cause of Action*.

1. *In Actions for Breach of Contract.* — *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408; *Wilcox v. Richmond, etc., R. Co.*, 52 Fed. Rep. 264; *Russell v. Western Union Tel. Co.*, 3 Dakota 315; *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 38 Am. St. Rep. 575; *Walsh v. Chicago, etc., R. Co.*, 42 Wis. 23, 24 Am. Rep. 376.

It May Be Laid Down as a General Rule that in actions upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, and not damages for the disappointment of mind occasioned by the breach. The damages in such cases must be such as are capable of being appreciated or estimated. *Pollock, C. B.*, in *Hamlin v. Great Northern R. Co.*, 1 H. & N. 408.

2. See *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249; *Fillebrown v. Hoar*, 124 Mass. 580; *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864; *Hale v. Bonner*, 82 Tex. 33; *St. Louis, etc., R. Co. v. Berry*, (Tex. App. 1890) 15 S. W. Rep. 48; *Wells, etc., Express v. Fuller*, 13 Tex. Civ. App. 610.

3. *The True Principle — Natural and Probable Consequence — England.* — *Coppin v. Braithwaite*, 8 Jur. 875.

United States. — *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

Indiana. — *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249; *Rees v. Western Union Tel. Co.*, 123 Ind. 294.

Kentucky. — *Chapman v. Western Union Tel. Co.*, 90 Ky. 265.

Massachusetts. — *Fillebrown v. Hoar*, 124 Mass. 580.

North Carolina. — *Young v. Western Union Tel. Co.*, 107 N. Car. 370, 22 Am. St. Rep. 883.

Tennessee. — *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864.

Texas. — *St. Louis, etc., R. Co. v. Berry*, (Tex. App. 1890) 15 S. W. Rep. 48; *Wells, etc., Express v. Fuller*, 13 Tex. Civ. App. 610; *Hale v. Bonner*, 82 Tex. 33, 27 Am. St. Rep. 550; *SoRelle v. Western Union Tel. Co.*, 55 Tex.

308, 40 Am. Rep. 805; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772.

Damages by Father for Delay in Transportation of Son's Dead Body. — In the case of *Wells, etc., Express v. Fuller*, 13 Tex. Civ. App. 610, a verdict of two thousand dollars for distress and mental anguish was recovered by a father for delay by an express company in the transportation of his son's dead body. In this case it appeared that in consequence of the delay there were no funeral services at the church as the father expected and desired; that the coffin was not opened except to show the face of the corpse through the glass; that it was necessary that the funeral should be held in the night-time, only twenty-five or thirty persons being present.

Damages by Wife for Delay in Transportation of Husband's Corpse. — See *Hale v. Bonner*, 82 Tex. 33, 27 Am. St. Rep. 850.

Remains of Child Interred Without Knowledge of Parents. — Undertakers who contract with parents to take charge of and preserve securely the corpse of their child until they are ready to inter the remains, are, if the remains are negligently permitted to be taken away and disposed of without the knowledge or consent of the parents, liable to the latter for mental distress suffered by reason thereof. *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249. In announcing this conclusion, *Coffey, J.*, said with reference to the authorities referred to in support thereof: "The cases rest upon the reasonable doctrine that where a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish and distress of mind on the part of the other contracting party, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of a breach of the contract on his part."

4. *Wilcox v. Richmond, etc., R. Co.*, 52 Fed. Rep. 264, 8 U. S. App. 118; *Illinois Cent. R. Co. v. Siddons*, 53 Ill. App. 607; *Pullman Palace-Car Co. v. Fowler*, 5 Tex. Civ. App. 755; *Yoakum v. Dunn*, 1 Tex. Civ. App. 524; *St. Louis Southwestern R. Co. v. Thomas*, (Tex. Civ. App. 1894) 27 S. W. Rep. 419; *Pacific Express Co. v. Black*, 8 Tex. Civ. App. 363; *Nichols v. Eddy*, (Tex. Civ. App. 1893) 24 S. W. Rep. 316; *Wells v. Fuller*, 4 Tex. Civ. App. 213.

probable consequence of the breach.¹

6. Expenses of Litigation — *a.* AS BETWEEN PARTIES TO THE SUIT IN WHICH INCURRED. — As a general rule, costs and expenses of litigation, other than the usual and ordinary court costs, are not recoverable in an action for damages,² nor are such costs even recoverable in a subsequent action.³

Counsel Fees. — Accordingly, it has been held that the mere fact that a party deems it necessary to resort to law to enforce or protect his rights does not, in general, give him the right to recover as damages the fees he may have paid legal counsel in the cause,⁴ in the absence of a contract stipulation therefor or provision of statute permitting.⁵

1. Privy. — *Wells v. Fuller*, 4 Tex. Civ. App. 213; *Nichols v. Eddy*, (Tex. Civ. App. 1893) 24 S. W. Rep. 316.

2. Expenses of Litigation — *England.* — *Holloway v. Turner*, 6 Q. B. 928, 51 E. C. L. 928, 14 L. J. Q. B. 143, 9 Jur. 160; *Abthorp v. Bedford, etc.*, R. Co., 8 L. T. N. S. 200.

Canada. — *Closson v. Post*, 6 U. C. L. J. 141. *Connecticut.* — *St. Peter's Church v. Beach*, 26 Conn. 355; *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552.

Louisiana. — *Osborn v. Moore*, 12 La. Ann. 714; *Cooper v. Cappel*, 29 La. Ann. 213.

Massachusetts. — *Henry v. Davis*, 123 Mass. 345; *Barnard v. Poor*, 21 Pick. (Mass.) 378; *Rice v. Austin*, 17 Mass. 197; *Leffingwell v. Elliott*, 10 Pick. (Mass.) 204.

Michigan. — *Warren v. Cole*, 15 Mich. 265.

Minnesota. — *Kelly v. Rogers*, 21 Minn. 146.

New Hampshire. — *Richards v. Whittle*, 16 N. H. 259.

New York. — *Lincoln v. Saratoga, etc.*, R. Co., 23 Wend. (N. Y.) 425; *Wilson v. Mathews*, 24 Barb. (N. Y.) 295.

Pennsylvania. — *Jennings v. Beale*, 146 Pa. St. 125; *Good v. Mylin*, 8 Pa. St. 51, 49 Am. Dec. 493.

Texas. — See *Walter A. Wood Mowing, etc., Mach. Co. v. Hancock*, 4 Tex. Civ. App. 302.

In Ancient Usage the word "damages" was employed in two significations. According to Coke, its proper and general sense included the costs of suit, while its strict or relative sense was exclusive of costs. The latter meaning alone has survived. *Black's L. Dict.*, title Damages.

3. Harris v. Elred, 42 Vt. 39; *Marvin v. Prentice*, 94 N. Y. 295.

The court, in the case of *Marvin v. Prentice*, 94 N. Y. 295, *supra*, observed that "costs usually are but an incident of the litigation, and to be disposed of therein, and not generally recoverable as damages in another action."

4. Counsel Fees — *United States.* — *Flanders v. Tweed*, 15 Wall. (U. S.) 450; *Day v. Woodworth*, 13 How. (U. S.) 363; *Arcambel v. Wiseman*, 3 Dall. (U. S.) 306.

Arkansas. — *McDaniel v. Crabtree*, 21 Ark. 431.

California. — *Ah Thae v. Quan Wan*, 3 Cal. 216.

Colorado. — *Joslin v. Teats*, 5 Colo. App. 531; *Spencer v. Murphy*, 6 Colo. App. 453.

Connecticut. — *St. Peter's Church v. Beach*, 26 Conn. 355.

Dakota. — *Jandt v. South*, 2 Dakota 46.

Georgia. — *Shaw v. Macon*, 19 Ga. 468.

Illinois. — *Knefel v. Ahern*, 57 Ill. App. 568.

Kansas. — *Winstead v. Hulme*, 32 Kan. 568;

Atchison, etc., R. Co. *v. Stewart*, 55 Kan. 667. And see *Dow v. Julien*, 32 Kan. 576.

Louisiana. — *Hale v. New Orleans*, 18 La. Ann. 321; *Levy v. Baer*, 19 La. Ann. 468; *Burnham v. Hart*, 15 La. Ann. 517; *Eatman v. New Orleans Pac. R. Co.*, 35 La. Ann. 1018; *Sarpy v. New Orleans*, 14 La. Ann. 311; *Williams v. Leblanc*, 14 La. Ann. 770; *Late v. Armorer*, 14 La. Ann. 838; *Hale v. New Orleans*, 13 La. Ann. 499.

Massachusetts. — *Henry v. Davis*, 123 Mass. 345; *Barnard v. Poor*, 21 Pick. (Mass.) 378.

Michigan. — *Hatch v. Hart*, 2 Mich. 289; *Warren v. Cole*, 15 Mich. 265.

Minnesota. — *Kelly v. Rogers*, 21 Minn. 146.

Mississippi. — *New Orleans, etc.*, R. Co. *v. Moore*, 40 Miss. 39.

New York. — *Bishop v. Hendrick*, 82 Hun (N. Y.) 323.

Ohio. — *Roberts v. Mason*, 10 Ohio St. 277.

Pennsylvania. — *Jennings v. Beale*, 146 Pa. St. 125.

South Carolina. — *Welch v. North-Eastern R. Co.*, 12 Rich. L. (S. Car.) 290.

Texas. — *Houston, etc.*, R. Co. *v. Cram*, 49 Tex. 341; *Landa v. Obert*, 45 Tex. 539; *Turner v. Miller*, 42 Tex. 418, 19 Am. Rep. 47. And see *Walter A. Wood Mowing, etc., Mach. Co. v. Hancock*, 4 Tex. Civ. App. 302.

Virginia. — *Burruss v. Hines*, 94 Va. 413.

Canada. — *Davis v. Cushing*, 10 New Bruns. 383.

Contrary Doctrine. — In the case of *Roberts v. Heim*, 27 Ala. 678, the court said: "Whenever a party is compelled by the wrongful act of another to have recourse to professional assistance, it is justly regarded as part of the damage occasioned by such act, and may properly be taken into consideration by the jury in all compensatory actions." *Seay v. Greenwood*, 21 Ala. 492; *Ferguson v. Baber*, 24 Ala. 402."

Damages for Infringement of Patent. — It has been held that in an action for the infringement of a patent the plaintiff may, in order for complete indemnity, be awarded counsel fees, if reasonable. *Allen v. Blunt*, 2 Woodb. & M. (U. S.) 121.

5. Joslin v. Teats, 5 Colo. App. 531; *Spencer v. Murphy*, 6 Colo. App. 453; *Richmond, etc.*, R. Co. *v. Benson*, 86 Ga. 203, 22 Am. St. Rep. 446; *Guernsey v. Shellman*, 59 Ga. 297; *Johnson v. East Tennessee, etc.*, R. Co., 90 Ga. 810; *Wichita, etc.*, R. Co. *v. Gibbs*, 47 Kan. 274; *Paddock v. Missouri Pac. R. Co.*, 60 Mo. App. 328, 1 Mo. App. Rep. 87. And see *Jandt v. South*, 2 Dakota 46.

Though a Contract Provide for the payment of five per cent. attorney's fees, an agreement by the obligee with his attorney for the payment

In Attachment and Injunction Bonds, the words "damages and costs" are generally construed to include attorneys' fees,¹ although in the federal courts a different rule seems to prevail.²

b. AS BETWEEN PARTIES TO ORIGINAL SUIT AND THIRD PERSONS. — Where the natural and proximate consequence of a wrongful act has been to involve the plaintiff in litigation with others the general rule seems to be that there may be a recovery in damages against the author of such act of the costs awarded against the person so subjected to suit, as well of all reasonable expenses of litigation incurred, as the regular court costs in the original action.³

of a smaller sum will inure to the benefit of the obligor, and no greater amount can be recovered than the amount actually paid. *Kennedy v. Richardson*, 70 Ind. 524.

1. Attachment and Injunction Bonds — The Phrase "Damages and Costs" — *Alabama*. — *Garrett v. Logan*, 19 Ala. 344; *Seay v. Greenwood*, 21 Ala. 491; *Roberts v. Heim*, 27 Ala. 679; *Rosser v. Timberlake*, 78 Ala. 162.

Arkansas. — *Hunt v. Burton*, 18 Ark. 188.

California. — *Heath v. Lent*, 1 Cal. 412; *Prader v. Grim*, 13 Cal. 585; *Willson v. McEvoy*, 25 Cal. 170.

Florida. — *Wittich v. O'Neal*, 22 Fla. 597.

Illinois. — *Steele v. Thatcher*, 56 Ill. 257; *Alexander v. Colcord*, 85 Ill. 323; *Knefel v. Ahern*, 57 Ill. App. 568; *Cummings v. Burleson*, 78 Ill. 281; *Elder v. Sabin*, 66 Ill. 126; *Tamara v. Southern Illinois Normal University*, 54 Ill. 334.

Indiana. — *Raupman v. Evansville*, 44 Ind. 392.

Iowa. — *Wallace v. York*, 45 Iowa 81; *Behrens v. McKenzie*, 23 Iowa 333, 92 Am. Dec. 428; *Langworthy v. McKelvey*, 25 Iowa 48.

Kentucky. — *Pettit v. Mercer*, 8 B. Mon. (Ky.) 51; *Michell v. Mattingly*, 1 Metc. (Ky.) 237.

Louisiana. — *Byrne v. Gardner*, 33 La. Ann. 6; *Accessory Co. v. McCarren*, 13 La. Ann. 214; *Phelps v. Coggeshall*, 13 La. Ann. 440; *Bonner v. Copley*, 15 La. Ann. 504.

Maryland. — See *Gist v. M'Guire*, 4 Har. & J. (Md.) 9.

Massachusetts. — *Guild v. Guild*, 2 Met. (Mass.) 229.

Mississippi. — *Baggett v. Beard*, 43 Miss. 120.

Missouri. — *Uhrig v. St. Louis*, 47 Mo. 528; *Hannibal, etc., R. Co. v. Shepley*, 1 Mo. App. 254.

Montana. — *Campbell v. Metcalf*, 1 Mont. 378.

Nevada. — *Brown v. Jones*, 5 Nev. 374.

New Hampshire. — *Derry Bank v. Heath*, 45 N. H. 524.

New York. — *Wilde v. Joel*, 6 Duer (N. Y.) 671; *Childs v. Lyons*, 3 Robt. (N. Y.) 704; *Strong v. De Forest*, 15 Abb. Pr. (N. Y. Supreme Ct.) 427; *Aldrich v. Reynolds*, 1 Barb. Ch. (N. Y.) 613; *Coates v. Coates*, 1 Duer (N. Y.) 664; *Rose v. Post*, 56 N. Y. 603; *Edwards v. Bodine*, 11 Paige (N. Y.) 223; *Dunning v. Humphrey*, 24 Wend. (N. Y.) 31; *Hovey v. Rubber-tip Pencil Co.*, 50 N. Y. 335; *Corcoran v. Judson*, 24 N. Y. 106.

Ohio. — *Noble v. Arnold*, 23 Ohio St. 264; *Alexander v. Jacoby*, 23 Ohio St. 358; *Riddle v. Cheadle*, 25 Ohio St. 278.

Wisconsin. — *Meshke v. Van Doren*, 16 Wis. 319; *Gear v. Shaw*, 1 Pin. (Wis.) 608.

In an action upon an attachment bond conditioned to pay all damages that may accrue to any defendant or garnishee by reason of any attachment or process or proceeding in a suit, or by reason of any judgment or process thereon, the measure of damages is not limited to such as may have accrued by reason of the attachment alone, but may include any damages directly occasioned by any process or proceeding in the suit. *State v. Stark*, 75 Mo. 569.

2. Oelrichs v. Spain, 15 Wall. (U. S.) 211.

3. Where Wrongful Act Involves Plaintiff in Litigation with Others — *England*. — *Mainwaring v. Brandon*, 8 Taunt. 202, 4 E. C. L. 71; *Neale v. Wyllie*, 3 B. & C. 533, 10 E. C. L. 172; *Howard v. Lovegrove*, L. R. 6 Exch. 43, 40 L. J. Exch. 13, 23 L. T. N. S. 396, 19 W. R. 188; *Murrell v. Fysh*, 1 Cababé & E. 80; *Godwin v. Francis*, L. R. 5 C. P. 295; *Hammond v. Bussey*, 20 Q. B. Div. 79; *Rolph v. Crouch*, L. R. 3 Exch. 44, 37 L. J. Exch. 8; *Dixon v. Fawcus*, 3 El. & El. 537, 107 E. C. L. 537; *Randell v. Trimen*, 18 C. B. 786, 86 E. C. L. 786; *Tindall v. Bell*, 11 M. & W. 228; *Malden v. Fyson*, 11 Q. B. 292, 63 E. C. L. 292; *Smith v. Compton*, 3 B. & Ad. 407, 23 E. C. L. 106; *Henderson v. Squire*, L. R. 4 Q. B. 170. And see *Morsle-Blanch v. Wilson*, L. R. 8 C. P. 227, 21 W. R. 109; *Gould v. Barratt*, 2 M. & Rob. 171. *Compare Malden v. Fyson*, 11 Q. B. 292, 63 E. C. L. 292; *Richardson v. Dunn*, 8 C. B. N. S. 655, 98 E. C. L. 655; *In re United Service Co.*, L. R. 6 Ch. 212; *Bleaden v. Charles*, 7 Bing. 246, 20 E. C. L. 119.

Canada. — *Spence v. Hector*, 24 U. C. Q. B. 277; *Eckstein v. Whitehead*, 10 U. C. C. P. 65; *Burn v. Blecher*, 14 U. C. C. P. 415; *Corbett v. Wilson*, 8 U. C. Q. B. 22.

United States. — See *New York State Marine Ins. Co. v. Protection Ins. Co.*, 1 Story (U. S.) 458; *Arcambel v. Wiseman*, 3 Dall. (U. S.) 306.

Arkansas. — *Smith v. Corege*, 53 Ark. 295; *Marlatt v. Clary*, 20 Ark. 251.

California. — *Ah Thae v. Quan Wan*, 3 Cal. 216; *Levitzy v. Canning*, 33 Cal. 299.

Connecticut. — *Noyes v. Ward*, 19 Conn. 250.

Illinois. — *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; *Ward v. Ward*, 77 Ill. 603; *Philpot v. Taylor*, 75 Ill. 309.

Indiana. — *Ziegler v. Powell*, 54 Ind. 173.

Iowa. — See *Ottumwa v. Parks*, 43 Iowa 119.

Kentucky. — *Robertson v. Lemon*, 2 Bush (Ky.) 301; *Colter v. Morgan*, 12 B. Mon. (Ky.) 278.

Maine. — *Ryerson v. Chapman*, 66 Me. 557; *Call v. Hagar*, 69 Me. 521.

Massachusetts. — *New Haven, etc., Co. v. Hayden*, 117 Mass. 433; *Coolidge v. Brigham*, 5 Met. (Mass.) 68; *Pond v. Harris*, 113 Mass.

Where a Party Has Been Held Liable in Law for the Misfeasance of Another against whom there is a remedy over, expenses incurred, including counsel fees paid by the former in the first suit, have been held recoverable as damages in the enforcement of the remedy over.¹ But, it has been held, where the claim against a party is upon his own contract or for his own misfeasance, though he may have a remedy against another, and the damages recoverable thereon may be the same as the amount of the judgment recovered against him, counsel fees paid in defense of such suit are not recoverable.²

c. DISTINCTION BETWEEN COUNSEL'S FEES AND OTHER EXPENSES OF LITIGATION. — It has been held that a vendor who has sold an article with a warranty as to its character and quality, knowing that it would be resold with like warranty, could not, though notified by his vendee of an action by the subvendee on the warranty and called upon to defend it, be held liable for counsel fees incurred by the defendant therein, though he would be liable for the regular court costs awarded against such defendant.³

d. WHERE INJURIES WANTON OR MALICIOUS. — It has been held that where an injury was wanton or malicious, and of a nature to warrant exemplary damages, there might be a recovery of attorneys' fees as damages, in

114; *Hayden v. Cabot*, 17 Mass. 169; *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292. And see *Barnard v. Poor*, 21 Pick. (Mass.) 378; *Doe v. Dobson*, 7 New Bruns. 446.

Michigan. — *McKee v. Campbell*, 27 Mich. 497.

New York. — *Dubois v. Hermance*, 56 N. Y. 673. And see *Armstrong v. Percy*, 5 Wend. (N. Y.) 535; *Hastie v. DePeyster*, 3 Cai. (N. Y.) 190.

Ohio. — *Noble v. Arnold*, 23 Ohio St. 264; *Alexander v. Jacoby*, 23 Ohio St. 358; *McAlpin v. Woodruff*, 11 Ohio St. 120.

Pennsylvania. — *Huckestein v. Allegheny City*, 165 Pa. St. 367.

Texas. — *Flack v. Neill*, 22 Tex. 253; *Rowe v. Heath*, 23 Tex. 614.

Vermont. — *Duxbury v. Vermont Cent. R. Co.*, 26 Vt. 751; *Pitkin v. Leavitt*, 13 Vt. 379.

Wisconsin. — *Bonesteel v. Bonesteel*, 30 Wis. 511.

Bond Conditioned to Pay Outstanding Mortgage. — In an action for the breach of a bond conditioned to pay an outstanding mortgage upon land purchased by the obligee, there may be a recovery for expenses incurred in defending the suit brought upon said mortgage by the obligee. *Gennings v. Norton*, 35 Me. 308.

For the Breach of an Agreement to Dismiss a Suit at the cost of the obligor, the latter may be held liable in damages for the costs paid by the obligee in the former suit. *Hagan v. Riley*, 13 Gray (Mass.) 515.

Breach of Agreement to Submit to Arbitration. — For the breach of an agreement to submit a controversy to arbitration, there may be a recovery for counsel fees paid by the plaintiff in preparing his case for hearing before the arbitrators. *Pond v. Harris*, 113 Mass. 114; *Call v. Hagar*, 69 Me. 521.

Liability of Tenant for Acts of Under Tenant. — Where an under tenant wrongfully holds over after the expiration of the term, it has been held that there might be a recovery by the landlord against a lessee of the premises for the expenses to which he has been put in tak-

ing legal proceedings to oust the subtenant from his wrongful possession. *Henderson v. Squire*, L. R. 4 Q. B. 170.

Natural and Probable Consequences. — In order that costs and expenses of litigation may be recovered it must appear that their incurrence was a natural and probable consequence of the defendant's wrong. *Merritt v. Nevin*, 20 U. C. Q. B. 540; *Taylor v. Strachan*, 16 U. C. Q. B. 76; *Pow v. Davis*, 1 B. & S. 220, 101 E. C. L. 220, 30 L. J. Q. B. 257, 7 Jur. N. S. 1010, 4 L. T. N. S. 399, 9 W. R. 611; *Fisher v. Val de Travers Asphalte Co.*, 1 C. P. Div. 511, 45 L. J. C. P. 479, 35 L. T. N. S. 366; *Baxendale v. London, etc., R. Co.*, L. R. 10 Exch. 35; *In re United Service Co.*, L. R. 6 Ch. 212, 40 L. J. Ch. 286, 24 L. T. N. S. 115, 19 W. R. 457; *Pennsylvania R. Co. v. Wabash, etc., R. Co.*, 157 U. S. 225; *Shaw v. Macon*, 19 Ga. 468; *Chase v. Bennett*, 59 N. H. 394; *Wilson v. Mathews*, 24 Barb. (N. Y.) 295; *Landa v. Obert*, 45 Tex. 539; *Walter A. Wood Mowing, etc., Mach. Co. v. Hancock*, 4 Tex. Civ. App. 302.

1. *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292; *Duxbury v. Vermont Cent. R. Co.*, 26 Vt. 751. And see *Mors-le-Blanch v. Wilson*, L. R. 8 C. P. 227.

2. *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292.

3. *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166. And see *Boston, etc., R. Co. v. Richardson*, 135 Mass. 473.

Reason Given for Distinction. — Delivering the opinion of the court in *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166, *Shaw, C. J.*, said that as the plaintiffs had given notice to the defendants of the pendency of the first action, they were entitled to recover their taxable costs. "But the counsel fees cannot be allowed. These are expenses incurred by the party for his own satisfaction, and they vary so much with the character and distinction of the counsel that it would be dangerous to permit him to impose such a charge upon an opponent; and the law measures the expenses incurred in the management of a suit by the taxable costs."

addition to the usual and ordinary court costs awarded the prevailing party.¹

Must Be Reasonable in Amount and Reasonably Incurred. — In order that attorneys' fees may be recovered the amount so expended or promised must be reason-

1. **In Cases of Wanton or Malicious Injuries** — *England*. — *Sandback v. Thomas*, 1 Stark. 306, 2 E. C. L. 121.

Alabama. — *Marshall v. Betner*, 17 Ala. 832. *Arkansas*. — *Lavender v. Hudgens*, 32 Ark. 763.

California. — See *Eastin v. Stockton Bank*, 66 Cal. 123.

Connecticut. — *St. Peter's Church v. Beach*, 26 Conn. 355; *Noyes v. Ward*, 19 Conn. 250; *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79; *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Mason v. Hawes*, 52 Conn. 12, 52 Am. Rep. 552; *Ives v. Carter*, 24 Conn. 392.

Georgia. — *Compare Shaw v. Macon*, 19 Ga. 468.

Illinois. — *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; *Krug v. Ward*, 77 Ill. 603.

Indiana. — *Ziegler v. Powell*, 54 Ind. 173.

Kansas. — *Winstead v. Hulme*, 32 Kan. 568. And see *Atchison, etc., R. Co. v. Stewart*, 55 Kan. 667. *Compare Dow v. Julien*, 32 Kan. 576.

Minnesota. — *Mitchell v. Davies*, 51 Minn. 168. And see *Seeman v. Feeney*, 19 Minn. 79.

Mississippi. — *New Orleans, etc., R. Co. v. Allbritton*, 38 Miss. 242.

Missouri. — *Gregory v. Chambers*, 78 Mo. 294.

Nebraska. — *Minneapolis Threshing-Mach. Co. v. Regier*, 51 Neb. 402.

New York. — *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y. Supreme Ct.) 468; *Williams v. Garrett*, 12 How. Pr. (N. Y. Supreme Ct.) 456.

Ohio. — *Roberts v. Mason*, 10 Ohio St. 277. And see *Finney v. Smith*, 31 Ohio St. 529, 27 Am. Rep. 524.

Texas. — *Landa v. Obert*, 45 Tex. 539.

Vermont. — *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316.

Virginia. — *Parsons v. Harper*, 16 Gratt. (Va.) 64; *Burruss v. Hines*, 94 Va. 413.

Wisconsin. — *Magmer v. Renk*, 65 Wis. 364; *Bonesteel v. Bonesteel*, 30 Wis. 511.

In a Suit for Malicious Prosecution the damages assessed may include a reasonable attorneys' fee for which the plaintiff became liable in the defense of the criminal charge. *Lavender v. Hudgens*, 32 Ark. 763; *Krug v. Ward*, 77 Ill. 603; *Ziegler v. Powell*, 54 Ind. 173.

But, it has been held, nothing can be recovered for attorneys' fees so incurred where their value is not proved. *Mitchell v. Davies*, 51 Minn. 168.

In an Action for Damages for False Imprisonment there may be a recovery of counsel fees and other expenses incurred in procuring the plaintiff's discharge. *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y. Supreme Ct.) 468; *Williams v. Garrett*, 12 How. Pr. (N. Y. Supreme Ct.) 456; *Bonesteel v. Bonesteel*, 30 Wis. 511.

For the Malicious Suing Out of a Writ of Attachment there may be a recovery of counsel fees incurred therein and other expenses incident to the defense of the attachment, exclusive, however, of taxable costs for which the plaintiff has judgment in the attachment proceedings. *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674.

Malicious Holding to Bail. — In an action for damages for maliciously holding the plaintiff to bail he is entitled to recover attorneys' fees as damages. *Sandback v. Thomas*, 1 Stark 306, 2 E. C. L. 121.

In Actions for Libel it has been held that the jury might, in estimating the damages, make allowance for the expenditure of reasonable counsel fees by the plaintiff in the maintenance of his action. *Finney v. Smith*, 31 Ohio St. 529, 27 Am. Rep. 524.

Action for Assault and Battery — Expenses of Former Trial. — Where, in an action of assault and battery, it appeared that there had been a former trial of the cause, but no verdict, by reason of the death of one of the jurors, it was held that the jury might take into consideration the expense of the former trial in estimating the damages. *Noyes v. Ward*, 19 Conn. 250.

Attorneys' Fees in Actions for Negligence Merely. — In *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79, which was an action for damages for personal injuries resulting from obstructions in a highway, the trial judge informed the jury, and it was held properly so, that in assessing the damages they might take into consideration the necessary trouble and expenses of the plaintiff in the prosecution of the action.

Rationale of Rule. — In cases of wanton and malicious injury a jury may take into consideration the expenses of the suit in which redress is sought, because in such cases the law furnishes no definite rule of damages. In consequence of this the jury are at liberty in the exercise of their discretion to consider such a known and actual incident of the injury, although not its natural consequence. *St. Peter's Church v. Beach*, 26 Conn. 355.

Rule in Actions Ex contractu and Those Only Nominally in Tort. — In the case of *Roberts v. Mason*, 10 Ohio St. 277, it was said that the better opinion was that in actions *ex contractu* and in cases nominally in tort, but where no wrong in the moral sense of the term is complained of, the fees of counsel ought not to be included in the estimate of damages; but in cases where the act complained of is tainted by fraud and involves an ingredient of malice or insult, the jury, who have power to punish, have the right to include the consideration of proper and reasonable counsel fees in their estimate of damages.

Contrary Doctrine. — In the case of *Kelly v. Rogers*, 21 Minn. 146, Young, J., delivering the opinion of the court, said that even "in that class of cases where the jury, in assessing damages, are not limited to an award of compensation, but may give what are called exemplary or punitive damages, it is the better opinion that no allowance can be made to the plaintiff for counsel fees and other expenses of prosecuting the suit. Punitive or exemplary damages are inflicted (as the terms import), not to compensate the plaintiff for his loss or damage, but with a view to punish the defendant for his wanton, malicious, oppressive, or outrageous conduct, and to deter him and

able, and it must be reasonable that professional services should have been employed;¹ and in such cases what is a reasonable fee should be estimated upon an absolute or cash basis rather than one that is contingent.²

Doctrine that Counsel Fees Not Recovered *eo nomine*. — The principle deducible from most of the cases seems to be that counsel fees are not recoverable *eo nomine*, as a distinct item of damages, but rather that such expenses are simply a subject for the consideration of the jury in assessing the amount of recovery.³ Thus, in one case it was held that evidence on the subject of attorneys' fees was not only unnecessary to warrant the jury in considering such item, but was improper;⁴ and where, in an action for personal injuries, there was an allowance for attorneys' fees apart from and in addition to an amount assessed as exemplary damages, it was held to have been error.⁵ On the other hand, in an action for damages for malicious prosecution it was held that there could be no recovery on the score of attorneys' fees, in the absence of proof of their value.⁶

Attorneys' Fees Need Not Have Been Actually Paid. — In cases warranting the recovery of attorneys' fees as damages, or their consideration by the jury in determining the amount of the verdict, it is not necessary that the fees should have been actually paid, so that a liability therefor has been incurred.⁷ And likewise, in an action for damages for malicious prosecution and false imprisonment, the expenses of litigation in defending the criminal suit were held recoverable though they had been paid by another for the plaintiff, the latter being liable to repay them.⁸

Natural and Proximate Consequence Again. — Attorneys' fees, in such cases, are only recoverable where their incurrence was a natural and proximate consequence of the act complained of.⁹

VI. PROSPECTIVE DAMAGES AND SUCCESSIVE ACTIONS FOR THE CONSEQUENCES OF THE SAME INJURY — 1. In General. — The general rule is that where a cause of action is complete, prospective damages are recoverable¹⁰ where it is

others from the commission of like offenses. The expenses of the prosecution can afford no criterion by which to judge of the degree of malice, oppression, or outrage of which the defendant has been guilty, and for which he is to be punished; nor can the quantum of punishment which the defendant has deserved, and which will prevent a repetition of the offense by him or others, be measured by these expenses. There is therefore no reason why these expenses should be considered by the jury in arriving at that sum which, in their judgment, will be sufficient as a punishment and an example. *Day v. Woodworth*, 13 How. (U. S.) 363; *Earl v. Tupper*, 45 Vt. 275; *Barnard v. Poor*, 21 Pick. (Mass.) 378; *Lincoln v. Saratoga, etc.*, R. Co., 23 Wend. (N. Y.) 425; *Warren v. Cole*, 15 Mich. 265; *Fairbanks v. Witter*, 18 Wis. 287, 86 Am. Dec. 765." And in the same case from which the foregoing quotation is taken it is said that it was true that in the courts of Connecticut, Alabama, Mississippi, and Ohio a different rule had been adopted, but that except in the Connecticut cases the question was not much considered, and that the doctrine of those cases was opposed to the weight of authority.

1. Counsel Fees Reasonably and Necessarily Incurred. — *Marshall v. Betner*, 17 Ala. 832; *Eastin v. Stockton Bank*, 66 Cal. 123.

2. Houston, etc., R. Co. *v. Oram*, 49 Tex. 341.

3. See St. Peter's Church v. Beach, 26 Conn. 355; *Atchison, etc.*, R. Co. *v. Stewart*, 55 Kan. 667; *Roberts v. Mason*, 10 Ohio St. 277.

4. Doctrine that Evidence as to Attorneys' Fees Unnecessary. — In the case of *Roberts v. Mason*, 10 Ohio St. 277, the rule was approved that in actions for damages resulting from wanton or malicious injuries counsel fees might be considered by the jury in assessing damages, although no evidence be given on such subject. The court further said that such evidence should not be given or received, but that the jury should simply take into consideration the fact that the plaintiff was, as a result of the act complained of, naturally subjected to expenses of the kind in question.

5. Atchison, etc., R. Co. *v. Stewart*, 55 Kan. 667.

6. Mitchell v. Davies, 51 Minn. 168.

7. Ziegler v. Powell, 54 Ind. 173; *Minneapolis Threshing-Mach. Co. v. Regier*, 51 Neb. 402; *Noble v. Arnold*, 23 Ohio St. 264.

8. Krug v. Ward, 77 Ill. 603.

9. Landa v. Obert, 45 Tex. 539.

10. Cause of Action Complete — Prospective Damages — England. — *Tucker v. Newman*, 11 Ad. & El. 40, 39 E. C. L. 21; *Great Laxey Min. Co. v. Clague*, L. R. 4 App. 115; *Planché v. Colburn*, 8 Bing. 14, 21 E. C. L. 203; *Clossman v. Lacoste*, 28 Eng. L. & Eq. 140; *Roper v. Johnson*, L. R. 8 C. P. 167; *Richardson v. Mellish*, 2 Bing. 229, 9 E. C. L. 391; *Rust v. Victoria Graving Dock Co.*, 36 Ch. Div. 113; *Lamb v. Walker*, 3 Q. B. Div. 389; *Clegg v. Dearden*, 12 Q. B. 576, 64 E. C. L. 576; *Hodsdoll v. Stallebrass*, 11 Ad. & El. 301, 39 E. C. L. 94; *Fetter v. Beale*, 1 Salk. 11.

Canada. — *St. Thomas v. Credit Valley R.*

reasonably certain that they will result.¹

Multiplicity of Suits. — And where prospective damages are recoverable, a party must, if he brings an action, recover all his damages at once, on account

Co., 15 Ont. Rep. 673; *Knapp v. Great Western R. Co.*, 6 U. C. C. P. 187; *Patterson v. Great Western R. Co.*, 8 U. C. C. P. 89; *Fox v. Saint John*, 23 New Bruns. 244; *Reg. v. Hubert*, 14 Can. Sup. Ct. Rep. 737; *Meade v. Doherty*, 7 New Bruns. 195.

United States. — *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. Rep. 553.

Alabama. — *Fail v. McRee*, 36 Ala. 61.

California. — *Malone v. Hawley*, 46 Cal. 409; *Hale v. Trout*, 35 Cal. 242; *Shoemaker v. Acker*, 116 Cal. 239.

Colorado. — *Denver City Irrigation, etc., Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234.

Delaware. — *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529.

Georgia. — *Rogers v. Parham*, 8 Ga. 190; *Atlanta, etc., R. Co. v. Johnson*, 66 Ga. 259.

Illinois. — *Cooper v. Randall*, 59 Ill. 317; *Chicago, etc., R. Co. v. Robbins*, 159 Ill. 598; *Chicago, etc., R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341; *Chicago v. Jones*, 66 Ill. 349; *Chicago v. Elzeman*, 71 Ill. 131; *Howell v. Goodrich*, 69 Ill. 556.

Indiana. — *Indiana Car Co. v. Parker*, 100 Ind. 181; *Pittsburgh, etc., R. Co. v. Sponier*, 85 Ind. 165; *North Vernon v. Voegler*, 103 Ind. 214; *Strickler v. Midland R. Co.*, 125 Ind. 412; *Elkhart, etc., R. Co. v. Waldorf*, 17 Ind. App. 29; *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542, 59 Am. Rep. 225.

Iowa. — *Finley v. Hershey*, 41 Iowa 389; *Powers v. Council Bluffs*, 45 Iowa 652, 24 Am. Rep. 792; *Russ v. The Steamboat War Eagle*, 14 Iowa 363.

Kansas. — *Townsend v. Paola*, 41 Kan. 591; *Kansas Pac. R. Co. v. Muhlman*, 17 Kan. 224.

Kentucky. — *Jeffersonville, etc., R. Co. v. Esterle*, 13 Bush (Ky.) 667; *Maysville v. Stanton*, (Ky. 1890) 14 S. W. Rep. 675; *Alexander v. Humber*, 86 Ky. 505.

Louisiana. — *Seaton v. Second Municipality*, 3 La. Ann. 44.

Maine. — *Rockland Water Co. v. Tillson*, 69 Me. 255.

Maryland. — *Jacobs v. Davis*, 34 Md. 204.

Massachusetts. — *Drummond v. Crane*, 159 Mass. 577, 38 Am. St. Rep. 460; *Ashley v. Warner*, 11 Gray (Mass.) 43; *Fowl v. New Haven, etc., Co.*, 112 Mass. 334, 17 Am. Rep. 106; *Hatch v. Fuller*, 131 Mass. 574.

Michigan. — *Thompson v. Ellsworth*, 39 Mich. 719; *Conlon v. McGraw*, 66 Mich. 194.

Minnesota. — *Chamberlain v. Porter*, 9 Minn. 260; *Ziebarth v. Nye*, 42 Minn. 541; *Ennis v. Buckeye Pub. Co.*, 44 Minn. 105; *American Mfg. Co. v. Klarquist*, 47 Minn. 344.

Missouri. — *Moore v. Winter*, 27 Mo. 380; *Van Hoozier v. Hannibal, etc., R. Co.*, 70 Mo. 145.

Montana. — *Sweeny v. Montana Cent. R. Co.*, 19 Mont. 163.

New Hampshire. — *Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287; *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177.

New Jersey. — *Veghte v. Hoagland*, 29 N. J. L. 125; *Stille v. Jenkins*, 15 N. J. L. 302.

New York. — *Schell v. Plumb*, 55 N. Y. 592;

Filer v. New York Cent. R. Co., 49 N. Y. 42; *Curtiss v. Rochester, etc., R. Co.*, 20 Barb. (N. Y.) 282; *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95; *Plate v. New York Cent. R. Co.*, 37 N. Y. 472; *Crank v. Forty-second St., etc., R. Co.*, 53 Hun (N. Y.) 425; *Ganiard v. Rochester City, etc., R. Co.*, 50 Hun (N. Y.) 22; *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258; *Caldwell v. Murphy*, 11 N. Y. 416; *Sheehan v. Edgar*, 58 N. Y. 631; *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Taylor v. Bradley*, 4 Abb. App. Dec. (N. Y.) 365; *Shaffer v. Lee*, 8 Barb. (N. Y.) 417; *Atwood v. Norton*, 27 Barb. (N. Y.) 648; *Fish v. Folley*, 6 Hill (N. Y.) 54; *Goodsall v. Western Union Tel. Co.*, 53 N. Y. Super. Ct. 46. And see *Blunt v. McCormick*, 3 Den. (N. Y.) 283.

North Carolina. — *Wallace v. Western North Carolina R. Co.*, 104 N. Car. 442; *Ridley v. Seaboard, etc., R. Co.*, 118 N. Car. 996.

Ohio. — *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821.

Pennsylvania. — *Imperial Coal Co. v. Port Royal Coal Co.*, 138 Pa. St. 45; *McLaughline v. Corry*, 77 Pa. St. 109, 18 Am. Rep. 432.

Tennessee. — *Tarbox v. Hartenstein*, 4 Baxt. (Tenn.) 78; *East Tennessee, etc., R. Co. v. Staub*, 7 Lea (Tenn.) 397; *Nashville v. Comar*, 88 Tenn. 415.

Texas. — *Massie v. State Nat. Bank*, 11 Tex. Civ. App. 280; *Fort Worth, etc., R. Co. v. Wallace*, 74 Tex. 581.

Vermont. — *Derby v. Johnson*, 21 Vt. 22; *Whitney v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150; *Morey v. King*, 51 Vt. 383; *Folsome v. Concord*, 46 Vt. 135; *Morrissey v. Hughes*, 65 Vt. 553; *Goodrich v. Dorset Marble Co.*, 60 Vt. 280; *Royalton v. Royalton, etc., Turnpike Co.*, 14 Vt. 311; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140.

Virginia. — *James v. Kibler*, 94 Va. 165.

West Virginia. — *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121; *Smith v. Point Pleasant, etc., R. Co.*, 23 W. Va. 453.

Wisconsin. — *Birchard v. Booth*, 4 Wis. 67.

All Damages, Past and Prospective. — In actions of damage for tort where, though the effects have not fully occurred, they must occur, and are reasonably and fairly capable of safe estimation, all damages, past and prospective, are recoverable in one action. *Thompson v. Ellsworth*, 39 Mich. 719.

Prospective Damages Considered as Payment in Advance. — In the case of *Morrissey v. Hughes*, 65 Vt. 553, the court charged the jury that what was given to the plaintiff for prospective damages was like a payment in advance, and that in fixing the sum that fact should be considered and the amount reduced to its then present worth. This was held to have been a proper view of the matter.

1. Reasonable Certainty. — *De Costa v. Massachusetts Flat Water, etc., Co.*, 17 Cal. 613; *Fry v. Dubuque, etc., R. Co.*, 45 Iowa 416; *Chicago, etc., R. Co. v. Kennedy*, 2 Kan. App. 693; *Thompson v. Ellsworth*, 39 Mich. 719; *Clark v. Nevada Land, etc., Co.*, 6 Nev. 203; *Lincoln v. Saratoga, etc., R. Co.*, 23 Wend. (N. Y.) 425;

of the principle forbidding a multiplicity of suits and prohibiting to a party the splitting up of an entire cause of action.¹

Concurrence of Damage and Injury. — As a general rule, successive actions cannot be maintained for damages resulting from the same injury.² Though from a completed wrong there afterwards results new and unforeseen damage, there does not arise a new cause of action; and if a recovery has been had for the wrong prior to the occurrence of the subsequent damage, no recovery can be had for the latter.³ There must, as has been seen, be a concurrence of damage and injury for the maintenance of every action for damages. Where there has been a recovery for an injury and its consequent damage, there must be another injury before there can be another recovery. But as often as there is this concurrence, an action may be maintained.⁴

Goodsell v. Western Union Tel. Co., 53 N. Y. Super. Ct. 46.

1. Full Recovery in One Suit — *England*. — *Rust v. Victoria Graving Dock Co.*, 36 Ch. Div. 113; *Fetter v. Beal*, 1 Ld. Raym. 339; *Best*, C. J., in *Richardson v. Mellish*, 2 Bing. 229, 9 E. C. L. 391.

Canada. — *Knapp v. Great West. R. Co.*, 6 U. C. C. P. 187; *Reg. v. Hubert*, 14 Can. Sup. Ct. Rep. 737; *Patterson v. Great Western R. Co.*, 8 U. C. C. P. 89.

United States. — *Fort v. Union Pac. R. Co.*, 2 Dill. (U. S.) 259.

Alabama. — *Fail v. McRee*, 36 Ala. 61.

Illinois. — *Pleasants, J.*, in *Just v. Greve*, 13 Ill. App. 302; *Chicago, etc., R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341; *Howell v. Goodrich*, 69 Ill. 556.

Indiana. — *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542, 59 Am. Rep. 225; *Ohio, etc., R. Co. v. Cosby*, 107 Ind. 32; *North Vernon v. Voegler*, 103 Ind. 314.

Iowa. — *Powers v. Council Bluffs*, 45 Iowa 652, 24 Am. Rep. 792; *Knapp v. Sioux City, etc., R. Co.*, 71 Iowa 41; *Stafford v. Oskaloosa*, 64 Iowa 251; *Stodghill v. Chicago, etc., R. Co.*, 53 Iowa 341.

Kansas. — *Kansas Pac. R. Co. v. Muhlman*, 17 Kan. 224.

Kentucky. — *Maysville v. Stanton*, (Ky. 1890) 14 S. W. Rep. 675; *Jeffersonville, etc., R. Co. v. Esterle*, 13 Bush (Ky.) 667.

Maryland. — *Jacobs v. Davis*, 34 Md. 204.

Massachusetts. — *Drummond v. Crane*, 159 Mass. 577, 38 Am. St. Rep. 460; *Fowle v. New Haven, etc., Co.*, 112 Mass. 334, 17 Am. Rep. 106.

Michigan. — *Thompson v. Ellsworth*, 39 Mich. 724.

Missouri. — *Squires v. Chillicothe*, 89 Mo. 226.

New Hampshire. — *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177.

New Jersey. — *Klein v. Jewett*, 26 N. J. Eq. 474.

New York. — *Fish v. Folley*, 6 Hill (N. Y.) 54; *Aaron v. Second Ave. R. Co.*, 2 Daly (N. Y.) 127; *Curtiss v. Rochester, etc., R. Co.*, 20 Barb. (N. Y.) 282; *Filer v. New York Cent. R. Co.*, 49 N. Y. 42; *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448.

North Carolina. — *Ridley v. Seaboard, etc., R. Co.*, 118 N. Car. 996.

Pennsylvania. — *McLaughlin v. Corry*, 77 Pa. St. 109, 18 Am. Rep. 432.

Tennessee. — *East Tennessee, etc., R. Co. v.*

Staub, 7 Lea (Tenn.) 397; *Tarbox v. Hartenstein*, 4 Baxt. (Tenn.) 78.

Texas. — *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443.

Vermont. — *Morey v. King*, 51 Vt. 383; *Whitney v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150; *Fulsome v. Concord*, 46 Vt. 135.

Wisconsin. — *Birchard v. Booth*, 4 Wis. 67.

2. *North Vernon v. Voegler*, 103 Ind. 314; *Fowle v. New Haven, etc., Co.*, 112 Mass. 334, 17 Am. Rep. 106; *Whitney v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140.

3. *Kansas Pac. R. Co. v. Muhlman*, 17 Kan. 224.

Successive Actions — Necessity for New Unlawful Act and Fresh Damage. — In the case of *North Vernon v. Voegler*, 103 Ind. 314, the court said: "The distinction between injury and damages is an important one * * * for the reason that the law is that fresh damages without a fresh injury will not authorize a second or subsequent action. The rule is thus tersely stated in *Warner v. Bacon*, 8 Gray (Mass.) 397, 69 Am. Dec. 253: 'A fresh action cannot be brought unless there be both a new unlawful act and fresh damage.' This rule is illustrated by many cases."

There may be successive recoveries of damages for every fresh injury and resultant damage. Thus, *Sergeant Williams*, in his note to the case of *Hambleton v. Veere*, 2 Saund. 171, lays down the proposition that in trespass and in tort new actions may be brought as often as new injuries and wrongs are repeated, and consequently prospective damages should not be given in a case in which there is a continuation of the injury. "There is no intimation," said *Bennett, J.*, however, in *Whitney v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150, commenting upon this proposition, "that every fresh damage gives a new action."

4. Where Subsequent Injuries Constitute a New Cause of Action, a former recovery is not a bar to a later action. *Block v. Ebner*, 54 Ind. 544.

In the case of *Robinson v. Bland*, 2 Burr. 1077, *Lord Mansfield* said that "in trespass and in tort new actions may be brought as often as new injuries and wrongs are repeated, and therefore damages shall be assessed only up to the time of the wrong complained of."

Trespass by Placing Stumps and Stakes on Plaintiff's Land. — In *Bowyer v. Cook*, 4 C. B. 236, 56 E. C. L. 236, there had been an action of trespass for placing stumps and stakes on the plaintiff's land, and the defendant paid into

Distinction Between Single and Entire Injury and Continuing Injury. — In other words, a distinction must be made between cases where the injury from which damage results is single and entire and those where it may be regarded as continuing or repeated. In the first instance, there cannot be successive actions, though there may be a continuation of the damages resulting from the single injury.¹ In the second, there may be successive actions, where the original injury may be regarded as continuing or repeated as often as fresh injury and resultant damage occur.²

Damages Not Sustained at Time of Trial — Subsequent Action. — It is observable, in general, that where the law will not permit the recovery of damages which have not actually been sustained at the time of the trial, there may be a recovery thereof by subsequent actions.³ But where a party would be entitled to maintain successive actions for damages subsequently accruing, entire damages are not in general recoverable.⁴ And, on the other hand, if no subsequent action can be maintained for damages there may be a recovery of all damages, present and future, in one action.⁵

Damages Accruing Between Institution of Suit and Time of Trial. — The Early Doctrine was that only such damages were recoverable as had been sustained at the time of the institution of the action.⁶

Present Rule. — This rule seems to have been first departed from by Lord Mansfield, who declared it to be "agreeable to the principles of the common law that whenever a duty has incurred, pending the writ, for which no satisfaction can be had by a new suit, such duty shall be included in the judgment to be given upon the action already depending."⁷ At the present time, however, the principle very generally obtains that though damages accrue after the institution of the suit, they may be recovered, provided they are a natural and proximate consequence of the act complained of,⁸ and do

court in that action forty shillings, which the plaintiff took in satisfaction of that trespass. The plaintiff afterwards gave notice to the defendant that unless he removed the stumps and stakes, further action would be brought against him; and in the second action it was held that the leaving of the stumps and stakes on the land was a new trespass, and that the plaintiff was entitled to recover.

1. *Whitney v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150.

The case of *Fowle v. New Haven, etc., Co.*, 112 Mass. 334, 17 Am. Rep. 106, was an action against a railroad corporation for the construction of its roadbed in such a manner as to turn the current of Mill river against the plaintiff's land, thereby causing the washing away of the soil. It was held in this case that the plaintiff might recover entire damages in one action for an injury occasioned by a permanent structure of this description, and was not limited to those which had actually been suffered at the date of the writ, and therefore that a judgment in such an action is a bar to a new action for subsequent injuries from the same cause, though the result of an unusual freshet.

2. *Whitney v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150.

3. "Plain justice requires," said the court, in *Warner v. Bacon*, 8 Gray (Mass.) 406, 69 Am. Dec. 253, "that a plaintiff should have a remedy for all the legal damage he sustains from a tort or breach of contract; and that if, by reason of some rule of law, and without any fault or mistake of his, he can recover only part of that damage in one action, he

should be entitled to recover the rest in another."

4. *Phelps v. New Haven, etc., Co.*, 43 Conn. 453; *Block v. Ebner*, 54 Ind. 544.

5. *England*. — *Fetter v. Beal*, 1 Ld. Raym. 339.

United States. — *Wilcox v. Plummer*, 4 Pet. (U. S.) 172.

Illinois. — *Howell v. Goodrich*, 69 Ill. 556.

Iowa. — *Stafford v. Oskaloosa*, 64 Iowa 251;

Knapp v. Sioux City, etc., R. Co., 71 Iowa 41.

Maryland. — *Jacobs v. Davis*, 34 Md. 204.

Michigan. — *Thompson v. Ellsworth*, 39 Mich. 719.

New Hampshire. — *Hopkins v. Atlantic etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287.

New Jersey. — *Klein v. Jewett*, 26 N. J. Eq. 474.

New York. — *Filer v. New York Cent. R. Co.*, 49 N. Y. 42.

Pennsylvania. — *Miller v. Wilson*, 24 Pa. St. 114; *McLaughlin v. Corry*, 77 Pa. St. 109, 18 Am. Rep. 432.

Vermont. — See *Spear v. Stacy*, 26 Vt. 61.

6. **Damages Between Institution of Suit and Time of Trial — Early Rule.** — "The cases are decisive," it was said, in *Powers v. Ware*, 4 Pick. (Mass.) 107, "that by the common law the plaintiffs can recover damages only to the time of bringing the action, unless there be a distinction in this respect between covenant and tort. It seems to us, however, that no such distinction can exist." See *Brasfield v. Lee*, 1 Ld. Raym. 329. And see *Whipple v. Fair Haven*, 63 Vt. 221.

7. *Robinson v. Bland*, 2 Burr 1077.

8. **Present Rule** — *United States*. — *Wilcox v.*

not themselves constitute a new cause of action.¹

Illustrations. — Thus, in an action against an attorney for damages arising from his negligence and lack of skill, evidence of damages incurred up to the day of trial is admissible, provided such injuries were the immediate and natural result of the original act.² And where growing timber was caused to die by reason of the overflow of the plaintiff's land, it was held not material that such result did not in fact occur until after the institution of the suit.³ Indeed, in such cases, the consequences ensuing naturally from the original injury since the institution of the suit may, in a sense, be regarded as evidence to show what was the real nature and extent of such injury inflicted before the action brought.⁴

2. Actions for Breach of Contract. — Where the Contract Is Entire there may, and in general must, be a recovery of all damages in one action.⁵

Plummer, 4 Pet. (U. S.) 172; *Fort v. Union Pac. R. Co.*, 2 Dill. (U. S.) 259.

California. — *Hicks v. Herring*, 17 Cal. 566.

Indiana. — *Pendergrast v. McCaslin*, 2 Ind. 87.

Maine. — *Whitney v. Stayton*, 40 Me. 224; *Gennings v. Norton*, 35 Me. 308.

Maryland. — *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618.

Massachusetts. — *Lord, J.*, in *Fay v. Guynon*, 131 Mass. 31; *Hagan v. Riley*, 13 Gray (Mass.) 515.

Missouri. — See *Alfter v. Hammitt*, 54 Mo. App. 303.

New York. — *Carples v. New York, etc., R. Co.*, 16 N. Y. App. Div. 158. And see *Everson v. Powers*, 60 How. Pr. (N. Y. C. Pl.) 166.

North Carolina. — *Dailey v. Dismal Swamp Canal Co.*, 2 Ired. L. (24 N. Car.) 222; *Pendergast v. McCaslin*, 2 Ind. 87.

South Carolina. — See *Puckett v. Smith*, 5 Strobb. L. (S. Car.) 26, 53 Am. Dec. 686; *Pepoon v. Clarke*, 1 Mill L. (S. Car.) 137; *Lamar v. Charlotte, etc., R. Co.*, 10 S. Car. 476.

Tennessee. — *Johnson v. Perry*, 2 Humph. (Tenn.) 569.

Vermont. — See *Spear v. Stacy*, 26 Vt. 61. Compare *Whipple v. Fair Haven*, 63 Vt. 221.

Wisconsin. — *Birchard v. Booth*, 4 Wis. 67.

In *Fifth Nat. Bank v. New York El. R. Co.*, 28 Fed. Rep. 231, the plaintiff recovered damages up to the date of the trial, where the injuries claimed resulted from the construction of the defendant's railroad track and station-house in front of the defendant's banking-house, it being held that the damages grew directly out of the maintenance of the structure and that the defendant could not have been misled.

Rule Applied in Cases of Personal Injuries. — In the case of *Pittsburg, etc., R. Co. v. Blair*, 11 Ohio Cir. Ct. Rep. 579, the action was for damages against a railroad company, the petition alleging an injury to the plaintiff which necessitated the loss of three fingers of one hand. On the trial the plaintiff was permitted to prove that since the institution of the action it had become necessary to amputate the entire hand as a direct result of the first injury received.

¹ *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618; *Dailey v. Dismal Swamp Canal Co.*,

2 Ired. L. (24 N. Car.) 222. And see *Spear v. Stacy*, 26 Vt. 61.

² *Wilcox v. Plummer*, 4 Pet. (U. S.) 172.

³ *Hayden v. Albee*, 20 Minn. 159.

⁴ See *Turley, J.*, in *Johnson v. Perry*, 2 Humph. (Tenn.) 569; *Weisel, J.*, in *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618; *Herring v. Tomlin*, 28 Eng. L. & Eq. 142; *Lowry v. Walker*, 5 Vt. 181. Compare *Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287.

By Statute in Some States provision for the recovery of damages up to the time of the trial is expressly made. Thus, under the *Indiana Code of Procedure*, damages in an action of disseisin may be recovered up to the date of the trial. See *Pendergast v. McCaslin*, 2 Ind. 87. And section 3283 of the *Civil Code of California* provides that "damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof." In *New York* evidence of damages accruing between the commencement of the action and the time of trial is admissible, provided the adverse party is not misled. See *Fifth Nat. Bank v. New York El. R. Co.*, 28 Fed. Rep. 231. In *Pennsylvania*, under the Act of May, 1876, P. L. 1895, which permits a plaintiff to give notice of claim for damages or mesne profits up to the date of trial and to offer evidence under the notice, damages or mesne profits are recoverable up to the date of trial, not only in cases where the possession as against the plaintiff is wrongful, but also in trespasses of a continuing nature, such as the pollution of a stream, in which a second action might have been brought for damages sustained after the service of the writ. *Hileman v. Hileman*, 172 Pa. St. 323, in which case it is held, however, that this statutory provision does not apply to actions for wrongs which, from their very nature, are perpetrated only at distant and rare intervals. The act only includes within its terms such causes of action as from their nature are persistent and continuing wrongs.

5. When Contract Entire. — *Fail v. McRee*, 36 Ala. 61; *Just v. Greve*, 13 Ill. App. 302; *Jacobs v. Davis*, 34 Md. 204; *Drummond v. Crane*, 159 Mass. 577, 38 Am. St. Rep. 460; *Fish v. Folley*, 6 Hill (N. Y.) 54; *Blunt v. McCormick*, 3 Den. (N. Y.) 283; *East Tennessee, etc., R. Co. v. Staub*, 7 Lea (Tenn.) 397; *Tarbox v. Hartenstein*, 4 Baxt. (Tenn.) 78; *Morey v. King*, 51 Vt. 383.

And in the Case of Continuing Contracts, the performance of which is to extend through a considerable period of time, there may, if the breach is total, be a recovery of all damages, present and prospective.¹

Plaintiff Need Not Await Time of Full Performance. — It is not necessary in such cases for the plaintiff to await the time for full performance, but there may be a recovery of full damages immediately upon breach.²

What Is Total Breach of Continuing Contract. — It has been stated that for the total breach of a continuing contract there may be a recovery of entire damages; but it is not always easy to determine what constitutes a total breach of such a contract.³ In this connection the true criterion for determining whether a

1. **Continuing Contracts — England.** — *Richardson v. Mellish*, 2 Bing. 229, 9 E. C. L. 391; *Planche v. Colburn*, 8 Bing. 14, 21 E. C. L. 203; *Clossman v. Lacoste*, 28 Eng. L. & Eq. 140; *Roper v. Johnson*, L. R. 8 C. P. 167; *Kane v. Jenkinson*, 10 Nat. Bank. Reg. 316.

Canada. — *St. Thomas v. Credit Valley R. Co.*, 15 Ont. Rep. 673; *Meade v. Doherty*, 7 New Bruns. 195.

United States. — *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. Rep. 553.

Alabama. — *Fail v. McRee*, 36 Ala. 61.

California. — *Shoemaker v. Acker*, 116 Cal. 239; *Hale v. Trout*, 35 Cal. 242.

Georgia. — *Rogers v. Parham*, 8 Ga. 190.

Louisiana. — *Seaton v. Second Municipality*, 3 La. Ann. 44.

Massachusetts. — *Drummond v. Crane*, 159 Mass. 577, 38 Am. St. Rep. 460; *Ashley v. Warner*, 11 Gray (Mass.) 43.

Minnesota. — *Ennis v. Buckeye Pub. Co.*, 44 Minn. 105; *American Mfg. Co. v. Klarquist*, 47 Minn. 344.

Missouri. — *Moore v. Winter*, 27 Mo. 380.

New Jersey. — *Stille v. Jenkins*, 15 N. J. L. 302.

New York. — *Atwood v. Norton*, 27 Barb. (N. Y.) 648; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Shaffer v. Lee*, 8 Barb. (N. Y.) 417; *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38.

Ohio. — *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821; *Imperial Coal Co. v. Port Royal Coal Co.*, 138 Pa. St. 45.

Tennessee. — *East Tennessee, etc., R. Co. v. Staub*, 7 Lea (Tenn.) 397; *Tarbox v. Hartenstein*, 4 Baxt. (Tenn.) 78.

Vermont. — *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140; *Royalton v. Royalton, etc., Turnpike Co.*, 14 Vt. 311; *Derby v. Johnson*, 21 Vt. 22.

Virginia. — *James v. Kibler*, 94 Va. 165.

Upon a Bond Conditioned for the Payment of Certain Royalties at stipulated times, there may, upon breach, if the defendant has disabed himself from further performing the conditions, be a recovery for the entire breach, or the plaintiff may, at his election, sue from time to time as the royalties are due. *Keck v. Bieber*, 148 Pa. St. 645, 33 Am. St. Rep. 846.

2. **Need Not Await Expiration of Time for Full Performance — England.** — *Roper v. Johnson*, L. R. 8 C. P. 167; *Richardson v. Mellish*, 2 Bing. 229, 9 E. C. L. 391.

Canada. — *St. Thomas v. Credit Valley R. Co.*, 15 Ont. Rep. 673; *Meade v. Doherty*, 7 New Bruns. 195.

Alabama. — *Fail v. McRee*, 36 Ala. 61.

California. — *Hale v. Trout*, 35 Cal. 242.

Massachusetts. — *Drummond v. Crane*, 159 Mass. 577, 38 Am. St. Rep. 460; *Ashley v. Warner*, 11 Gray (Mass.) 43.

Michigan. — *Conlon v. McGraw*, 66 Mich. 194.

Minnesota. — *American Mfg. Co. v. Klarquist*, 47 Minn. 344.

Missouri. — *Moore v. Winter*, 27 Mo. 380.

Nebraska. — *Terry v. Beatrice Starch Co.*, 43 Neb. 866.

New Jersey. — *Stille v. Jenkins*, 15 N. J. L. 302.

New York. — *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38.

Texas. — *Massie v. State Nat. Bank*, 11 Tex. Civ. App. 280.

Vermont. — *Royalton v. Royalton, etc., Turnpike Co.*, 14 Vt. 311; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140.

Wisconsin. — See *Gordon v. Brewster*, 7 Wis. 355.

It Has Been Held, However, that an Undertaking by a Landlord to keep the demised premises in repair during the term is a continuing covenant, liable to successive breaches, for each of which, on its occurring, an action may be maintained by the lessee. *Block v. Ebner*, 54 Ind. 544. See also *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369. And it has also been decided that the continuance of the breach of such a covenant after the commencement of a suit for damages therefor is, in law, a new breach thereof, for which another action may be maintained. *Block v. Ebner*, 54 Ind. 544. Likewise, where a railroad company had undertaken to keep in repair certain cattle passes under its track, it was held that damages only to the institution of the suit were recoverable. *Phelps v. New Haven, etc., Co.*, 43 Conn. 453.

Contract to Execute Note Payable in the Future.

— For the breach of a contract to execute a note payable in the future damages may be recovered immediately, though the time when the note would have matured if executed according to the agreement has not arrived. *American Mfg. Co. v. Klarquist*, 47 Minn. 344.

3. **What Constitutes Total Breach of Continuing Contract — Confusion of Authorities.** — "Courts and text-writers," said Pleasants, J., in *Just v. Greve*, 13 Ill. App. 302, "have expended no small amount of labor in formulating rules for determining in what cases continuing contracts and the damages recoverable for their breach are entire and in what divisible, which are for the most part unsatisfactory, because inconsistent, obscure, or difficult of application."

"Often it is nice and difficult," said Poland, J., in *Remelee v. Hall*, 31 Vt. 582, 76 Am.

party in such action can recover damages for a nonperformance of the whole contract and sue for damages not actually sustained when the action is brought and suit tried, has been declared to be whether there has been such a breach of the contract as authorizes the plaintiff to treat it as entirely putting an end to the contract.¹ Whether this is so or not must depend upon the facts of each case.²

Dec. 140, "to determine whether the breach of such continuing contract is entire and total, so as to entitle the party to recover damages for an entire nonfulfilment, or only partial and temporary, so that a party can recover only such damages as he has already sustained, and he must still accept the performance of the residue of the contract if the other party will fulfil it."

1. *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618; *Amos v. Oakley*, 131 Mass. 413; *Parker v. Russell*, 133 Mass. 74; *Shaffer v. Lee*, 8 Barb. (N. Y.) 412; *Massie v. State Nat. Bank*, 11 Tex. Civ. App. 280; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140. And see *Wright v. Wright*, 49 Mich. 624.

With reference to the cases announcing the rule that damages recoverable for the breach of an entire agreement are not divisible, the court, in *Just v. Greve*, 13 Ill. App. 302, said: "These cases, however, for the most part, arose upon positive contracts, to continue for a time that was certain or could be rendered approximately certain, and in which prospective damages for an entire breach could be approximately estimated — as, to furnish a certain amount of water power for such a time, *Fish v. Folley*, 6 Hill (N. Y.) 54; or to furnish all necessary meat, drink, etc., to a man and his wife during their natural lives, *Shaffer v. Lee*, 8 Barb. (N. Y.) 412. Here, perhaps, the courts recognized what they understood to be meant by the 'true criterion' laid down in *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140, viz., whether the breach is 'such as authorizes the plaintiff to consider [it] as entirely putting an end to the contract.'"

Where the Vendee in a Contract of Sale of articles to be delivered in instalments throughout a period of time repudiates the contract before the time for full performance, the vendor may, at his election, consider the entire contract as rescinded, and recover damages therefor, the measure of the recovery being fixed by the difference between the contract price and the value of the articles to be delivered in future, as of the day of the breach of contract. *Masterton v. Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38.

2. *Shaffer v. Lee*, 8 Barb. (N. Y.) 412; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140.

Whether, in a Contract to Support Another During Life, entire damages may be recovered upon breach, depends upon whether or not the breach is total and entire. If this is so, then all damages, present and prospective, are recoverable. *Amos v. Oakley*, 131 Mass. 413; *Parker v. Russell*, 133 Mass. 74; *Morrison v. McAtee*, 23 Oregon 530; *Carpenter v. Carpenter*, 66 Hun (N. Y.) 177; *Shover v. Myrick*, 4 Ind. App. 7; *Shaffer v. Lee*, 8 Barb. (N. Y.) 412; *Schell v. Plumb*, 55 N. Y. 592. But where the contract is merely to furnish a home to a person "when he is sober and well be-

haved," damages should be assessed to the date of the writ only. *Fay v. Guynon*, 131 Mass. 31.

Contracts Not to Engage in a Rival Business have been generally held not to be entire, or rather are regarded as susceptible of successive breaches for which successive actions will lie, and hence prospective damages are not recoverable. *Pierce v. Woodward*, 6 Pick. (Mass.) 206; *Just v. Greve*, 13 Ill. App. 302; *Hunt v. Tibbetts*, 70 Me. 221.

Apprenticeship. — Another illustration of this class of cases, more common formerly than now, is the contract of apprenticeship, which is held susceptible of successive breaches, for which successive causes of action accrue, and where the invariable rule is to assess only such damages as are sustained previously to the date of the writ, leaving all subsequent damages to be recovered by subsequent suits. *Hambleton v. Veere*, 2 Saund. 169; *Hodsoll v. Stallebrass*, 11 Ad. & El. 301, 39 E. C. L. 94; *Moore v. Love*, 3 Jones L. (48 N. Car.) 215; *Powers v. Ware*, 4 Pick. (Mass.) 107. The case of *Hambleton v. Veere*, 2 Saund. 169, is a leading case on the recovery of prospective damages in cases of continuing contracts susceptible of successive breaches. This was an action for damages for enticing an apprentice to depart from the plaintiff's service, the plaintiff claiming damage for the loss of service for the whole of the residue of the term of apprenticeship. The term of apprenticeship had not expired, and, upon motion in arrest of judgment, it was held to be error to assess damages beyond the time of the institution of the suit. It was alleged in the declaration that the person enticed away had been retained in the service of the plaintiff as his apprentice for the term of nine years, and that having served the plaintiff five years, he was then enticed away by the defendant, he (the defendant) well knowing of the circumstances, the plaintiff thereby, it was alleged, losing the service of his apprentice for the residue of the term. The court held that the assessment of future damages was erroneous, because it appeared from the declaration that the injury was not complete when the action was brought. The defendant, argued the court, enticed the servant away, knowing that he was the apprentice of the plaintiff for the term of nine years, and of course every detention of the servant with such knowledge was a fresh injury; and when new damage had accrued, a second action might be sustained, as in the case of a continuation of a nuisance, or of false imprisonment. And see also the case of *Ward v. Rich*, 1 Vent. 103, which was an action for enticing away the plaintiff's wife and keeping her from the plaintiff until, as was alleged, a certain day, which was some time after suit was commenced. After judgment for the plaintiff, judgment was arrested

3. Actions in Tort — Torts to Property. — For a permanent injury to or trespass upon real estate, all damages, past and prospective, are recoverable in one action; ¹ and where such damages are recoverable, a verdict and judgment

upon the ground that it must be intended that the jury gave damages for the entire term specified in the declaration, and the subsequent detention of the wife after action brought was a new injury. And in the case of *Powers v. Ware*, 4 Pick. (Mass.) 106, which was an action on indentures of apprenticeship, damages were sought against the master for the entire term, the action having, however, been brought before. In this connection the court said: "We certainly cannot look forward six years and give damages for a supposed continuance of the breach, when, for aught we know, the defendant may be ready to perform his covenant in future, and when, if the boy should die, the defendant would be discharged." But this rule as to the recovery of prospective damages is one of justice and good sense, and if from the nature of the case the plaintiff must necessarily lose the services of his apprentice for the entire residue of the term, damages, it would seem, should be assessed accordingly. *Trigg v. Northcut*, Litt. Sel. Cas. (Ky.) 414; *Hodsoll v. Stallebrass*, 9 C. & P. 63, 38 E. C. L. 35; *Moore v. Love*, 3 Jones L. (48 N. Car.) 215.

1. Permanent Injury to Real Estate — All Past and Prospective Damages Recoverable — England. — *Clegg v. Dearden*, 12 Q. B. 576, 64 E. C. L. 576; *Great Laxey Min. Co. v. Clague*, L. R. 4 App. 115, 27 W. R. 417; *Lamb v. Walker*, 3 Q. B. Div. 389, 45 L. J. Q. B. 451, 38 L. T. N. S. 643, 26 W. R. 775; *Rust v. Victoria Graving Dock Co.*, 36 Ch. Div. 113; *Tucker v. Newman*, 11 Ad. & El. 40, 39 E. C. L. 21.

Canada. — *Patterson v. Great Western R. Co.*, 8 U. C. C. P. 89; *Knatt v. Great Western R. Co.*, 6 U. C. C. P. 187; *Reg. v. Hubert*, 14 Can. Sup. Ct. Rep. 737.

Colorado. — *Denver City Irrigation, etc., Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234.

Illinois. — *Chicago, etc., R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341.

Indiana. — *Elkhart, etc., R. Co. v. Waldorf*, 17 Ind. App. 29; *Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542, 59 Am. Rep. 225; *Strickler v. Midland R. Co.*, 125 Ind. 412; *North Vernon v. Voegler*, 103 Ind. 314.

Iowa. — *Finley v. Hershey*, 41 Iowa 389; *Stodghill v. Chicago, etc., R. Co.*, 53 Iowa 341; *Van Orsdel v. Burlington, etc., R. Co.*, 56 Iowa 470.

Kansas. — *Kansas Pac. R. Co. v. Muhlman*, 17 Kan. 224.

Kentucky. — *Maysville v. Stanton*, (Ky. 1890) 14 S. W. Rep. 675; *Jeffersonville, etc., R. Co. v. Esterle*, 13 Bush (Ky.) 667.

Maine. — *Rockland Water Co. v. Tillson*, 69 Me. 255.

Massachusetts. — *Fowle v. New Haven, etc., Co.*, 112 Mass. 334, 17 Am. Rep. 106.

Michigan. — *Conlon v. McGraw*, 66 Mich. 194.

Minnesota. — *Ziebarth v. Nye*, 42 Minn. 541.

Missouri. — *Van Hoozier v. Hannibal, etc., R. Co.*, 70 Mo. 145.

New Hampshire. — *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177.

New Jersey. — *Veghte v. Hoagland*, 29 N. J. L. 125.

New York. — *Matter of Water Com'rs*, 4 Edw. Ch. (N. Y.) 545.

Tennessee. — *Nashville v. Comar*, 88 Tenn. 415.

Texas. — *Fort Worth, etc., R. Co. v. Wallace*, 74 Tex. 581.

Vermont. — *Goodrich v. Dorset Marble Co.*, 60 Vt. 280.

West Virginia. — *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121; *Smith v. Point Pleasant, etc., R. Co.*, 23 W. Va. 453.

Damages for Wrongful Construction of Embankment. — In the case of *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177, "which," it was said in *Ridley v. Seaboard, etc., R. Co.*, 118 N. Car. 996, "has been cited as authority by text-writers and many of the courts of the states," the action was brought for damages for the occupation of a street and town bridge by a railway company, and it was conceded that in the sense that the highway was obstructed the company had created a nuisance. The court said: "The railroad is in its nature and design and use a permanent structure, which cannot be assumed to be liable to change; the appropriation of the roadway and materials to the use of the railroad is, therefore, a permanent appropriation; the use of the land set apart to be used as a highway by the railroad company for the use of their track is a permanent diversion of that property to that new use, and a permanent dispossession of the town of it as the place on which to maintain the highway. The injury done to the town is, then, a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages."

Damages for Wrongful Cutting of Ditch. — In the case of *Powers v. Council Bluffs*, 45 Iowa 652, 24 Am. Rep. 792, the city cut a ditch along the side of the plaintiff's lots and caused his lands to be overflowed, and it was declared that the cause of action was complete when the unlawful act was committed, and that all of the damages accruing from the original wrong must be included in one action. See also *Sweeny v. Montana Cent. R. Co.*, 19 Mont. 163.

Plaintiff Required to Recover All Damages in One Action. — Where the nature of the defendant's act is such as to cause permanent injury to the plaintiff's land, the plaintiff is generally required to recover his entire damage, present and prospective, in one action. *Ridley v. Seaboard, etc., R. Co.*, 118 N. Car. 996. "It is familiar learning," said Avery, J., in this case, "that there is no elementary principle upon which continued actions have been held to lie for the wrongful erection of a structure, except in cases where its erection was a trespass resulting in a nuisance, and then for the purpose of bringing about a removal. It must be conceded, then, that unless a railway em-

ment will bar a subsequent action for damages from the same injury.¹ Where, however, the injury or trespass is only temporary in character, only such damages are, in general, recoverable as have accrued up to the date of the institution of the action,² for subsequent damage successive actions being

bankment or culvert which obstructs the passage of the water of a non-navigable stream in ordinary freshets so as to pond it back upon and injure a landowner is a nuisance, the damage, present and prospective, must be assessed in one action."

Injury Permanent in Character or Treated as Permanent by the Parties.—"The case at bar," said the court in *Fowle v. New Haven, etc., Co.*, 112 Mass. 334, 117 Am. Rep. 106, "is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately, it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury."

1. *Fowle v. New Haven, etc., Co.*, 112 Mass. 334, 17 Am. Rep. 106. And see also cases cited in preceding note.

Subsequent Action Barred by Former Recovery.—Where a railroad company duly authorized by law constructed a railway, built an embankment partly on the bed of a river, and thereby changed the current of the stream from its proper course and caused it to wash away adjacent lands, it was held by the Supreme Court of Massachusetts, in *Fowle v. New Haven R. Co.*, 107 Mass. 354, that a second action brought to recover damages for the wrongful washing away of some of the plaintiff's land, due to the same diversion of the watercourse, was barred by the judgment in the former action instituted for the same purpose, though several acres of land had been washed away after the judgment in the first and before the bringing of the last action.

2. Temporary Injury—Damages to Date of Action Only—England.—*Holmes v. Wilson*, 10 Ad. & El. 503, 37 E. C. L. 161; *Battishill v. Reed*, 18 C. B. 696, 86 E. C. L. 696, 25 L. J. C. P. 290.

Canada.—*Snarr v. Granite Curling, etc., Co.*, 1 Ont. Rep. 102.

Alabama.—*Eufaula v. Simmons*, 86 Ala. 515; *Polly v. McCall*, 37 Ala. 20.

Colorado.—*Denver City Irrigation, etc., Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234.

Georgia.—*Savannah, etc., Canal Co. v. Bourquin*, 51 Ga. 378; *Jones v. Lavender*, 55 Ga. 228.

Indiana.—*Indiana, etc., R. Co. v. Eberle*, 110 Ind. 542, 59 Am. Rep. 225.

Kansas.—*Union Trust Co. v. Cuppy*, 26 Kan. 754.

Kentucky.—*Langford v. Owsley*, 2 Bibb (Ky.) 215, 4 Am. Dec. 699.

Maine.—*Cumberland, etc., Canal Corp. v. Hutchings*, 65 Me. 140; *Russell v. Brown*, 63 Me. 203; *Williams v. Camden, etc., Water Co.*, 79 Me. 543; *Dority v. Dunning*, 78 Me. 381.

Massachusetts.—*Aldworth v. Lynn*, 153 Mass. 56, 25 Am. St. Rep. 608.

Minnesota.—*Dorman v. Ames*, 12 Minn. 451; *Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41.

Missouri.—*Paddock v. Somes*, 51 Mo. App. 320; *Benson v. Chicago, etc., R. Co.*, 78 Mo. 504; *Van Hoozier v. Hannibal, etc., R. Co.*, 70 Mo. 145; *Brown v. Chicago, etc., R. Co.*, 80 Mo. 457.

New Hampshire.—*Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177; *Cheshire Turnpike v. Stevens*, 13 N. H. 28.

New York.—*Covert v. Valentine*, (Supreme Ct.) 21 N. Y. Supp. 219, 66 Hun (N. Y.) 632; *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 98, 53 Am. Rep. 123, note; *Duryea v. New York*, 26 Hun (N. Y.) 120; *Barrick v. Schifferdecker*, 48 Hun (N. Y.) 355; *Blunt v. McCormick*, 3 Den. (N. Y.) 283; *Taylor v. Metropolitan El. R. Co.*, 50 N. Y. Super. Ct. 312; *Greene v. New York Cent., etc., R. Co.*, 65 How. Pr. (N. Y. Super. Ct.) 154; *Mahon v. New York Cent. R. Co.*, 24 N. Y. 658; *Whitmore v. Bischoff*, 5 Hun (N. Y.) 176; *Phillips v. Terry*, 3 Keyes (N. Y.) 313.

North Carolina.—*Adams v. Durham, etc., R. Co.*, 110 N. Car. 325; *Spilman v. Roanoke Nav. Co.*, 74 N. Car. 675; *Shaw v. Etheridge*, 3 Jones L. (48 N. Car.) 300; *Moore v. Love*, 3 Jones L. (48 N. Car.) 215.

Ohio.—*Thayer v. Brooks*, 17 Ohio 489, 49 Am. Dec. 474.

Pennsylvania.—*Eshelman v. Martie Tp.*, 152 Pa. St. 68, 31 W. N. C. (Pa.) 180; *Bare v. Hoffman*, 79 Pa. St. 71, 21 Am. Rep. 42; *Sanderson v. Pennsylvania Coal Co.*, 102 Pa. St. 370.

South Carolina.—*Duncan v. Markley, Harp. L. (S. Car.)* 276.

Tennessee.—*Nashville v. Comar*, 88 Tenn. 415.

West Virginia.—*Rogers v. Coal River Boom, etc., Co.*, 39 W. Va. 272; *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121.

Wisconsin.—*Cobb v. Smith*, 38 Wis. 21; *Carl v. Sheboygan, etc., R. Co.*, 46 Wis. 625; *Stadler v. Grieben*, 61 Wis. 500; *Winchester v. Stevens Point*, 58 Wis. 350.

See also the title NUISANCES.

Damages for Obstructing Lights.—The case of *Blunt v. McCormick*, 3 Den. (N. Y.) 283, was an action for obstructing lights. In this case it was held that damages were recoverable only up to the commencement of the suit, but that had the action been upon a covenant not to obstruct the light, the rule would be otherwise, for the covenant being a single cause of action, a recovery on it would operate as a bar to any further action.

Evidence of Prospective Damages Incompetent.—In the case of *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121, it was held that in an action for turning surface water on the plaintiff's lands, evidence of prospective damages was incompetent.

Evidence of Damages Accruing After Institution of Suit Admissible for What Purpose.—In *Polly*

maintainable.¹ The reason of this distinction is that the law will not presume the continuance of the latter class of wrongs, but rather, as they are of a nature temporary and remediable, will suppose their discontinuance and abatement after a recovery in damages therefor.² And if, in such cases, all damages were recoverable in a single action, and successive suits could not be maintained, a verdict and judgment in the first action would operate as a virtual purchase of the right by the defendant to do that on account of which the action for damages was brought, and, in a sense, legalize the defendant's wrong.³

v. McCall, 1 Ala. Sel. Cas. 246, which was an action to recover damages for causing the overflow of land, it was held that evidence of injuries occurring from the overflow after the institution of the suit might be admitted for the purpose of explaining more clearly to the jury the consequences of similar overflows before the institution of the suit.

In North Carolina, in actions for damages for a trespass resulting in a nuisance, damages are recovered up to the time of the trial of the action. *Ridley v. Seaboard, etc.*, R. Co., 118 N. Car. 996.

1. Successive Actions for Subsequent Damages — *England*. — *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. Div. 125; *Battishill v. Reed*, 18 C. B. 696, 86 E. C. L. 696, 25 L. J. C. P. 290.

Georgia. — *Savannah, etc., Canal Co. v. Bourquin*, 51 Ga. 378.

Illinois. — *McConnell v. Kibbe*, 33 Ill. 175.

Iowa. — *Willits v. Chicago, etc., R. Co.*, 88 Iowa 281.

Maine. — *Russell v. Brown*, 63 Me. 203; *Cumberland, etc., Canal Corp. v. Hutchings*, 65 Me. 140; *Rockland Water Co. v. Tillson*, 69 Me. 255; *Esty v. Baker*, 48 Me. 495.

Minnesota. — *Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41.

New Jersey. — *Freeman v. Sayre*, 48 N. J. L. 37.

New York. — *Plate v. New York Cent. R. Co.*, 37 N. Y. 472.

North Carolina. — See *Ridley v. Seaboard, etc., R. Co.*, 118 N. Car. 996.

Pennsylvania. — *Bare v. Hoffman*, 79 Pa. St. 71, 21 Am. Rep. 42.

Tennessee. — *Nashville v. Comar*, 88 Tenn. 415.

Vermont. — See *Whitney v. Clarendon*, 18 Vt. 252.

West Virginia. — *Rogers v. Coal River Boom, etc., Co.*, 39 W. Va. 272.

Wisconsin. — *Cobb v. Smith*, 38 Wis. 21.

See also the title NUISANCES.

With reference to the measure of damages, whether for prospective or only for past injuries, in the case of a railroad crossing a street and raising the grade in front of the plaintiff's land, *Earl, J.*, delivering the opinion of the court in *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 98, after expressing the conclusion that the plaintiff on the facts of the case was entitled to a recovery, said: "The question, however, still remains, *what* damages? All her damages upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? We have here for consideration an important principle of law, which has to be frequently applied and which ought to be well known and thoroughly settled.

There never has been in this state, before this case, the least doubt expressed in any judicial decision, so far as I can discover, that the plaintiff in such a case is entitled to recover damages only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts; and it is the prevailing doctrine elsewhere. In *Hambleton v. Veere*, 2 Saund. 170, the learned annotator, in his note, says: 'So in trespass and in tort, new actions may be brought as often as new injuries and wrongs are repeated, and therefore damages shall be assessed only up to the time of the wrong complained of.' In *Rosewell v. Prior*, 2 Salk. 459, the plaintiff being seized of an ancient house and lights, defendant erected a building whereby plaintiff's lights were estopped. There was a former recovery for the erection, and the second action was for the continuance of the erection, and it was held that the former recovery was not a bar."

2. Continuance of Temporary Injuries Not Presumed. — *Adams v. Hastings, etc., R. Co.*, 13 Minn. 260; *Cheshire Turnpike v. Stevens*, 13 N. H. 28; *Silsby Mfg. Co. v. State*, 104 N. Y. 562; *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 98; *Adams v. Durham, etc., R. Co.*, 110 N. Car. 325; *Nashville v. Comar*, 88 Tenn. 415.

Presumption of Termination of Trespass. — In the case of *Bizer v. Ottumwa Hydraulic Power Co.*, 70 Iowa 145, the court said: "Where an injury is permanent it is such as is spoken of in the books as original, that is, as accruing wholly when the wrongful acts were done; and is distinguished from an injury which is to be regarded as continuing, that is, an injury that could and should be terminated, and is to be compensated strictly with reference to the past and upon the theory that it would be terminated."

Earl, J., delivering the opinion of the court in *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 98, said: "The law will not proceed upon the assumption that a nuisance or illegal conduct will continue forever."

3. Full Damages for Temporary Injury Would Legalize Wrong. — *Walton, J.*, in *Cumberland, etc., Canal Corp. v. Hitchings*, 65 Me. 140; *Nashville v. Comar*, 88 Tenn. 415. See also *Holmes v. Wilson*, 10 Ad. & El. 503, 37 E. C. L. 161; *Savannah, etc., Canal Co. v. Bourquin*, 51 Ga. 379; *Blesch v. Chicago, etc., R. Co.*, 43 Wis. 183.

In *Thompson v. Morris Canal, etc., Co.*, 17 N. J. L. 480, it was held that the title to lands does not pass by a verdict for the plaintiff in an action of trespass, that it remains in the plaintiff, and that therefore a verdict for dam-

What Injuries Are Permanent. — It is not always easy to determine what injuries to or trespasses upon real estate are permanent in the sense of permitting a recovery of prospective damages. The right to recover prospective as well as past damages has been held to depend upon the answer to the question whether the whole injury resulted from the original tortious act or from the wrongful continuance of the state of facts produced by those acts.¹ And although the consequences of the act done are in the nature of a nuisance, for which, in general, successive actions may be maintained, yet if necessarily injurious and permanent, the party injured may at once recover for the whole injury.² Again, it has been declared that if the injury is remediable, by the expenditure of either labor or money, it will not be regarded as permanent.³ And if it is uncertain whether further injuries will result, a recovery to the date of the institution of the suit only will be permitted.⁴ In other cases the question seems to have turned upon whether or not the act for which damages were claimed was legal in itself, and only illegal in its manner of commission, or whether it was unlawful *ab initio*; prospective damages or damages for permanent injuries being recoverable in the first but not in the latter instance.⁵

Election of Parties as to Measure of Recovery. — Notwithstanding the general rule above adverted to that a party must, if the nature of the case admits, recover all his damages in one action, it has been held that where a case presents two aspects, one of constant annoyance or nuisance and the other of permanent depreciation in the value of the property by reason thereof, the plaintiff, at his election, may in a sense waive the tort, and sue for the value of the land or the permanent damage thereto, or treat the case as a continuing nuisance and sue successively for the damages as they accrue.⁶ And it has also been

ages to the full value of the land is manifestly wrong.

In *Russell v. Brown*, 63 Me. 203, the action was trespass *quare clausum* for continuing upon the plaintiff's land the wall of a building nine inches wide and one hundred and six feet long. The defendant pleaded in bar a former judgment recovered for building the wall, and satisfaction, and it was held that the mere continuance of a structure tortiously erected upon another's land, even after recovery and satisfaction of a judgment for its wrongful erection, is a trespass for which another action of trespass *quare clausum* will lie, and that a recovery with satisfaction for erecting a structure does not operate as a purchase of the right to continue such erection.

1. Tests as to Permanence: Does Whole Injury Result from Original Wrong? — *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177; *Ridley v. Seaboard, etc., R. Co.*, 118 N. Car. 996.

2. *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177.

3. Another Test: Is Injury Remediable by Labor or Money? — *Nashville v. Comar*, 88 Tenn. 415.

4. *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177. And see *Conlon v. McGraw*, 66 Mich. 194; *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 98.

5. Was Act Unlawful Ab Initio? — A distinction has been made in actions for damages for the mere doing of an authorized act tortiously and the doing of an unauthorized act. Thus it has been held that prospective damages or damages for permanent injury may be recovered against a municipal corporation which, though having the right to change the grade of streets, has exercised this right in an improper manner. But where a railroad corpora-

tion, in crossing a street, had wrongfully raised the grade in front of the plaintiff's land, it was held that only damages sustained up to the institution of the action were recoverable. *Lafayette Plankroad Co. v. New Albany, etc., R. Co.*, 13 Ind. 90, 74 Am. Dec. 246; *Montmorency Gravel Road Co. v. Stockton*, 43 Ind. 328; *Anderson, etc., R. Co. v. Kernode*, 54 Ind. 314; *North Vernon v. Voegler*, 103 Ind. 314; *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 98; *Ridley v. Seaboard, etc., R. Co.*, 118 N. Car. 996. Compare *Harrington v. St. Paul, etc., R. Co.*, 17 Minn. 215.

Waiver of Right to Damages for Permanent Injuries. — In *White v. Northwestern North Carolina R. Co.*, 113 N. Car. 610, 37 Am. St. Rep. 639, it was held that where a railroad company had gone upon a public street with its track without exercising its right of eminent domain, according to the legislative authority, the abutting owner might elect to waive the want of authority to condemn, and demand damages present and prospective, or to ask compensation only up to the time of the trial.

6. Election of Plaintiff as to Measure of Recovery. — In *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 241, a distinction was made between cases where a nuisance is alleged as the cause of action and where damages are sought to be recovered for diminution in the value of the land by reason of the nuisance. In that case the injury complained of by the owner of the lot grew out of the erecting and maintaining of cattle pens near his premises. The court held that he might elect to bring an action solely for the nuisance of rendering the air unwholesome, and in that event a similar recovery might be had in a suit brought to any succeeding term while the nuisance should be

declared that where the damages have resulted merely from the improper performance of a legal right, the defendant has also the right in an action against him to insist that the damages be assessed once for all.¹

Torts to the Person. — As has already been seen in connection with a discussion of the measure of damages in torts to the person, there may be a recovery of prospective as well as present and past damages therein.² Applying in connection with this principle the rule already stated, that where the law permits a recovery of full damages, past and future, an injured party is limited to one action therefor, we have the rule in the case of torts to the person, viz., successive actions cannot be maintained though damages be actually suffered subsequent to a former recovery.³ As the action, it is said, is for a single

kept up. But it was also held that where the plaintiff declared for the depreciation of his land, as well as for the annoyance of the nuisance to him while occupying the premises, permanent damages would be allowed, and the judgment would operate as a bar to any subsequent suit for injury due to the erection of the pens. See also *White v. Northwestern North Carolina R. Co.*, 113 N. Car. 610, 37 Am. St. Rep. 639; *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894. And see *Pennybecker v. McDougal*, 48 Cal. 160.

In the case of *Ridley v. Seaboard, etc., R. Co.*, 118 N. Car. 996, which was an action for damages against a railroad company for the negligent construction of its embankments, in which the question of present and prospective damages was involved, Avery, J., delivering the opinion of the court, adduced the following rules from a review of the authorities: (1) A railroad company that has constructed its road under lawful authority creates neither an abatable public nuisance nor a continuing private nuisance, by failing to leave sufficient space between embankments or by means of culverts for the passing of water in running streams in case of any rise in the streams that might reasonably be expected; and the injury due to that cause may be compensated for by the assessment of present and prospective damages in a single action. (2) It is the legal right of either plaintiff or defendant to elect to have permanent damages assessed in such an action upon demand made in the pleadings, and when either makes the demand the judgment may be pleaded in bar of any subsequent action. The defendant is required to set up this or any other equity upon which it relies, as well as to prove the averment on the trial. But where the plaintiff is allowed, without objection, to have such damage apportioned, the judgment is not a bar, and either party to a subsequent suit involving the same question may demand that both present and prospective damages be assessed; but upon proof of a previous partial assessment, the jury may consider that fact in diminution of the permanent damage.

1. Election of Defendant as to Measure of Recovery. — *Ridley v. Seaboard, etc., R. Co.*, 118 N. Car. 996.

2. Torts to the Person — Prospective Damages Recoverable — *England*. — *Hodsoll v. Stallebrass*, 11 Ad. & El. 301, 39 E. C. L. 94.

Canada. — *Fox v. Saint John*, 23 New Bruns. 244.

Alabama. — *Barbour County v. Horn*, 48 Ala. 566.

California. — *Malone v. Hawley*, 46 Cal. 409.
Delaware. — *Wallace v. Wilmington, etc., R. Co.*, 8 Houst. (Del.) 529.

Georgia. — *Atlanta, etc., R. Co. v. Johnson*, 66 Ga. 259.

Illinois. — *Chicago v. Jones*, 66 Ill. 349; *Chicago v. Elzeman*, 71 Ill. 131; *Howell v. Goodrich*, 69 Ill. 556. And see *Chicago City R. Co. v. Yancey*, 33 Ill. App. 94.

Indiana. — *Pittsburgh, etc., R. Co. v. Sponier*, 85 Ind. 165; *Indiana Car Co. v. Parker*, 100 Ind. 181.

Iowa. — *Russ v. The Steamboat War Eagle*, 14 Iowa 363.

Kansas. — *Townsend v. Paola*, 41 Kan. 591.

Kentucky. — *Alexander v. Humber*, 86 Ky. 565.

Massachusetts. — *Hatch v. Fuller*, 131 Mass. 574.

Minnesota. — *Chamberlain v. Porter*, 9 Minn. 260.

New Hampshire. — *Hopkins v. Atlantic, etc., R. Co.*, 36 N. H. 9, 72 Am. Dec. 287.

New York. — *Sheehan v. Edgar*, 58 N. Y. 631; *Caldwell v. Murphy*, 11 N. Y. 416; *Curtis v. Rochester, etc., R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258; *Ganiard v. Rochester City, etc., R. Co.*, 50 Hun (N. Y.) 22; *Crank v. Forty-second St., etc., R. Co.*, 53 Hun (N. Y.) 425; *Plate v. New York Cent. R. Co.*, 37 N. Y. 472; *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95; *Curtis v. Rochester, etc., R. Co.*, 20 Barb. (N. Y.) 282; *Filer v. New York Cent. R. Co.*, 49 N. Y. 42.

North Carolina. — *Wallace v. Western North Carolina R. Co.*, 104 N. Car. 442.

Pennsylvania. — *McLaughlin v. Corry*, 77 Pa. St. 109, 18 Am. Rep. 432.

Vermont. — *Fulsome v. Concord*, 46 Vt. 135; *Whitney v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150; *Poland, J., in Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140.

Wisconsin. — *Birchard v. Booth*, 4 Wis. 67.

See also *supra*, this title, *Measure of Damages and Elements of Recovery*.

Prospective Damages Notwithstanding Certain Contingencies. — In an action for personal injuries, the general rule is to allow a recovery for such prospective damages as the jury are satisfied the party will sustain, notwithstanding the uncertainty of the duration of his life and other contingencies which may probably affect the amount. *Grover, J., in Schell v. Plumb*, 55 N. Y. 592.

3. Successive Actions Not Maintainable for Torts to the Person — *England*. — *Fetter v. Beal*, 1 Ld. Raym. 339.

United States. — *Fort v. Union Pac. R. Co.*, 2 Dill. (U. S.) 259.

injury, the party cannot sue from time to time as damages ensue;¹ or, expressed differently, personal injuries from a single wrongful act are regarded as an entirety, and a recovery for all damages must be had in one action.²

VII. MITIGATION OF DAMAGES — 1. In General. — The Principles Controlling the Mitigation of Damages, as the term "mitigation" is broadly understood and employed, are in general precisely the same as those affecting the allowance of damages in the first instance. In other words, the rules of law are the same, whether the plaintiff is claiming recovery for damages alleged to have been caused by the defendant's wrongful act or whether the defendant is seeking to mitigate or reduce the damages by showing that in part they resulted from some act or omission of the plaintiff, or from some other cause for which the former is not responsible.³

Natural and Proximate Connection. — Thus, in order that a circumstance should be considered in mitigation of the damages resulting from the defendant's act, it must, in general, have some natural and proximate connection with such act.⁴

Nor Will Mere Remote Possibilities, or estimates based upon speculation or conjecture, be allowed to go in mitigation of damages to any greater extent than they will afford a ground of recovery for an original wrong.⁵

Illinois. — *Howell v. Goodrich*, 69 Ill. 556.

Indiana. — *Ohio, etc., R. Co. v. Cosby*, 107 Ind. 32.

Iowa. — *Stafford v. Oskaloosa*, 64 Iowa 251; *Knapp v. Sioux City, etc., R. Co.*, 71 Iowa 41.

Missouri. — *Squires v. Chillicothe*, 89 Mo. 226.

New Jersey. — *Klein v. Jewett*, 26 N. J. Eq. 474.

New York. — *Aaron v. Second Ave. R. Co.*, 2 Daly (N. Y.) 127; *Curtiss v. Rochester, etc., R. Co.*, 20 Barb. (N. Y.) 282; *Filer v. New York Cent. R. Co.*, 49 N. Y. 42.

Pennsylvania. — *McLaughlin v. Corry*, 77 Pa. St. 109, 18 Am. Rep. 432.

Texas. — *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443.

Vermont. — *Fulsome v. Concord*, 46 Vt. 135; *Whitney v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150.

Wisconsin. — *Birchard v. Booth*, 4 Wis. 67.

In *North Vernon v. Voegler*, 103 Ind. 314, the court said: "In *Hodsoll v. Stallebrass*, 11 Ad. & El. 301, 39 E. C. L. 94, it was held that both injury and damage must concur to give a cause of action; that the damages were not the sole cause of action; and the jury were directed to assess both present and prospective damages, because a second action could not be brought for damages resulting from the same injury. Upon this ancient doctrine rest the cases which hold that where personal injuries are received from the negligent act of a carrier of passengers, or are caused by the negligence of a municipal corporation, all the damages, present and prospective, must be assessed in one action, because a second action cannot be brought. *Elkhart v. Ritter*, 66 Ind. 136; *Weisenberg v. Appleton*, 26 Wis. 56, 7 Am. Rep. 39; *Whitney v. Clarendon*, 18 Vt. 252, 46 Am. Dec. 150."

The case oftenest cited in support of the proposition stated in the text is *Fetter v. Beale*, 1 Salk. 11. The plaintiff in that case had recovered in a previous action for an assault and battery, which had caused a fracture of his skull. Upon another piece of his skull coming out he brought a new action. Lord Holt, in

holding that the former action was a bar to any subsequent recovery, said that "in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the trial."

1. *Filer v. New York Cent. R. Co.*, 49 N. Y.

42.

2. *San Antonio St. R. Co. v. Muth*, 7 Tex. Civ. App. 443.

3. **Mitigation of Damages.** — *Ransone v. Christian*, 56 Ga. 351; *O'Conner v. New York, etc., Land Imp. Co.*, 8 Misc. Rep. (N. Y. C. Pl.) 243; *Bills v. New York Cent. R. Co.*, 84 N. Y. 5; *Francis v. Schoellkopf*, 53 N. Y. 152; *Gulf, etc., R. Co. v. Holliday*, 65 Tex. 512; *Piper v. Kingsbury*, 48 Vt. 480. See also *Wilson v. Hicks*, 26 L. J. Exch. 242.

Rights of Parties Fixed at Time of Commencement of Action. — Evidence that after the commencement of the action for damages for obstructing the street in front of the plaintiff's property he sold a portion of his property to others is not admissible in mitigation of damages. *Van Brunt v. Ahearn*, 13 Hun (N. Y.) 388. And see *Bartlett v. Holmes*, 13 C. B. 630, 76 E. C. L. 630.

Evidence in Mitigation of Damages Must Be Confined to the Issues Involved. — In the case of *Union Pac. R. Co. v. Reese*, 56 Fed. Rep. 288, which was an action for damages for personal injuries, it was held that evidence that the plaintiff was addicted to excessive drinking was not admissible where there was no issue as to the plaintiff's capacity to earn a livelihood prior to the accident.

New Trial for Newly Discovered Evidence in Mitigation of Damages. — In general, a new trial will not be granted for newly discovered evidence which would merely tend to mitigate the damages. *Gulf, etc., R. Co. v. Brown*, (Tex. Civ. App. 1897) 40 S. W. Rep. 608.

4. *Wolf v. Studebaker*, 65 Pa. St. 459. See also *Child v. Homer*, 13 Pick. (Mass.) 503; *Bliss v. Franklin*, 13 Allen (Mass.) 244.

5. *Ransone v. Christian*, 56 Ga. 351; *Marcy v. Fries*, 18 Kan. 353; *O'Connor v. New York, etc., Land Imp. Co.*, 8 Misc. Rep. (N. Y. C. Pl.) 243;

Duty of Defendant to Endeavor to Limit Extent of Damages. — As has already been seen, it is the duty of a party injured by the tortious act or breach of contract of another to make reasonable efforts to limit the damages suffered, and there can be no recovery for such damages as might have been so prevented.¹ This is but another way of saying that a defendant may mitigate or reduce the recovery against him to whatever extent he can show that, by reasonable efforts on the part of the plaintiff, the damages might have been avoided.² And, of course, where an injured party has succeeded in reducing the damages suffered, or which would otherwise have been suffered, his claim against the defendant must be reduced accordingly.³

Degree of Care Required. — But a plaintiff, it has been held, is not required to exercise greater care in mitigating the damages after injury suffered than in the first instance to avoid it.⁴

Burden of Proof. — The burden of proving circumstances in mitigation of damages is upon the party guilty of the tortious act or breach of contract.⁵

Amounts Received on Insurance Policies. — As a general rule, the damages to which a plaintiff is entitled for injuries to person or property cannot be reduced by amounts received upon policies of insurance as indemnity for the injuries.⁶

Francis v. Schoellkopf, 53 N. Y. 152; *Bills v. New York Cent. R. Co.*, 84 N. Y. 5; *Gulf, etc., R. Co. v. Holliday*, 65 Tex. 512; *Piper v. Kingsbury*, 48 Vt. 480.

The Damages Caused by an Injunction Against the Sale of an Option on Real Estate cannot be reduced by the mere fact that by a further speculation in real estate the defendant might have reduced his loss. *O'Connor v. New York, etc., Land Imp. Co.*, 8 Misc. Rep. (N. Y. C. Pl.) 243.

And in an Action for the Breach of a Contract of Marriage the jury cannot consider in mitigation of damages the fact that had there not been a breach of his contract by the defendant the plaintiff might have been rendered unhappy in her married life by the lack of that love and affection which a husband should feel for his wife. *Piper v. Kingsbury*, 48 Vt. 480. See the title *BREACH OF PROMISE OF MARRIAGE*, vol. 4, p. 882.

Where the Rule Obtains that Injuries to Growing Crops cannot be estimated with reference to what the crops would probably have been worth when matured, neither can the damages be reduced by showing what might have been realized if another crop had been put in the land immediately after the injury to the one which was growing. *Gulf, etc., R. Co. v. Holliday*, 65 Tex. 512.

Damages for Negligence—Evidence of What Might Have Happened in the Absence of Negligence. — In an action against a common carrier for damages for negligence, evidence merely speculative as to what might have happened even though there had been no negligence, is not admissible in mitigation of damages. *Bills v. New York Cent. R. Co.*, 84 N. Y. 5.

Nuisance—Increased Rental Value of Property. — Damages will not be reduced because it appears that the nuisance complained of resulted in the employment of great numbers of people, which increase in population led to an increased rental value of the property of the complainant. *Francis v. Schoellkopf*, 53 N. Y. 152. And see *Marcy v. Fries*, 18 Kan. 353.

1. See *supra*, this title, *Damages Which Injured Party Might Have Avoided*.

2. *Indiana*. — *Standard Oil Co. v. Bowker* 141 Ind. 12.

Maine. — *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341; *Grindle v. Eastern Express Co.*, 67 Me. 317, 24 Am. Rep. 31.

Massachusetts. — *Loker v. Damon*, 17 Pick. (Mass.) 284.

New York. — *Shannon v. Comstock*, 21 Wend. (N. Y.) 461; *Heckscher v. McCrea*, 24 Wend. (N. Y.) 309; *Clark v. Marsiglia*, 1 Den. (N. Y.) 317, 43 Am. Dec. 670; *Spencer v. Halstead*, 1 Den. (N. Y.) 606.

Vermont. — *Blodgett v. Brattleboro*, 30 Vt. 579.

And see *Georgia Pac. R. Co. v. Fullerton*, 79 Ala. 298. Compare *Heaney v. Heaney*, 2 Den. (N. Y.) 625. See also *supra*, this title, *Damages Which Injured Party Might Have Avoided*.

3. *Chandler v. Allison*, 10 Mich. 460.

4. *Vallo v. U. S. Express Co.*, 29 W. N. C. (Pa.) 423.

5. **Burden of Proof.** — *Citizens' St. R. Co. v. Hobbs*, 15 Ind. App. 610; *Boland v. Whitman*, 33 Ind. 64; *Hopkins v. Sanford*, 41 Mich. 243; *Thompson v. Wood*, 1 Hilt. (N. Y.) 93; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Costigan v. Mohawk, etc., R. Co.*, 2 Den. (N. Y.) 609, 43 Am. Dec. 758; *Medbery v. Sweet*, 3 Chand. (Wis.) 231.

6. **Effect of Moneys Received on Insurance Policy** — *England*. — *Bradburn v. Great Western R. Co.*, L. R. 10 Exch. 1; *Yates v. Whyte*, 4 Bing. N. Cas. 272, 33 E. C. L. 349.

Indiana. — *Lake Erie, etc., R. Co. v. Griffin*, 8 Ind. App. 47; *Cunningham v. Evansville, etc., R. Co.*, 102 Ind. 478, 52 Am. Rep. 683.

Iowa. — *Allen v. Barrett*, 100 Iowa 16.

Missouri. — *Dillon v. Hunt*, 105 Mo. 154, 24 Am. St. Rep. 374.

New Jersey. — *Weber v. Morris, etc., R. Co.*, 36 N. J. L. 213.

New York. — *Althorf v. Wolfe*, 22 N. Y. 355; *Briggs v. New York Cent., etc., R. Co.*, 72 N. Y. 26.

Pennsylvania. — *Lindsay v. Bridgewater Gas Co.*, 14 Pa. Co. Ct. Rep. 181.

Texas. — *Missouri, etc., R. Co. v. Raines*, (Tex. Civ. App. 1897) 40 S. W. Rep. 635.

Vermont. — *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304.

Virginia. — *Baltimore, etc., R. Co. v. Wight-*

But in an action on the purchase-money notes by the vendor of a barge, who, as part security for the price, had taken out policies of insurance thereon, but upon injury to the barge had turned them over to the vendee for collection, it was held that the latter could not recoup damages for breach of warranty as to quality, without regard to the amount received on the policies of insurance.¹

2. Actions for Breach of Contract. — In actions for the breach of contract, evidence that a certain part of the damage was the consequence of the plaintiff's own acts,² or any evidence to show that in point of fact all of the damage claimed was not suffered by the plaintiff, is admissible to reduce the amount of recovery.³ This last proposition is, indeed, a truism, applicable to the entire subject of damages, but in some cases such evidence has been referred to as going in mitigation of damages merely. Thus it has been held

man, 29 Gratt. (Va.) 431, 26 Am. Rep. 384. And see *Matthews v. Warner*, 29 Gratt. (Va.) 570, 26 Am. Rep. 396.

Evidence of Indemnity on Insurance Policies. — In the case of *Congdon v. Howe Scale Co.*, 66 Vt. 255, which was an action for personal injuries caused by the bursting of an emery wheel, the defendant, over the objection of the plaintiff, was allowed to show, upon cross-examination of the plaintiff, that he held a policy of insurance against accidents, and that he was paid under the policy for twenty-six weeks of lost time. The defendant claimed, and its evidence tended to show, that the plaintiff's injuries were slight and largely feigned. The exceptions did not show the purpose for which such evidence was received, and it was held, therefore, that if it was admissible upon any issue in the case, or by reason of any claims made by the plaintiff in his direct examination, the contrary not appearing, it would be presumed that the trial court admitted it on that issue, and that the jury were properly instructed as to its consideration. With reference to whether the evidence was admissible for any purpose, the court said: "Great latitude is allowed in conducting a cross-examination. Especially is this true when a party claiming damages on account of a personal injury takes the stand for the purpose of proving the extent of such injuries. For the purpose of testing the truthfulness of a witness it is proper to show, upon cross-examination, his interest, motive, inclination, and prejudice. In view of the respective claims of the parties, and the great latitude allowed on the cross-examination of a party or witness, we are not prepared to say that this was not proper cross-examination."

1. *Eureka Fertilizer Co. v. Baltimore Copper, etc., Co.*, 78 Md. 179.

2. *A. J. Anderson Electric Co. v. Cleburne Water, etc., Co.*, (Tex. Civ. App. 1894) 27 S. W. Rep. 504; *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618.

Breach by Lessor of Covenant to Repair. — The case of *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618, was an action for damages against a lessor for breach of a covenant to repair a mill leased to the plaintiff. In this case it was held that if the necessity for repairs was produced by the carelessness or unskilfulness of the lessee, this might be considered in mitigation of damages for breach of the covenant by the lessor.

3. See *Lincoln v. Bassett*, 23 Pick. (Mass.) 154; *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332; *Louisville, etc., Canal Co. v. Rowan*, 4 Dana (Ky.) 606.

Illustrations. — Thus, in an action for damages for the breach of a charter-party by the person engaging the vessel, evidence of freight earned in the carrying of another cargo during the period for which the vessel had been chartered is admissible in mitigation. *Watts v. Camors*, 115 U. S. 353; *Dalbeattie Steamship Co. v. Card*, 59 Fed. Rep. 159. See also *Jebsen v. East, etc., India Dock Co.*, L. R. 10 C. P. 300. Likewise, where the defendant was sued for the breach of a parol lease of land, evidence that the plaintiff, after making the lease to the defendant, leased a portion of the premises to another and received rent from him is admissible. *Ewing v. Codding*, 5 Blackf. (Ind.) 433. It has also been held that where a plaintiff who had purchased certain property to enable him to perform a contract for the defendant, when prevented from performance by the acts of the defendant, employed part of the property purchased in his own (the plaintiff's) business, the defendant was entitled to a mitigation of the amount of recovery by the value of the use of such property as was used by the plaintiff as stated. *Baker Transfer Co. v. Merchants' Refrigerating, etc., Mfg. Co.*, 12 N. Y. App. Div. 260.

The Damages for Breach of a Contract to Receive and Transport Grain are not lessened by the plaintiffs' settlement with their vendors for sums less than the purchase price of the property. The legal liability of the plaintiffs under their contract of purchase fixes defendant's liability, which cannot be varied by the manner of the plaintiffs' discharge of their obligations. *Cobb v. Illinois Cent. R. Co.*, 38 Iowa 631.

Destruction of Property by Railroad — Deduction of Factor's Commission. — Where a carrier loses property consigned to a factor for sale, it has been held that the amount of the factor's commissions cannot be deducted from damages for the value of the property lost. *Kyle v. Laurens R. Co.*, 10 Rich. L. (S. Car.) 382, 70 Am. Dec. 231.

Evidence of the Efforts of the Defendant to Perform the Contract is not in general admissible in mitigation of damages in an action for damages for the breach. *Dana v. Fiedler*, 1 E. D. Smith (N. Y.) 463.

that in an action for failure to make certain excavations according to contract, evidence that the work, if done, would not have been of value to the plaintiff was admissible in mitigation.¹ In actions for breach of contract the plaintiff cannot, as a general rule, be required to accept, in mitigation of damages, the property for the nondelivery of which the suit has been brought, though tendered to him in open court.²

3. Actions in Tort — Torts to Real Property. — It has been said that if incidental benefits as well as damages result from a trespass upon the lands of another, the damages should be mitigated or reduced to the extent of the benefits received.³ In order, however, that the amount of recovery may be reduced thereby, such benefits should be reasonably definite and capable of ascertainment.⁴

Torts to Personal Property. — Where the owner of personal property has been tortiously deprived of it, he is not, it has been held, bound to accept its return or restoration if proposed, but may stand upon his legal rights.⁵ But the rule is general that if the owner does so accept restitution of the property, or if it is legally applied to his use, such circumstance will go in mitigation of the damages against the wrongdoer, to the extent of the value of the goods returned.⁶ And where the property had not been carried away, the tort consisting merely in a refusal to permit the owner of the property to remove it on demand, it has been held that a subsequent notice to the plaintiff by the defendant that he had relinquished all claim to the property should be considered in mitigation of damages.⁷ In actions for damages for the value of property lost or converted, evidence that the real value of the property is less than the apparent value is admissible.⁸

Torts to the Person. — It is the duty of a person injured to procure medical attention if the nature of the injury is such as reasonably to require it;⁹ and

1. *Louisville, etc., Canal Co. v. Rowan*, 4 Dana (Ky.) 606.

2. *Colby v. Reed*, 99 U. S. 560.

3. **Torts to Realty** — *United States*. — *Gill v. Patten*, 1 Cranch (C. C.) 465.

California. — *Hicks v. Drew*, 117 Cal. 305.

Connecticut. — *Nicholson v. New York, etc., R. Co.*, 22 Conn. 74, 56 Am. Dec. 390; *Nichols v. Bridgeport*, 23 Conn. 201, 60 Am. Dec. 636; *Trinity College v. Hartford*, 32 Conn. 478.

Illinois. — *Compare Chicago South Branch Dock Co. v. Dunlap*, 32 Ill. 207.

Massachusetts. — *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171.

North Carolina. — *Compare Kimel v. Kimel*, 4 Jones L. (49 N. Car.) 121.

Ohio. — *Symonds v. Cincinnati*, 14 Ohio 147, 45 Am. Dec. 529.

Washington. — *Koch v. Sackman-Phillips Invest. Co.*, 9 Wash. 405.

4. See *Marcy v. Fries*, 18 Kan. 353; *Francis v. Schoellkopf*, 53 N. Y. 152.

Overflow Caused by Dam — Benefits from Ditch Dug by Owner of Dam. — Evidence of the benefit resulting to a meadow below a milldam by a ditch dug at the time of the construction of the dam, by the owner of the dam, through his own land below the meadow, is not admissible in mitigation of damages in an action for the subsequent flowing caused by the dam. *Gile v. Stevens*, 13 Gray (Mass.) 146. And see *Kimel v. Kimel*, 4 Jones L. (49 N. Car.) 121.

5. **Damages for Wrongful Levy upon Goods — Offer to Return.** — The case of *Kelly v. McDonald*, 39 Ark. 387, was an action for damages against a constable for trespass for wrongfully levying upon and carrying away

the goods of the plaintiff. It appeared that shortly after the levy and asportation the constable offered to return the goods uninjured, which offer was, however, rejected by the plaintiff. The court said in this case that "where a trespass has been committed and goods carried away, the injured party is not obliged to accept an offer to compromise, or receive the goods upon restoration proposed, but may stand by his legal rights."

6. *Nightingale v. Scannell*, 18 Cal. 315; *Bates v. Courtwright*, 36 Ill. 518; *Tripp v. Grouner*, 60 Ill. 474; *Merrill v. How*, 24 Me. 126; *Squire v. Hallenbeck* 9 Pick. (Mass.) 551, 20 Am. Dec. 506; *Greenfield Bank v. Leavitt*, 17 Pick. (Mass.) 1, 28 Am. Dec. 268; *Delano v. Curtis*, 7 Allen (Mass.) 470. And see *Leggett v. Baker*, 13 Allen (Mass.) 470; *Dailey v. Crowley*, 5 Lans. (N. Y.) 301.

7. *Delano v. Curtis*, 7 Allen (Mass.) 470.

8. *Zeigler v. Wells*, 23 Cal. 179, 83 Am. Dec. 87; *Potter v. Merchants' Bank*, 28 N. Y. 641, 86 Am. Dec. 273. And see *Booth v. Powers*, 56 N. Y. 22.

9. **Torts to the Person.** — *Kennedy v. Busse*, 60 Ill. App. 440; *Citizens' St. R. Co. v. Hobbs*, 15 Ind. App. 610.

As to Duty of Injured Person to Submit to Surgical Operation. — In the case of *Mattis v. Philadelphia Traction Co.*, 6 Pa. Dist. Rep. 94, which was an action for damages for personal injuries, the jury were instructed in substance that if they believed that a surgical operation would bring relief to the plaintiff and that the operation was of such a character that a person of ordinary prudence and regard for herself ought to submit to it, then they should consider the plaintiff as being un-

evidence of the plaintiff's failure in this regard, whereby the injuries were aggravated, is admissible in mitigation of damages.¹

Evidence of Malice, Motive, and Intent.—Where the jury are permitted to consider the motive or intent of the defendant in assessing damages, evidence of the lack of malice, the defendant's provocation, and the intent with which the act complained of was done, is always admissible.²

DAMN. (See also CONDEMNATION, vol. 6, p. 434; and see the title DAMAGES.)—To damn or condemn is to deem, think, or judge any one to be guilty, to be criminal; to give judgment or sentence or doom of guilt; to adjudge or declare the penalty or punishment.³

DAMNOSA HEREDITAS. (See also the title SUCCESSION.)—*Damnosa hereditas* is a term of the civil law, meaning a burdensome inheritance, where the liability exceeds the assets; the term has also been applied to the property of a bankrupt, of an onerous or unprofitable character, which, if accepted by the assignee, would be a burden or a charge to the creditors. It has long been the recognized principle of bankrupt law, that the assignee is not bound to accept such property.⁴

DAMNUM. (See also DAMAGE; LOSS; and the title DAMAGES, *ante*.)—*Damnum* means loss, damage.⁵

der a duty to submit to the operation in order to secure relief from her physical injuries for which it was claimed the defendants were responsible. On error by the defendants, it was held that the instruction was quite as favorable to them as justice or a true view of the case would warrant.

1. *Waxachie v. Connor*, (Tex. Civ. App. 1896) 35 S. W. Rep. 692; *Citizens' St. R. Co. v. Hobbs*, 15 Ind. App. 610.

In an Action by a Husband for damages for personal injuries to his wife, resulting in the loss of her services and society, the admission of evidence of inharmonious marital relations, introduced by the defendant in mitigation of damages only, was held not reversible error. *Sullivan v. Lowell, etc.*, St. R. Co., 162 Mass. 536. And where the action was for criminal conversation, the fact of the husband's cruel treatment of the wife prior to the alleged seduction has been held admissible. *Palmer v. Crook*, 7 Gray (Mass.) 418.

2. **Evidence of Intent**—*Georgia*.—*Gilliam v. Love*, 30 Ga. 864.

Massachusetts.—*Avery v. Ray*, 1 Mass. 12; *Larned v. Buffinton*, 3 Mass. 546, 3 Am. Dec. 185.

Michigan.—*Farr v. Rasco*, 9 Mich. 353, 80 Am. Dec. 88; *Huson v. Dale*, 19 Mich. 17, 2 Am. Rep. 66; *Allison v. Chandler*, 11 Mich. 542; *Kreiter v. Nichols*, 28 Mich. 496; *Ganssly v. Perkins*, 30 Mich. 492; *Welch v. Ware*, 32 Mich. 77.

New York.—*Gilman v. Lowell*, 8 Wend. (N. Y.) 573, 24 Am. Dec. 96; *Bennett v. Smith*, 21 Barb. (N. Y.) 439.

South Carolina.—*Buford v. M'Luny*, 1 Nott & M. (S. Car.) 268.

And see *Reuck v. McGregor*, 32 N. J. L. 70; *White v. Wyley*, 17 Ala. 167; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Linford v. Lake*, 3 H. & N. 276; *Skull v. Glenister*, 33 L. J. C. P. 185.

3. *Blaufus v. People*, 69 N. Y. 111. See generally the titles JUDGMENT AND DECREE; SENTENCE.

4. *American F. Co. v. Garrett*, 110 U. S. 388. See generally the title INSOLVENCY AND BANKRUPTCY.

5. **Ad Damnum.**—*Ad damnum* means "to the damage." These were the emphatic words in the clause at the end of the declaration, when in Latin, in which a certain amount of damages was claimed. This is literally translated in the modern form, "to the damage of said A.," and hence the clause itself is technically termed *ad damnum*. 1 Chitty 419. See generally the cross-references given in 5 ENCYC. OF PLEADING AND PRACTICE, p. 945. A similar clause in libels in admiralty is so termed. See generally the title ADMIRALTY, 1 ENCYC. OF PLEADING AND PRACTICE, p. 253.

Ad Quod Damnum.—A writ so called from these, its emphatic words directed to the sheriff, commanding him to inquire by the oath of jurors whether grants intended to be made by the king would be to his damage or prejudice, or to that of others, and if they be, then "to what damage." The same name has been given to corresponding writs which are issued to take possession of lands under the power of eminent domain. See generally the title EMINENT DOMAIN.

DAMNUM ABSQUE INJURIA.

I. MEANING OF TERM AND SCOPE OF TREATMENT, 694.

II. ILLUSTRATIONS AND APPLICATIONS, 695.

1. *Injuries Caused by the Exercise of a Right*, 695.
2. *Acts Authorized by Statute*, 697.
3. *Injuries Resulting from Necessary or Compulsory Acts*, 698.
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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles ABUTTING OWNERS, vol. 1, p. 224; ACCIDENT, vol. 1, p. 272; ACT OF GOD, vol. 1, p. 584; ANIMALS, vol. 2, p. 341; DAMAGES, ante, p. 537; EMINENT DOMAIN; INTERFERENCE WITH CONTRACT; LABOR COMBINATIONS; LIGHT AND AIR; MUNICIPAL CORPORATIONS; NUISANCES; PRIVILEGED COMMUNICATIONS; TORTS; WATERS AND WATERCOURSES.

I. MEANING OF TERM AND SCOPE OF TREATMENT.—In law the term *damnum absque injuria* is used to designate damage which is not occasioned by anything which the law esteems an injury, and for which consequently no action can be maintained.¹

1. Meaning of Term.—Broom's Legal Maxims 195; note to *Ashby v. White*, 1 Smith L. Cas. 297. See also *North Vernon v. Voegler*, 103 Ind. 314; *Janesville v. Carpenter*, 77 Wis. 288.

The phrase may be translated, "harm which gives no cause of action" (Pollock on Torts, *130, note), or more literally "damage without legal injury;" that is, damage, loss, or harm to the plaintiff which results without a violation of any legal right of the plaintiff, or damage resulting without a breach of legal duty on the part of the defendant.

"By *injuria*," said Lord Chief Justice Willes, in *Winsmore v. Greenbank*, Willes 581, "is meant a tortious act; it need not be wilful and malicious; for though it be accidental, if it be tortious, an action will lie." In order to make this definition comprehensive, "tortious act" must be taken to include a tortious omission to do some act which the law requires. Wood's Note to 1 Addison on Torts, p. 4. Otherwise, *injuria* resulting from negligent omissions of duty are not included.

The phrase is very ancient. In the case of the schoolmasters, Y. B. 11 Hen. IV., fol. 47, pl. 21 (A. D. 1410), where it was held that if one schoolmaster sets up a new school to the damage of an old school, and thereby the scholars are lured from the old school to come to the new, no action will lie, Hankford, J., said: "*Damnum* may be *absque injuria*, as if I have a mill, and my neighbor build another mill, whereby the profit of my mill is diminished, I shall have no action against him, though it is damage to me." See Pollock on Torts, *131, where the quotation is given.

The idea contained in the phrase is expressed more explicitly in the maxim *ex damno sine injuria non oritur actio*. This has been explained as equivalent to, "damage which is not the result of a legal injury does not give a cause of action; in other words, however great the damage which has been suffered, before the party suffering it is entitled to recover he must prove a violation of a right possessed by him, or a breach of a duty owed to him." Piggott on Torts 123.

No Legal Injury unless a Right Is Infringed.—No one, legally speaking, is injured or damaged unless some right is infringed. The refusal or discontinuance of a favor gives no cause for action. *National Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83, 58 Am. Rep. 333; *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47; *Mahan v. Brown*, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461.

Injuria Sine Damno.—There is a considerable group of torts in which the mere *injuria* or wrong suffices to support an action, without either alleging or proving that the wrong has been accompanied with or has produced damage, and this latter group of torts is designated by the phrase *injuria sine damno*. Brown's Law Dict. Thus where there is what the law esteems an injury, the violation of a legal right, damage will be presumed and an action will lie. "A damage," said Lord Holt, in *Ashby v. White*, 2 Ld. Raym. 938, 1 Smith L. Cas. 264, "is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right." But though the violation of a legal right furnishes in itself a ground of action, the damages recov-

It is a maxim of the law that there is no wrong without a remedy;¹ but "wrong" as used here is not to be taken in its broad ethical sense. It means legal wrong. For, as Chancellor Kent says in his Commentaries: "Human laws are not so perfect as the dictates of conscience, and the sphere of morality is more enlarged than the limits of civil jurisdiction. There are many duties that belong to the class of imperfect obligations which are binding on conscience, but which human laws do not and cannot undertake directly to enforce."² It is to these moral and social wrongs of which the law takes no cognizance, and to damage which sometimes occurs without any wrong either moral or legal being perpetrated, that the doctrine of *damnum absque injuria* applies. The specific applications of the principle embodied in the phrase will be treated under appropriate titles in this work.³ In this article no attempt will be made to do more than supply such illustrations as will indicate the scope of the doctrine.

II. ILLUSTRATIONS AND APPLICATIONS — 1. Injuries Caused by the Exercise of a Right. — When a person while reasonably exercising a right with a cautious regard for the rights of others causes damage or loss to another, such damage, whether it be the direct result of the exercise of the right, or arise indirectly as a consequence of such exercise, is *damnum absque injuria*, and an action will not lie for it.⁴

Use of One's Own Property or Rights. — Applying this principle, it may be stated as a general proposition that every man has a right to the natural use and enjoyment of his own property, and if while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's own property may cause damage to another without any legal wrong.⁵

ered can be only nominal unless substantial loss is shown. There is, moreover, a class of cases wherein no recovery can be had unless special damages are shown, as, for example, certain cases of slander. See the title LIBEL AND SLANDER. Here the question of the violation of legal right, *injuria*, is dependent upon proof of damage.

1. No Wrong Without a Remedy. — Ashby v. White, 1 Salk. 19, 2 Ld. Raym. 953, 1 Bro. P. C. 45, 1 Smith L. Cas. 264. See the maxim *ubi jus, ibi remedium*, treated in its appropriate place.

2. The Law Does Not Enforce All Moral Duties. — 2 Kent's Com. 490.

"It is not every moral and social duty the neglect of which is the ground of an action. For there are which are called in the civil law duties of imperfect obligation, for the enforcing of which no action lies. There are many cases where the pure effusion of a good mind may induce the performance of particular duties which yet cannot be enforced by municipal laws." Lord Kenyon, C. J., in *Pasley v. Freeman*, 3 T. R. 63. See also *Ibottson v. Peat*, 3 H. & C. 644, *per* Bramwell, B.; *Lamb v. Stone*, 11 Pick. (Mass.) 527, *per* Morton, J.

3. See the cross-references at the beginning of this title, and in the subsequent notes.

4. Exercise of a Right. — 2 Roll. Abr. 565; 1 Bacon's Abr., Actions in General (B); *Burroughs v. Housatonic R. Co.*, 15 Conn. 124, 38 Am. Dec. 64; *National Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83, 58 Am. Rep. 533; *Panton v. Holland*, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369; *Rounds v. Mumford*, 2 R. I. 154; *Chatfield v. Wilson*, 28 Vt. 49. See also *Allen v. Flood*, (1898) App. 1; *Chasemore v. Rich-*

ards, 7 H. L. Cas. 349; *Bradford v. Pickles*, (1895) App. 587, (1895) 1 Ch. 145; *Perrault v. Gauthier*, 28 Can. Sup. Ct. Rep. 241, 6 Quebec L. R. Q. B. 65.

Means Essential to Exercise of Right. — "Whatever may be the injury that casually results to an individual from the act of another while pursuing the reasonable exercise of an established right, it is his misfortune. The law pronounces it *damnum absque injuria*, and the individual from whose act it proceeds is liable neither at law nor in the forum of conscience. And the principal right necessarily carries with it also all the means essential to its exercise." Johnson, J., in *The Eleanor*, 2 Wheat. (U. S.) 345.

5. Right of Dominion — England. — *Hurdman v. North Eastern R. Co.*, 3 C. P. Div. 168.

Canada. — *Saint John Young Men's Christian Assoc. v. Hutchison*, 18 New Bruns. 523.

Illinois. — *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392.

Massachusetts. — *Rand v. Boston*, 164 Mass. 354; *Carson v. Western R. Co.*, 8 Gray (Mass.) 423.

Michigan. — *Underwood v. Waldron*, 33 Mich. 232; *Barry v. Peterson*, 48 Mich. 263.

New Hampshire. — *Eaton v. Boston, etc., R. Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164.

New York. — *Hedges v. West Shore R. Co.*, 150 N. Y. 150, *reversing* 80 Hun (N. Y.) 310; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Booth v. Rome, etc., R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552, 57 Am. & Eng. R. Cas. 442; *Victory v. Baker*, 67 N. Y. 366;

Accidents Arising from the Exercise of a Right. — If a person in the prosecution of a lawful act uses proper care and caution to prevent injury, but, notwithstanding, a casualty purely accidental arises, and injury results from it, it is in the eye of the law *damnum absque injuria*, and will not support an action for damages.¹

The Applications of These Principles are as various as the uses to which property may be put. Excavations upon one's own land by which the lateral and subjacent support of adjoining land is removed;² erections by which one's neighbors are deprived to some extent of light and air;³ machines, structures, or excavations by which persons coming upon one's premises are injured,⁴ all give rise to cases calling for the application of the principle *damnum absque injuria*. So, too, injuries due to the use upon the owner's premises of natural streams or percolating surface waters,⁵ or the use of one's right to carry on his

Bohan v. Port Jervis Gas-Light Co., 122 N. Y. 18; *Gardner v. Heartt*, 2 Barb. (N. Y.) 165.

Pennsylvania. — *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445; *Evans v. Reading Chemical Fertilizing Co.*, 160 Pa. St. 209; *Pfeiffer v. Brown*, 165 Pa. St. 267, 44 Am. St. Rep. 660.

Rhode Island. — *Rounds v. Mumford*, 2 R. I. 154.

Tennessee. — *Humes v. Knoxville*, 1 Humph. (Tenn.) 403, 34 Am. Dec. 657.

Vermont. — *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49.

See also the title *SIC UTERE TUO UT ALIENUM NON LÆDAS*; and as to liability for such a use of one's own property as amounts to a nuisance, see the title *NUISANCE*.

Andrews, C. J., in delivering the opinion of the court in *Booth v. Rome*, etc., R. Co., 140 N. Y. 277, 37 Am. St. Rep. 552, 57 Am. & Eng. R. Cas. 442, said: "The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy." See also *Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545.

Illustration — Overlooking Another's Privacy. — Where a window is opened overlooking the privacy of an adjoining owner, the damage caused thereby is *damnum absque injuria*. 1 Bacon's Abr., tit. Actions in General (B); *Mahan v. Brown*, 13 Wend. (N. Y.) 261, 28 Am. Dec. 461.

So damages caused by a deterioration in the value of property adjoining a railway, by reason of the premises being overlooked by persons on the railway and railway platform, are *damnum absque injuria* and will not support an action. *Matter of Penny*, 7 El. & Bl. 660, 90 E. C. L. 660; *Reg. v. Barry*, 2 Can. Exch. Rep. 333.

1. Accident Arising from a Lawful Act. — *Davis v. Saunders*, 2 Chit. Rep. 639, 18 E. C. L. 437; *Morris v. Platt*, 32 Conn. 75, 4 Am. L. Reg. N. S. 523, 532, note; *Brown v. Kendall*, 6 Cush. (Mass.) 292; *Boland v. Missouri R. Co.*, 36 Mo. 484; *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372. See also the title *ACCIDENT*.

Illustration. — In *Brown v. Kendall*, 6 Cush. (Mass.) 292, the defendant, having interfered to part his dog and the plaintiff's, which were fighting, in raising a stick for the purpose accidentally struck the plaintiff and injured him. It was held that parting the dogs was a lawful and proper act, which the defendant might do by the use of proper and safe means, and that if the plaintiff's injury was caused by such an act, done with care and all proper precautions, the defendant was not liable.

Accidents upon Public Highways. — The rule stated in the text has very frequently been applied to accidental injuries happening upon public highways.

Lord Blackburn says, in *Fletcher v. Rylands*, L. R. 1 Exch. 286: "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger," and they cannot recover therefor "without proof of want of care or skill occasioning the accident." See also *Zumstein v. Shrumm*, 22 Ont. App. 263.

In *Vincent v. Stinehour*, 7 Vt. 62, 29 Am. Dec. 145, which was an action of trespass against the defendant for driving a horse and sulky against the plaintiff, the defendant claimed that the accident was unavoidable, under the circumstances, for that his horse became ungovernable, and the injury could not be prevented by prudence and care; and the court held that a defense. See also *Wakeman v. Robinson*, 1 Bing. 213, 8 E. C. L. 478; *Goodman v. Taylor*, 5 C. & P. 410, 24 E. C. L. 385; *Hammack v. White*, 8 Jur. N. S. 796.

A reaping machine was being driven by the defendant along the highway, the knife to the right side of the road. The plaintiff's colt, which was straying upon the road ran upon the machine, notwithstanding the defendant's efforts to keep it off, and received an injury from which it subsequently died. It was held that the plaintiff was not entitled to recover the loss. *Carr v. Black*, 3 Montreal L. R. Super. Ct. 350. See also the title *HIGHWAYS*.

2. See the titles LATERAL AND SUBJACENT SUPPORT; MINES AND MINING.

3. See the title LIGHT AND AIR.

4. See the titles NUISANCES; TRESPASS.

5. See the title WATERS AND WATERCOURSES.

trade or business,¹ may inflict loss upon another which the law will not undertake to remedy. The duty to guard against the injury to others which may arise from the escape from one's premises of dangerous agencies, either animate or inanimate, is treated in several connections in this work.²

2. Acts Authorized by Statute. — It may be stated as a general rule that if the legislature, acting within its constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the authorized way and without negligence cannot be wrongful; if damage results as a consequence of its being done, it is *damnum absque injuria*, and no action will lie for it.³

1. See the titles CONSPIRACY, vol. 6, p. 830; INTERFERENCE WITH CONTRACT; LABOR COMBINATIONS; RESTRAINT OF TRADE.

2. See the titles ANIMALS, vol. 2 p. 341; EXPLOSIVES; FIRES; NEGLIGENCE; NUISANCES; WATERS AND WATERCOURSES.

3. **Damage Arising from Acts Authorized by Statute** — *England*. — Hammersmith, etc., R. Co. v. Brand, L. R. 4 H. L. 171; Dixon v. Metropolitan Board of Works, 7 Q. B. Div. 418; Dunn v. Birmingham Canal Nav. Co., L. R. 7 Q. B. 244; Madras R. Co. v. Zemindar, L. R. 1 Ind. App. 364; Boulton v. Crowther, 2 B. & C. 703, 9 E. C. L. 227; Geddis v. Bann Reservoir, L. R. 3 App. 430. Rex v. Pease, 4 B. & Ad. 30, 24 E. C. L. 17; Hill v. Metropolitan Asylum Dist., 4 Q. B. Div. 433, affirmed in L. R. 6 App. 193; British Cast Plate Manufacturers v. Meredith, 4 T. R. 704; Cracknell v. Thetford, L. R. 4 C. P. 629; Vaughan v. Taff Vale R. Co., 5 H. & N. 679; Reg. v. Darlington, 5 B. & S. 515, 117 E. C. L. 515, affirmed in 6 B. & S. 562, 118 E. C. L. 562; Blyth v. Birmingham Waterworks Co., 25 L. J. Exch. 212; Rex v. London Dock Co., 5 Ad. & El. 163, 31 E. C. L. 311.

Canada. — Atcheson v. Rural Municipality, 9 Manitoba L. Rep. 192; Connors v. Great Western R. Co., 6 U. C. C. P. 108; Griffiths v. Welland Canal Co., 5 U. C. Q. B. O. S. 686; McDonnell v. Ontario, etc., R. Union Co., 11 U. C. Q. B. 271; Preston v. Camden, 14 Ont. App. 85; Soule v. Grand Trunk R. Co., 21 U. C. C. P. 308.

United States. — High Bridge Lumber Co. v. U. S., 69 Fed. Rep. 320; Gibson v. U. S., 166 U. S. 269.

Connecticut. — Skinner v. Hartford Bridge Co., 29 Conn. 523; New York, etc., R. Co. v. Bridgeport Traction Co., 65 Conn. 410.

Illinois. — Rigney v. Chicago, 102 Ill. 64.

Louisiana. — Irwin v. Great Southern Telephone Co., 37 La. Ann. 63.

Massachusetts. — Callender v. Marsh, 1 Pick. (Mass.) 418; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; Lincoln v. Com., 164 Mass. 368.

Michigan. — Pontiac v. Carter, 32 Mich. 164, 2 Am. L. T. N. S. 376; Larkin v. Saginaw County, 11 Mich. 88, 82 Am. Dec. 63; Detroit v. Beckman, 34 Mich. 125, 22 Am. Rep. 507; Lansing v. Toolan, 37 Mich. 152; Grand Rapids, etc., R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Buhl v. Fort Street Union Depot Co., 98 Mich. 596.

Mississippi. — Homochitto River Com'rs v. Withers, 29 Miss. 21.

Missouri. — Abbott v. Kansas City, etc., R. Co., 83 Mo. 271, 53 Am. Rep. 581.

New Jersey. — Morris, etc., R. Co. v. Newark, 10 N. J. Eq. 352; Tinsman v. Belvidere

Delaware R. Co., 26 N. J. L. 148, 69 Am. Dec. 565; Bordentown, etc., Turnpike Road v. Camden, etc., R., etc., Co., 17 N. J. L. 314.

New York. — Steele v. Western Inland Lock Nav. Co., 2 Johns. (N. Y.) 283; Lansing v. Smith, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89, affirming 8 Cow. (N. Y.) 146; Plant v. Long Island R. Co., 10 Barb. (N. Y.) 26; Briesen v. Long Island R. Co., 31 Hun (N. Y.) 112; Flinn v. New York Cent., etc., R. Co., 142 N. Y. 11, reversing 67 Hun (N. Y.) 631; Bellinger v. New York Cent. R. Co., 23 N. Y. 42; Kellinger v. Forty-Second St., etc., R. Co., 50 N. Y. 206; Benner v. Atlantic Dredging Co., 134 N. Y. 156, 30 Am. St. Rep. 649; Hudson River Telephone Co. v. Watervliet Turnpike, etc., Co., 135 N. Y. 393, 31 Am. St. Rep. 838, 56 Am. & Eng. R. Cas. 469.

Pennsylvania. — Monongahela Nav. Co. v. Coons, 6 W. & S. (Pa.) 101; Henry v. Pittsburgh, etc., Bridge Co., 8 W. & S. (Pa.) 85; Philadelphia, etc., R. Co.'s Case, 6 Whart. (Pa.) 25; Monongahela Nav. Co. v. Coon, 6 Pa. St. 379, 47 Am. Dec. 474; Paul v. Carver, 24 Pa. St. 207, 64 Am. Dec. 649; New York, etc., R. Co. v. Young, 33 Pa. St. 175; Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112, 84 Am. Dec. 527; Pennsylvania R. Co. v. Lippincott, 116 Pa. St. 472; Pennsylvania R. Co. v. Marchant, 119 Pa. St. 559; West Branch, etc., Canal Co. v. Mulliner, 68 Pa. St. 357.

Vermont. — Hatch v. Vermont Cent. R. Co., 25 Vt. 49, 28 Vt. 142.

Compare Hackstack v. Keshena Imp. Co., 66 Wis. 439; Pumpelly v. Green Bay, etc., Canal Co., 13 Wall. (U. S.) 166; Arimond v. Green Bay, etc., Canal Co., 31 Wis. 316; Eaton v. Boston, etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147; Powell v. Fall, 5 Q. B. Div. 597.

See also the titles CONSTITUTIONAL LAW, vol. 6, p. 882; NEGLIGENCE.

Mr. Justice Blackburn, in delivering the opinion in *Mersey Docks, etc. v. Gibbs*, L. R. 1 H. L. 93, 11 H. L. Cas. 686, said: "If the legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation under the provision of the statutes legalizing what would otherwise be a wrong. This, however, is the case, whether the thing is authorized for a public purpose or a private profit. No action will lie against a railway company for erecting a line of railway authorized by its acts, so long as the directors pursue the authority given

3. Injuries Resulting from Necessary or Compulsory Acts. — As a general rule, imperative necessity or compulsion will exempt a person from liability.¹ There is an implied assent on the part of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community, and that his property shall, under certain circumstances, be subjected to injury or even sacrificed for the public good. At such times the individual rights of property give way to the higher laws of impending necessity.²

4. Injuries Committed by Consent of Injured Party. — It is a general rule of the law that no one can maintain an action for a wrong where he has consented to the act which occasions his loss.³ This principle is embodied in the maxim *volenti non fit injuria*.⁴

DAMNUM FATALE. (See also the title ACT OF GOD, vol. 1, p. 584.) — *Damnum fatale* is a term of the civil law, meaning fatal damage; a loss happening from a cause beyond human control.⁵

them, any more than it would lie against the trustees of a turnpike road for making their road under their acts; though the one road is made for the profit of the shareholders in the company, and the other is not. The principle is that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature."

Acts of Public Agents or Agencies. — This principle finds especial application to the acts of public officers and governmental agencies, and to consequential damages resulting from the carrying out of public works or from the legal employment of public franchises. See the titles ABUTTING OWNERS, vol. 1, p. 224; EMINENT DOMAIN; HIGHWAYS; MUNICIPAL CORPORATIONS; NUISANCES; PUBLIC OFFICERS; RAILROADS; STREETS, etc.

1. Broom's Leg. Max. 11; Bac. Max. Reg. 5.

2. Private Rights Subservient to Public Good. — Bac. Max. Reg. 12; Grotius, De Jure Belli, bk. 3, c. 20, s. 7, § 1; Surocco v. Geary, 3 Cal. 70, 58 Am. Dec. 385.

Destruction of Property to Prevent Conflagration. — Thus it is lawful to destroy property to prevent the spreading of a conflagration, and for such destruction no action will lie. Field v. Des Moines, 39 Iowa 575, 18 Am. Rep. 46; Taylor v. Plymouth, 8 Met. (Mass.) 462; American Print Works v. Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420; Russell v. New York, 2 Den. (N. Y.) 461; Keller v. Corpus Christi, 50

Tex. 614, 32 Am. Rep. 613. See also the titles FIRES; FIRE DEPARTMENT.

Erection of Bulwarks in Time of War. — It is said that in time of war bulwarks may be built on private land and the owner of the land cannot recover for the damage caused thereby. 1 Dyer 60b; 20 Vin. Abr., tit. Trespass (B) a, 4; Case of Prerogative of King in Saltpeter, 12 Coke 12; New York v. Lord, 17 Wend. (N. Y.) 285.

3. No Liability for Injury Where Injured Party Consents. — Gould v. Oliver, 4 Bing. N. Cas. 134, 33 E. C. L. 301, per Tindal, C. J.; Horne v. Widlake, Yelv. 141; Gould v. Oliver, 2 Scott N. R. 241; Atty.-Gen. v. College of Physicians, 30 L. J. Ch. 769.

4. Broom's Legal Maxims 268.

The maxim seems not applicable in criminal cases. See the title CRIMINAL LAW, ante, p. 293.

Illustration. — A husband cannot maintain an action for criminal conversation with his wife if he consented to her adultery. Winter v. Henn, 4 C. & P. 494, 19 E. C. L. 491; Dumberley v. Gunning, 4 T. R. 651.

5. In Thickstun v. Howard, 8 Blackf. (Ind.) 536, it is said: "Under the term *damnum fatale*, the civilians included all those accidents which are summed up in the common-law expressions 'act of God,' or 'public enemies,' though perhaps it embraced some which would not now be admitted as occurring from an irresistible force."

DAMS.

BY WALTER CARRINGTON.

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CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW AND EVIDENCE* related to this subject, see the titles *ABATEMENT OF NUISANCES*, vol. 1, p. 63; *ADVERSE POSSESSION*, vol. 1, p. 787; *BOOM COMPANIES*, vol. 4, p. 797; *BOUNDARIES*, vol. 4, p. 756; *BRIDGES*, vol. 4, p. 918; *CANALS*, vol. 5, p. 111; *EASEMENTS*; *FISH AND FISHERIES*; *ICE AND ICE COMPANIES*; *LICENSE*; *LOGS AND LUMBER*; *MILLS*; *NAVIGABLE WATERS*; *NUISANCES*; *PRESCRIPTION*; *WATERS AND WATERCOURSES*.

I. DEFINITION. — The word "dam" properly means the work or structure raised to obstruct the flow of water in a river; but by well-settled usage it is often applied to designate the pond of water created by this obstruction.¹

Flash Boards Are Part of Dams. — The flash boards used at low water form part of a dam, and measure the height of the flowage.²

II. RIGHT TO ERECT AND MAINTAIN DAMS — 1. On Unnavigable Streams —
a. AT COMMON LAW — (1) *When Party Owns Both Sides of Stream.* — The owner of land on both sides of a stream, not navigable, may erect and maintain a dam, swelling the water of the stream or pond, in its natural state,³ up to the line of his neighbor next above.⁴

1. The Term Defined. — *Colwell v. May's Landing Water Power Co.*, 19 N. J. Eq. 245. See also *Natoma Water, etc.*, Co. v. Hancock, 101 Cal. 42; *Hutchinson v. Chicago, etc.*, R. Co., 37 Wis. 604; *West Branch Boom Co. v. Pennsylvania Joint Lumber, etc.*, Co., 121 Pa. St. 160.

A dam is an instrument for turning the water of a stream to the use of a mill; but it may not in fact have been used for that purpose at all, or if at all, in such a way as to change or affect the original rights of riparian owners on either hand. *Burnham v. Kempton*, 44 N. H. 78.

Structure Built to Sustain Bank Not a Dam. — A structure of plank, built on the bank of a river, in a place where the bank had been carried away by former freshets, and not erected across the channel of the river, is not a dam within the meaning of the *Michigan* statute providing punishment for wilfully, etc., injuring any dam, etc. *People v. Gaige*, 23 Mich. 93.

2. Flash Boards Part of Dams. — *Campbell v. Young*, 18 Grant's Ch. (U. C.) 97; *Lammott v. Ewers*, 106 Ind. 310, 55 Am. Rep. 746; *Dingley v. Gardiner*, 73 Me. 63; *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522. See also *Hall v. Augsburg*, 46 N. Y. 622; *Harris v. Social Mfg. Co.*, 8 R. I. 133, 5 Am. Rep. 549.

But Not When Used Occasionally for short periods, as an exception to the rule not to keep them on. *Carlisle v. Cooper*, 21 N. J. Eq. 576, *affirming* 19 N. J. Eq. 256. And see *Knapp v. Douglas Axe Co.*, 13 Allen (Mass.) 1; *Pierce v. Travers*, 97 Mass. 306.

It Is For the Jury to Determine whether flash boards are or are not a part of a dam. *Noyes v. Stillman*, 24 Conn. 15.

3. The Natural State of a Stream is that in which the stream is under the ordinary operation of the physical laws which affect it. This may be different at different seasons of the year, and yet be ordinary by the recurrence of the same condition about the same season of every year. It may ordinarily be high a por-

tion of the season, and low at another portion, and at another it may be at a medium stage; yet as these are ordinary by reason of their annual or frequent occurrence, so that a variance therefrom is an exception, they are the natural condition of the stream. *Dorman v. Ames*, 12 Minn. 451. See also *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245.

4. Erection of Dam — Right of Owner of Both Sides of Stream — England. — *Miner v. Gilmour*, 12 Moo. P. C. C. 131, 33 L. J. P. C. 98; *Nuttall v. Bracewell*, L. R. 2 Exch. 1; *Acton v. Blundell*, 12 M. & W. 324; *Orr Ewing v. Colquhoun*, L. R. 2 App. 839.

Canada. — *Dickson v. Burnham*, 14 Grant's Ch. (U. C.) 594.

United States. — *Holyoke Co. v. Lyman*, 15 Wall. (U. S.) 500.

Alabama. — *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394.

Delaware. — *Delaney v. Boston*, 2 Harr. (Del.) 489.

Illinois. — *Hill v. Ward*, 7 Ill. 285.

Massachusetts. — *Smith v. Agawam Canal Co.*, 2 Allen (Mass.) 355; *Wood v. Edes*, 2 Allen (Mass.) 578.

Michigan. — *Richards v. Peter*, 70 Mich. 286.

Minnesota. — *Dorman v. Ames*, 12 Minn. 451; *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245.

New York. — *Townsend v. McDonald*, 12 N. Y. 381, 64 Am. Dec. 508.

Pennsylvania. — *M'Calmont v. Whitaker*, 3 Rawle (Pa.) 84, 23 Am. Dec. 102; *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379, 47 Am. Dec. 474.

Dam with Waste Gates. — An owner of a mill privilege may erect a dam by which he will be able to flow back water on another's land, provided such dam has waste gates, and is so controlled and managed that no water is thrown back on such lands. *Sargent v. Stark*, 12 N. H. 332.

Dam Owner Cannot Erect Embankment on Adjoining Land Unlawfully Overflowed. — If one having the right to maintain a dam to a cer-

Mode of Determining Proper Height of Dam. — The height at which a dam ought to be allowed to stand should be determined rather by experiments than upon theoretical conclusions drawn from surveys.¹

(2) *When Party Owns But One Side of the Stream.* — The owner of but one bank of a non-navigable stream cannot without legal permission erect a dam which extends beyond the thread of the stream.²

(3) *When Party Owns an Island in the Stream.* — The owner of an island which divides a stream into two channels may erect dams extending to the middle of each channel.³

b. BY STATUTE. — For the purpose of encouraging the erection of mills, some of the states have, on grounds of public policy, made special statutory enactments, giving a riparian owner the right to erect a dam on his own land, even though in so doing he flows the land of the owner above him. In some of these permission is given to the riparian owner to erect his dam although he is the owner of the land on one side of the stream only. In all these cases the statute provides a mode of assessing and collecting damages, which generally supersedes the common-law remedy for similar injuries.⁴

Milldam Acts Constitutional. — Many cases have arisen on the constitutionality of the milldam acts, and they have usually been held to be constitutional and valid.⁵

tain height raises it to a higher level, and thereby raises the water so as to break the bank and overflow the land of a riparian proprietor, he cannot enter upon the land so overflowed and erect an embankment upon the outer margin of it, for the purpose of preventing the escape of the water. *Fessenden v. Morrison*, 19 N. H. 226.

1. **How Proper Height of Dam Should Be Determined.** — *Decorah Woolen Mill Co. v. Greer*, 58 Iowa 86; *Gibson v. Fischer*, 68 Iowa 29; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243; *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503; *Brown v. Bush*, 45 Pa. St. 61. But compare *Newland v. Hudson River Water Power, etc., Co.*, (Supreme Ct.) 42 N. Y. St. Rep. 45, 133 N. Y. 687.

2. **Erection of Dam by Owner of One Side of Stream.** — *Holyoke Co. v. Lyman*, 15 Wall. (U. S.) 500; *Illinois, etc., Canal v. Haven*, 11 Ill. 554; *Jewell v. Gardiner*, 12 Mass. 311; *Pinney v. Luce*, 44 Minn. 367; *Lindeman v. Lindsey*, 69 Pa. St. 93, 8 Am. Rep. 219; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711; *Adams v. Barney*, 25 Vt. 225.

In *England* it has been held that the owner of one bank of a stream cannot erect a dam or other building encroaching upon the alveus of the stream. *Bickett v. Morris*, L. R. 1 H. L. Sc. 47.

When Dam Joined to Opposite Shore by Consent, Materials Belong to Dam Owner. — When the owner of one side of a stream, with the consent of the opposite riparian owner, joins his dam to the opposite shore, he owns the materials of the dam, and the opposite owner, while he may so interfere with the dam as to enjoy his rights, cannot appropriate any of the materials to his individual use. *Trask v. Ford*, 39 Me. 437.

3. **Right of Owner of Island to Erect Dams.** — *Stolp v. Hoyt*, 44 Ill. 219; *West v. Fox River Paper Co.*, 82 Wis. 647.

4. **Statutes — Alabama.** — *Hendricks v. Johnson*, 6 Port. (Ala.) 472; *Rosser v. Randolph*, 7 Port. (Ala.) 238, 31 Am. Dec. 712; *Bottoms v. Brewer*, 54 Ala. 288.

Connecticut. — *McArthur v. Morgan*, 49 Conn. 347.

Indiana. — *Wright v. Pugh*, 16 Ind. 106; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236; *Test v. Larsh*, 76 Ind. 452.

Iowa. — *Lummery v. Brady*, 8 Iowa 33; *Wilson v. Hanthorn*, 72 Iowa 451.

Kansas. — *Kirkendall v. Hunt*, 4 Kan. 514.

Kentucky. — *Morgan v. Banta*, 1 Bibb (Ky.) 579; *Neale v. Cogar*, 1 A. K. Marsh. (Ky.) 589; *Trabue v. Macklin*, 4 B. Mon. (Ky.) 407; *Hamilton v. Adams*, 7 J. J. Marsh. (Ky.) 248; *Wootten v. Campbell*, 7 Dana (Ky.) 204.

Maine. — *Wooster v. Great Falls Mfg. Co.*, 39 Me. 246; *Jordan v. Woodward*, 40 Me. 317; *Snow v. Moses*, 53 Me. 546; *Hubbard v. Great Falls Mfg. Co.*, 80 Me. 39; *Hathorn v. Kelley*, 86 Me. 487.

Massachusetts. — *Eames v. New England Worsted Co.*, 11 Met. (Mass.) 570; *Wilmarth v. Knight*, 7 Gray (Mass.) 294; *Hinckley v. Nickerson*, 117 Mass. 213; *Howes v. Grush*, 131 Mass. 207; *Atkins v. Witherell*, 142 Mass. 482.

Missouri. — *Willoughby v. Shipman*, 28 Mo. 50; *Huffman v. Vaughan*, 72 Mo. 465.

Nebraska. — *Pierce Mill Co. v. Koltermann*, 26 Neb. 722. See also *Kyner v. Upstill*, 29 Neb. 768.

New Hampshire. — *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522; *Hovey v. Perkins*, 63 N. H. 516.

North Carolina. — *Goodson v. Mullen*, 92 N. Car. 207, 211. See also *Hester v. Broach*, 84 N. Car. 251.

Rhode Island. — *Dyer v. Cranston Print Works Co.*, 17 R. I. 774.

Tennessee. — *Harding v. Goodlett*, 3 Verg. (Tenn.) 41, 24 Am. Dec. 546.

Virginia. — *Hunter v. Matthews*, 1 Rob. (Va.) 494; *Whitworth v. Puckett*, 2 Gratt. (Va.) 528; *Wroe v. Harris*, 2 Wash. (Va.) 126. See also *Home v. Richards*, 4 Call (Va.) 441, 2 Am. Dec. 574.

5. **Milldam Acts Are Constitutional.** — *Connecticut.* — *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Todd v. Austin*, 34 Conn. 78.

Flooding of Mills Not Authorized. — These acts do not authorize the flooding of mills or milldams above.¹

Loss of Rights Acquired under Milldam Acts. — A right acquired under the milldam acts to maintain a dam flooding lands above may be lost by non-user, accompanied by an adverse user continued uninterruptedly for such a length of time as would, by statute, bar a possessory action for land.²

2. On Navigable Streams — *a. IN GENERAL.* — In general, a riparian owner on a navigable stream, whether navigable by nature or declared a public highway by the legislature of the state through which it flows, cannot erect a dam on such stream without the permission of the legislature.³

Statutes Regulating Construction of Dams on Navigable Streams. — The milldam acts of most of the states apply to navigable streams,⁴ some of them containing pro-

Kansas. — *Venard v. Cross*, 8 Kan. 248; *Harding v. Funk*, 8 Kan. 315.

Massachusetts. — *Boston, etc., Mill Corp. v. Newman*, 12 Pick. (Mass.) 467, 23 Am. Dec. 622; *Lowell v. Boston*, 111 Mass. 464; *Murdock v. Stickney*, 8 Cush. (Mass.) 117.

New Hampshire. — *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Amoskeag Mfg. Co. v. Head*, 56 N. H. 386; *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522; *Amoskeag Mfg. Co. v. Goodale*, 62 N. H. 66; *Hovey v. Perkins*, 63 N. H. 516.

Tennessee. — *Harding v. Goodlett*, 3 Yerg. (Tenn.) 41, 24 Am. Dec. 546.

Wisconsin. — *Newcomb v. Smith*, 1 Chand. (Wis.) 71; *Fisher v. Horicon Iron, etc., Co.*, 10 Wis. 351; *Babb v. Mackey*, 10 Wis. 371.

See the title **MILLS**.

The constitutionality of the *Alabama* act, so far as it authorizes the taking of private property in the erection of a mill and the construction of a dam, can be vindicated only on the ground that the mill is public. *Sadler v. Langham*, 34 Ala. 311; *Bottoms v. Brewer*, 54 Ala. 288.

1. Milldam Acts Do Not Authorize Flooding Mills Above. — *Miller v. Stowman*, 26 Ind. 143; *French v. Braintree Mfg. Co.*, 23 Pick. (Mass.) 216; *Bottomly v. Chism*, 102 Mass. 463; *Seeley v. Bridges*, 13 Neb. 547; *Mowry v. Sheldon*, 2 R. I. 369. See the title **MILLS**.

In *Alabama* it has been held that a person who has erected a dam as authorized by the statute is not liable for flooding another's mill, erected without statutory authority, and the erection of which was not commenced until after application made for the erection of the dam. *Hendricks v. Johnson*, 6 Port. (Ala.) 472.

Under the *Connecticut* statute, the fall in a raceway belonging to a mill above is protected, but small mills erected to defeat the benefits of the statute are not. *Occum Co. v. A. & W. Sprague Mfg. Co.*, 35 Conn. 496.

Under the *Virginia* act, permission will not be granted to build a milldam, which, if erected, would destroy a mill privilege previously granted farther up the stream. *Humes v. Shugart*, 10 Leigh (Va.) 343.

2. How Rights Acquired under Milldam Acts May Be Lost. — *Manier v. Myers*, 4 B. Mon. (Ky.) 514, 6 B. Mon. (Ky.) 132; *French v. Braintree Mfg. Co.*, 23 Pick. (Mass.) 216.

For the Measure of Damages under the milldam acts, see *infra*, this title, *Remedies — Damages*.

3. Right to Erect Dam in Navigable Waters. — *Yolo County v. Sacramento*, 36 Cal. 193; *State v. Godfrey*, 12 Me. 361; *Knox v. Chaloner*, 42 Me. 150; *Dunbar v. Vinal*, 2 Dane Abr. 695; *Renwick v. Morris*, 7 Hill (N. Y.) 575; *Com. v. Church*, 1 Pa. St. 105, 44 Am. Dec. 112; *Newbold v. Mead*, 57 Pa. St. 487; *Fulmer v. Williams*, 122 Pa. St. 191, 9 Am. St. Rep. 88; *Cox v. State*, 3 Blackf. (Ind.) 193. But see *Walker v. Board of Public Works*, 16 Ohio 540.

The same rule applies to a dam built across an arm of the sea. *Dyer v. Curtis*, 72 Me. 181.

The law of the erection of a dam in a navigable stream is that it shall not lessen its navigability. *Hall v. Lacy*, 3 Grant's Cas. (Pa.) 264.

In *New Jersey* and *Wisconsin* there are statutes prohibiting the erection of dams on navigable streams without the consent of the legislature. Revision of *New Jersey* (1877), p. 727, §§ 1 and 2; *Sanborn & Berryman's Anno. Stat. of Wis.* (1889), p. 963, § 1596.

And in the latter state it has been held that the erection and maintenance of a dam in a navigable river, without legislative sanction, is unlawful, whether it does or does not interfere with the navigation of the river. *Wisconsin River Imp. Co. v. Lyons*, 30 Wis. 61.

But as to the obstruction of logs in a floatable stream, see *A. C. Conn Co. v. Little Suamico Lumber Mfg. Co.*, 74 Wis. 652.

This permission may be granted by either general or special laws. *Cranshaw v. Slate River Co.*, 6 Rand. (Va.) 245.

4. The Exceptions to This Rule Are the Following: *Alabama*, Civil Code (1886), § 3184; *Arkansas*, *Sandels & Hill's Digest* (1894), § 2790; *Maine*, Rev. Stat. (1883), p. 777, § 1; *Massachusetts*, Gen. Stat. (1882), p. 1087; *Minnesota*, Gen. Stat. (1894), § 2353; *New Hampshire*, Pub. Stat. (1891), pp. 393, 394; *New Jersey*, Laws (1890), p. 324; *South Dakota*, Comp. Laws of Dakota (1887), § 5577; *Vermont*, Rev. Laws (1880), § 3215; *Wisconsin*, *Sanborn & Berryman's Annot. Stat.* (1889), p. 1880, § 3374. See *Bryant v. Glidden*, 36 Me. 36; *Strout v. Millbridge Co.*, 45 Me. 76; *Cobb v. Smith*, 16 Wis. 661, *overruling Newell v. Smith*, 15 Wis. 101; *Wood v. Hustis*, 17 Wis. 416; *Crosby v. Smith*, 19 Wis. 449.

A milldam at the very threshold of an unnavigable outlet of a navigable lake, damming up the waters of the lake, is within the provisions of the *Wisconsin* milldam act. *Clute v. Briggs*, 22 Wis. 607.

visions especially applicable to dams erected on such streams; and in several of the states there are statutes sanctioning and regulating the erection of dams for the purpose of improving navigation.¹

b. POWER OF STATE TO AUTHORIZE. — In the absence of legislation by Congress bearing on the case, a state may authorize the erection of a dam across a navigable river which is wholly within her limits, either for the improvement of the navigation of the river or for some other public purpose.²

Ordinance of 1787. — The ordinance of 1787 provided that the navigable waters leading into the Mississippi and the St. Lawrence rivers should be common highways, forever free. And a similar clause as to their navigable rivers is found in the acts providing for the admission into the Union of California, Wisconsin, and Louisiana. Such a provision does not prevent a state from

1. **The Statutes of Several States** provide that dams shall be so constructed as not to obstruct navigation. *Kentucky*, Stat. (1894), §§ 2713, 2714; *Mississippi*, Code (1892), §§ 2896, 2898; *Missouri*, Rev. Stat., p. 1635, § 7014; *Tennessee*, Code (1884), § 1441; *Virginia*, Code (1887), § 1353; *West Virginia*, Code (1891), pp. 355, 357.

In *Massachusetts* only persons who are authorized by the general court, and who have obtained a license from the board of harbor and land commissioners, and have otherwise complied with the provisions of the statute, may build a dam across tide-waters, or the waters of any great pond, and every such dam built, except as authorized by law, is a public nuisance. *Mass. Pub. Stat.* (1882), pp. 194-197; *Supp. to the Pub. Stat. of Mass.* (1882-1888), pp. 723, 724.

In *Michigan* the board of supervisors of the several counties may permit or prohibit the construction of dams over navigable streams in their respective counties. *Constitution*, art. 18, § 4; *Howell's Annot. Stat.* (1882), §§ 493, 494; *Wood v. Rice*, 24 Mich. 423.

This provision of the constitution of Michigan does not apply to waters that form part of the state boundary, *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; nor to streams that have no naturally valuable capacity for floorage purposes, *Shepard v. Gates*, 50 Mich. 495.

Any number of persons may associate for the purpose of improving the navigation of any river in the state, and may for that purpose erect dams, etc., therein, subject to the conditions prescribed by the statute. *Howell's Annot. Stat.* (1882), c. III. This act refers to navigable streams only. *East Branch Sturgeon River Imp. Co. v. White, etc.*, *Lumber Co.*, 69 Mich. 207.

Improvements already made, without authority, are not legalized by incorporation under this statute. *East Branch Sturgeon River Imp. Co. v. White, etc.*, *Lumber Co.*, 69 Mich. 207.

The *Pennsylvania* act embraces streams navigable at common law as well as those declared navigable by acts of assembly, except the rivers Lehigh, Schuylkill, and Delaware. *Ensforth v. Com.*, 52 Pa. St. 320.

Dams to create floods to carry down lumber, not being within the provisions of this statute, are unlawful. *Dubois v. Glaub*, 52 Pa. St. 238.

One who erects a milldam on a navigable river, under this statute, is entitled to all the protection in its use which the law would give

him if his dam had been erected on a non-navigable stream. *Bigler v. Antes*, 21 Pa. St. 288.

The statute must be so construed as to make it consistent and beneficial to the public as well as to the landowner. The dam must be constructed so that it will not obstruct navigation in a case where the navigator uses ordinary care, diligence, and skill. *Newbold v. Mead*, 57 Pa. St. 487.

In *South Carolina* milldams may be erected in streams capable of being navigated by rafts of lumber or timber, but they are required to have locks, slopes, or canals for the passage of such rafts. *Gen. Stat.* (1882), §§ 1104, 1105.

Surplus Water Power of Dams Authorized to Improve Navigation. — Where the legislature of a state authorizes the erection of dams, upon public streams, for the *bona fide* purpose of improving their navigation, the surplus water power incidentally created by such dams may be leased or sold to private individuals. *Green Bay, etc., Canal Co. v. Kaukauna Water-Power Co.*, 70 Wis. 635. See also *Atty.-Gen. v. Eau Claire*, 37 Wis. 400; *State v. Eau Claire*, 40 Wis. 533; *Kimberly, etc., Co. v. Hewitt*, 79 Wis. 334; *Green Bay, etc., Canal Co. v. Kaukauna Water-Power Co.*, 90 Wis. 370, 48 Am. St. Rep. 937; *Kaukauna Water-Power Co. v. Green Bay, etc., Canal Co.*, 142 U. S. 254.

2. When State May Authorize Dam in Navigable River. — *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. (U. S.) 245; *Pound v. Turk*, 95 U. S. 459; *Woodman v. Kilbourn Mfg. Co.*, 1 Abb. (U. S.) 158, 1 Biss. (U. S.) 546; *St. Joseph County v. Pidge*, 5 Ind. 13; *Egan v. Hart*, 45 La. Ann. 1358; *Dover v. Portsmouth Bridge*, 17 N. H. 200; *State v. Eau Claire*, 40 Wis. 533; *Tewksbury v. Schulenberg*, 41 Wis. 584; *Falls Mfg. Co. v. Oconto River Imp. Co.*, 87 Wis. 134. *Compare Neaderhouser v. State*, 28 Ind. 257.

Dams for the Improvement of Navigation. — The legislature may authorize the erection of dams for the improvement of navigation without providing compensation for mere consequential injuries where no private property is appropriated. *Holyoke Water-Power Co. v. Connecticut River Co.*, 52 Conn. 570; *Brooks v. Cedar Brook, etc., Imp. Co.*, 82 Me. 17, 17 Am. St. Rep. 459.

And the acts authorizing such dams need not declare that the improvement of navigation is their principal object. *Tewksbury v. Schulenberg*, 41 Wis. 584.

improving the navigation of such waters within its limits by dams and locks so increasing the depth of the water as to extend the line of navigation.¹

c. STATUTORY RIGHT TO ERECT, NO PROTECTION AGAINST INJURIES TO A PRIVATE OWNER. — While a dam in a navigable stream, if authorized by the act of the legislature, cannot be indicted as a public nuisance for obstructing the stream, still the act is no protection against injuries to a private owner.²

3. On Floatable Streams. — The owner of soil over which a floatable, but not navigable, stream passes may build a dam across it, provided he furnishes a convenient and suitable sluice or passageway for the public by or through his dam.³ The passageway need not be better than would be afforded by the river in its natural condition unobstructed by the dam. The right of passage is to the natural flow of the river or its equivalent.⁴

4. Fishways in Dams. — All persons who build a dam for mill or other purposes, on a stream annually frequented by fish, do it under an implied obligation to keep open sufficient sluices and fishways for the passage of fish at the proper season; and if a grant is made by the legislature authorizing the erection of a dam across a river, it is to be construed to be under the same implied condition to keep open fishways, unless such implication is excluded by an express provision exempting the grantee from maintaining such fishways.⁵ In

1. *Construction of Ordinance of 1787.* — Huse v. Glover, 119 U. S. 543; Palmer v. Cuyahoga County, 3 McLean (U. S.) 226.

2. *Statute Authorizing Dam No Protection against Injuries to Private Owner.* — Lee v. Pembroke Iron Co., 57 Me. 481, 2 Am. Rep. 59; Hooksett v. Amoskeag Mfg. Co., 44 N. H. 105; Eastman v. Amoskeag Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Trenton Water-Power Co. v. Raff, 36 N. J. L. 335; Crittenden v. Wilson, 5 Cow. (N. Y.) 105, 15 Am. Dec. 462; Hogg v. Zanesville Canal, etc., Co., 5 Ohio 410; Cobb v. Smith, 16 Wis. 661. But see Waggoner v. Jermaine, 7 Hill (N. Y.) 357, reversing 1 Hill (N. Y.) 279; Silver Creek Nav., etc., Co. v. Mangum, 64 Miss. 682.

3. *Right to Erect Dam on Floatable Stream.* — Brown v. Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Knox v. Chaloner, 42 Me. 150; Dwinel v. Veazie, 44 Me. 167, 69 Am. Dec. 94; Veazie v. Dwinel, 50 Me. 479; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561; Foster v. Searsport Spool, etc., Co., 79 Me. 508; Stratton v. Currier, 81 Me. 497; Buchanan v. Grand River, etc., Log Running Co., 48 Mich. 364; Shaw v. Crawford, 10 Johns. (N. Y.) 236; Gaston v. Mace, 33 W. Va. 14, 25 Am. St. Rep. 848; A. C. Conn Co. v. Little Suamico Lumber Mfg. Co., 74 Wis. 652. See also James v. Carter, 96 Ky. 378. Compare Palmer v. Mulligan, 3 Cai. (N. Y.) 307, 2 Am. Dec. 270.

General Statutes of *Minnesota*, chapter 32, does not make it unlawful for a person acting without license to erect and maintain across a stream on his own land a dam which does not obstruct the free passage of logs, timber, or lumber down such stream, and a contract between the owner of such a dam and the owner of logs for sluicing over it is valid. Lamprey v. Nelson, 24 Minn. 304.

4. *Passageway Must Be Equivalent to Natural Flow of Stream.* — Pearson v. Rolfe, 76 Me. 380; Connecticut River Lumber Co. v. Olcott Falls Co., 65 N. H. 290.

Therefore a mill owner who constructs and maintains a dam on his own land, on a stream floatable for running logs, to raise a sufficient

head of water to operate his mill, with a sufficient sluiceway to conveniently pass over it all logs which the stream will float in its natural condition, cannot afterwards be required to enlarge the capacity of the sluice, by a log owner above his dam, who, under a charter from the legislature, constructs dams to store and hold the water of the stream for use when needed, and removes natural obstructions in it, and thereby increases its capacity for floating logs to such an extent that the sluice is insufficient. Stratton v. Currier, 81 Me. 497.

Obstructing Passageway a Public Nuisance. — To obstruct the passageway with any waste material, or, to an unreasonable extent, even with valuable property, is a public nuisance. Veazie v. Dwinel, 50 Me. 479.

Right to Repair Dam. — Where a person has acquired the right to maintain a dam in a stream navigable for logging purposes, and without fault there is a recent breach in the dam, he is entitled to a reasonable time to repair the dam, and to its reasonable protection, and when the detention of the logs is necessary to such repair and protection, he has the clear right to a reasonable temporary detention for that purpose. Pratt v. Brown, 106 Mich. 628.

In Several States There Are Statutes requiring dams to have sluiceways or aprons for the passage of logs and timber. See, for example, *Minnesota Gen. Stat.* (1894), §§ 2368, 2387; *North Carolina Code* (1893), §§ 3712-3715.

The Maine Milldam Acts apply to floatable streams. Veazie v. Dwinel, 50 Me. 479.

But the right of erecting mills and milldams, and of flowing land, conferred by these acts, is subject to the paramount right of passage of the public across and upon streams, in all cases where the streams in their natural state are capable of floating boats or logs. Knox v. Chaloner, 42 Me. 150.

5. Persons Erecting Dams Must Keep Open Fishways. — Weld v. Hornby, 7 East 195; Holyoke Co. v. Lyman, 15 Wall. (U. S.) 500; Com. v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; Stoughton v. Baker, 4 Mass. 522, 3 Am. Dec.

several states fishways are required in dams by express statutory provision; and such statutes have been held to be constitutional.¹

III. RIGHT TO USE OF WATER. — A riparian proprietor has a right to detain the water of a stream by his dam so far as is reasonable and necessary for mill or other rightful purposes,² but he cannot detain it unreason-

236; *State v. Gilmore*, (Mo. 1897) 42 S. W. Rep. 817; *West Point Water Power, etc., Co. v. State*, 49 Neb. 218; *State v. Franklin Falls Co.*, 49 N. H. 240, 6 Am. Rep. 513. See the title **FISH AND FISHERIES**.

In *Maine* the construction and maintenance of a dam across a tidal stream, under legislative authority, do not exempt the stream from the general statute for the protection of fisheries. *Oliver v. Bailey*, 85 Me. 161.

Requirement Not Affected by Laches or Prescription. — The requirement that persons erecting dams shall keep open fishways in them, being for the benefit of the public, is not extinguished by any inattention or neglect in compelling the owner to comply with it. For no laches can be imputed to the government, and against it no time runs so as to bar its rights. *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236; *West Point Water Power, etc., Co. v. State*, 49 Neb. 218.

1. Statutes Requiring Fishways in Dams Constitutional. — *Holyoke Co. v. Lyman*, 15 Wall. (U. S.) 500; *Parker v. People*, 111 Ill. 581; *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236; *Vinton v. Welsh*, 9 Pick. (Mass.) 87; *Com. v. Essex Co.*, 13 Gray (Mass.) 239; *West Point Water Power, etc., Co. v. State*, 49 Neb. 218; *State v. Franklin Falls Co.*, 49 N. H. 240, 6 Am. Rep. 513.

Enforceable Against Persons Erecting Dams by Legislative Authority. — A statute requiring fishways in dams may be enforced against a person who erects a dam by legislative authority. *West Point Water Power, etc., Co. v. State*, 49 Neb. 218.

Effect of Contract. — A corporation made and maintained a fishway in its dam across a certain river, as required by its charter. Subsequently it accepted an act of the legislature authorizing it to increase its capital stock on condition that it should be liable for all damages occasioned by its dam to the owners of fish rights above it, and paid large sums of money for such damages. It was held that, notwithstanding a statute reserving to the legislature the right to amend, alter, or repeal charters, it could not, after such acceptance and payment, and without any change of circumstances, require the corporation to make different fishways in its dam. *Com. v. Essex Co.*, 13 Gray (Mass.) 239.

But in a later case in the Supreme Court of the United States, *Holyoke Co. v. Lyman*, 15 Wall. (U. S.) 500, it was held that after a manufacturing corporation, chartered with authority to construct and maintain a dam across a river, paying damages to the owners of fishing rights above, and whose charter does not expressly exempt it from maintaining the dam without a fishway, and is subject under a prior general statute to amendment, alteration, and repeal at the pleasure of the legislature, has paid such damages and constructed the dam without a fishway, so as to destroy the

fishing rights above and to impair similar rights below (for the injury to which last no compensation has ever been made or provided), that corporation, or any other which purchases its dam under the authority of a subsequent statute, may be constitutionally required by the legislature to construct a fishway in the dam to the satisfaction of commissioners appointed by the legislature for the purpose. See also *State v. Gilmore*, (Mo. 1897) 42 S. W. Rep. 817.

As to fishways in dams, see also the title **FISH AND FISHERIES**.

2. Right to Detain Water — *Connecticut*. — *Parker v. Hotchkiss*, 25 Conn. 321; *Keeney, etc., Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 576; *Robertson v. Miller*, 40 Conn. 40.

Georgia. — *Hendrick v. Cook*, 4 Ga. 241.

Illinois. — *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106.

Massachusetts. — *Pitts v. Lancaster Mills*, 13 Met. (Mass.) 156; *Thurber v. Martin*, 2 Gray (Mass.) 394, 61 Am. Dec. 468; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *Wood v. Edes*, 2 Allen (Mass.) 578; *Springfield v. Harris*, 4 Allen (Mass.) 494.

Michigan. — *Dumont v. Kellogg*, 29 Mich. 420.

Minnesota. — *Pinney v. Luce*, 44 Minn. 367.

New York. — *Palmer v. Mulligan*, 3 Cai. (N. Y.) 308, 2 Am. Dec. 270; *Platt v. Johnson*, 15 Johns. (N. Y.) 213, 8 Am. Dec. 233; *Bullard v. Saratoga Victory Mfg. Co.*, 77 N. Y. 525, affirming 13 Hun (N. Y.) 43; *Van Hoesen v. Coventry*, 10 Barb. (N. Y.) 518; *Pollitt v. Long*, 3 Thomp. & C. (N. Y.) 232; *De Baun v. Bean*, 29 Hun (N. Y.) 236.

Ohio. — *Cilly v. Cincinnati*, 2 Cinc. Wkly. L. Bul. 135.

Oregon. — *Oregon Iron Co. v. Trullenger*, 3 Oregon 1.

Pennsylvania. — *Hartzall v. Sill*, 12 Pa. St. 248; *Whaler v. Ahl*, 29 Pa. St. 98.

Vermont. — *Martin v. Bigelow*, 2 Aik. (Vt.) 184, 16 Am. Dec. 696; *Cannell v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828.

Wisconsin. — *Patten v. Marden*, 14 Wis. 473; *Mabie v. Matteson*, 17 Wis. 1; *Coldwell v. Sanderson*, 69 Wis. 52.

See generally the title **WATERS AND WATER-COURSES**.

Where There Is a Prescriptive Right in a Lower Proprietor. — But a riparian proprietor is not justified in even a reasonable detention of the water by means of a dam to the essential injury of a lower proprietor having a prescriptive right to the uninterrupted flow of the water. *Tucker v. Jewett*, 11 Conn. 311.

Upon the Question of What Is a Reasonable Detention, see *Keeney, etc., Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 576; *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Phillips v. Sherman*, 64 Me. 171; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *Thurber v.*

ably,¹ or divert it,² or spread out the water so that it is lost by absorption and

Martin, 2 Gray (Mass.) 394, 61 Am. Dec. 468; Pitts v. Lancaster Mills, 13 Met. (Mass.) 156; Dumont v. Kellogg, 29 Mich. 420; Bullard v. Saratoga Victory Mfg. Co., 77 N. Y. 525, affirming 13 Hun (N. Y.) 43; Clinton v. Myers, 46 N. Y. 511, 7 Am. Rep. 373; De Baun v. Bean, 29 Hun (N. Y.) 236; Oregon Iron Co. v. Trullenger, 3 Oregon 1; Timm v. Bear, 29 Wis. 254; Coldwell v. Sanderson, 69 Wis. 52.

The Question of Reasonableness of Detention Is a Question of Fact for the Jury. — Parker v. Hotchkiss, 25 Conn. 321; Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526; White v. East Lake Land Co., 96 Ga. 415; Phillips v. Sherman, 64 Me. 171; Pollitt v. Long, 3 Thomp. & C. (N. Y.) 232; Hoy v. Sterrett, 2 Watts (Pa.) 327, 27 Am. Dec. 313; Hetrich v. Deachler, 6 Pa. St. 32; Hartzall v. Sill, 12 Pa. St. 248; Coldwell v. Sanderson, 69 Wis. 52.

1. Unreasonable Detention Not Allowed — United States. — Tyler v. Wilkinson, 4 Mason (U. S.) 397.

Connecticut. — Twiss v. Baldwin, 9 Conn. 291; Johnson v. Lewis, 13 Conn. 303, 33 Am. Dec. 405; Mason v. Hoyle, 56 Conn. 255.

Georgia. — Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526.

Indiana. — Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385.

Kentucky. — Anderson v. Cincinnati Southern R. Co., 86 Ky. 44, 9 Am. St. Rep. 263.

Maine. — Wentworth v. Poor, 38 Me. 243; Woodbury v. Willis, 50 Me. 403; Phillips v. Sherman, 64 Me. 171; Stevens v. Kelley, (Me. 1888) 13 Atl. Rep. 45.

Massachusetts. — Chandler v. Howland, 7 Gray (Mass.) 348, 66 Am. Dec. 487; Barrett v. Parsons, 10 Cush. (Mass.) 367; Thompson v. Moore, 2 Allen (Mass.) 350; Clarke v. French, 122 Mass. 419; Whitney v. Wheeler Cotton Mills, 151 Mass. 396.

Michigan. — Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184.

New York. — Merritt v. Brinkerhoff, 17 Johns. (N. Y.) 306, 8 Am. Dec. 404; Clinton v. Myers, 46 N. Y. 511, 7 Am. Rep. 373; Pollitt v. Long, 58 Barb. (N. Y.) 20.

Pennsylvania. — Hoy v. Sterrett, 2 Watts (Pa.) 327, 27 Am. Dec. 313; Cress v. Varney, 17 Pa. St. 496.

Texas. — Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631.

Wisconsin. — Timm v. Bear, 29 Wis. 254.

Canada. — Minor v. Gilmour, 9 L. C. Rep. 115; Proulx v. Tremblay, 7 Quebec L. Rep. 353. See generally the title WATERS AND WATER-COURSES.

Where Lower Owner Has Neglected to Supply Adequate Works. — An upper mill owner is not liable for a detention of the water by his dam for the profitable use of his mills, at the suit of the owner of a lower mill privilege, who has neglected to provide adequate works to store the supply of water for his own mill. Coldwell v. Sanderson, 69 Wis. 52.

2. Cannot Divert the Water — England. — Nuttall v. Bracewell, L. R. 2 Exch. 1.

Ireland. — Belfast Rope Works Co. v. Boyd, 21 L. R. Ir. 500.

Canada. — McLean v. Davis, 11 New Bruns. 266.

Alabama. — Stein v. Burden, 29 Ala. 127, 65 Am. Dec. 394.

California. — Weaver v. Eureka Lake Co., 15 Cal. 271; Stanford v. Felt, 71 Cal. 249; Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 7 Am. St. Rep. 183; Bliss v. Johnson, 76 Cal. 597; Paige v. Rocky Ford Canal, etc., Co., 83 Cal. 84.

Colorado. — McClellan v. Hurdle, 3 Colo. App. 430.

Illinois. — Evans v. Merriweather, 4 Ill. 492, 38 Am. Dec. 106.

Iowa. — Moffett v. Brewer, 1 Greene (Iowa) 348.

Maine. — Thomas v. Hill, 31 Me. 252.

Maryland. — Binney's Case, 2 Bland (Md.) 99. *Massachusetts.* — Newhall v. Ireson, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; Lund v. New Bedford, 121 Mass. 286.

Michigan. — Dumont v. Kellogg, 29 Mich. 420.

Montana. — Columbia Min. Co. v. Holter, 1 Mont. 296.

New Hampshire. — Gilman v. Tilton, 5 N. H. 231.

New Jersey. — Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 366.

New York. — Sackrider v. Beers, 10 Johns. (N. Y.) 241; Crooker v. Bragg, 10 Wend. (N. Y.) 260, 25 Am. Dec. 555; Van Hoesen v. Coventry, 10 Barb. (N. Y.) 518; Marsh v. Delaware, etc., R. Co., 59 Hun (N. Y.) 615, 12 N. Y. Supp. 376; Standen v. New Rochelle Water Co., 91 Hun (N. Y.) 272.

Oregon. — Oregon Iron Co. v. Trullenger, 3 Oregon 1.

Pennsylvania. — Union Canal Co. v. Keiser, 19 Pa. St. 134; Clark v. Pennsylvania R. Co., 145 Pa. St. 438, 27 Am. St. Rep. 710.

Rhode Island. — Olney v. Fenner, 2 R. I. 211, 57 Am. Dec. 711.

Vermont. — Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334.

Washington. — Shotwell v. Dodge, 8 Wash. 337; Rigney v. Tacoma Light, etc., Co., 9 Wash. 576.

Wisconsin. — Green Bay, etc., Canal Co. v. Kaukauna Water Power Co., 90 Wis. 370, 48 Am. St. Rep. 937.

See generally the title WATERS AND WATER-COURSES.

A riparian proprietor is not permitted to divert the water by means of his dam, even though the amount of water in the stream has been increased by his means. Webb v. Portland Mfg. Co., 3 Sumn. (U. S.) 189; Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408; Druley v. Adam, 102 Ill. 177. Compare Brymbo Water Co. v. Lesters Lime Co., 8 Reports 329, Romer, J.

But Where a Person Assists in Maintaining a Dam and Diverting Water he cannot recover for such diversion. Churchill v. Baumann, 95 Cal. 541.

Where One of Two Mill Owners Has Priority. — Where one of two mill owners has the exclusive right to the use of the whole of the water, when there is not enough for the mills of both, he has no right to erect a permanent dam to turn the water to his mill. Curtis v. Jackson, 13 Mass. 507.

evaporation.¹

Rights of Opposite Riparian Owners. — Opposite riparian owners on a stream who each erect a mill and milldam are severally entitled to an equal share of the water of the stream.²

Where Two Adjoining Riparian Proprietors Draw Water from the Same Dam, each has the right to use the water, whatever the effect may be on the other, unless such other has acquired, by grant or prescription, the right to an exclusive use or to use when there is not enough for both.³

Right to Ice. — A millowner who has a pondage right in land of a proprietor above, acquired by grant, adverse user, or proceedings under the mill acts, is not the absolute owner of the ice formed upon the pond, but has the right to have it remain so long as it will be of benefit to him in the use of the water for his mill.⁴ If he maliciously and unnecessarily lowers the water and destroys the ice field, he is liable in damages to the owner of the land under the pond.⁵

IV. HOW RIGHTS PERTAINING TO DAMS MAY BE ACQUIRED — 1. By Occupancy. — As between riparian proprietors owning dams on the same stream, he who erected his dam first has the right to maintain it, and to make a reasonable use of the head of water raised thereby, without interference by the other proprietors; but in the absence of a grant or license, or an enjoyment for such a length of time as will give him a right under the statute of limitations, he acquires, by such prior occupancy, no exclusive right to the water in the stream, nor does he thereby acquire any right to divert the water from the

Where a Mill Owner Sold Lots Below His Dam, and it was apparent to the vendee that he had appropriated the whole stream to his mill, although some water leaked through the dam at the time of the sale, it was held that he (the mill owner) might erect a new dam better than the old one, diverting all the water to his mill. *Frey v. Witman*, 7 Pa. St. 440.

Stream Flowing Across Public Lands. — Where one has appropriated the waters of a stream flowing across public lands, a person who subsequently acquires title from the United States takes subject to such appropriation, and he cannot, by erecting a dam on his own land, divert the water from the prior appropriator. *Geddis v. Parrish*, 1 Wash. 587.

Irrigation. — In *Texas* a riparian proprietor may divert the water of a stream, by his dam, for the purpose of irrigating his lands. *Mud Creek Irrigation, etc., Co. v. Vivian*, 74 Tex. 170. See the titles IRRIGATION; WATERS AND WATERCOURSES.

Subterranean Streams. — The diversion by means of a dam of a subterranean stream which has a well-defined and known channel is illegal. But when water filtrates or percolates through the soil or interstices of rock, the owner of the land through which it passes may erect a dam and thereby divert or appropriate it for the improvement or benefit of his estate without giving an adjoining proprietor ground for complaint. The right of appropriation in the latter case, however, is not absolute or unlimited. The owner of land through which water thus percolates cannot divert it without benefit to himself or his land, and for the purpose merely of injuring an adjoining proprietor who is subjecting it to beneficial uses. *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74.

1. Spreading Out the Water. — *Ferrea v. Knipe*,

28 Cal. 340, 87 Am. Dec. 128; *White v. East Lake Land Co.*, 96 Ga. 415.

2. Opposite Riparian Owners Entitled to Equal Share of Water. — *Arthur v. Case*, 1 Paige (N. Y.) 447. See the titles MILLS; WATERS AND WATERCOURSES.

3. Adjoining Proprietors Drawing Water from Same Dam. — *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406.

Use of Water by Parties Subsequent in Right. — But where a particular owner is entitled to a priority in the use of a specified quantity of water at a dam, and the water becomes so low that parties subsequent in right, by continuing to use the water, prevent him from using the amount specified, they are liable as for a wrongful diversion. *Samuels v. Blanchard*, 25 Wis. 320.

Limit of Right of Owner of Certain Portion of Water. — A mill owner having the right to a certain portion of the water of a stream for the use of his mill at a particular dam has no right to draw off any of the water at a point on the stream above the dam without the consent of the owners of the other mills on the same dam. *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 180.

4. Dam Owners' Rights in Ice Above. — *Howe v. Andrews*, 62 Conn. 398; *Brookville, etc., Hydraulic Co. v. Butler*, 91 Ind. 134, 46 Am. Rep. 580; *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238; *Dodge v. Berry*, 26 Hun (N. Y.) 246, *disapproving* *Myer v. Whitaker*, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 172; *Searle v. Gardner*, (Pa. 1888) 13 Atl. Rep. 835, 22 W. N. C. (Pa.) 73; *Reysen v. Roate*, 92 Wis. 543. Compare *Mill River Woollen Mfg. Co. v. Smith*, 34 Conn. 465. See also the titles ICE AND ICE COMPANIES; MILLS.

5. Stevens v. Kelley, 78 Me. 445, 57 Am.

land of a proprietor above, to throw the water back upon him in the channel of the stream, or otherwise to interfere with the rights of riparian proprietors above or below him.¹

On Public Lands. — The right to maintain dams in streams on public lands may be acquired by prior occupancy, and this right has been recognized and protected by Act of Congress.²

2. By Grant or License — Grant. — The right to erect a dam, to overflow lands above or below, to set back water on an upper mill privilege, or any other right that may pertain to the ownership of a dam, may be acquired by special grant or reserved in a conveyance of land.³

The Construction of Such Grants or Reservations will depend upon the stipulations they contain in connection with the right granted or reserved.⁴

Rep. 813; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238.

1. Rights Acquired by Occupancy — United States. — *Tyler v. Wikinson*, 4 Mason (U. S.) 397; *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. (U. S.) 538.

Alabama. — *Hendricks v. Johnson*, 6 Port. (Ala.) 472.

California. — *Eddy v. Simpson*, 3 Cal. 249, 58 Am. Dec. 408; *McDonald v. Askew*, 29 Cal. 200.

Connecticut. — *King v. Tiffany*, 9 Conn. 162; *Parker v. Hotchkiss*, 25 Conn. 321; *Keeny, etc., Mfg. Co. v. Union Mfg. Co.*, 39 Conn. 576.

Georgia. — *Hendrick v. Cook*, 4 Ga. 241.

Illinois. — *Stout v. M'Adams*, 3 Ill. 67, 33 Am. Dec. 441; *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106.

Iowa. — *Gibson v. Fischer*, 68 Iowa 29.

Maine. — *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265; *Lincoln v. Chadbourne*, 56 Me. 197.

Massachusetts. — *Thurber v. Martin*, 2 Gray (Mass.) 394, 61 Am. Dec. 468; *Bearse v. Perry*, 117 Mass. 211.

Michigan. — *Dumont v. Kellogg*, 29 Mich. 420; *Buchanan v. Grand River, etc., Log Running Co.*, 48 Mich. 364.

Montana. — *Columbia Min. Co. v. Holter*, 1 Mont. 206.

New Hampshire. — *Gilman v. Tilton*, 5 N. H. 231; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Norway Plains Co. v. Bradley*, 52 N. H. 86.

New York. — *Platt v. Johnson*, 15 Johns. (N. Y.) 213, 8 Am. Dec. 233.

North Carolina. — *Pugh v. Wheeler*, 2 Dev. & B. L. (19 N. Car.) 50.

Pennsylvania. — *Hoy v. Sterrett*, 2 Watts (Pa.) 327, 27 Am. Dec. 313; *Hartzall v. Sill*, 12 Pa. St. 248.

Rhode Island. — *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711.

Vermont. — *Martin v. Bigelow*, 2 Aik. (Vt.) 184, 16 Am. Dec. 696; *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334.

Canada. — *McLaren v. Cook*, 3 U. C. Q. B. 299.

See also *Mason v. Hill*, 3 B. & Ad. 304, 23 E. C. L. 76. See generally the title **WATERS AND WATERCOURSES**

In *England* the rule has been laid down that an encroachment on the alveus of a running stream may be complained of by an adjacent or *ex adverso* proprietor, without the necessity of proving either that damage has been sus-

tained, or that it is likely to be sustained from that cause. *Bickett v. Morris*, L. R. 1 H. L. Sc. 47; *Norbury v. Kitchen*, 15 L. T. N. S. 501.

Where Rights of Proprietors on Same Stream Conflict. — When two proprietors upon the same stream possess water powers, of which one cannot be improved without the destruction of the other, the first occupant must have the preference, and is entitled to have an abatement of the dam of the other. *Dunkerly v. McCarty*, 8 L. C. Rep. 132.

2. Prior Occupancy in Streams on Public Lands. — Rev. Stat. United States (1878), §§ 2339, 2340; *Natoma Water, etc., Co. v. Hancock*, 101 Cal. 42; *Larimer County Reservoir Co. v. People*, 8 Colo. 614; *Lobdell v. Simpson*, 2 Nev. 274, 90 Am. Dec. 537; *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240; *Reno Smelting, etc. Works v. Stevenson*, 20 Nev. 269, 19 Am. St. Rep. 364; *Ellis v. Pomeroy Imp. Co.*, 1 Wash. 572. But see *Wilcoxon v. McGhee*, 12 Ill. 381, 54 Am. Dec. 409. See generally the title **WATERS AND WATERCOURSES**.

Rights Confined to Actual Appropriation. — But the prior appropriator acquires rights only to the extent of his actual appropriation as against subsequent appropriators on the same stream. *Nevada Water Co. v. Powell*, 34 Cal. 109, 91 Am. Dec. 685; *Lobdell v. Simpson*, 2 Nev. 274, 90 Am. Dec. 537; *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240. See also *McKinney v. Smith*, 21 Cal. 374.

Right to Remove Obstructions Placed in Stream. — One who, by a dam and ditch, has appropriated the waters of a natural stream flowing through the public lands of the United States, has a right as against a subsequent purchaser from the United States, to go upon the land of such purchaser, higher up the stream than the point of diversion, and remove obstructions from the bed of the stream, so as to cause its waters to flow in their natural channel to the point of diversion. *Ware v. Walker*, 70 Cal. 591.

3. Rights Acquired by Grant. — *Tourtellot v. Phelps*, 4 Gray (Mass.) 370; *Fitch v. Constantine Hydraulic Co.*, 44 Mich. 74; *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503; *Wright v. Shindler*, 17 Oregon 404; *State v. Suttle*, 115 N. Car. 784; *Campbell v. McCoy*, 31 Pa. St. 263; *Peay v. Salt Lake City*, 11 Utah 331; *Wright v. Howard* 1 Sim. & S. 190; *Ruttan v. Winans*, 5 U. C. C. P. 379.

4. Grant of Right to Erect Dam on Another's Land. — A privilege given by deed to build a dam on the land of another and divert the water for the use of the grantee is a franchise.

Legislative Grants. — A legislative grant of a right to erect a dam in a navi-

but the dam erected under the privilege is the property of the grantee. *Conwell v. Brookhart*, 4 B. Mon. (Ky.) 580, 41 Am. Dec. 244.

Deed Conveying Fee in Land on Which Dam Stands. — A deed wherein the grantor gives, grants, bargains, sells and conveys unto the grantee, his heirs and assigns forever, the right of having, building, and maintaining and repairing and keeping in repair a dam on certain premises, with the right to so much of the premises as may be necessary on which to build and maintain the dam with its wings, conveys a fee in the land upon which the dam stands. *Monmouth v. Plimpton* 77 Me. 556.

Right to Erect Dam Implies Right to Use Land. — The right granted by deed to build a dam to turn the water of a stream to the use of the grantee implies the right to the use of so much of the land as is necessary to obtain the benefit of the privilege granted. *Conwell v. Brookhart*, 4 B. Mon. (Ky.) 580, 41 Am. Dec. 244.

A grant of the right to maintain a dam across a running stream at a given height includes, as an incident, the right of flowage necessarily caused by its maintenance. *Albee v. Hagden*, 25 Minn. 267.

Grant of Ground on Which Abutment of Dam Stands. — A conveyed by deed to B the ground on which the abutment of a dam stood, with all and singular the rights and privileges thereto belonging. It was held that A conveyed not only the ground on which the abutment stood, but also the entire and exclusive use of all the water power created by the erection of the dam, it being necessary to the enjoyment of the property purchased and appurtenant thereto. *Wall v. Cloud*, 3 Humph. (Tenn.) 181.

Rights Incident to Grant of Flowage Rights. — To the grant of a right to back the water by a dam on the land of the grantor there is incident the right to enter and cleanse the pool and repair the dam. *Frailey v. Waters*, 7 Pa. St. 221.

Grant of Dam Does Not Include Bed of Pond. — The words "together with all and singular the mill, milldam, races, watercourses, and the other appurtenances," contained in a deed for mill property, will not convey the bed of the millpond, or the land covered with the water of it. *Bartholomew v. Edwards*, 1 Houst. (Del.) 17.

Reservation of Right to Raise and Rebuild Milldam. — Where, in a deed conveying land, the grantor reserves the right to raise and rebuild a milldam on a stream below the land so granted, the reservation is of the right to raise as well as to rebuild the dam. *State v. Suttle*, 115 N. Car. 784.

Grant of Half a Milldam. — A granted to B by deed one-half of a milldam, with the privilege of taking the water from any part of the half granted. It was held that the deed passed the right to the use of one-half of the water only. *Runnels v. Bullen*, 2 N. H. 532.

Grant Imposing No Restrictions on Use. — A grant conveying the right to keep up a milldam at a specified height, and imposing no restrictions on the use, cannot be confined to the use then presently contemplated. *Hathaway v. Mitchell*, 34 Mich. 164.

Overflowing Public Highway Not Justified under Grant to Overflow Lands. — A grant by a proprietor to overflow his lands by a dam cannot justify the overflowing of a public highway existing upon the lands at the time of the grant. *Monmouth v. Gardiner*, 35 Me. 247.

"All the Land That the Dam Flows." — These words in a grant of a water privilege may reasonably be construed to include all the land that the dam flows when actually used for the purpose for which it was erected and conveyed, although at the time of the conveyance the dam was out of repair and flowed a smaller extent of land. *Morse v. Marshall*, 13 Allen (Mass.) 288, 11 Allen (Mass.) 229.

For Other Cases of the Construction of Grants and Reservations of dams, flowage, and other rights appertaining to dams, see:

England. — *Taylor v. St. Helens*, 6 Ch. Div. 264.

Canada. — *Minor v. Gilmour*, 9 L. C. Rep. 115.

United States. — *Bank of British North America v. Miller*, 7 Sawy. (U. S.) 163, 6 Fed. Rep. 545.

Connecticut. — *Tucker v. Jewett*, 11 Conn. 311; *Smith v. Moodus Water Power Co.*, 35 Conn. 392.

Dakota. — *Langness v. Pettigrew*, 5 Dakota 45.

Georgia. — *Ford v. Lukens*, 81 Ga. 633; *Stafford v. Maddox*, 87 Ga. 537.

Illinois. — *Shelby v. Chicago, etc.*, R. Co., 143 Ill. 385.

Maine. — *Vickerie v. Buswell*, 13 Me. 289; *Bennett v. Kennebec Fibre Co.*, 87 Me. 162. See also *Graham v. Virgin*, 78 Me. 338.

Massachusetts. — *Jackson v. Harrington*, 2 Allen (Mass.) 242; *Knapp v. Douglas Axe Co.*, 13 Allen (Mass.) 1; *Coogan v. Burling Mills*, 124 Mass. 390; *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319; *Baker v. Sanderson*, 3 Pick. (Mass.) 348; *Tourtellot v. Phelps*, 4 Gray (Mass.) 370; *Brady v. Blackinton*, 113 Mass. 238; *Prentiss v. Wood*, 118 Mass. 589.

Michigan. — *Kilgore v. Hascall*, 21 Mich. 502.

Minnesota. — *Eastman v. St. Anthony Falls Water-Power Co.*, 43 Minn. 60.

New Hampshire. — *Salmon Falls Mfg. Co. v. Portsmouth Co.*, 46 N. H. 249; *Wilder v. Clough*, 55 N. H. 359; *Watson v. Bartlett*, 62 N. H. 447.

New Jersey. — See also *Johnston v. Hyde*, 33 N. J. Eq. 632.

New York. — *Hoyt v. Carter*, 16 Barb. (N. Y.) 212; *Jones v. Turner*, 46 Barb. (N. Y.) 527; *Barber v. Nye*, 65 N. Y. 211; *Groat v. Moak*, 94 N. Y. 115; *Roberts v. Baumgarten*, 110 N. Y. 380; *Nye v. Hoyle*, 120 N. Y. 195; *Wells v. Garbutt*, 132 N. Y. 430; *Hall v. Sterling Iron, etc., Co.*, 148 N. Y. 432, affirming 74 Hun (N. Y.) 10.

North Carolina. — *Hall v. Turner*, 110 N. Car. 292; *State v. Suttle*, 115 N. Car. 784.

Pennsylvania. — *Dyer v. Depui*, 5 Whart. (Pa.) 584; *Edgett v. Douglass*, 144 Pa. St. 95.

Vermont. — *Mower v. Hutchinson*, 9 Vt. 242; *Rogers v. Bancroft*, 20 Vt. 250; *Adams v. Warner*, 23 Vt. 395; *Rood v. Johnson*, 26 Vt. 64; *Howe Scale Co. v. Terry*, 47 Vt. 109; *Albee*

gable river is strictly construed against the grantee.¹

Grant of a Mill with Its Appurtenances. — A grant of a mill with its appurtenances passes not only the mill itself, but whatever naturally and necessarily belongs to it, as the dam, race, flood-gates, water rights in the stream on which it is situated,² and in some cases the right to the use of storage dams, even though they may be at a considerable distance from the mill.³

Loss of. — Where there has been a grant or reservation of the right to flow lands, there must be not only disuse but actual adverse user for twenty years, to extinguish the right.⁴

v. Huntley, 56 Vt. 454; *Shed v. Leslie*, 22 Vt. 498.

West Virginia. — *Miller v. Shenandoah Pulp Co.*, 38 W. Va. 558.

Wisconsin. — *Richards v. Koenig*, 24 Wis. 360; *Samuels v. Blanchard*, 25 Wis. 329; *Mack v. Bensley*, 63 Wis. 81; *Fox River Flour, etc., Co. v. Kelley*, 70 Wis. 287; *Janesville Cotton Mills v. Ford*, 82 Wis. 416.

1. Legislative Grants Strictly Construed. — *Dermott v. State*, 99 N. Y. 101; *Stokes v. Upper Appomattox Co.*, 3 Leigh (Va.) 318.

For the construction of particular grants, see *Delaney v. Boston*, 2 Harr. (Del.) 489; *Mullen v. Penobscot Log-Driving Co.*, 90 Me. 555; *St. Cloud Water-Power, etc., Co. v. Mississippi, etc.*, Boom Co., 43 Minn. 380; *State v. Glen*, 7 Jones L. (52 N. Car.) 321; *Cornelius v. Glen*, 7 Jones L. (52 N. Car.) 512; *Susquehanna Canal Co. v. Wright*, 9 W. & S. (Pa.) 9, 42 Am. Dec. 312; *Jones v. Pettibone*, 2 Wis. 308.

2. What Passes under Grant of Mill with Its Appurtenances. — *United States.* — *Whitney v. Olney*, 3 Mason (U. S.) 280.

Connecticut. — *Smith v. Moodus Water Power Co.*, 35 Conn. 392.

Indiana. — *Neadersouser v. State*, 28 Ind. 257.

Maine. — *Rackley v. Sprague*, 17 Me. 281.

Maryland. — *Riverdale Park Co. v. Westcott*, 74 Md. 311, 28 Am. St. Rep. 249.

Massachusetts. — *Richardson v. Bigelow*, 15 Gray (Mass.) 154.

New Hampshire. — *Gibson v. Brockway*, 8 N. H. 465, 31 Am. Dec. 200; *Seavey v. Jones*, 43 N. H. 441; *Shepardson v. Perkins*, 58 N. H. 354; *Watson v. Bartlett*, 62 N. H. 447.

New York. — *Le Roy v. Platt*, 4 Paige (N. Y.) 77; *Nye v. Hoyle*, 120 N. Y. 195.

Ohio. — *Morgan v. Mason*, 20 Ohio 401, 55 Am. Dec. 464.

Rhode Island. — *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711.

South Carolina. — *Leggett v. Kerton*, 2 Rich. L. (S. Car.) 156.

See also *Young v. Wilson*, 21 Grant's Ch. (U. C.) 144. See the title **MILLS**.

And this is so, whether the word "appurtenances" be used or not. *Scott v. Michael*, 129 Ind. 250; *Jackson v. Trullinger*, 9 Oregon 393. See also *Babcock v. Utter*, 1 Abb. App. Dec. (N. Y.) 27, 1 Keyes (N. Y.) 397.

And such rights will pass whether they were originally incident to the mill, or were acquired by the grantor by grant or prescription. *Daniels v. Citizens' Sav. Inst.*, 127 Mass. 534; *Seavey v. Jones*, 43 N. H. 441; *Perrin v. Garfield*, 37 Vt. 304; or by irrevocable license, *Winham v. McGuire*, 51 Ga. 578.

The Grant of a Mill Site conveys a water

power, together with the right to maintain a dam wherever such dam would be suitable for the convenient and beneficial appropriation of the water power. *Stackpole v. Curtis*, 32 Me. 383. See also *Mandeville v. Comstock*, 9 Mich. 536; *Thompson v. Banks*, 43 N. H. 540; *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 678.

The Grant of a Mill Privilege carries with it a right to the natural flow of the stream, subject to its reasonable use by upper owners. *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396. But the grantee takes it subject to any servitudes imposed upon it by his grantor. *Whitney v. Eames*, 11 Met. (Mass.) 517.

Flowage Rights. — The grant of a mill and its appurtenances carries with it the right to continue to overflow the lands of the grantor, or his subsequent grantees, to the same extent as when the grant was made.

Georgia. — *Baker v. McGuire*, 53 Ga. 245; *Maguire v. Baker*, 57 Ga. 109.

Indiana. — *Lammott v. Ewers*, 106 Ind. 310, 55 Am. Rep. 746.

Maine. — *Hathorn v. Stinson*, 10 Me. 224, 25 Am. Dec. 228; *Rackley v. Sprague*, 17 Me. 281; *Hutchinson v. Chase*, 39 Me. 508, 63 Am. Dec. 645; *Butler v. Huse*, 63 Me. 447.

Maryland. — *Riverdale Park Co. v. Westcott*, 74 Md. 311, 28 Am. St. Rep. 249.

New York. — *Le Roy v. Platt*, 4 Paige (N. Y.) 77; *Oakley v. Stanley*, 5 Wend. (N. Y.) 523; *Burr v. Mills*, 21 Wend. (N. Y.) 290; *Barber v. Nye*, 65 N. Y. 211.

North Carolina. — *Kestler v. Verble*, 7 Jones L. (52 N. Car.) 185.

Vermont. — *Perrin v. Garfield*, 37 Vt. 304.

Wisconsin. — *Sabine v. Johnson*, 35 Wis. 185.

Canada. — *Hickman v. Lawson*, 7 Grant's Ch. (U. C.) 494; *Calhoun v. Rourke*, 19 New Bruns. 591.

See also *Pettee v. Hawes*, 13 Pick. (Mass.) 323. *Compare Wilcoxon v. McGhee*, 12 Ill. 381, 54 Am. Dec. 409; *Preble v. Reed*, 17 Me. 169; *Colvin v. Burnet*, 2 Hill (N. Y.) 620; *Tabor v. Bradley*, 18 N. Y. 109, 72 Am. Dec. 498.

3. Use of Storage Dams. — *Baker v. Bessey*, 73 Me. 472, 40 Am. Rep. 377. And see *Curtis v. Norton*, 58 Mich. 411; *Perrin v. Garfield*, 37 Vt. 304. But see *Brace v. Yale*, 4 Allen (Mass.) 393.

4. Extinguishment of Right Acquired by Grant. — *Angell on Watercourses*, 252; *Smith v. Moodus Water Power Co.*, 35 Conn. 392; *State v. Suttle*, 115 N. Car. 784; *Lindeman v. Lindsey*, 69 Pa. St. 93, 8 Am. Rep. 219; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Ruttan v. Winans*, 5 U. C. C. P. 379. See also *Mower v. Hutchinson*, 9 Vt. 242. But see *Taylor v. Hampton*, 4 McCord L. (S. Car.) 96, 17 Am. Dec. 710; *Eddy v. Chace*, 140 Mass. 471.

License. — A parol license, as long as it remains unrevoked, will authorize a dam owner to back water on the land of another, and where such a license has been granted upon a consideration, or in consequence of it expense has been incurred, and it has been acted upon, the licensor will not be permitted to recall his license, and treat the dam owner as a trespasser.¹

3. By Prescription — *a.* IN GENERAL. — The right, by means of a dam, to overflow lands, or to raise the water in a stream to the injury of an upper mill privilege,² or to detain or divert the

1. Rights Acquired by License — *England.* — *Mason v. Hill*, 5 B. & Ad. 1, 27 E. C. L. 11; *Liggins v. Inge*, 5 M. & P. 712.

Canada. — *Dean v. Gray*, 22 U. C. C. P. 202; *Henry v. English*, 18 Grant's Ch. (U. C.) 119.

Georgia. — *Winham v. McGuire*, 51 Ga. 578; *Southwestern R. Co. v. Mitchell*, 69 Ga. 114; *De Vaughn v. Minor*, 77 Ga. 809; *Middlebrooks v. Mayne*, 96 Ga. 449.

Indiana. — *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370; *Ogle v. Dill*, 55 Ind. 130; *Stephens v. Benson*, 19 Ind. 367.

Kentucky. — *Cain v. Hays*, 4 Dana (Ky.) 338. *Maine.* — *Clement v. Durgin*, 5 Me. 9; *Gleason v. Tuttle*, 46 Me. 288.

Michigan. — *Miller v. Reeves*, 1 Mich. 107.

Nebraska. — *Newcomb v. Royce*, 42 Neb. 323.

Pennsylvania. — *Lacy v. Arnett*, 33 Pa. St. 169.

Tennessee. — *Heiskell v. Cobb*, 11 Heisk. (Tenn.) 638.

Compare *Williamson v. Yingling*, 80 Ind. 379; *Seidensparger v. Spear*, 17 Me. 123, 35 Am. Dec. 234; *Wood v. Edes*, 2 Allen (Mass.) 578; *Risien v. Brown*, 73 Tex. 135. See generally the title LICENSE.

Parol License Not Assignable. — A parol license to back water on the land of another is not assignable. *Beaven v. Reed*, 9 U. C. Q. B. 152; *Pitman v. Poor*, 38 Me. 237; *Carleton v. Redington*, 21 N. H. 291; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287.

But in Georgia it has been held that the successor in title of one having rights under a parol license is not liable in damages for exercising such rights, either to the person against whom the original rights existed, or to his privies in estate. *Middlebrooks v. Mayne*, 96 Ga. 449.

A Parol License Ceases with the Life of the Licensor. — *Bridges v. Purcell*, 1 Dev. & B. L. (18 N. Car.) 492.

Such a License Also Terminates with the Decay of the Dam, and gives no right when the dam has become decayed and ruinous to re-erect or repair it and flow the land again. *Carleton v. Redington*, 21 N. H. 291; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Hepburn v. McDowell*, 17 S. & R. (Pa.) 383, 17 Am. Dec. 677.

Where Dam Is Washed Away. — In *Georgia*, it has been held that if a dam has been erected under a parol license, and no expense at all has been incurred except in its erection, and it washes away, the party granting the original license may then revoke it before the other has incurred any expense in rebuilding; but where, in connection with the dam, money has been expended for buildings, machinery, etc., the mere washing away of the dam alone would not authorize a revocation of the parol license. *Middlebrooks v. Mayne*, 96 Ga. 449.

Dam Must Be Erected at Point Indicated. — By a license to erect a dam at a certain point on a stream, the licensee acquires no right to erect a dam at any other place. *Mason v. Hill*, 5 B. & Ad. 1, 27 E. C. L. 11.

2. Right to Overflow Lands on a Mill Above — *England.* — *Wright v. Howard*, 1 Sim. & S. 190.

Canada. — *Ruttan v. Winans*, 5 U. C. C. P. 379; *Smith v. Wallbridge*, 6 U. C. C. P. 324; *Bechtel v. Street*, 20 U. C. Q. B. 15; *Stothart v. Hilliard*, 19 Ont. Rep. 542; *Lawlor v. Porter*, 12 New Bruns. 328; *Connors v. M'Laggan*, 4 New Bruns. 446.

Connecticut. — *Parker v. Hotchkiss*, 25 Conn. 321.

Illinois. — *Vail v. Mix*, 74 Ill. 127; *Ballard v. Struckman*, 123 Ill. 636.

Indiana. — *Postlethwaite v. Payne*, 8 Ind. 104; *Ogle v. Dill*, 55 Ind. 130.

Maine. — *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

Massachusetts. — *Williams v. Nelson*, 23 Pick. (Mass.) 141, 34 Am. Dec. 45; *Borden v. Vincent*, 24 Pick. (Mass.) 301; *Tyler v. Mather*, 9 Gray (Mass.) 177; *Powers v. Osgood*, 102 Mass. 454; *Campbell v. Talbot*, 132 Mass. 174.

Michigan. — *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243; *Shearer v. Middleton*, 88 Mich. 621; *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503; *Williams v. Barber*, 104 Mich. 31.

Minnesota. — *Mueller v. Fruen*, 36 Minn. 273; *Swan v. Munch*, 65 Minn. 500.

Mississippi. — *Alcorn v. Sadler*, 71 Miss. 634.

New Hampshire. — *Gilman v. Tilton*, 5 N. H. 231; *Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71; *Norway Plains Co. v. Bradley*, 52 N. H. 86; *Bucklin v. Truell*, 54 N. H. 122; *Perley v. Hilton*, 55 N. H. 444.

New Jersey. — *Hulme v. Shreve*, 4 N. J. Eq. 116; *Carlisle v. Cooper*, 19 N. J. Eq. 256.

New York. — *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Russell v. Scott*, 9 Cow. (N. Y.) 279; *Hammond v. Zehner*, 21 N. Y. 118; *Hall v. Augsburg*, 46 N. Y. 622; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167; *Wilford v. Lane*, 37 Barb. (N. Y.) 244.

North Carolina. — *Wilson v. Wilson*, 4 Dev. L. (15 N. Car.) 154; *Gerenger v. Summers*, 2 Ired. L. (24 N. Car.) 229; *Griffin v. Foster*, 8 Jones L. (53 N. Car.) 337.

Pennsylvania. — *M'Calmont v. Whitaker*, 3 Rawle (Pa.) 84, 23 Am. Dec. 102; *Jessup v. Loucks*, 55 Pa. St. 350; *Gehman v. Erdman*, 105 Pa. St. 371; *McGeorge v. Hoffman*, 133 Pa. St. 381; *Costello v. Harris*, 162 Pa. St. 397.

South Carolina. — *Chalk v. McAlilly*, 11 Rich. L. (S. Car.) 153.

water,¹ or to use it in a particular way without interruption,² or the right of a riparian owner on one side to abut his milldam upon the opposite shore,³ may, like easements in general, be acquired by an uninterrupted and adverse enjoyment⁴ for twenty years, or for the period of time, whatever it may be,

Tennessee. — *Heiskell v. Cobb*, 11 Heisk. (Tenn.) 638.

Texas. — *Haas v. Choussard*, 17 Tex. 588.

Vermont. — *Perrin v. Garfield*, 37 Vt. 304; *Weed v. Keenan*, 60 Vt. 74, 6 Am. St. Rep. 93.

Wisconsin. — *Rooker v. Perkins*, 14 Wis. 79; *Arimond v. Green Bay, etc., Canal Co.*, 31 Wis. 316, 35 Wis. 41; *Pioneer Wood Pulp Co. v. Chandos*, 78 Wis. 526.

Compare Nichols v. Aylor, 7 Leigh (Va.) 546.

Sufficient if Dam Maintained on Same Mill Site. — To establish a prescriptive right of flowing land by a dam for the use of a mill, it is not necessary that the dam should have been maintained for the whole period, upon the same spot; it is sufficient if shown to have been maintained upon the same mill site, though removed from time to time to different places upon such site. *Stackpole v. Curtis*, 32 Me. 383.

Flowing by Different Dams Owned by Different Persons. — And a right to flow lands, for the working of a mill, may be acquired by prescription, although the flowing was occasioned by different dams owned by different persons. *Davis v. Brigham*, 29 Me. 391.

But the person claiming the right must show that the occupation was by some one under whom he claims. *Benson v. Soule*, 32 Me. 39.

Prescription Gives Only Easement in Land Flowed. — A person who acquires by prescription a right to flow the lands of another, does not own the lands flowed, but merely has an easement in them. *Terre Haute, etc., R. Co. v. Zehner*, 15 Ind. App. 273, *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455; *Costello v. Harris*, 162 Pa. St. 397.

Right to Enter Land Flowed to Repair Breaches. — But he has, as an incident to that right, authority to enter upon the land flowed and repair breaches in the natural state of the soil of the dam, but not to add thereto so as to cause additional overflow. *Ruttan v. Winans*, 5 U. C. P. 379.

In *Wisconsin*, where lands are flowed by a milldam, ten years gives a prescriptive right. *Sanb. & B. Annot. Stat.* (1889), § 4221; *Janssen v. Lammers*, 29 Wis. 88; *Johnson v. Boorman*, 63 Wis. 268.

Maine Milldam Act. — As to the acquisition of prescriptive rights to flow lands by dams erected within the provisions of the Maine milldam act, see *Tinkham v. Arnold*, 3 Me. 120; *Seidensparger v. Spear*, 17 Me. 123, 35 Am. Dec. 234; *Nelson v. Butterfield*, 21 Me. 220; *Davis v. Brigham*, 29 Me. 391; *Wood v. Kelley*, 30 Me. 47; *Wentworth v. Sanford Mfg. Co.*, 33 Me. 547; *Burleigh v. Lumbert*, 34 Me. 322; *Underwood v. North Wayne Seythe Co.*, 41 Me. 291; *Prescott v. Curtis*, 42 Me. 64; *Augusta v. Moulton*, 75 Me. 284.

Public Lands. — The right to overflow lands of the United States or of a state cannot be acquired by prescription. See the title ADVERSE POSSESSION, vol. I, p. 875.

1. Right to Detain or Divert the Water — *England*. — *Wright v. Howard*, 1 Sim. & S. 190.

Canada. — *Buell v. Read*, 5 U. C. Q. B. 546; *McLean v. Davis*, 11 New Bruns. 266.

United States. — *Tyler v. Wilkinson*, 4 Mason (U. S.) 397; *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. (U. S.) 538.

California. — *Coonrad v. Hill*, 79 Cal. 587.

Delaware. — *Delaney v. Boston*, 2 Harr. (Del.) 489.

Massachusetts. — *Brace v. Yale*, 10 Allen (Mass.) 441, 97 Mass. 18.

Michigan. — *Mastenbrook v. Alger*, (Mich. 1896) 68 N. W. Rep. 213.

New York. — *Matter of Clark*, (Supreme Ct.) 21 N. Y. St. Rep. 711, 4 N. Y. Supp. 259; *Hoyt v. Carter*, 16 Barb. (N. Y.) 212; *Matter of Water Com'rs*, 4 Edw. Ch. (N. Y.) 545.

Rhode Island. — *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711; *Vickery v. Providence*, 17 R. I. 651.

Evidence of the Right Must Be Clear. — *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396; *Campbell v. Smith*, 8 N. J. L. 140, 14 Am. Dec. 400.

Erection of New Dam Not Exceeding Prescriptive Right. — The defendant, who had acquired by prescription a right to divert the water of a stream upon his land by means of a dam built of loose stone, erected in the place of such dam, and upon the same spot, a dam built of stone and cement. About as much water escaped after the erection of the new dam as was wont to escape before. It was held that the defendant, by erecting the new dam, had not exceeded his prescriptive right, and therefore had not infringed the right of a lower riparian proprietor. *Wong Kim v. Kioula*, 4 Hawaiian 504.

Right Passes with the Inheritance. — Where a right has been acquired by prescription to divert water by means of a dam, it is perpetual and passes with the inheritance. *McLean v. Davis*, 11 New Bruns. 266. See the title PRESCRIPTION.

2. Right to Use the Water Without Interruption. — *Tucker v. Jewett*, 11 Conn. 311; *Adams v. Manning*, 48 Conn. 477; *Rogers v. Bruce*, 17 Pick. (Mass.) 184; *Cook v. Hull*, 3 Pick. (Mass.) 269, 15 Am. Dec. 208; *Shreve v. Voorhees*, 3 N. J. Eq. 25; *Belknap v. Trimble*, 3 Paige (N. Y.) 577; *Hale v. Oldroyd*, 14 M. & W. 789; *Buell v. Read*, 5 U. C. Q. B. 546.

3. Right to Abut on Opposite Shore. — *Trask v. Ford*, 39 Me. 437; *Bliss v. Rice*, 17 Pick. (Mass.) 23; *Burnham v. Kempton*, 44 N. H. 78; *Pioneer Wood Pulp Co. v. Chandos*, 78 Wis. 526. See also *Ruttan v. Winans*, 5 U. C. P. 379.

4. Enjoyment Must Be Uninterrupted and Adverse. — *Parker v. Hotchkiss*, 25 Conn. 321; *Terre Haute, etc., R. Co. v. Zehner*, 15 Ind. App. 273; *Sumner v. Tileston*, 7 Pick. (Mass.) 198; *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442; *Pratt v. Lamson*, 2 Allen (Mass.) 275; *Colvin v. Burnet*, 17 Wend. (N. Y.) 564;

limited by the statute of limitations for the right of entry upon land.¹

No Prescriptive Right where Dam Creates Public Nuisance. — Where a dam creates a public nuisance, the right to maintain it cannot be acquired by prescription,² so the right to maintain a dam which is injurious to the public rights on a navigable or floatable stream cannot be acquired by prescription.³

b. TIME FROM WHICH PRESCRIPTION RUNS. — The period of adverse user necessary to acquire a prescriptive right to flow by a dam the lands or mill of another commences when the dam is so far completed as to be in a condition to permanently back the water on such lands or mill.⁴

c. MEASURE OF PRESCRIPTIVE RIGHT — To Flow Lands. — The extent of the right to flow the lands of another acquired by prescription is not determined by the height of the structure of the dam, but is commensurate with the actual enjoyment of the easement, as evidenced by the extent to which the land of the owner of the servient tenement was habitually or usually flowed during the period of prescription.⁵

Use of Flash Boards. — There may be such continuity of use of flash boards as

Hart v. Vose, 19 Wend. (N. Y.) 365; Hoy v. Sterrett, 2 Watts (Pa.) 327, 27 Am. Dec. 313; Hartzall v. Sill, 12 Pa. St. 248; Wiley v. Hunter, 57 Vt. 479; Stokes v. Upper Appomattox Co., 3 Leigh (Va.) 318; Sabine v. Johnson, 35 Wis. 185. See the title ADVERSE POSSESSION, vol. 1, p. 787.

And whether it has been so or not is a question of fact for the jury. Trenton Water Power Co. v. Raff, 36 N. J. L. 335.

In delivering the opinion of the court, in Cornwell Mfg. Co. v. Swift, 89 Mich. 503, McGrath, J., said: "Occupation and use of a right of flowage or pondage, in order to create a prescriptive right, need not be constant, in the sense of a daily occupancy or use. It must be continuous and uninterrupted, but not necessarily constant. It is necessarily an irregular use, depending upon season and rainfall; and it is sufficient if the use be the ordinary use, and be resorted to without interruption whenever necessary in the operation of the power."

1. No Presumption that Dam Was Erected under Mill Acts. — That mills have for many years been maintained in connection with a dam, does not warrant the presumption that it was erected under the mill acts. Vickery v. Providence, 17 R. I. 651. See also Hempsted v. Cargill, 46 Minn. 118.

2. No Prescriptive Right to Maintain Public Nuisance. — Dyer v. Curtis, 72 Me. 181; New Salem v. Eagle Mill Co., 138 Mass. 8; State v. Rankin, 3 S. Car. 438, 16 Am. Rep. 737; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631. See the title PRESCRIPTION.

3. No Prescriptive Right to Obstruct Navigation. — Olive v. State, 86 Ala. 88; Parker v. People, 111 Ill. 581; Knox v. Chaloner, 42 Me. 150; Renwick v. Morris, 7 Hill (N. Y.) 575, affirming 3 Hill (N. Y.) 621; Gaston v. Mace, 33 W. Va. 14, 25 Am. St. Rep. 848. Compare Matter of State Reservation, 16 Abb. N. Cas. (N. Y. Supreme Ct.) 395, 37 Hun (N. Y.) 537.

Dam Built Across Arm of Sea. — The right cannot be acquired by prescription to maintain a dam which, without legislative authority, is built across an arm of the sea, into which a fresh-water creek empties, to exclude the salt water, for the purpose of creating a fresh-water pond. Dyer v. Curtis, 72 Me. 181.

4. When the Prescriptive Period Commences. — Branch v. Doane, 17 Conn. 402.

5. Measure of Right Acquired by Prescription — Georgia. — Ellington v. Bennett, 59 Ga. 286.

Michigan. — Turner v. Hart, 71 Mich. 128, 15 Am. St. Rep. 243.

New Hampshire. — Gilford v. Winnipiseogee Lake Co., 52 N. H. 262; Griffin v. Bartlett, 55 N. H. 119.

New Jersey. — Carlisle v. Cooper, 21 N. J. Eq. 576, affirming 19 N. J. Eq. 256.

New York. — Stiles v. Hooker, 7 Cow. (N. Y.) 266; Marcy v. Shults, 29 N. Y. 346.

North Carolina. — Gerenger v. Summers, 2 Ired. L. (24 N. Car.) 229; Morris v. Commander, 3 Ired. L. (25 N. Car.) 510; Powell v. Lash, 64 N. Car. 456.

Vermont. — Shrewsbury v. Brown, 25 Vt. 197.

Wisconsin. — Sabine v. Johnson, 35 Wis. 185; Johnson v. Boorman, 63 Wis. 268; Murray v. Scribner, 70 Wis. 228, 74 Wis. 602.

Canada. — Ruttan v. Winans, 5 U. C. C. P. 379; McKechnie v. McKeyes, 10 U. C. Q. B. 37; Bechtel v. Street, 20 U. C. Q. B. 15; Lawlor v. Potter, 12 New Bruns. 328.

In Several States, the rule has been laid down that a prescriptive right to flow lands by a dam is measured by the efficient height of the dam, in its ordinary action and operation, during the period of prescription. Voter v. Hobbs, 69 Me. 19; Ray v. Fletcher, 12 Cush. (Mass.) 200; Cowell v. Thayer, 5 Met. (Mass.) 253, 38 Am. Dec. 400; Jackson v. Harrington, 2 Allen (Mass.) 242; Daniels v. Citizens' Sav. Inst., 127 Mass. 534; Gehman v. Erdman, 105 Pa. St. 371; McGeorge v. Hoffman, 133 Pa. St. 381.

These *Pennsylvania* cases do not follow the rule laid down in Mertz v. Dorney, 25 Pa. St. 519.

Qualification of Right Acquired by Prescription.

— Where the practice in the use of a dam and its appendages during the period of prescription has been to control the height of the water in the pond in times of high water by removing the gates and permitting the water to flow off, this mode of user qualifies the right which has been acquired by prescription. Carlisle v. Cooper, 21 N. J. Eq. 576.

that they in effect are parts of the permanent structure, and by such user a right to flow by means of a permanent dam to the height of such boards may be acquired; but the occasional use of flash boards for short periods, when little or no injury may be done, as an exception to the general rule not to keep them on, does not amount to the open, uninterrupted, and notorious adverse use necessary to establish a prescriptive right.¹

To Divert Water. — One having a prescriptive right to divert water by means of a dam is limited to the amount he has been accustomed to divert during the period of prescription.²

d. LOSS OF PRESCRIPTIVE RIGHT. — A prescriptive right to overflow lands, or to interfere with an upper mill owner by setting back water upon him, may be lost by non-user for the length of time required to gain it, or by non-user commenced or continued under such circumstances as to evince unmistakably an intention by the mill owner to abandon his right, and which would render a subsequent resumption of it by him clearly inequitable to the owner of the servient tenement.³

V. LIABILITY FOR INJURIES CAUSED BY ERECTION OF DAM — 1. General Rule. — The general rule is that a riparian owner who erects a dam is responsible for all the injury caused by it at ordinary stages of water,⁴ or in times of ordinary, usual, and expected freshets,⁵ but he is not liable for injuries resulting from unexpected or unusual freshets.⁶ Of course this rule may be modified by rights acquired by grant, prescription, or statute.

1. How Prescriptive Right to Use Flash Boards Acquired. — *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Hall v. Augsburg*, 46 N. Y. 622; *Coloney v. Farrow*, 91 Hun (N. Y.) 82.

The fact that a party has, for upwards of twenty years, raised the height of a dam, by means of flash boards, during a portion of the year, does not prove a right by prescription to do so during the whole year. *Marcy v. Shults*, 29 N. Y. 346.

Uninterrupted Use a Question for the Jury. — Whether or not there has been such a constant and uninterrupted use of flash boards on a dam as to establish a prescriptive right to maintain them, is a question of fact for the jury. *Coloney v. Farrow*, 91 Hun (N. Y.) 82.

2. Measure of Right to Divert Water. — *Tyler v. Wilkinson*, 4 Mason (U. S.) 397. See also *Buell v. Read*, 5 U. C. Q. B. 546.

Right Must Be Exercised in a Reasonable Manner. — A party having a prescriptive right to utilize the water of a stream, by means of a dam, can exercise that right only in a reasonable manner, and not maliciously and wantonly to the prejudice of another. *Twiss v. Baldwin*, 9 Conn. 291.

3. How Prescriptive Rights May Be Lost. — *Williams v. Nelson*, 23 Pick. (Mass.) 141, 34 Am. Dec. 45; *French v. Braintree Mfg. Co.*, 23 Pick. (Mass.) 216; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *McConnell v. American Bronze Powder Mfg. Co.*, 41 N. J. Eq. 447; *Taylor v. Hampton*, 4 McCord L. (S. Car.) 96, 17 Am. Dec. 710; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Hazard v. Robinson*, 3 Mason (U. S.) 272. Compare *Farrar v. Cooper*, 34 Me. 394.

Short Cessation in Exercise of Right — Removal of Dam by Tenant. — A short cessation in the exercise of such right, occasioned by the burning of the mill, will not affect it, if there was an intention to rebuild the mill, carried into effect within a reasonable time. If a ten-

ant, without the assent of the owner of the inheritance, removes the milldam, this will not destroy the right, and after the expiration of the tenancy the owner of the freehold may restore the dam. *McLean v. Davis*, 11 New Bruns. 266.

4. What Is Ordinary Height of Water. — See *Decorah Woolen Mill Co. v. Greer*, 58 Iowa 86; *Smith v. Agawam Canal Co.*, 2 Allen (Mass.) 355; *Dorman v. Ames*, 12 Minn. 451; *McCoy v. Danley*, 20 Pa. St. 85, 57 Am. Dec. 680.

5. Liability of Dam Owner. — *Dorman v. Ames*, 12 Minn. 451; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72, reversing 32 Barb. (N. Y.) 268; *McCoy v. Danley*, 20 Pa. St. 85, 57 Am. Dec. 680; *Casebeer v. Mowry*, 55 Pa. St. 419, 93 Am. Dec. 766; *Sabine v. Johnson*, 35 Wis. 185.

6. Injuries Resulting from Unexpected and Unusual Freshets. — *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236; *China v. Southwick*, 12 Me. 238; *Smith v. Agawam Canal Co.*, 2 Allen (Mass.) 355; *Richards v. Peter*, 70 Mich. 286; *Dorman v. Ames*, 12 Minn. 451; *Ames v. Cannon River Mfg. Co.*, 27 Minn. 245; *Jones v. Turner*, 46 Barb. (N. Y.) 527; *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379, 47 Am. Dec. 474; *Thatcher v. Baker*, 109 Pa. St. 22; *Myers v. Fritz*, (Pa. 1887) 10 Atl. Rep. 30. But see *Pugh v. Wheeler*, 2 Dev. & B. L. (19 N. Car.) 50.

But if a dam backs water on another's land at ordinary stages of water and at times of expected freshets, the owner will also be liable for such injuries as are caused by the dam in extraordinary freshets. *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Humphrey v. Irvin*, (Pa. 1886) 4 Cent. Rep. 685.

Concurrence of Ordinary Natural Agencies Will Not Affect Liability. — A person who erects a dam cannot escape liability because ordinary natural agencies concurred with his acts in

2. Specific Applications of the Rule — a. FLOODING UPPER LANDS OR MILLS.

— A dam owner is liable for injuries caused by his dam setting the water back upon the lands of another,¹ and for flowing back water on a mill or reservoir above,² or on a mill privilege on which a mill formerly stood, thereby render-

producing injury to the property of another. Mississippi, etc., *R. Co. v. Archibald*, 67 Miss. 38, 41 Am. & Eng. R. Cas. 4. See also *Hooksett v. Amoskeag Mfg. Co.*, 44 N. H. 105; *Cline v. Baker*, 118 N. Car. 780; *Knoll v. Light*, 76 Pa. St. 268; *Hines v. Jarrett*, 26 S. Car. 480. Compare *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240.

Want of Care in Party Injured No Excuse. — Nor can a dam owner escape liability on the ground that the party injured did not use reasonable care to prevent the injury. *Fraler v. Sears Union Water Co.*, 12 Cal. 555; *Athens Mfg. Co. v. Rucker*, 80 Ga. 291. Compare *Decorah Woolen Mill Co. v. Greer*, 49 Iowa 490.

1. Flowing Lands of Proprietor Above. — *United States.* — *Tyler v. Wilkinson*, 4 Mason (U. S.) 397.

Connecticut. — *Chapman v. Thames Mfg. Co.*, 13 Conn. 269, 33 Am. Dec. 401; *Noyes v. Stillman*, 24 Conn. 15.

Georgia. — *Athens Mfg. Co. v. Rucker*, 80 Ga. 291; *Farmer v. McDonald*, 59 Ga. 509; *Gorman v. Trice*, 79 Ga. 731.

Illinois. — *Hill v. Ward*, 7 Ill. 285; *Centralia v. Wright*, 156 Ill. 561; *Economy Light, etc., Co. v. Cutting*, 49 Ill. App. 422.

Indiana. — *Wabash, etc., Canal v. Spears*, 16 Ind. 441, 79 Am. Dec. 444; *Miller v. Stowman*, 26 Ind. 143; *Scheible v. Law*, 65 Ind. 332.

Kansas. — *Akin v. Davis*, 11 Kan. 580.

Maine. — *Stevens v. Morse*, 5 Me. 26; *Preble v. Reed*, 17 Me. 169; *Strout v. Millbridge Co.*, 45 Me. 76.

Massachusetts. — *Charles v. Monson, etc.*, Mfg. Co., 17 Pick. (Mass.) 70; *Winkley v. Salisbury Mfg. Co.*, 14 Gray (Mass.) 443; *Ballard v. Ballard Vale Co.*, 5 Gray (Mass.) 468.

Michigan. — *Fox v. Holcomb*, 32 Mich. 494; *Shearer v. Middleton*, 88 Mich. 621.

Minnesota. — *Dorman v. Ames*, 12 Minn. 451; *Hayden v. Albee*, 20 Minn. 159.

Mississippi. — *Mississippi, etc., R. Co. v. Archibald*, 67 Miss. 38, 41 Am. & Eng. R. Cas. 4.

Missouri. — *Payne v. Kansas City, etc., R. Co.*, 112 Mo. 6.

New Hampshire. — *Plumer v. Harper*, 3 N. H. 88; *Watson v. Bartlett*, 62 N. H. 447.

New York. — *Jones v. Turner*, 46 Barb. (N. Y.) 527; *Russell v. Scott*, 9 Cow. (N. Y.) 279; *Colvin v. Burnet*, 2 Hill (N. Y.) 620; *Penfield v. New York, etc., Water Co.*, 53 Hun (N. Y.) 633, 6 N. Y. Supp. 180; *Coloney v. Farrow*, 91 Hun (N. Y.) 82.

North Carolina. — *Purcell v. McCallum*, 1 Dev. & B. L. (18 N. Car.) 221; *Bridges v. Purcell*, 1 Dev. & B. L. (18 N. Car.) 492; *Morris v. Commander*, 3 Ired. L. (25 N. Car.) 510; *Cagle v. Parker*, 97 N. Car. 271.

Ohio. — *McCombs v. Stewart*, 40 Ohio St. 647.

Oregon. — *Marsh v. Trullinger*, 6 Oregon 356.

Pennsylvania. — *M'Calmont v. Whitaker*, 3

Rawle (Pa.) 84, 23 Am. Dec. 102; *Kemmerer v. Edelman*, 23 Pa. St. 143; *Mertz v. Dorney*, 25 Pa. St. 519; *Casebeer v. Mowry*, 55 Pa. St. 419, 93 Am. Dec. 766; *Knoll v. Light*, 76 Pa. St. 268.

South Carolina. — *Hines v. Jarrett*, 26 S. Car. 480; *Townes v. Augusta*, 46 S. Car. 15.

Tennessee. — *Neal v. Henry*, Meigs (Tenn.) 17, 33 Am. Dec. 125.

Texas. — *Haas v. Choussard*, 17 Tex. 588; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631.

Utah. — *Peay v. Salt Lake City*, 11 Utah 331.

Vermont. — *Johns v. Stevens*, 3 Vt. 308; *Wiley v. Hunter*, 57 Vt. 479.

Virginia. — *Ellis v. Harris*, 32 Gratt. (Va.) 684.

Wisconsin. — *Arimond v. Green Bay, etc., Canal Co.*, 35 Wis. 41; *Lohmiller v. Indian Ford Water Power Co.*, 51 Wis. 683; *Velte v. U. S.*, 76 Wis. 278.

Canada. — *McNab v. Adamson*, 6 U. C. Q. B. 100; *Breathour v. Bolster*, 23 U. C. Q. B. 317; *Stothart v. Hilliard*, 19 Ont. Rep. 542; *Dickson v. Burnham*, 14 Grant's Ch. (U. C.) 594; *Hawkins v. Mahaffy*, 29 Grant's Ch. (U. C.) 326; *Currie v. Adams*, 14 Quebec L. Rep. 169; *Smith v. Scott*, 3 New Bruns. 1.

Accumulation of Sand in Stream. — *Hines v. Jarrett*, 26 S. Car. 480.

Flooding Caused by Grass Growing in Dam. — *Knoll v. Light*, 76 Pa. St. 268.

Damage Resulting from Combined Effect of Dam and Bridge. — *Payne v. Kansas City, etc., R. Co.*, 112 Mo. 6.

Liability Not Dependent on Injured Party Attempting to Avoid Injury. — The defendant built a dam across a river, which caused the water of a creek, passing through the plaintiff's land, to overflow. It was held that the plaintiff could recover though he did nothing to avoid the consequences of the defendant's act. *Athens Mfg. Co. v. Rucker*, 80 Ga. 291.

Dam Erected as Protection Against Dam of Injured Party. — Where a plaintiff had erected a dam which caused the defendant to have to erect one for the protection of his land, it was held that the latter was not liable for the injuries his dam caused by flooding the lands of the former. *Wilhelm v. Burleyson*, 106 N. Car. 381.

Liability for Overflowing Land Purchased After Erection of Dam. — A railroad company, which has negligently suffered a dam built by it across a natural watercourse to remain in a condition to overflow the lands above it, is liable to the owner for injury to said lands, resulting from an overflow, although such owner purchased the lands after the erection of the dam and with knowledge of its effects, and although no positive acts of the company have intervened since the purchase. The wrong is a continuing one. *Mississippi, etc., R. Co. v. Archibald*, 67 Miss. 38.

2. Flowing Back Water on a Mill or Reservoir Above. — *England.* — *Saunders v. Newman*, 1 B. & Ald. 258.

ing the site useless for the purpose of erecting a mill; unless the owner has abandoned it.¹

Tenants in Common. — One tenant in common of land, who by means of a dam erected on other land of which he is sole seized flows the land owned in common without the consent of his co-tenants, is liable therefor to such co-tenants.²

Flooding Public Highways. — A dam owner is liable for the injury which results from his dam flooding a public highway.³

b. CREATING STAGNANT POOL INJURIOUS TO HEALTH. — Where a dam creates a stagnant pool injurious to health, the dam owner is liable for all injuries resulting therefrom.⁴

c. DROWNING NEIGHBORING LANDS BY PERCOLATION. — One who erects a dam is liable for injuries which result from the water confined by it percolating through the soil and drowning neighboring lands.⁵

Canada. — McLaren *v.* Cook, 3 U. C. Q. B. 299; Watson *v.* Perine, 13 U. C. C. P. 229; Wadsworth *v.* McDougall, 30 U. C. Q. B. 369; Pangman *v.* Bricault dit Lamarche, 11 L. C. Rep. 76.

United States. — Whipple *v.* Cumberland Mfg. Co., 2 Story (U. S.) 661.

Connecticut. — King *v.* Tiffany, 9 Conn. 162; Branch *v.* Doane, 17 Conn. 402; Robertson *v.* Miller, 40 Conn. 40.

Delaware. — Delaney *v.* Boston, 2 Harr. (Del.) 489.

Illinois. — Stout *v.* M'Adams, 3 Ill. 67, 33 Am. Dec. 441; Rudd *v.* Williams, 43 Ill. 385.

Indiana. — Case *v.* Weber, 2 Ind. 108; Bristol Hydraulic Co. *v.* Boyer, 67 Ind. 236; Williamson *v.* Yingling, 80 Ind. 379.

Iowa. — Gibson *v.* Fischer, 68 Iowa 29.

Maine. — Lincoln *v.* Chadbourne, 56 Me. 197.

Massachusetts. — Baker *v.* Sanderson, 3 Pick. (Mass.) 348; Sumner *v.* Tileston, 7 Pick. (Mass.) 108; Thompson *v.* Crocker, 9 Pick. (Mass.) 59; Pierce *v.* Travers, 97 Mass. 306; Brown *v.* Dean, 123 Mass. 254; Brown Paper Co. *v.* Dean, 123 Mass. 267.

Michigan. — Richards *v.* Peter, 70 Mich. 286.

Minnesota. — Ames *v.* Cannon River Mfg. Co., 27 Minn. 245.

Missouri. — McIntosh *v.* Rankin, 134 Mo. 340.

New Hampshire. — Gilman *v.* Tilton, 5 N. H. 231; Cowles *v.* Kidder, 24 N. H. 364, 57 Am. Dec. 287.

New York. — Stiles *v.* Hooker, 7 Cow. (N. Y.) 266; Brown *v.* Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Scriver *v.* Smith, 100 N. Y. 471.

North Carolina. — Hardin *v.* Ledbetter, 103 N. Car. 90.

Rhode Island. — Mowry *v.* Sheldon, 2 R. I. 360.

South Carolina. — Omelvany *v.* Jagers, 2 Hill L. (S. Car.) 634, 27 Am. Dec. 417.

Tennessee. — Webster *v.* Fleming, 2 Humph. (Tenn.) 518.

Vermont. — Davis *v.* Fuller, 12 Vt. 178, 36 Am. Dec. 334.

Injury Must Be Caused by Dam. — It is not enough to show that the injury to the mill had existed only since the erection of the dam, but it must be shown that the injury was actually caused by the dam. Newland *v.* Hudson River Water-Power, etc., Co., (Supreme Ct.) 16 N. Y. Supp. 654, 62 Hun (N. Y.) 618. See

also Wadsworth *v.* McDougall, 24 Grant's Ch. (U. C.) 1.

Where Injury Is Caused by Act of Mill Owner. — The owner of a dam is not liable for flowing back water on an upper mill, if the mill owner lowers his wheel or lowers or changes the natural bed of the stream below his mill, and thus by his own act causes the water to flow upon his mill. Dean *v.* Colt, 99 Mass. 486; Gleason *v.* Assabet Mfg. Co., 101 Mass. 72. See also Watson *v.* Perine, 13 U. C. C. P. 229; Wadsworth *v.* McDougall, 24 Grant's Ch. (U. C.) 1.

Nor is a dam owner liable for flowing back water on a mill if the mill owner causes to flow over his land a greater quantity of water than it is naturally subjected to. Merritt *v.* Parker, 1 N. J. L. 526.

State Dam to Improve Navigable River. — The owner of a mill on a navigable river cannot recover for an injury to his mill caused by back water from a dam erected by the state or its agents in the exercise of their power to regulate and improve the river. McKen *v.* Delaware Div. Canal Co., 49 Pa. St. 424.

Expert Testimony is competent to show what effect the erection of a milldam will have upon the mill above. Ball *v.* Hardesty, 38 Kan. 540.

1. Flooding Mill Privilege. — Pillsbury *v.* Moore, 44 Me. 154, 69 Am. Dec. 91; Hatch *v.* Dwight, 17 Mass. 289, 9 Am. Dec. 145. See also Lincoln *v.* Chadbourne, 56 Me. 197.

2. Liability of Tenants in Common. — Hutchinson *v.* Chase, 39 Me. 508, 63 Am. Dec. 645; Odiorne *v.* Lyford, 9 N. H. 502, 32 Am. Dec. 387; Great Falls Co. *v.* Worster, 15 N. H. 412.

3. Injuries to Public Highways. — New Salem *v.* Eagle Mill Co., 138 Mass. 8; Cheshire *v.* Adams, etc., Reservoir Co., 119 Mass. 356; State *v.* Ousatonie Water Co., 51 Conn. 137.

4. Stagnant Pool Endangering Health. — Neal *v.* Henry, Meigs (Tenn.) 17, 33 Am. Dec. 125; Haas *v.* Choussard, 17 Tex. 588; Fort Worth, etc., R. Co. *v.* Scott, 2 Tex. App. Civ. Cas., § 142. See also Ogletree *v.* McQuaggs, 67 Ala. 580, 42 Am. Rep. 112; White *v.* Forbes, Walk. (Mich.) 112. See generally the titles NUISANCES; WATER AND WATERCOURSES.

5. Drowning Neighboring Lands by Percolation. — Wilson *v.* New Bedford, 108 Mass. 261, 11 Am. Rep. 352; Pixley *v.* Clark, 35 N. Y. 520, 91 Am. Dec. 72, reversing 32 Barb. (N. Y.) 268; Reed *v.* State, 108 N. Y. 407; Marsh *v.* Trul-

d. **DISCHARGING WATER ON LANDS BELOW.** — If a dam owner discharges the water from his dam in large quantities and floods the lands of lower proprietors, he will be responsible for the resulting injuries.¹

e. **INTERFERING WITH NATURAL DRAINAGE.** — Where the natural course and outlet for surface water on the land of one owner is over the land of another, such course cannot be obstructed by a dam, and any one so obstructing it is liable therefor.² A contrary doctrine is held in some states.³

f. **INJURIES RESULTING FROM FAULTY CONSTRUCTION.** — The owner of a dam must use reasonable care and skill in so constructing and maintaining it that it will be capable of resisting the water of the stream in times of ordinary, usual, and expected freshets, and if he does not do so he will be liable for any injuries resulting from his neglect; but he is not responsible for inevitable accidents, or for injuries caused by extraordinary floods which could not be anticipated or guarded against.⁴

linger, 6 Oregon 356; *Esson v. Wattier*, 25 Oregon 7. See also *Fletcher v. Rylands*, L. R. 1 Exch. 265.

Back Water Saturating Soil of Proprietor Above. — The owner of a dam is responsible if the back water from his dam saturates the soil of the proprietor above, even though it does not overflow the surface. *Ellington v. Bennett*, 59 Ga. 286; *Athens Mfg. Co. v. Rucker*, 80 Ga. 291. See also *Monson, etc., Mfg. Co. v. Fuller*, 15 Pick. (Mass.) 554.

Causing Subterranean Streams to Set Back. — But a dam owner is not liable because his dam causes subterranean streams to set back and stand upon the land of another. *Harwood v. Benton*, 32 Vt. 724.

1. Flooding Lands Below. — *Frye v. Moor*, 53 Me. 583; *Wilson v. Campbell*, 76 Me. 94; *Clapp v. Herrick*, 129 Mass. 292; *Gerrish v. New Market Mfg. Co.*, 30 N. H. 478; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *McKee v. Delaware, etc., Canal Co.*, 125 N. Y. 353, 21 Am. St. Rep. 740, *affirming* 52 Hun (N. Y.) 52; *Kelly v. Lett*, 13 Ired. L. (35 N. Car.) 50; *Rich v. Keshena Imp. Co.*, 56 Wis. 287; *Hackstack v. Keshena Imp. Co.*, 66 Wis. 439; *Boyington v. Squires*, 71 Wis. 276.

Measure of Care Required in Letting Down Water. — If the owner of a mill and reservoir dam on the same stream only lets down water which is reasonably necessary for the use of his mill, and which does not increase the volume of the stream beyond its usual limit or overflow its usual channel, he is not liable if he thereby renders intermediate land wet and less valuable for cultivation. *Drake v. Hamilton Woolen Co.*, 99 Mass. 574. See also *Brown v. Atlanta*, 66 Ga. 71; *Norway Plains Co. v. Bradley*, 52 N. H. 105.

If a dam owner does not let down a larger quantity of water than would naturally flow down the stream, he is not liable for an injury to the dam of a proprietor below. — *Wegenast v. Ernst*, 8 U. C. C. P. 456.

Turning a Stream into Mill Pond. — If the owner of a mill turns into his mill pond a stream which does not naturally flow into it, he is liable to an action for damages at the suit of the owner below. *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355.

2. Dams Obstructing Natural Drainage. — *Patneaud v. Claire*, 32 Ill. App. 554. See also *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Ogburn v. Connor*, 46 Cal. 346, 13 Am.

Rep. 213; *Drew v. Cole*, (Cal. 1893) 32 Pac. Rep. 229; *Wharton v. Stevens*, 84 Iowa 107; *Palmer v. Waddell*, 22 Kan. 352; *Martin v. Jett*, 12 La. 501, 32 Am. Dec. 120; *Lattimore v. Davis*, 14 La. 161, 33 Am. Dec. 581; *Delahoussaye v. Judice*, 13 La. Ann. 587, 71 Am. Dec. 521; *Hooper v. Wilkinson*, 15 La. Ann. 497, 77 Am. Dec. 794; *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199; *Bowman v. New Orleans*, 27 La. Ann. 501; *Ludeling v. Stubbs*, 34 La. Ann. 935; *Treat v. Bates*, 27 Mich. 390; *Porter v. Durham*, 74 N. Car. 767; *Sheldon v. Cole*, 2 Ohio N. P. 307; *Kauffman v. Griesemer*, 26 Pa. St. 407, 67 Am. Dec. 437; *Beard v. Murphy*, 37 Vt. 99, 86 Am. Dec. 693. Compare *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179.

3. *Cairo, etc., R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Benthall v. Seifert*, 77 Ind. 302; *Cairo, etc., R. Co. v. Houry*, 77 Ind. 364; *Parks v. Newburyport*, 10 Gray (Mass.) 28; *Gannon v. Hargadon*, 10 Allen (Mass.) 106, 87 Am. Dec. 625.

On this subject see the title **WATERS AND WATERCOURSES.**

4. Liability for Injuries Resulting from Faulty Construction — *England.* — *Nichols v. Marsland*, 2 Exch. Div. 1.

Canada. — *Mills v. Dixon*, 4 U. C. C. P. 222; *Peters v. Devinney*, 6 U. C. C. P. 389; *Philps v. St. John Water Co.*, 9 New Bruns. 24.

United States. — *Hardt v. Liberty Hill Consol. Min., etc., Co.*, 27 Fed. Rep. 788. See also *Mining Debris Case*, 9 Sawy. (U. S.) 441.

California. — *Fraler v. Sears Union Water Co.*, 12 Cal. 555; *Wiedekind v. Tuolumne County Water Co.*, 83 Cal. 198; *Everett v. Hydraulic Flume Tunnel Co.*, 23 Cal. 225.

Michigan. — *Darling v. Thompson*, 108 Mich. 215.

New York. — *Livingston v. Adams*, 8 Cow. (N. Y.) 175; *Pollett v. Long*, 56 N. Y. 200.

Pennsylvania. — *Lehigh Bridge Co. v. Lehigh Coal, etc., Co.*, 4 Rawle (Pa.) 9, 26 Am. Dec. 111; *Roush v. Walter*, 10 Watts (Pa.) 86; *Knoll v. Light*, 76 Pa. St. 268; *Myers v. Fritz*, (Pa. 1887) 10 Atl. Rep. 30.

South Carolina. — *State v. Knotts*, 2 Spears L. (S. Car.) 582.

Vermont. — *Lapham v. Curtis*, 5 Vt. 371, 26 Am. Dec. 310.

Wisconsin. — *Rich v. Keshena Imp. Co.*, 56 Wis. 287.

No Liability in Absence of Negligence. — Where

g. **OBSTRUCTING NAVIGATION.** — One who without legislative authority erects a dam across a navigable river is liable for all the injuries that result from it,¹ even though had the dam not been erected another obstruction in the river would have produced the same result.²

VI. LIABILITY FOR REPAIRS — 1. Of Joint Owners. — Where a milldam is owned by several persons they are bound, in the absence of a special contract, to defray the costs of repair in proportion to their several interests.³ In several states this question is regulated by statute.⁴

2. Where Dam Is Part of a Highway. — If the owners of a water mill, whose pond is raised by a causeway which they maintain by affirmative acts as their dam, but which forms part of a highway which the town is bound to keep

one builds a milldam upon a proper model, and the work is well and substantially done, he is not liable though it break away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown in order to make him liable. *Livingston v. Adams*, 8 Cow. (N. Y.) 175. See also *Peters v. Devinney*, 6 U. C. C. P. 389.

Chute Rendered Unnavigable by Flood or Accident. — If a dam be built in a navigable stream, in conformity with the provisions of the law, and the chute be rendered unnavigable by flood or accident, the owner of the dam will not be liable for damage occasioned thereby. *Roush v. Walter*, 10 Watts (Pa.) 86.

Where the Stream Is Subject to Extraordinary Freshets the owner of the dam is bound to so construct it as to resist such freshets. *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *New York v. Bailey*, 2 Den. (N. Y.) 433. See also *Dickson v. Burnham*, 14 Grant's Ch. (U. C.) 594.

In California the rule has been laid down that such care shall be required in the construction of a dam, as discreet or prudent men should use or ordinarily use in such cases, where their own interests are to be affected. *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413; *Wolf v. St. Louis Independent Water Co.*, 10 Cal. 541; *Todd v. Cochell*, 17 Cal. 97.

Reasonable Care a Question for the Jury. — Whether or not the owner of a dam has used reasonable care in constructing or maintaining it, is a question of fact for the jury. *Peters v. Devinney*, 6 U. C. C. P. 389; *Weiderkind v. Tuolumne County Water Co.*, 65 Cal. 431; *Darling v. Thompson*, 108 Mich. 215.

1. Obstructing Navigation. — *Burrows v. Pixley*, 1 Root (Conn.) 363, 1 Am. Dec. 56; *Clark v. Lake*, 2 Ill. 229. See the title NAVIGABLE WATERS.

Where Raft Could Not Have Navigated River Without Dam. — It is no defense to an action for injuries to a raft, occasioned by improper obstructions at a dam, that such a raft could not have navigated the river at all before the dam was built. *Volk v. Eldred*, 23 Wis. 410.

Mutual Rights of Dam Owners and Public. — Where one has a right to erect a dam in a public stream, so as not to obstruct its navigation, persons passing such dam are required to use ordinary care, diligence, and skill; but where these are used, and the dam is such an obstruction as to occasion loss to those attempting its passage, the one erecting or maintaining it must answer in damages, no

matter what was the stage of the water at the time of passing it. *Plumer v. Alexander*, 12 Pa. St. 81; *Newbold v. Mead*, 57 Pa. St. 487.

The owner of a mill, having a right to erect a dam upon a navigable stream, is bound to exercise his right in such manner as not to interfere unreasonably with the rights of the public in the use of the stream. Such owner will be liable to an action by any citizen whose reasonable use of the stream to float logs to market he has prevented. *Parks v. Morse*, 52 Me. 260.

Obstructing Floatable Streams. — Though a stream is not strictly navigable, yet if it is inherently and in its nature capable of being used for the purpose of commerce, for the floating of vessels, boats, rafts, or logs, a public easement in it exists; and where the proprietor of such a stream, by means of a dam and an accumulation of his logs above the dam under claim of a right to control the stream, designedly obstructs the running of another's logs and refuses to make any provision for the passage of them, he will be liable for the damages resulting therefrom. *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641. See also *McBean v. Carlisle*, 19 L. Can. Jur. 276; *Knox v. Chaloner*, 42 Me. 150.

2. Immaterial that Another Obstruction Would Have Produced Same Result. — *Clark v. Lake*, 2 Ill. 229.

3. Liability of Joint Owners for Repairs. — *Cooper v. Cedar Rapids Water Power Co.*, 42 Iowa 398; *Alden v. Carleton*, 81 Me. 358; *Gwineth v. Thompson*, 9 Pick. (Mass.) 31, 19 Am. Dec. 350; *Campbell v. Hand*, 49 Pa. St. 234; *Webb v. Laird*, 59 Vt. 108, 59 Am. Rep. 699; *Clark v. Plummer*, 31 Wis. 442.

4. Regulated by Statute in Several States. — *Buck v. Spofford*, 31 Me. 34; *Alden v. Carleton*, 81 Me. 358.

The *New Hampshire* statute (Pub. Stat. 1891, pp. 391, 392) relative to the repair of mills, dams, etc., owned by tenants in common, does not, on the neglect of the one tenant, authorize another to erect a new dam substantially different from the former and to call on his cotenant under an appraisal for contribution. *Bellows v. Dewey*, 9 N. H. 278.

Under the *Wisconsin* statute (Tay. Stat., c. 56, §§ 43, 44, *et seq.*), joint owners of milldams, booms, and piers are liable for the expense of necessary repairs, and a summary mode is provided for determining the necessity and expense of such repairs and the time for commencing and completing them. *Clark v. Plummer*, 31 Wis. 442.

in repair, render repairs to it as a highway needful by their negligence in maintaining it as a dam, they are liable to the town for the cost of such repairs.¹

3. To Bridge Erected by Dam Owner Across a Flooded Highway. — Where a dam floods a public highway, and the dam owner erects a bridge or causeway on the highway at the place where it is flooded, and thereby renders it better than it was before the flooding, and the public uses such bridge or causeway, the dam owner is not chargeable with the maintenance and repair of such structure, but the liability for repairs rests with the public authorities.²

VII. LIABILITY FOR INJURIES TO DAMS. — Any person who, without legal authority to do so, destroys or injures a dam, or infringes any right pertaining to the ownership of a dam, is liable for the damage resulting from his acts.³

Injuries Resulting from Reasonable and Proper Use of Stream. — But if a riparian proprietor, in the reasonable and proper use of the stream, causes injury to the dam of another proprietor, he will not be liable therefor.⁴

Removing Dam Which Unlawfully Floods Another's Land. — A riparian proprietor who removes a dam which unlawfully floods his land is not liable in damages therefor.⁵

Contributory Negligence. — There is no liability for injury to a dam where the dam owner's own negligence contributed approximately to the injury.⁶

VIII. REMEDIES — **1. Of Persons Injured by a Dam** — *a. INJUNCTION AND ABATEMENT.* — Where the erection or the raising of a dam, or the improper use of the water of a stream by means of a dam, would violate another's right and cause irreparable injury or danger of such injury, it will be restrained by injunction; and where the maintenance of a dam works an injury to the rights of others for which an action at law furnishes no adequate remedy, equity will interfere and order its abatement to such an extent as will remedy the injury. But the right of equity to interfere is subject to the provisions

1. Where Dam Is Formed by Part of Highway. — *Brookfield v. Walker*, 100 Mass. 94.

2. Bridge Erected by Dam Owner Across Flooded Highway. — *Rex v. Kent County*, 2 M. & S. 513; *Wallace v. Evans*, 43 Kan. 509. See the titles *BRIDGES*, vol. 4, p. 918; *HIGHWAYS*.

3. Injuries to Dams. — *Toothaker v. Winslow*, 61 Me. 123; *Darling v. Thompson*, 108 Mich. 215; *Quigley v. Birdseye*, 11 Mont. 439; *Runnels v. Bullen*, 2 N. H. 532; *Van Rensselaer v. Van Rensselaer*, 9 Johns. (N. Y.) 377; *Gwaltney v. Scottish Carolina Timber Co.*, 115 N. Car. 579; *Canfield v. Andrews*, 54 Vt. 1, 41 Am. Rep. 828.

Impeding Operation of Mill by Use of Water. — *Louisville, etc., R. Co. v. Beauchamp*, (Ky. 1897) 40 S. W. Rep. 679.

No Liability for Exposing Dam to Sun. — An upper riparian owner is not liable for so using the water in the stream that a lower owner's milldam, instead of remaining under the water, is exposed to the action of the sun, the operation of the mill not being impeded. *Louisville, etc., R. Co. v. Beauchamp*, (Ky. 1897) 40 S. W. Rep. 679.

4. Reasonable and Proper Use of Stream. — *Prentice v. Geiger*, 74 N. Y. 341, *affirming* 9 Hun (N. Y.) 350; *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828.

Whether or not a particular use of a stream is, under all the circumstances, a reasonable and proper one, is a question of fact for the jury to decide. *Prentice v. Geiger*, 74 N. Y. 341, *affirming* 9 Hun (N. Y.) 350.

Injuries Caused by Logs in Floatable Stream.

— One who places logs in a floatable stream is not liable for the damage they occasion to a dam below, if such dam has no convenient sluice or passageway for logs. *Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848; *Whisler v. Wilkinson*, 22 Wis. 572; *Miller v. Sherry*, 65 Wis. 129. See also *Beliveau v. Levasseur*, 1 Rev. Leg. 720. But see *Munson v. Hungerford*, 6 Barb. (N. Y.) 265. See the title *LOGS AND LUMBER*.

In *James v. Carter*, 96 Ky. 378, the appellee had maintained a dam in a floatable stream for more than fifty years. It was held that persons engaged in floating logs down the stream, who injured the dam by reason of their negligence in handling their logs, were liable to the appellee for such injury.

5. Removal of Dam Which Floods Another's Land. — *Winchell v. Clark*, 68 Mich. 64. As to the right to abate a dam, see *infra*, this title, *Remedies*.

Dam Erected by State. — But where a dam is erected by the state for a public purpose, a person who removes it is liable therefor even though it floods his lands. To the extent that a dam is maintained by the state or by its authority it cannot be a nuisance, and no private person can destroy it because the state neglects to keep it in good preservation or because he considers it dangerous or injurious. *Harris v. Thompson*, 9 Barb. (N. Y.) 350.

6. Where Dam Owner's Negligence Contributes Proximately to Injury. — *Lilley v. Fletcher*, 81 Ala. 234. See generally the title *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368.

of the milldam acts of the several states.¹

When Party Injured May Abate. — One upon whose land a dam or a part of a dam is unlawfully erected may remove so much of it as is upon his land.² And where the dam of one proprietor causes injury to another by backing water on his lands or mill above or by obstructing the flow of the stream to his mill below, the party injured may go upon the land of the dam owner and abate the dam to such an extent as will remedy the injury.³ But he must abate it within a reasonable time,⁴ and if he remove more of the dam than is

1. Injunction and Abatement — England. — *Agnew v. McDowell*, 14 L. R. Ir. 445; *Belfast Rope Works Co. v. Boyd*, 21 L. R. Ir. 560.

Canada. — *Graham v. Burr*, 4 Grant's Ch. (U. C.) 1; *Wright v. Turner*, 10 Grant's Ch. (U. C.) 67; *Beamish v. Barrett*, 16 Grant's Ch. (U. C.) 318; *Dickson v. Burnham*, 17 Grant's Ch. (U. C.) 261, 14 Grant's Ch. (U. C.) 594.

United States. — *Hardt v. Liberty Hill Consol. Min., etc., Co.*, 27 Fed. Rep. 788; *U. S. v. Lawrence*, 53 Fed. Rep. 632.

Alabama. — *Rosser v. Randolph*, 7 Port. (Ala.) 238, 31 Am. Dec. 712; *Ogletree v. McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112.

California. — *Ramsay v. Chandler*, 3 Cal. 90; *McDonald v. Askew*, 29 Cal. 200; *Stanford v. Felt*, 71 Cal. 249; *Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426, 7 Am. St. Rep. 183; *Paige v. Rocky Ford Canal, etc., Co.*, 83 Cal. 84.

Colorado. — *Sylvester v. Jerome*, 19 Colo. 128.

Connecticut. — *Agawam Canal Co. v. Edwards*, 36 Conn. 476; *Holyoke Water Power Co. v. Connecticut River Co.*, 52 Conn. 570.

Georgia. — *Norwood v. Dickey*, 18 Ga. 528; *Minor v. DeVaughn*, 72 Ga. 208; *DeVaughn v. Minor*, 77 Ga. 809.

Indiana. — *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Anderson v. Hubble*, 93 Ind. 570.

Iowa. — *Decorah Woolen Mill Co. v. Greer*, 49 Iowa 490.

Kansas. — *Kirkendall v. Hunt*, 4 Kan. 514; *Akin v. Davis*, 11 Kan. 580.

Kentucky. — *Hahn v. Thornberry*, 7 Bush (Ky.) 403; *Daniel v. Princeton*, (Ky. 1893) 22 S. W. Rep. 324.

Maine. — *Bradford v. Cressey*, 45 Me. 9; *Williams v. Camden, etc., Water Co.*, 79 Me. 543.

Massachusetts. — *Stevens v. Stevens*, 11 Met. (Mass.) 251, 45 Am. Dec. 203; *Hill v. Sayles*, 12 Cush. (Mass.) 454; *Brace v. Yale*, 99 Mass. 488; *Potter v. Howe*, 141 Mass. 357.

Michigan. — *Stone v. Roscommon Lumber Co.*, 59 Mich. 24; *Koopman v. Blodgett*, 70 Mich. 610, 14 Am. St. Rep. 527; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243; *A. P. Cook Co. v. Beard*, 108 Mich. 17; *Mastenbrook v. Alger*, (Mich. 1896) 68 N. W. Rep. 213.

Missouri. — *Smith v. Musgrove*, 32 Mo. App. 241; *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74.

Nebraska. — *Nosser v. Seeley*, 10 Neb. 460; *Stumbo v. Seeley*, 23 Neb. 212; *Culver v. Garbe*, 27 Neb. 312; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238.

New Hampshire. — *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71; *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426.

New Jersey. — *Shreve v. Voorhees*, 3 N. J.

Eq. 25; *Quackenbush v. Van Riper*, 3 N. J. Eq. 350, 29 Am. Dec. 716; *Hulme v. Shreve*, 4 N. J. Eq. 116; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Outcalt v. George W. Helme Co.*, 42 N. J. Eq. 665.

New York. — *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Rothery v. New York Rubber Co.*, 90 N. Y. 30; *Leonard v. Spencer*, 108 N. Y. 338, *affirming* 34 Hun (N. Y.) 341; *McKee v. Delaware, etc., Canal Co.*, 125 N. Y. 353, 21 Am. St. Rep. 740, *affirming* 52 Hun (N. Y.) 52; *Wells v. Garbutt*, 132 N. Y. 430; *Hoyt v. Cline*, 133 N. Y. 686, *affirming* 39 N. Y. St. Rep. 937, 61 Hun (N. Y.) 619; *Arthur v. Case*, 1 Paige (N. Y.) 447; *Pollitt v. Long*, 58 Barb. (N. Y.) 20; *Dean v. Benn*, 69 Hun (N. Y.) 519; *Wright v. Shanahan*, 61 Hun (N. Y.) 264.

North Carolina. — *Atty.-Gen. v. Blount*, 4 Hawks (11 N. Car.) 384; *Atty.-Gen. v. Hunter*, 1 Dev. Eq. (16 N. Car.) 12; *Burnett v. Nicholson*, 72 N. Car. 334.

Oregon. — *Esson v. Wattier*, 25 Oregon 7. **Pennsylvania.** — *M'Calmont v. Whitaker*, 3 Rawle (Pa.) 84, 23 Am. Dec. 102; *Hieskell v. Gross*, 7 Phila. (Pa.) 317.

Rhode Island. — *Bull v. Valley Falls Co.*, 8 R. I. 42; *Stone v. Peckham*, 12 R. I. 27.

Tennessee. — *Caldwell v. Knott*, 10 Yerg. (Tenn.) 209; *Phillips v. Stockett*, 1 Overt. (Tenn.) 200.

Texas. — *Thomas v. Junction City Irrigation Co.*, 80 Tex. 550.

Washington. — *Rigney v. Tacoma Light, etc., Co.*, 9 Wash. 576.

Wisconsin. — *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 265; *Patten v. Marden*, 14 Wis. 473; *Crossby v. Smith*, 19 Wis. 449; *Wisconsin River Imp. Co. v. Lyons*, 30 Wis. 61; *Patten Paper Co. v. Kaukauna Water-Power Co.*, 70 Wis. 659.

See also the title INJUNCTION.

2. Abatement by Injured Party. — *Jewell v. Gardiner*, 12 Mass. 311; *Lindeman v. Lindsey*, 69 Pa. St. 93, 8 Am. Rep. 219; *Adams v. Barney*, 25 Vt. 225; *Richardson v. Emerson*, 3 Wis. 319, 62 Am. Dec. 694. See the title ABATEMENT OF NUISANCES, vol. 1, p. 63.

3. Miner v. Gilmour, 12 Moo. P. C. C. 131, 33 L. J. P. C. 98; *Graham v. Burr*, 4 Grant's Ch. (U. C.) 1; *Moffett v. Brewer*, 1 Greene (Iowa) 348; *Gates v. Blincoe*, 2 Dana (Ky.) 158, 26 Am. Dec. 440; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265; *Hodges v. Raymond*, 9 Mass. 316; *Colburn v. Richards*, 13 Mass. 420, 7 Am. Dec. 160; *Winchell v. Clark*, 68 Mich. 64; *Great Falls Co. v. Worster*, 15 N. H. 412; *Dyer v. Depui*, 5 Whart. (Pa.) 584. See also *Langford v. Owsley*, 2 Bibb (Ky.) 215, 4 Am. Dec. 699.

4. Abatement Must Be Within a Reasonable Time. — *Moffett v. Brewer*, 1 Greene (Iowa) 348.

necessary to remedy the injury he will be liable in damages therefor to the owner of the dam.¹

Abatement of Dam Obstructing Navigation. — A dam obstructing navigation in a navigable river may be abated by any one, though it has stood for more than twenty years.²

b. DAMAGES. — Any person injured by the erection or maintenance of a dam may recover damages in a common-law action against the owner for the injury done him, unless the right has been taken away by statute.³

Possession Sufficient. — In order to recover it is not necessary to show a title to the land injured; an actual possession is sufficient.⁴

1. Liability for Removing More than Is Necessary. — *Truesdale v. McDonald*, 1 Taylor (U. C.) 153. See also *Hill v. Cock*, 26 L. T. N. S. 185; *Greenslade v. Halliday*, 6 Bing. 379, 19 E. C. L. 106, 4 M. & P. 71.

Dam May Be Removed Though Causing But Nominal Damages. — One whose property is flooded by backwater from a dam may remove it, though at the time of such removal it causes but nominal damage. *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53.

Equity Will Interfere to Prevent Great Loss or Inconvenience. — Where the abatement of a dam would produce great loss to the owner and great inconvenience to the public, equity will prevent such abatement until the question as to the dam owner's right to maintain his dam is decided. *Crenshaw v. Slate River Co.*, 6 Rand. (Va.) 245.

2. Dam Obstructing Navigation. — *Renwick v. Morris*, 7 Hill (N. Y.) 575, *affirming* 3 Hill (N. Y.) 621.

But in *New Brunswick* it has been held that though a dam erected in a stream which is capable of being used as a highway for floating lumber may be a nuisance as regards the public, and the owner of the dam may consequently be liable to a prosecution for erecting it, yet no person who has not been thereby obstructed in the exercise of his public right to use the stream is justified in destroying the dam. *Davis v. Hayden*, M. Rolls (1864), *Stevens's New Bruns. Dig.* 1251.

3. Person Injured by Dam May Recover Damages — *England.* — *Mason v. Hill*, 5 B. & Ad. 1, 27 E. C. L. 11.

Connecticut. — *Noyes v. Stillman*, 24 Conn. 15; *Robertson v. Miller*, 40 Conn. 40.

Illinois. — *Stout v. M'Adams*, 3 Ill. 67, 33 Am. Dec. 441; *Rudd v. Williams*, 43 Ill. 385.

Indiana. — *Wabash, etc., Canal v. Spears*, 16 Ind. 441, 79 Am. Dec. 444; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236.

Kansas. — *Akin v. Davis*, 11 Kan. 580.

Kentucky. — *Proctor v. Terrill*, 8 B. Mon. (Ky.) 451.

Maine. — *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Lincoln v. Chadbourne*, 56 Me. 197.

Massachusetts. — *Baker v. Sanderson*, 3 Pick. (Mass.) 348; *Sumner v. Tileston*, 7 Pick. (Mass.) 198; *Charles v. Monson, etc., Mfg. Co.*, 17 Pick. (Mass.) 70; *Barrett v. Parsons*, 10 Cush. (Mass.) 367; *Brace v. Yale, to Allen* (Mass.) 441, 97 Mass. 18; *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 145.

Michigan. — *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184.

New Hampshire. — *Great Falls Co. v. Wors-*

ter, 15 N. H. 412; *Gerrish v. New Market Mfg. Co.*, 30 N. H. 478.

New Jersey. — *Colwell v. May's Landing Water Power Co.*, 19 N. J. Eq. 245; *Morris Canal, etc., Co. v. Seward*, 23 N. J. L. 219; *Halsey v. Lehigh Valley R. Co.*, 45 N. J. L. 26.

New York. — *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Polliitt v. Long*, 58 Barb. (N. Y.) 20.

Pennsylvania. — *Plumer v. Alexander*, 12 Pa. St. 81.

South Carolina. — *Hines v. Jarrett*, 26 S. Car. 480.

Texas. — *Haas v. Choussard*, 17 Tex. 588; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631.

Vermont. — *Johns v. Stevens*, 3 Vt. 308.

Obstruction Need Not Be Continuous to Authorize Action. — An obstruction caused by the back flowage from a dam need not be continuous to authorize an action. *Cory v. Silcox*, 6 Ind. 39.

Contributory Negligence. — A person injured by a dam cannot recover damages if the injury was caused by his own neglect to use due precaution to prevent it. *Richards v. Peter*, 70 Mich. 286. See generally the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368.

Nor Can He Recover Where He Caused the Water of a Stream to Flow upon the Land of Another and the dam was erected to prevent such unlawful flowage. *Avery v. Empire Woolen Co.*, 82 N. Y. 582; *Wilhelm v. Burleyson*, 106 N. Car. 381.

Where a lower riparian proprietor can make use of the waters of a flowing stream only by means of a dam which floods the water back upon the land of an upper proprietor, he cannot recover damages for a diversion of a portion of the waters of the stream by the dam of the upper proprietor. *Shotwell v. Dodge*, 8 Wash. 337.

Water Need Not Be Appropriated to Special Use. — It is not necessary for one to appropriate the water of a stream to some special use before he can maintain an action. *Adams v. Barney*, 25 Vt. 225.

Remote Damages. — In *Georgia*, under the provisions of the code, if an action is brought to recover damages for an injury to land caused by a dam, and it appears that other and contingent circumstances preponderated largely in causing the injurious effects, such damages are too remote to be the basis of a recovery. Code of Georgia, § 3072; *Rucker v. Athens Mfg. Co.*, 54 Ga. 84.

4. Title to Injured Premises Not Necessary to Support Recovery. — *Palmer v. Keblethwaite*, 1 Show. 64; *Connors v. McLaggan*, 4 New Bruns. 446; *Eagle, etc., Mfg. Co. v. Gibson*,

A Tenant May Recover for the diminution in value of the use of the property during his term.¹

Reversioner. — And an action will lie by the reversioner for an injury to the reversion.²

Tenants in Common. — One tenant in common may maintain an action against his cotenant for flooding the common property by means of a dam upon the cotenant's several estate.³

A Town or Corporation which has sustained special damages in its corporate capacity has the same right of redress as an individual in like circumstances.⁴

The Statute of Limitations will not bar an action for damages sustained within the statutory period by the wrongful continuance of a dam, although the injury has existed longer than the statutory period.⁵

Recovery of Damages under Milldam Acts. — The milldam acts of the several states generally provide a special mode of recovering damages, which must be strictly followed, and is generally a bar to any other action for the damages incurred.⁶

Nominal Damages. — If the erection or maintenance of a dam has violated the right of any person, he is entitled to nominal damages, whether any perceptible damage can be shown or not.⁷

62 Ala. 369; *Parker v. Hotchkiss*, 25 Conn. 321; *Norris v. Glenn*, 1 Idaho 590; *Case v. Weber*, 2 Ind. 108; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Pace v. Freeman*, 10 Ired. L. (32 N. Car.) 103; *Wattier v. Miller*, 11 Oregon 329; *Bigler v. Antes*, 21 Pa. St. 288; *Allen v. McCorkle*, 3 Head (Tenn.) 181; *Boydington v. Squires*, 71 Wis. 276.

1. **Tenant May Recover.** — *Halsey v. Lehigh Valley R. Co.*, 45 N. J. L. 26. But see *Baker v. Sanderson*, 3 Pick. (Mass.) 348.

2. **Reversioner May Recover for Injury to Reversion.** — *Woodbury v. Willis*, 50 Me. 403; *Baker v. Sanderson*, 3 Pick. (Mass.) 348; *Lund v. New Bedford*, 121 Mass. 286; *Halsey v. Lehigh Valley R. Co.*, 45 N. J. L. 26; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406.

3. *Hutchinson v. Chase*, 39 Me. 508, 63 Am. Dec. 645; *Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Great Falls Co. v. Worster*, 15 N. H. 412.

4. *Shrewsbury v. Brown*, 25 Vt. 197.

5. *Prentiss v. Wood*, 132 Mass. 486. See also *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167; *Connors v. M'Laggan*, 4 New Bruns. 446. See generally the title LIMITATION OF ACTIONS.

6. **Recovery under Milldam Acts.** — See the provisions of the local statutes.

7. **When Nominal Damage May Be Recovered** — *England.* — *Norbury v. Kitchin*, 15 L. T. N. S. 501; *Bickett v. Morris*, L. R. 1 H. L. Sc. 47; *M'Glone v. Smith*, 22 L. R. Ir. 559, *overruling* *Williams v. Morland*, 2 B. & C. 910, 9 E. C. L. 269.

Canada. — *Graham v. Burr*, 4 Grant's Ch. (U. C.) 1; *Dickson v. Burnham*, 14 Grant's Ch. (U. C.) 594.

United States. — *Whipple v. Cumberland Mfg. Co.*, 2 Story (U. S.) 661.

Alabama. — *Eagle, etc., Mfg. Co. v. Gibson*, 62 Ala. 369.

Georgia. — *Hendrick v. Cook*, 4 Ga. 241; *Ellington v. Bennett*, 59 Ga. 286; *Green v. Weaver*, 63 Ga. 302; *White v. East Lake Land Co.*, 96 Ga. 415.

Illinois. — *Doud v. Guthrie*, 13 Ill. App. 653.

Indiana. — *Cory v. Silcox*, 6 Ind. 39.

Maine. — *Butman v. Hussey*, 12 Me. 407.

Massachusetts. — *Newhall v. Ireson*, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; *Lund v. New Bedford*, 121 Mass. 286; *Ware v. Allen*, 140 Mass. 513.

Minnesota. — *Dorman v. Ames*, 12 Minn. 451.

Missouri. — *Mize v. Glenn*, 38 Mo. App. 98.

Montana. — *Quigley v. Birdseye*, 11 Mont. 439.

New Hampshire. — *Woodman v. Tufts*, 9 N. H. 88; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53.

New York. — *Hall v. Augsburg*, 46 N. Y. 622; *Standen v. New Rochelle Water Co.*, 91 Hun (N. Y.) 272.

North Carolina. — *Wright v. Stowe*, 4 Jones L. (49 N. Car.) 516; *Little v. Stanback*, 63 N. Car. 285.

Pennsylvania. — *Graver v. Sholl*, 42 Pa. St. 58; *Casebeer v. Mowry*, 55 Pa. St. 419, 93 Am. Dec. 766; *Clark v. Pennsylvania R. Co.*, 145 Pa. St. 438, 27 Am. St. Rep. 710.

Vermont. — *Wiley v. Hunter*, 57 Vt. 489.

Washington. — *Shotwell v. Dodge*, 8 Wash. 337.

Compare *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191; *Dwight Printing Co. v. Boston*, 122 Mass. 583; *McGee v. Fox*, 107 N. Car. 766.

See generally the title DAMAGES, *ante*, p. 537.

But in Ohio and South Carolina it has been held that no damages can be recovered unless actual injury has been sustained. *Cooper v. Hall*, 5 Ohio 320; *Garret v. M'Kie*, 1 Rich. L. (S. Car.) 444, 44 Am. Dec. 263; *Chalk v. McAlilly*, 11 Rich. L. (S. Car.) 153.

The Law Will Not Notice Theoretical Injuries.

— Theoretical injuries, such as the insensible evaporation and decrease of water by dams, or the occasional increase and decrease of the velocity of the current and the quantum of the water below, the law will not notice. *Dorman v. Ames*, 12 Minn. 451. See also *Thompson v. Crocker*, 9 Pick. (Mass.) 59; *Palmer v. Mulligan*, 3 Cai. (N. Y.) 307, 2 Am. Dec. 270; *Graham v. Burr*, 4 Grant's Ch. (U. C.) 1.

Measure of. — The amount of damages to be recovered by a party injured by a dam is commensurate with the injury done, having regard to all the circumstances of each particular case.¹ But this rule may be altered by statute, and in several states the provisions of the milldam acts relating to the amount of damages to be allowed the injured party have received the interpretation of the courts.²

1. Measure of Damages — Georgia. — Ellington v. Bennett, 59 Ga. 286; Jones v. Lavender, 55 Ga. 228; White v. East Lake Land Co., 96 Ga. 415.

Illinois. — Stout v. M'Adams, 3 Ill. 67, 33 Am. Dec. 441; Hill v. Ward, 7 Ill. 285; Economy Light, etc., Co. v. Cutting, 49 Ill. App. 422.

Iowa. — Gibson v. Fischer, 68 Iowa 29.

Massachusetts. — Hatch v. Dwight, 17 Mass. 289, 9 Am. Dec. 145; Frazer v. Bigelow Carpet Co., 141 Mass. 126.

Michigan. — Richards v. Peter, 70 Mich. 286; Shearer v. Middleton, 88 Mich. 621.

Minnesota. — Dorman v. Ames, 12 Minn. 451.

New York. — Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Matter of Thompson, 85 Hun (N. Y.) 438.

Oregon. — Marsh v. Trullinger, 6 Oregon 356.

Pennsylvania. — Lehigh Bridge Co. v. Lehigh Coal, etc., Co., 4 Rawle (Pa.) 9, 26 Am. Dec. 111; Clark v. Pennsylvania R. Co., 145 Pa. St. 438, 27 Am. St. Rep. 710.

Texas. — Hughes v. Austin, 12 Tex. Civ. App. 178.

Vermont. — Wiley v. Hunter, 57 Vt. 479.

Washington. — Shotwell v. Dodge, 8 Wash. 337.

Canada. — Breathour v. Bolster, 23 U. C. Q. B. 317.

Market Value of Land at Time of Submersion. — In Austin v. Walsh, (Tex. Civ. App. 1896) 34 S. W. Rep. 324, it was held that one whose land is submerged by reason of the building of a dam by another is entitled to recover its market value at the time of submersion.

Permanent Injury. — In Missouri, etc., R. Co. v. Graham, 12 Tex. Civ. App. 54, it was held that when a dam causes permanent injury to land, the damages must be computed on the value of the land when the dam was built.

In *Illinois* and *Iowa* it has been held that whether recovery for injury to land, caused by a dam, is confined to such damages as had arisen before bringing suit, or may extend to all damages, past, present, and future, depends upon whether the injury is temporary or permanent. *Centralia v. Wright*, 156 Ill. 561; *Bizer v. Ottumwa Hydraulic Power Co.*, 70 Iowa 145. Compare *Williams v. Camden*, etc., Water Co., 79 Me. 543.

Diminished Rental Value. — It has been held in *New York* that the proper measure of damages is the diminished rental value of the premises injured. *Van Buren v. Fishkill*, etc., Water-Works Co., 50 Hun (N. Y.) 448; *Dean v. Benn*, 69 Hun (N. Y.) 519.

Speculative Profits Are Not Recoverable. — *Politt v. Long*, 58 Barb. (N. Y.) 20; *Clark v. Pennsylvania R. Co.*, 145 Pa. St. 438, 27 Am. St. Rep. 710.

Where a Dam Obstructs a Public River, and is in consequence a public nuisance, a person whose rafts are injured and delayed by it can

recover only for such damage as is peculiar to him, and is the natural and proximate consequence of the nuisance. *Powers v. Irish*, 23 Mich. 429.

Injury to an Easement. — Where a mill owner has a right to the use of a reservoir and dam, the fee belonging to a third person, and is charged with the duty of maintaining the dam, and a riparian proprietor below erects a dam which sets the water back upon the reservoir dam, he can recover only for the injury to his easement.

A diminished benefit from the use of the reservoir, or, an increase of the cost and trouble of keeping the dam in repair, or an obstruction of the plaintiff in his right of repairing, would constitute such an injury. *Robertson v. Woodworth*, 42 Conn. 163.

Where Injured Party Makes No Effort to Limit Effects of Injury. — Where injury is caused by a dam it is the duty of the person injured to make a reasonable effort to limit the effects of the injury. So where the operation of a mill is impaired by the construction of a dam on the stream below, the measure of damages is not the loss caused by the entire stoppage of the mill, but only such loss as cannot be prevented by the use of other appliances. *Decorah Woolen Mill Co. v. Greer*, 49 Iowa 490.

The Amount of Damage Is a Question for the Jury. — *Farmer v. McDonald*, 59 Ga. 509.

General Benefits Cannot Be Set Off Against Damages. — In an action to recover damages for an injury to land, caused by a milldam, the defendant cannot offset or reduce those damages by the general benefits resulting to the plaintiff from the building and proximity of the mill. *Marcy v. Fries*, 18 Kan. 353.

2. Under the *Delaware* Act, if the owner of an upper mill wilfully discharges an unusual quantity of water from his pond, or if such discharge is caused by the accidental breaking or overflowing of his milldam, he is bound to give notice to the owner or keeper of the mill next below, and for neglecting this duty is liable to double damages. *Laws of Delaware* (1893), c. 61, § 3; *McIlvaine v. Marshall*, 3 Harr. (Del.) 1; *Ross v. Horsey*, 3 Harr. (Del.) 60.

It is no defense that such notice would not have been of any use to the lower mill. *Ross v. Horsey*, 3 Harr. (Del.) 60.

In an assessment of damages under the *Iowa* statute, the overflow of agricultural land and the consequent damage are not the only matters to be looked at. The flooding of a coal bed or stone quarry, the loss of a spring, or the destruction of a ford should be considered. *Walters v. Houck*, 7 Iowa 72.

Where land is overflowed by a milldam erected under the *Kansas* milldam act, the measure of damages is the difference in value of the land without the milldam and the value of the land with the milldam. *Harding v. Funk*, 8 Kan. 315.

Exemplary Damages. — Where a dam is a nuisance, if a person continues to maintain it after its wrongful character has been judicially determined and damages have been recovered against him, the case becomes one for exemplary damages, and in a second action the plaintiff should be awarded damages sufficient to compel the defendant to abate the nuisance.¹

c. INDICTMENT. — A dam which obstructs navigation, or causes water to overflow a public highway, or creates a stagnant pool injurious to the health or comfort of the neighborhood,² is a public nuisance and may be indicted as such.³

2. Of Dam Owner — a. INJUNCTION. — Where interference with or the destruction of a dam would cause an injury for which an action at law would

Under the *Maine* act it is competent for the jury in their verdict to include compensation for injury done to fences, and for the annual expense of maintaining fences for the future. *Jones v. Phillips*, 30 Me. 455.

The general rule for estimating damages under the *Massachusetts* mill acts is, that comparison is to be made between the present productive value of the land flowed and what its productive value would have been had it not been injured by the dam. *Palmer Co. v. Ferrill*, 17 Pick. (Mass.) 58; *Bates v. Ray*, 102 Mass. 458; *Howe v. Ray*, 113 Mass. 88.

Under these acts damages may be recovered for flooding a well and the cellar of a house, but damages cannot be recovered for injuries to land which is not itself overflowed, but is rendered less valuable for building purposes by noxious and offensive smells proceeding from the adjacent lands when the water caused by the dam to overflow them is occasionally drawn off. *Eames v. New England Worsted Co.*, 11 Met. (Mass.) 570; *Fuller v. Chicopee Mfg. Co.*, 16 Gray (Mass.) 46.

In assessing damages under the *Massachusetts* mill acts, the jury may take into view any benefit derived from the overflowing. *Avery v. Van Deusen*, 5 Pick. (Mass.) 182; *Paine v. Woods*, 108 Mass. 160.

Under the *Nebraska* act one whose land is flowed by a milldam is entitled to compensation for the land overflowed and rendered useless by reason of the erection of the dam, and for the diminution in value of the residue of the tract by reason of the increased depth of the stream. *Sutliff v. Johnson*, 17 Neb. 575.

This is also the measure of damages under the *Wisconsin* act. *Rooker v. Perkins*, 14 Wis. 79; *Pick v. Rubicon Hydraulic Co.*, 27 Wis. 433. But damages resulting from noxious and offensive vapors which affect the health of the plaintiff or of his family, but do not affect the land itself, cannot be recovered under the *Wisconsin* act. *Rooker v. Perkins*, 14 Wis. 79.

Under the *New Hampshire* milldam act (N. H. Pub. Stat. 1891, p. 396) fifty per cent is added to the amount of damages assessed by the jury. *Dow v. Electric Co.*, (N. H. 1894) 31 Atl. Rep. 22.

On a petition under the *Virginia* mill act for leave to add to the height of a milldam, the only proper subject of inquiry is what damages will be occasioned by the proposed addition. It is error, therefore, to direct the jury to assess such other damages accruing from the dam already erected as were not contem-

plated by the original jury. *Eppes v. Crallé*, 1 Munf. (Va.) 258.

1. When Exemplary Damages May Be Recovered. — *v. Deberry*, 1 Hayw. (1 N. Car.) 248; *Carruthers v. Tillman*, 1 Hayw. (1 N. Car.) 501; *Bradley v. Amis*, 2 Hayw. (2 N. Car.) 399. See generally the title EXEMPLARY DAMAGES.

2. Effect of Dam on Health a Question for Jury. — Whether or not a dam renders the neighborhood unhealthy is a question of fact for the jury. *Douglass v. State*, 4 Wis. 387.

3. Dam Which Creates a Public Nuisance May Be Indicted. — *Yolo County v. Sacramento*, 36 Cal. 193; *Cox v. State*, 3 Blackf. (Ind.) 193; *State v. Godfrey*, 12 Me. 361; *Com. v. Fisher*, 6 Met. (Mass.) 433; *Eames v. New England Worsted Co.*, 11 Met. (Mass.) 570; *Com. v. Stevens*, 10 Pick. (Mass.) 247; *Board of Health v. Copcutt*, 140 N. Y. 12; *State v. Thompson*, 2 Strobb. L. (S. Car.) 12, 47 Am. Dec. 588; *State v. Rankin*, 3 S. Car. 438, 16 Am. Rep. 737; *State v. Gainer*, 3 Humph. (Tenn.) 39; *Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848; *Douglass v. State*, 4 Wis. 387; *In re Eldred*, 46 Wis. 530. See also the title NUISANCES.

In *West Virginia* a dam erected in a floatable stream, to furnish power to operate a mill useful to the public, under authority duly had from a county court, is not a public nuisance, though without a sluice, and though it obstructs navigation. *Watts v. Norfolk, etc., R. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894, 57 Am. & Eng. R. Cas. 694.

A Dam Erected by Legislative Authority, although it obstructs navigation, cannot be indicted as a public nuisance. *Ensworth v. Com.*, 52 Pa. St. 320.

Under the Milldam Acts of Several States, a person who has complied with the provisions of the acts will not be held responsible for overflowing a highway. See, for example, *Connecticut* Gen. Stat. (1888), § 2687; *Massachusetts* Pub. Stat. (1882), pp. 1091, 1092; *Minnesota* Gen. Stat. (1894), §§ 2375-2382.

In *Wisconsin* it has been held that a dam which creates a public nuisance may be indicted even though it be erected in conformity to the provisions of the milldam acts. *Luning v. State*, 1 Chand. (Wis.) 178. Compare *Stoughton v. State*, 5 Wis. 291. See also *Nead-erhouser v. State*, 28 Ind. 257.

When an Indictment Will Not Lie. — A person cannot be indicted for maintaining a dam whereby no greater nuisance is created, and of no different character, than would have ex-

afford no adequate remedy, an injunction will be granted to restrain such interference or destruction.¹

b. DAMAGES. — The owner of a dam who suffers damage by reason of the destruction of his dam, or of an injury to it or to any of his rights as a dam owner, may bring an action against the party doing the injury for the damages sustained.²

DANCING. — See note 3.

DANGER — DANGEROUS. — “Danger” means peril; risk; hazard; exposure to injury, loss, pain, or other evil.⁴

Homicide. — As to the danger which will justify the killing of another in self-defense, see the title SELF-DEFENSE.⁵

isted without it. *Beach v. People*, 11 Mich. 106.

1. **When Dam Owner Entitled to Injunction.** — *Romer, J.*, in *Brymbo Water Co. v. Lesters Lime Co.*, 8 Reports 329; *Tatnall v. Shallcross*, 4 Del. Ch. 634; *Sword v. Allen*, 25 Kan. 67; *Riverdale Park Co. v. Westcott*, 74 Md. 311, 28 Am. St. Rep. 249; *Kay v. Kirk*, 76 Md. 41, 35 Am. St. Rep. 408; *Belknap v. Trimble*, 3 Paige (N. Y.) 577; *Pioneer Wood-Pulp Co. v. Bensley*, 70 Wis. 476. See also *Fremont v. June*, 8 Ohio Cir. Ct. Rep. 124; *Egan v. Russ*, 39 La. Ann. 967.

On this subject see the title INJUNCTION.

2. **Action for Damages — California.** — *Nevada County, etc., Canal Co. v. Kidd*, 37 Cal. 282.

Kentucky. — *Conwell v. Brookhart*, 4 B. Mon. (Ky.) 580, 41 Am. Dec. 244.

Massachusetts. — *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236; *Brace v. Yale*, 4 Allen (Mass.) 393.

Michigan. — *Darling v. Thompson*, 108 Mich. 215.

Montana. — *Quigley v. Birdseye*, 11 Mont. 479.

New Hampshire. — *Runnels v. Bullen*, 2 N. H. 532.

New York. — *Van Rensselaer v. Van Rensselaer*, 9 Johns. (N. Y.) 377; *Munson v. Hungerford*, 6 Barb. (N. Y.) 265; *Prentice v. Geiger*, 9 Hun (N. Y.) 350; *Trevett v. Barnes*, 36 Hun (N. Y.) 646, 21 N. Y. W'kly Dig. 560.

North Carolina. — *Gwaltney v. Scottish Carolina Timber Co.*, 115 N. Car. 579.

South Carolina. — *Leggett v. Kerton*, 2 Rich. L. (S. Car.) 156.

Vermont. — *Coe v. Hall*, 41 Vt. 325; *Canfield v. Andrew*, 54 Vt. 1, 41 Am. Rep. 828.

See also *Toothaker v. Winslow*, 61 Me. 123.

See generally the title DAMAGES, *ante*, p. 537.

Measure of Damages. — In an action by the owner of a cranberry meadow for the removal of his dam, it was held that the true measure of damages was the diminution in value of the land for cranberry culture caused by the removal of the dam. *Howes v. Grush*, 131 Mass. 207.

3. **License Tax.** (See generally the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES.)

— **Dancing** upon the tight-rope, and keeping time to music with the feet on the back of a horse going around a circus ring, do not amount to **dancing** within an act which provides that “no house, room, or other place * * * shall be kept or used for public **danc-**

ing, music, or other public entertainment of the like kind, without a license.” If the **dancing** and music were essential parts of the entertainment, and not merely subsidiary to the general performance, the above acts would be included in the meaning of the term **dancing**. The defendant having been convicted in the court below, the case was remitted, as it could not be seen from the case stated whether the justices before whom the case was tried thought that music and **dancing** were an essential part of the circus performance, or convicted the defendant on the ground that any music or **dancing** brought the case within the statute. *Quaglieni v. Matthews*, 6 B. & S. 482, 118 E. C. L. 482.

4. Webster's Dict.

Concealed Weapons. — See the title CARRYING WEAPONS, vol. 5, p. 732.

5. **Exposure to Unnecessary Danger.** — See the title ACCIDENT INSURANCE, vol. 1, p. 306.

Tolerably Safe, Contrasted with Actually Dangerous. — In an action against a railroad company for injuries to an employee, a track repairer testified that he thought that he had made the track tolerably safe for use while the ground remained frozen. This was held not to exempt the company from liability. The court said: “Perhaps he did. After he repaired it, many trains ran over it safely before one was wrecked. A large percentage of the chances was therefore in favor of safety, and that is probably what Mr. Folsom means by the term ‘tolerably safe.’ But that is not the reasonably safe condition required by law. ‘Tolerably safe’ and ‘actually dangerous’ are not necessarily conflicting terms; indeed, the former frequently, perhaps usually, implies the latter. To illustrate: it is a **dangerous** act to stand on the brink of Table Rock and gaze into the turbulent waters of the Niagara; yet, because hundreds of thousands of people have done so safely and only a few have been precipitated into the abyss beneath, the act is tolerably safe.” *Steller v. Chicago, etc., R. Co.*, 49 Wis. 619. See generally the title MASTER AND SERVANT.

Dangerous Condition — City Streets. (See also the title STREETS AND SIDEWALKS.) — A witness testified that a street had been in a **dangerous** condition at the time of the accident. The court said: “By **dangerous** condition is meant, we think, something more than the accumulation of materials on the neighborhood of a building undergoing erection or repair, or that excavation, more or less deep,

DANGEROUS CROSSINGS.— See the title *CROSSINGS*, *ante*.

DANGEROUS WEAPONS.— See the titles *ASSAULT AND BATTERY*, vol. 2, p. 970; *CARRYING WEAPONS*, vol. 5, p. 736; and see generally the titles *HOMICIDE*; *SELF-DEFENSE*.

DANGERS AND ACCIDENTS OF THE SEAS, RIVERS, AND NAVIGATION.— See the titles *ACT OF GOD*, vol. 1, p. 587; *BAILMENTS*, vol. 3, p. 748; *CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTIES*, vol. 7, p. 221; *MARINE INSURANCE*.

DANSEUSE.— A leading dancer in a ballet.¹

DARREIN CONTINUANCE.— See *ENCYC. OF PLEADING AND PRACTICE*, *PUIS DARREIN CONTINUANCE*.

DARTMOUTH COLLEGE CASE.— See the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*.

DASH.— To throw mortar on the joints of a wall, and with the flat surface of the trowel smooth it even with the surface.²

which is needed in order to put down a sidewalk of stone slabs. A temporary state of disorder is absolutely inseparable from improvement of certain kinds; a street or sidewalk is rendered impassable, or partially impassable, during the progress of the work; it is matter of familiar experience that a part of it is for the time withdrawn from public use, in order to allow the doing of the work needed for the embellishment or convenience of the city; and all that can reasonably be demanded of the city, under such circumstances, is the taking of due care, or the enforcement of the regulations made (if there be such competent regulations), for securing passengers of ordinary prudence from danger." *Schweichhardt v. St. Louis*, 2 Mo. App. 580. In *Coates v. Canaan*, 51 Vt. 137, it is said: "The word *dangerous* is the opposite of the word 'safe.' When a given place in a highway ceases to be safe it becomes *dangerous*. While it is reasonably safe the town is not liable though the traveler receives injury thereon."

Navigation—Dangerous Exposure. (See also the title *NAVIGATION*.)— In *The Mary Powell*, 31 Fed. Rep. 624, Judge Brown says: "By *dangerous* exposure, I understand not the mere possibility of injury through some mischance not reasonably likely to occur, but an exposure that is clearly liable to receive or to inflict injury, in the ordinary chances, mistakes, and hazards of navigation, such as are to be reasonably apprehended as liable to arise." See also *The Michigan*, 52 Fed. Rep. 504.

Covenant. (See also the titles *BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS*, vol. 5, p. 2; *COVENANTS, ante*; *LEASES*.)— A lessee's covenant, in a lease of a public house, that he will not do or suffer anything whereby the license "may be in any danger of being suspended, discontinued, or forfeited," is not broken by his being convicted of selling drink after hours, if the conviction is not indorsed on the license. *Fleetwood v. Hull*, 58 L. J. Q. B. 341. The learned judge said: "If the conviction had been indorsed on the license, a question might have arisen whether the license

was or was not endangered. If two convictions had been indorsed, then the license would no doubt have been in danger, because a third conviction would, by section 30 Licensing Act 1872, forfeit the license."

Same—Dangerous Business.— The manufacture of paraffine or lubricating oil, which is obtained from the residuum of petroleum by distillation, is a breach of a covenant in a deed not to erect on the lots conveyed "any manufactory of gunpowder, glue, varnish, vitriol, turpentine, or any brewery, distillery, slaughter-house, or other noxious or *dangerous* trade or business." It is a *dangerous* and noxious business. *Atlantic Dock Co. v. Libby*, 45 N. Y. 499. So of resin oil. *Atlantic Dock Co. v. Leavitt*, 50 Barb. (N. Y.) 135, 54 N. Y. 35. See the titles *COVENANTS, ante*; *LEASES*; *BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS*, vol. 5, p. 2.

1. Danseuse.— Under an employment as *seconde première danseuse*, one can only be required to appear in the dances which, according to the usages of the theatre, enter into that employment; and a refusal by one so employed to dance a parlor dance, the polka, in parlor dress, with the figurantes of the theatre, in a play, is not ground for dismissal. *Baron v. Placide*, 7 La. Ann. 229. See generally the title *THEATRES*.

Where theatrical managers engage a woman as *première danseuse*, and then assign her a place in the ballet which by the usages of the stage is filled by those of inferior rank, she cannot be compelled to fill the lower position, and may consider the contract broken and recover damages. *Roserie v. Kiralfy*, 12 Phila. (Pa.) 209.

2. Distinguished from Pointing.— This is distinguished from "pointing," which is "to fill the joints of the wall with mortar and then smooth them with the point of the trowel." The words have not the same meaning, and an engagement to point mason-work is not satisfied by *dashing*. *Gulf Creek Bridge*, 3 Del. Co. Rep. (Pa.) 172. See generally the title *WORKING CONTRACTS*.

DATE.

By WALTER CARRINGTON.

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CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles: *ACKNOWLEDGMENTS*, vol. 1, p. 483; *ALTERATION OF INSTRUMENTS*, vol. 2, p. 181; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *DEEDS*; *JUDICIAL NOTICE*; *LIMITATION OF ACTIONS*; *PRESUMPTIONS*; *RECORDING ACTS*.

I. DEFINITION. — The date of a writing is that part which purports to specify the time when it was executed.¹

1. Century Dictionary, vol. 2, p. 1461.

Other Definitions. — The designation or indication in an instrument of writing of the time and place when and where it was made. The word is derived from the Latin *datum* (given) because when instruments were in Latin the form ran: *Datum*, etc. (Given the — day of, etc.). Bouv. Law Dict. 471.

The primary signification of the word "date" is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time given or specified; time in some manner ascertained and fixed. *Bement v. Trenton Locomotive, etc., Mfg. Co.*, 32 N. J. L. 515.

"Date of the Last Work Done or Materials Furnished." — This expression in a mechanic's

lien may be taken, in the absence of anything in the act indicating a different intention, to mean the time when such work was done or materials furnished, as specified in the plaintiff's written claim. *Bement v. Trenton Locomotive, etc., Mfg. Co.*, 32 N. J. L. 515.

"After Date of Appointment" — "From Such Date." — In § 1556 of the United States Rev. Stat., the phrases "after date of appointment" and "from such date," touching a passed assistant surgeon, do not refer to the date of his original appointment, when he entered the service as assistant surgeon, but to the time of the notification by the secretary of the navy, that he would thereafter be regarded as a passed assistant surgeon. *U. S. v. Moore*, 95 U. S. 760.

II. NOT NECESSARY TO VALIDITY OF INSTRUMENTS — 1. In General. — A date is not necessary to the validity of an instrument.¹

2. **Deeds.** — A deed is good without a date, and takes effect from the time of its delivery.²

Incorrect or Impossible Date. — The fact that a deed contains an incorrect or impossible date does not vitiate it.³

Acknowledgment. — And the omission of the date in the acknowledgment will not invalidate a deed.⁴

3. **Bills, Notes, and Checks.** — A date is not essential to the legal validity of a bill or note, and in the absence of a date it will be considered as dated at the time it was made.⁵

Bank Checks. — A date is not necessary to the validity of a bank check.⁶

Not Invalidated by Being Antedated or Postdated. — A promissory note, a bill of exchange, or a bank check is not invalidated by being antedated or postdated.⁷

III. ALTERATION OF DATE — **Commercial Paper.** — An alteration of the date in any commercial paper, whether it hasten or delay the time of payment, if made without the consent of the party sought to be charged, extinguishes his liability.⁸

1. **Instrument Valid Without Date.** — And this is true in regard to a contract, *Davis v. Jones*, 17 C. B. 625, 84 E. C. L. 625; a bond, *Pierce v. Richardson*, 37 N. H. 306; or a policy of insurance, *Lee v. Massachusetts F. & M. Ins. Co.*, 6 Mass. 208.

2. **Deeds Valid Without Date** — *England.* — *Goddard's Case*, 2 Coke 4b.

Arkansas. — *Mecch v. Fowler*, 14 Ark. 29.

Florida. — *Moody v. Hamilton*, 22 Fla. 298.

Illinois. — *Blake v. Fash*, 44 Ill. 302.

Indiana. — *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638.

Massachusetts. — *Dresel v. Jordan*, 104 Mass. 407.

Minnesota. — *Banning v. Edes*, 6 Minn. 402.

New York. — *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230; *Jackson v. Bard*, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267.

Pennsylvania. — *Geiss v. Odenheimer*, 4 Yeates (Pa.) 278, 2 Am. Dec. 407; *McKinney v. Rhoads*, 5 Watts (Pa.) 343.

Tennessee. — *Swan v. Hodges*, 3 Head (Tenn.) 251.

Texas. — *Webb v. Huff*, 61 Tex. 677.

See also the title **DEEDS**.

3. **Incorrect Dates.** — *Moody v. Hamilton*, 22 Fla. 298.

The date is not an essential part of a deed. The deed will be good although it have no date or a false or impossible date, and will take effect from the time of delivery. 2 Black. Com. 304.

A deed from the trustees of the town dated in 1714 was held to be valid though the grantors were not trustees in that year but in 1717, there being evidence of a mistake in the date. The court said: "The date is no part of the substance of a deed, and not necessary to be inserted." *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230.

The date may therefore be rejected whenever it differs from the real time of delivery. *Swan v. Hodges*, 3 Head (Tenn.) 251.

The fact that a deed bears date anterior to a patent on the same land will not vitiate it. *Bledsoe v. Little*, 4 How. (Miss.) 13.

4. **Omission of Date in Acknowledgment.** — *Lea v. Polk County Copper Co.* 21 How. (U. S.) 493; *Rackleff v. Norton*, 19 Me. 274; *Wicks v. Caulk*, 5 Har. & J. (Md.) 36; *Kelly v. Rosenstock*, 45 Md. 389; *Webb v. Huff*, 61 Tex. 677.

See also the title **ACKNOWLEDGMENTS**, vol. 1, p. 529.

5. **Date Not Essential to Validity of Bills, Notes, and Checks.** — *English v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96; *Godin v. Commonwealth Bank*, 6 Duer (N. Y.) 76; *Page v. Morrel*, 3 Abb. App. Dec. (N. Y.) 433.

See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 128.

6. **Bank Checks Good Without a Date.** — *Godin v. Commonwealth Bank*, 6 Duer (N. Y.) 76.

7. **May Be Antedated or Postdated.** — *Aldridge v. Branch Bank*, 17 Ala. 45; *Collins v. Driscoll*, 69 Cal. 550; *Gray v. Wood*, 2 Har. & J. (Md.) 328; *Bill v. Stewart*, 156 Mass. 508; *Almich v. Downey*, 45 Minn. 460; *Godin v. Commonwealth Bank*, 6 Duer (N. Y.) 76; *Richter v. Selin*, 8 S. & R. (Pa.) 425. See also the titles **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 129; **CHECKS**, vol. 5, p. 1032.

Although the date of a bank check is not material to its validity, it determines the time of the payment. Hence the payment by a bank of a postdated check before the day upon which it is dated is a payment in its own wrong, and the money so paid remains to the credit of the drawer. *Godin v. Commonwealth Bank*, 6 Duer (N. Y.) 76.

8. **Alteration Extinguishes Liability.** — *Master v. Miller*, 4 T. R. 320, 2 H. Bl. 140, 1 Smith's L. Cas. 857; *Letcher v. Bates*, 6 J. J. Marsh. (Ky.) 524, 22 Am. Dec. 92; *McMillan v. Hefferlin*, 18 Mont. 385; *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369; *Stephens v. Graham*, 7 S. & R. (Pa.) 505, 10 Am. Dec. 485.

See also the title **ALTERATION OF INSTRUMENTS**, vol. 2, pp. 190, 236.

Changing, Erasing, or Inserting Date. — "It is quite immaterial whether the alteration is effected by the changing, erasing, or inserting a date, the legal consequences are the same."

Innocent Purchaser. — And this is so even though the instrument has come into the hands of an innocent purchaser.¹

Alteration in Date of Bond. — An alteration in the date of a bond avoids it as to sureties who do not assent thereto.²

IV. EVIDENCE — 1. Presumptions as to Date — a. IN GENERAL. — It may be laid down as a general *prima facie* presumption, that all documents were made on the day they bear date.³

Several Documents of the Same Date. — If more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed.⁴

No Presumption as to Collateral Facts. — But the date of an instrument cannot be relied on as evidence of a collateral fact.⁵

English v. Breneman, 5 Ark. 377, 41 Am. Dec. 96.

But if the date be left blank, any holder may insert the true date, for in such case it is still the same obligation. *English v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96; *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9.

As to implied authority to fill blank dates in commercial paper see the titles ALTERATION OF INSTRUMENTS, vol. 2, p. 253; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 207, 337.

1. Altered Instrument in Hands of Innocent Holder. — *Master v. Miller*, 4 T. R. 320, 1 Smith L. Cas. 857; *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9; *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369; *Stephens v. Graham*, 7 S. & R. (Pa.) 505, 10 Am. Dec. 485. See the titles ALTERATION OF INSTRUMENTS, vol. 2, p. 193; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 332.

2. Nesbitt v. Turner, 155 Pa. St. 429. In this case it was held that an alteration in the date of a cashier's bond, without the assent of the surety, relieved such surety from all liability even though the alteration was made for his benefit or did him no harm. See also the title ALTERATION OF INSTRUMENTS, vol. 2, pp. 189, 236.

Alteration of Date of Guardian's Bond. — The alteration of a date in a guardian's bond after its execution, from the blank date of December, 1823, to the 3d day of May, 1824, is an immaterial alteration and does not affect the validity of the bond. *State v. Miller*, 3 Gill (Md.) 335.

3. Presumption Is that Documents Were Made on Day of Date. — *Taylor on Evidence*, § 137; *Best's Principles of Evidence*, § 402; *Stephen's Dig. of Evidence* 138.

England. — *Smith v. Battens*, 1 M. & Rob. 341; *Sinclair v. Baggaley*, 4 M. & W. 312; *Malpas v. Clements*, 19 J. L. Q. B. 435; *Potez v. Glossop*, 2 Exch. 191; *Morgan v. Whitmore*, 6 Exch. 716; *Yorke v. Brown*, 10 M. & W. 78.

United States. — *Fowler v. Merrill*, 11 How. (U. S.) 375.

Illinois. — *Abrams v. Pomeroy*, 13 Ill. 134; *Chicago, etc., R. Co. v. Keegan*, 152 Ill. 413, citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 78.

Iowa. — *Savery v. Browning*, 18 Iowa 246; *Meldrum v. Clark*, Morr. (Iowa) 130.

Maine. — *Pullen v. Hutchinson*, 25 Me. 249.

Maryland. — *Glenn v. Grover*, 3 Md. 212; *Williams v. Woods*, 16 Md. 220.

New York. — *Livingston v. Arnoux*, 56 N. Y. 507; *Breck v. Cole*, 4 Sandf. (N. Y.) 79.

North Carolina. — *Meadows v. Cozart*, 76 N. Car. 450.

Illustrations. — The presumption prevails whether the document be an assignment, *Byrd v. Tucker*, 3 Ark. 451; *Pressly v. Hunter*, 1 Spears L. (S. Car.) 133; an account, *Sinclair v. Baggaley*, 4 M. & W. 312; a chattel mortgage, *Briggs v. Fleming*, 112 Ind. 313; a guaranty, *Abrams v. Pomeroy*, 13 Ill. 134; a receipt given for the payment of money, *Hollingsworth v. Martin*, 23 Ala. 591; *Caldwell v. Gamble*, 4 Watts (Pa.) 292; *Erickson v. Brookings County*, 3 S. Dak. 434; a memorandum, *New-Haven County Bank v. Mitchell*, 15 Conn. 206; an abstract, *Chicago, etc., R. Co. v. Keegan*, 152 Ill. 413; or even a letter, *Potez v. Glossop*, 2 Exch. 191; *Hunt v. Massey*, 5 B. & Ad. 902, 27 E. C. L. 230; *Goodtitle v. Milburn*, 2 M. & W. 853; *Malpas v. Clements*, 19 L. J. Q. B. 435; *Sinclair v. Baggaley*, 4 M. & W. 312; *Pullen v. Hutchinson*, 25 Me. 249.

In *England*, the courts have gone so far as to hold that a letter will be presumed to have been written on the day it bears date, whether it be written by a party to the suit or not. *Potez v. Glossop*, 2 Exch. 191; *Anderson v. Weston*, 6 Bing. N. Cas. 296, 37 E. C. L. 388, *per Bosanquet*, J.

The postmark on a letter is evidence that the letter was mailed and sent on the day of the postmark. *New-Haven County Bank v. Mitchell*, 15 Conn. 206.

Prima facie, the law presumes that a sold note or memorandum of sale executed and delivered to a purchaser was so executed and delivered on the day on which it bears date. *Williams v. Woods*, 16 Md. 220.

4. Stephen's Dig. of Evidence, c. 11, art. 85; *Loomis v. Pingree*, 43 Me. 299; *Ivy v. Yancey*, 129 Mo. 501.

5. Collateral Facts. — *Given v. Albert*, 5 W. & S. (Pa.) 333. In this case, it was held that the date of an instrument raised no presumption that the person by whom it was executed was at the place where it was dated.

Evidence that land was a homestead at the date of the acknowledgment of the mortgage thereon, made ten days after date of the mortgage, is not evidence that it was a homestead when the mortgage was executed. *Smith v. Scarbrough*, 61 Ark. 104.

Place of Date Raises Presumption as to Place of Making. — In the *South Missouri Land Co. v. Rhodes*, 54 Mo. App. 129, it was held that, in

b. DEEDS. — A deed is presumed to have been executed and delivered on the day on which it is dated.¹

Acknowledgment Contemporaneous with Date. — And this presumption is greatly strengthened if the deed is accompanied by an acknowledgment of the same date.²

Where Acknowledgment Subsequent. — Some courts hold that a deed is presumed to have been delivered on the day of its date, notwithstanding it was not acknowledged until afterwards.³ But others hold that the deed will not be presumed to have been delivered until it was acknowledged.⁴

the absence of evidence to the contrary, a note was presumed to have been made in the state where dated. See the title *BILLS AND NOTES*, vol. 4, p. 129, the paragraph *Expression of Place of Making*.

1. Presumption Arising from Date of Deed — England. — *Shep. Touch.* 52, 78; *Stone v. Grubham*, 1 Rolle 3; *Oshey v. Hicks*, Cro. Jac. 264; *Smith v. Battens*, 1 M. & Rob. 341; *Doe v. Stillwell*, 8 Ad. & El. 645, 35 E. C. L. 480; *Steele v. Mart*, 4 B. & C. 272, 10 E. C. L. 331; *Davies v. Lowndes*, 6 M. & G. 471, 46 E. C. L. 471; *Anderson v. Weston*, 6 Bing. N. Cas. 296, 37 E. C. L. 388.

United States. — *Pascault v. Cochran*, 34 Fed. Rep. 358; *Fowler v. Merrill*, 11 How. (U. S.) 375; *Merrill v. Dawson*, Hempst. (U. S.) 563.

Alabama. — *Jordan v. Mead*, 12 Ala. 247; *Aldridge v. Branch Bank*, 17 Ala. 45.

Arkansas. — *Meech v. Fowler*, 14 Ark. 29; *Smith v. Scarbrough*, 61 Ark. 104.

California. — *Treadwell v. Reynolds*, 47 Cal. 171.

Florida. — *Billings v. Stark*, 15 Fla. 297; *Moody v. Hamilton*, 22 Fla. 298.

Illinois. — *Jayne v. Gregg*, 42 Ill. 413; *Blake v. Fash*, 44 Ill. 302; *Darst v. Bates*, 51 Ill. 439.

Indiana. — *Scobey v. Walker*, 114 Ind. 254; *Faulkner v. Adams*, 126 Ind. 459.

Iowa. — *Savery v. Browning*, 18 Iowa 246; *Lyon v. McIlvaine*, 24 Iowa 9; *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa 286.

Kansas. — *Clark v. Akers*, 16 Kan. 166.

Kentucky. — *Ford v. Gregory*, 10 B. Mon. (Ky.) 175; *Breckenridges v. Todd*, 3 T. B. Mon. (Ky.) 52, 16 Am. Dec. 83; *M'Connell v. Brown*, Litt. Sel. Cas. (Ky.) 459.

Maine. — *Cutts v. York Mfg. Co.*, 18 Me. 190; *Sweetser v. Lowell*, 33 Me. 446; *Hill v. McNichol*, 80 Me. 209.

Maryland. — *Glenn v. Grover*, 3 Md. 212; *Barry v. Hoffman*, 6 Md. 78; *Henderson v. Baltimore*, 8 Md. 352.

Massachusetts. — *Smith v. Porter*, 10 Gray (Mass.) 66.

Minnesota. — *Banning v. Eades*, 6 Minn. 402.

New Jersey. — *Ellsworth v. Central R. Co.*, 34 N. J. L. 93.

New York. — *Robinson v. Wheeler*, 25 N. Y. 252; *Costigan v. Gould*, 5 Den. (N. Y.) 290; *Harris v. Norton*, 16 Barb. (N. Y.) 264.

North Carolina. — *Meadows v. Cozart*, 76 N. Car. 450; *Kendrick v. Dellinger*, 117 N. Car. 491.

Pennsylvania. — *Cover v. Manaway*, 115 Pa. St. 338, 2 Am. St. Rep. 552.

South Carolina. — *Pressly v. Hunter*, 1 Spears L. (S. Car.) 133.

Vermont. — *Brooks v. Chaplin*, 3 Vt. 281, 23 Am. Dec. 209.

Virginia. — *Colquhoun v. Atkinson*, 6 Munf. (Va.) 550.

See also the title *DEEDS*.

Creditors of Grantor. — This presumption applies as against creditors coming in or claiming under the grantor, certainly as against persons not shown to be creditors of the grantor at the time of the deed. *Savery v. Browning*, 18 Iowa 246. See also *Dubose v. Young*, 14 Ala. 139.

Presumption as to Execution. — The date of a deed which is proved to have been delivered at the same time is *prima facie* proof that it was executed on that day. This evidence may be rebutted by proof that it was not delivered on that day. *Newlin v. Osborne*, 4 Jones L. (49 N. Car.) 157, 67 Am. Dec. 269; *Lyerly v. Wheeler*, 12 Ired. L. (34 N. Car.) 290.

In California, it is provided by statute that a grant duly executed is presumed to have been delivered at its date. Civ. Code of California (1896), § 1055; *Gordon v. San Diego*, 108 Cal. 264; *Ward v. Dougherty*, 75 Cal. 240, 7 Am. St. Rep. 151.

2. Cover v. Manaway, 115 Pa. St. 338, 2 Am. St. Rep. 552.

3. Subsequent Acknowledgment. — *Gordon v. San Diego*, 108 Cal. 264 (decision based on statute); *Smith v. Scarbrough*, 61 Ark. 104; *Ford v. Gregory*, 10 B. Mon. (Ky.) 175; *Breckenridges v. Todd*, 3 T. B. Mon. (Ky.) 52, 16 Am. Dec. 83; *M'Connell v. Brown*, Litt. Sel. Cas. (Ky.) 459; *Jayne v. Gregg*, 42 Ill. 413; *Darst v. Bates*, 51 Ill. 439; *Lake Erie, etc., R. Co. v. Whitham*, 155 Ill. 514; *Smith v. Porter*, 10 Gray (Mass.) 66. See also *Clark v. Akers*, 16 Kan. 166.

The acknowledgment of a deed on a day subsequent to the date of the deed is an acknowledgment that it was executed on the day it bears date. *Owen v. Owen*, 5 Humph. (Tenn.) 352.

4. Delivery Presumed as at Date of Acknowledgment. — *Loomis v. Pingree*, 43 Me. 299; *Henderson v. Baltimore*, 8 Md. 352; *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Johnson v. Moore*, 28 Mich. 3; *Eaton v. Trowbridge*, 38 Mich. 454; *Windom v. Schuppel*, 39 Minn. 35; *Fontaine v. Boatmen's Sav. Inst.*, 57 Mo. 552; *Kent v. Cecil*, (Tex. Civ. App. 1894) 25 S. W. Rep. 715.

In *Flynn v. Flynn*, (N. J. 1895) 31 Atl. Rep. 30, the court said: "In the absence of all evidence to the contrary, the presumption would be that [a deed] was delivered at or about the day of its date and acknowledgment."

Where a deed is executed and acknowledged by parties living in different counties, and on different days, the presumption arising from its date, that it was delivered on that day,

Date of Recording. — There is no presumption of law that the date of filing for record is *prima facie* the time of delivery.¹

Presumption as to Date of Acknowledgment. — The date of the certificate of acknowledgment of a deed is *prima facie* evidence that it was acknowledged on that day.² And when no time appears in an acknowledgment of a deed, the date of the deed is presumed to be at the time of such acknowledgment.³

c. BILLS, NOTES, AND CHECKS. — Bills of exchange, promissory notes, and bankers' checks, and indorsements upon them, are presumed to have been made on the day they bear date.⁴

d. POWER OF ATTORNEY. — A power of attorney is *prima facie* presumed to have been delivered on the day it was dated, even though it was not acknowledged until afterwards.⁵

e. DATE OF WRIT. — It is a *prima facie* presumption of law, that an action was commenced on the day of the date of the writ.⁶

2. Exceptions to Rule as to Presumptions. — The rule that all documents

cannot stand against the positive averments in the acknowledgments, that it was executed afterwards. *Henderson v. Baltimore*, 8 Md. 352.

But where a grantee died after the date of the deed, and before its acknowledgment, and the grantor afterwards duly acknowledged the deed, it was presumed that the deed had been delivered in the lifetime of the grantee. *Eaton v. Trowbridge*, 38 Mich. 454.

New York — Unacknowledged and Unattested Deed. — In New York, under the Revised Statutes, the presumption that a deed was delivered on the day it bears date, does not prevail in respect to deeds not acknowledged or proved, and which have no subscribing witness. *Elsay v. Metcalf*, 1 Den. (N. Y.) 323; *Harris v. Norton*, 16 Barb. (N. Y.) 264; *Genter v. Morrison*, 31 Barb. (N. Y.) 155.

But the Revised Statutes do not affect the presumption in cases where the deed has been proved or acknowledged. *Robinson v. Wheeler*, 25 N. Y. 252.

1. Savery v. Browning, 18 Iowa 246; **Bull v. Griswold**, 19 Ill. 631. See the title RECORDING ACTS.

2. Barry v. Hoffman, 6 Md. 78; **Cover v. Manaway**, 115 Pa. St. 338, 2 Am. St. Rep. 552.

Date of Acknowledgment Not Controlled by Date Inserted in Deed. — The certificate of acknowledgment is presumed to be correct, and will not be controlled by the date inserted in the deed, even if that date was inserted subsequently and indicates the true time of the delivery of the deed. The discrepancy does not render the deed invalid. The real date of a deed is the time of its delivery, which may be subsequent to its acknowledgment, and even after registration. *Hedge v. Drew*, 12 Pick. (Mass.) 141, 22 Am. Dec. 416; *Parker v. Hill*, 8 Met. (Mass.) 447; *Dresel v. Jordan*, 104 Mass. 417.

3. Doe v. Peeples, 1 Ga. 3; *Rackleff v. Norton*, 19 Me. 274.

4. Bills, Notes, and Checks Presumed to Be Made on Day of Date — *England*. — *Anderson v. Weston*, 6 Bing. N. Cas. 206, 37 E. C. L. 388; *Laws v. Rand*, 3 C. B. N. S. 445, 91 E. C. L. 445; *Smith v. Battens*, 1 M. & Rob. 341.

Alabama. — *Hollingsworth v. Martin*, 23 Ala. 591; *Hauerwas v. Goodloe*, (Ala. 1893) 13 So. Rep. 567.

California. — *Collins v. Driscoll*, 69 Cal. 550.

Illinois. — *Knisely v. Sampson*, 100 Ill. 573.

Maine. — *Pullen v. Hutchinson*, 25 Me. 249; *Emery v. Vinall*, 26 Me. 295.

Massachusetts. — *Cranston v. Goss*, 107 Mass. 439.

Minnesota. — *Almich v. Downey*, 45 Minn. 460.

Missouri. — *Gage v. Averill*, 57 Mo. App. 111.

North Carolina. — *Meadows v. Cozart*, 76 N. Car. 450.

Pennsylvania. — *Claridge v. Klett*, 15 Pa. St. 255.

South Carolina. — *Pressly v. Hunter*, 1 Spears L. (S. Car.) 133.

See also the title BILLS AND NOTES, vol. 4, pp. 129, 204.

When Indorsement Is Without Date. — When the indorsement of a promissory note is without date, in absence of proof of the date, the date of the note is presumed to be the date of the indorsement. *White v. Camp*, 1 Fla. 109; *Webster v. Cobb*, 17 Ill. 459; *Stewart v. Smith*, 28 Ill. 397; *Grier v. Cable*, 45 Ill. App. 405; *Snyder v. Oatman*, 16 Ind. 265; *Colburn v. Averill*, 30 Me. 310, 50 Am. Dec. 630; *Manistee Nat. Bank v. Seymour*, 64 Mich. 59; *Amsbaugh v. Gearhart*, 11 Pa. St. 482; *Hutchins v. Flintge*, 2 Tex. 473, 47 Am. Dec. 659; *Carr v. Rowland*, 14 Tex. 275.

See also the title BILLS AND NOTES, vol. 4, pp. 281, 319.

No Presumption of Acceptance at Date. — But a bill of exchange is not presumed to have been accepted on the day of its date, but within a reasonable time afterwards, regard being had to the distance the bill would have to travel from the one party to the other. *Roberts v. Bethell*, 12 C. B. 778, 74 E. C. L. 778. See also the title BILLS AND NOTES, vol. 4, p. 215.

5. Dodge v. Hopkins, 14 Wis. 630.

6. Gardner v. Webber, 17 Pick. (Mass.) 407; *Society, etc. v. Whitcomb*, 2 N. H. 227; *Day v. Lamb*, 7 Vt. 426; *Chapman v. Goodrich*, 55 Vt. 354. See also the title LIMITATION OF ACTIONS.

Date of Signature of Justice of the Peace. — The date of the signature of a justice of the peace to a judgment is *prima facie* presumed to be correct. *Van Vleck v. Thomas*, 9 Ind. App. 83.

are presumed to have been made on the day they bear date has been very reluctantly recognized, at least by some distinguished judges,¹ and is subject to the following exceptions:—

Against a Person Neither Party nor Privy to the Instrument.—Where an instrument is offered in support of an action or defense against a person who is neither party nor privy to it, the date is not *prima facie* evidence of the time of its execution.²

Instrument Signed by Bankrupt.—Where, in order to prove a petitioning creditor's debt, an instrument is put in signed by the bankrupt, which bears date before the act of bankruptcy, some independent proof of the existence of the instrument previous to the act of bankruptcy should be given in evidence, beyond the mere date apparent on its face.³

Where, in Petitions for Damages on the Ground of Adultery, letters are put in evidence to show the terms on which the husband and wife were living before the seduction, in order to avoid the obvious danger of collusion it has been deemed necessary that some independent proof should be given that the letters were written at the time they bear date.⁴

Indorsement by Deceased Obligee on a Bond.—Where indorsements made by a deceased obligee on a bond, acknowledging the receipt of interest, are tendered in evidence by his assignee, with a view of defeating a plea of the statute of limitations set up by the obligor, no presumption of payment arises unless the indorsements must necessarily have been made before the lapse of that time which raises the presumption of payment.⁵

Alterations in a Will.—In the case of alterations in a will, it appears that a date to an alteration is not in itself sufficient to establish that the alteration was made at the time of the date.⁶

3. Presumptions Not Conclusive—Parol Evidence—*a.* IN GENERAL.—The

1. **Rule Reluctantly Recognized.**—*Potez v. Glossop*, 2 Exch. 191; *Butler v. Mountgarret*, 7 H. L. Cas. 633; *Pollock, C. B.*, in *Morgan v. Whitmore*, 6 Exch. 716.

2. **No Presumption Against Strangers.**—*Baker v. Blackburn*, 5 Ala. 417; *Meldrum v. Clark*, 1 Morr. (Iowa) 130.

3. **As Proof of Petitioning Creditors' Debt.**—Taylor on Evidence, § 137; *Anderson v. Weston*, 6 Bing. N. Cas. 296, 37 E. C. L. 388, *per* Bosanquet, J.; *Sinclair v. Baggaley*, 4 M. & W. 312, *per* Ld. Abinger; *Hoare v. Coryton*, 4 Taunt. 560; *Wright v. Lainson*, 2 M. & W. 739. These cases *override* Taylor *v. Kinloch*, 1 Stark. 175, 2 E. C. L. 74.

The reason for this exception is that "a proceeding in bankruptcy is retrospective, and the object of it is to invalidate all transactions which have taken place between the act of bankruptcy and the time when the commission takes effect. In order, therefore, to support such an instrument, bearing date before the act of bankruptcy, it may well be necessary to give evidence in addition to the date." *Anderson v. Weston*, 6 Bing. N. Cas. 296, 37 E. C. L. 388, *per* Bosanquet, J.

In *Gibson v. King*, 1 C. & M. 458, 41 E. C. L. 251, the bankrupt was a boarding-house keeper, and the court held that a paper in the handwriting of the bankrupt purporting to be an account between her and one of her boarders, made previous to the bankruptcy, was not receivable in evidence to prove the trading, unless it could be shown to have been written before the bankruptcy; and it was also held that a book containing accounts between the bankrupt and one of her boarders, of dates all

antecedent to the bankruptcy, and to which the word "settled" was added in the bankrupt's handwriting, was also not receivable in evidence, unless it were shown that the entries were written before the bankruptcy. *Questioning Sinclair v. Baggaley*, 4 M. & W. 312.

4. **Letters in Actions for Adultery.**—Taylor on Evidence, § 137; *Trelawney v. Colman*, 2 Stark. 191, 3 E. C. L. 372; *Houlston v. Smyth*, 2 C. & P. 22, 12 E. C. L. 9; *Edwards v. Crock*, 4 Esp. N. P. 39.

5. **Indorsements on a Bond to Defeat Limitations.**—Taylor on Evidence, § 137; *Cremer's Estate*, 5 W. & S. (Pa.) 331, where the court said: "The party who produces an indorsement of partial payment, must satisfactorily show that it was made when it could have been done to revive a cause of action extinguished by lapse of time."

In Taylor on Evidence, §§ 623-629, it is said that "perhaps the safest rule that can be laid down on this subject is, that if the indorsement appear by its date to have been written within the twenty years, the question may be left to the jury, under all the circumstances of the case, whether it were really so written; the law raising no presumption either way."

6. In *Goods of Adamson*, L. R. 3 P. & D. 253, it was held that where there was no proof that alterations in a will were made before its execution, beyond the fact that they bore an earlier date than the will in the handwriting of the testator, such alterations would not be recognized by the court nor appear in the probate. See also the title ALTERATION OF INSTRUMENTS, vol. 2, p. 283.

presumption that an instrument was made on the day of its date is not conclusive, and may be overcome by parol evidence that it was, in fact, made on another day, and the date of delivery may be shown, although different from the date of the instrument.¹ Parol evidence has been admitted to contradict the dates of various kinds of instruments.²

Omitted Dates may be supplied by parol.³

Illegible Dates. — When the date of an instrument is illegible, extraneous evidence is admissible to show the true date.⁴

b. DEEDS. — The presumption that a deed was executed and delivered on the day of its date is not conclusive, and the true date of execution and delivery may be proved *aliunde*.⁵

1. Parol Evidence Admissible to Contradict Date. — Taylor on Evidence, § 1052; 1 Greenleaf on Evidence, § 285; Steele *v.* Mart, 4 B. & C. 272, 10 E. C. L. 331; Cooper *v.* Robinson, 10 M. & W. 694; Reg. *v.* Flintshire, 3 D. & L. 537; Russell *v.* Carr, 38 Ga. 459; Burditt *v.* Hunt, 25 Me. 419, 43 Am. Dec. 289; Manistee Nat. Bank *v.* Seymour, 64 Mich. 59; Draper *v.* Snow, 20 N. Y. 331, 75 Am. Dec. 408.

"The rules of law as applied in construing the dates of [instruments] such as deeds and writings under seal, certainly are, that the written date is not conclusive evidence of the time of the transaction. This, when controverted and material, may be proved by extraneous evidence, notwithstanding a written date." Lee *v.* Massachusetts F. & M. Ins. Co., 6 Mass. 208.

Fraud or Mistake. — The presumption that the date of an instrument is the time of its execution may, when fraud or mistake is alleged, be rebutted by parol evidence. Breck *v.* Cole, 4 Sandf. (N. Y.) 79.

2. Written Contracts. — School Dist. No. 4 *v.* Stille, 36 Ill. App. 133.

In Hall *v.* Cazenove, 4 East 477, it was shown that a charter-party dated Feb. 6th, conditioned to sail on or before Feb. 12th, was not executed until after the latter day, and that, therefore, the condition was dispensed with.

Louisiana — Act Sous Seing Prive. — An act *sous seing prive* has no date against third parties, except the one at which it is produced, unless the real date is shown by evidence *dehors* the instrument. Corcoran *v.* Sheriff, 19 La. Ann. 139; Murray *v.* Gibson, 2 La. Ann. 311; Antognini *v.* Railey, 11 La. Ann. 275.

But any circumstance which renders the antedating of the writing impossible will give effect to the date of the instrument. McGill *v.* McGill, 4 La. Ann. 262; Rachal *v.* Rachal, 4 La. Ann. 500; Carpenter *v.* Featherston, 15 La. Ann. 235.

Wills. — Reffell *v.* Reffell, L. R. 1 P. & D. 139. In this case, it was shown that a will bearing date the 27th of February, 1855, was in fact executed in 1865, and that it consequently revoked another will that was made in 1858. See also Randolph *v.* Randolph, 6 Jur. N. S. 901; Quincey *v.* Quincey, 11 Jur. 111.

Chattel Mortgages. — Briggs *v.* Fleming, 112 Ind. 313.

Bills of Sale. — Churchill *v.* Bailey, 13 Me. 64.

Advertisements of Sale. — Arberry *v.* Noland, 2 J. J. Marsh. (Ky.) 421.

Releases. — Churchill *v.* Bailey, 13 Me. 64.

Receipts. — Municipality No. 1 *v.* Wheeler, 10 La. Ann. 745.

Guaranties. — Abrams *v.* Pomeroy, 13 Ill. 134.

Letters. — Stockham *v.* Stockham, 32 Md. 196.

Bonds. — In Byrne *v.* Luning Co., (Cal. 1894) 38 Pac. Rep. 454, a bond given for the faithful performance of a contract for public work, recited that it was of even date with the contract, but it was dated one day earlier. It was held that the recital in the bond neutralized the tendency of the written dates to prove that the execution of the bond was not contemporaneous with that of the contract.

3. Omitted Dates Supplied by Parol. — Lobb *v.* Stanley, 5 Q. B. 574, 48 E. C. L. 574; Trowbridge *v.* Sanger, 4 Ark. 179; Burditt *v.* Hunt, 25 Me. 419, 43 Am. Dec. 289; Harrison *v.* Phillips Academy, 12 Mass. 455; Draper *v.* Snow, 20 N. Y. 331, 75 Am. Dec. 408; Perry *v.* Smith, 34 Tex. 277.

Illustrations. — In Lobb *v.* Stanley, 5 Q. B. 574, 48 E. C. L. 574, parol evidence was admitted to show when an undated letter was written.

In Burditt *v.* Hunt, 25 Me. 419, 43 Am. Dec. 289, parol evidence was admitted to show the day of the execution and delivery of a chattel mortgage, which was without date.

In Davis *v.* Jones, 17 C. B. 625, 84 E. C. L. 625, it was held that parol evidence was admissible to show that a written contract which had no date was not intended to operate from its delivery, but from a future uncertain period.

4. Dates Illegible. — Jefferson County *v.* Savory, 2 Greene (Iowa) 238; Fenderson *v.* Owen, 54 Me. 372, 92 Am. Dec. 551; Armstrong *v.* Burrows, 6 Watts (Pa.) 266.

5. True Date of Deed Proved Aliunde. — England. — Steele *v.* Mart, 4 B. & C. 272, 10 E. C. L. 331.

United States. — Pascault *v.* Cochran, 34 Fed. Rep. 358.

California. — Treadwell *v.* Reynolds, 47 Cal. 171.

Florida. — Moody *v.* Hamilton, 22 Fla. 298.

Georgia. — Russell *v.* Carr, 38 Ga. 459.

Illinois. — Blake *v.* Fash, 44 Ill. 302.

Maine. — Cutts *v.* York Mfg. Co., 18 Me. 190.

Maryland. — Barry *v.* Hoffman, 6 Md. 78.

Massachusetts. — Fairbanks *v.* Metcalf, 8 Mass. 230; Dresel *v.* Jordan, 104 Mass. 407.

Michigan. — Cook *v.* Knowles, 38 Mich. 316.

Minnesota. — Banning *v.* Edes, 6 Minn. 402.

Mississippi. — McComb *v.* Gilkey, 29 Miss. 146.

Erroneous Recital in Deeds as to dates may be contradicted by parol.¹

Certificate of Acknowledgment. — The date of the certificate of acknowledgment of a deed may be contradicted by parol.²

c. BILLS AND NOTES. — The true date of a bill of exchange or a promissory note may be shown by parol, without regard to the recited date.³

Where a Note Has Been Antedated or Postdated, the real date may be inquired into and effect given to the instrument.⁴

Indorsements and Assignments upon Notes. — Parol evidence is admissible to show when an indorsement or an assignment upon a note was made.⁵

4. Judicial Notice of Certain Dates. — The coincidence of the days of the week with the days of the month, the order of the months, the date of the sittings of the legislature, etc., are facts judicially noticed, and if the memory of the judge be at fault he will refer to an almanac.⁶

Missouri. — *Fontaine v. Boatmen's Sav. Inst.*, 57 Mo. 552; *Saunders v. Blythe*, 112 Mo. 1.

New York. — *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230; *Jackson v. Bard*, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267.

North Carolina. — *Kendrick v. Dellinger*, 117 N. Car. 491.

Ohio. — *Fisher v. Butcher*, 19 Ohio 406, 53 Am. Dec. 436.

Virginia. — *Bruce v. Slemph*, 82 Va. 352.

Wisconsin. — *Moore v. Smead*, 89 Wis. 558.

But see *Pratt v. Phillips*, 1 Sneed (Tenn.) 543, 60 Am. Dec. 162. See generally the title **DEEDS**.

The delivery may be averred and proved to be either before or after the date. *Harrison v. Phillips Academy*, 12 Mass. 455.

In *Jayne v. Hughes*, 10 Exch. 430, it was shown that a deed acknowledging a plaintiff's title, dated the 27th of October, 1827, was not executed until the 23d of August, 1834, and consequently, that the plaintiff's right of entry was not barred.

Deed in Hands of Grantor After Date. — The presumption that a deed was delivered at the time of date is repelled by proof that the instrument continued in the hands of the grantor after its date. *Harris v. Norton*, 16 Barb. (N. Y.) 264.

Subsequent Delivery of Similar Deed. — And the presumption is also rebutted by the execution and delivery of a similar deed several years later. *Flynn v. Flynn*, (N. J. 1895) 31 Atl. Rep. 30.

Facts Held Not Sufficient to Overcome Presumption. — The facts that the grantee resided in Chicago, and the grantor in Rockland, were not sufficient to overcome the presumption that a deed was delivered on the day of its date. *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa 286.

Absurd or Impossible Date. — If the date of a deed be an absurd or impossible one, the time of execution may be shown by parol evidence. *Harrison v. Phillips Academy*, 12 Mass. 455.

1. *Pascault v. Cochran*, 34 Fed. Rep. 358.

2. *Jordan v. Mead*, 12 Ala. 247.

3. **True Date of a Bill or Note May Be Shown by Parol.** — *Aldridge v. Branch Bank*, 17 Ala. 45; *Hauerwas v. Goodloe*, (Ala. 1893) 13 So. Rep. 567; *Paige v. Carter*, 64 Cal. 489; *Barlow v. Buckingham*, 68 Iowa 169, *Gray v. Wood*, 2 Har. & J. (Md.) 328; *Germania Bank v. Distler*, 64 N. Y. 642, *affirming* 4 Hun (N.

Y.) 633; *Biggs v. Piper*, 86 Tenn. 589. See also the title **BILLS AND NOTES**, vol. 4, p. 129.

Illustrations. — A mercantile partnership composed of two members being indebted to a bank on a promissory note in the sum of \$4,398, one of the partners executed and delivered to the bank a mortgage containing itself a promise to pay the bank \$5,000, and without mentioning the note for \$4,398, reciting that it was given to secure the above note. The mortgage on its face bore date one day earlier than the note for \$4,398. It was held that parol evidence was admissible to show that this discrepancy in the date was the result of an error. *Kiser v. Carrollton Dry Goods Co.*, 96 Ga. 760.

In an action on a promissory note which bears date on Sunday, it is competent to allege and prove that it was, in fact, executed and delivered on a different day. *Aldridge v. Branch Bank*, 17 Ala. 45. See also the title **BILLS AND NOTES**, vol. 4, p. 203.

When the Date Is Referred To in the Body of the Note. — But the date of a note or contract in writing, when referred to in the body of the note or contract as fixing the time of payment cannot be altered or varied by parol evidence. *Barlow v. Buckingham*, 68 Iowa 169; *Huston v. Young*, 33 Me. 85; *Joseph v. Bigelow*, 4 Cush. (Mass.) 82.

In *Huston v. Young*, 33 Me. 85, an action was brought against the maker of a note payable at a specified length of time after its date, by an indorsee who obtained it for value before its apparent pay-day, and without knowledge of a mistake in its date. The maker, in order to establish a defense that the action was prematurely brought, was not allowed to prove that, by mistake, the note bore date earlier than the day upon which it was actually made.

4. Antedated or Postdated Notes. — Story on Promissory Notes, § 48; *Collins v. Driscoll*, 69 Cal. 550.

5. True Date of Indorsements and Assignments Shown by Parol. — *Perrin v. Broadwell*, 3 Dana (Ky.) 596; *Pressly v. Hunter*, 1 Spears L. (S. Car.) 133. See also the titles **BILLS AND NOTES**, vol. 4, pp. 281, 204.

Undated Indorsement. — The presumption that an undated indorsement upon a promissory note was made at the date of the note may be rebutted by parol evidence that it was made subsequently. *Grier v. Cable*, 45 Ill. App. 405.

6. Judicial Notice Taken of Dates. — Taylor on Evidence, § 14 *et seq.*

5. Opinions of Experts. — Where the figures expressing the date of an instrument are difficult to be deciphered, the testimony of experts is admissible to show what the true date is.¹

The Opinions of Antiquaries have been received relative to the date of ancient handwriting.²

6. Proof of Date of Judgment by Record. — If it is desired to prove the date of a judgment, the production of the record or the proof of an examined copy is conclusive evidence against all the world.³

V. INCONSISTENT, IMPOSSIBLE, AND ILLEGIBLE DATES. — Where a date is given both as a day of the week and a day of the month, and the two are inconsistent, the day of the month must govern.⁴

An Impossible Date does not raise a presumption of alteration.⁵

Illegible Date. — To decipher an illegible date in a paper material to the issue belongs to the jury, not to the court.⁶

Construction of Ambiguous Language as to Date. — Where one construction of the language of an instrument relating to a date will render the instrument nonsensical or repugnant, or without any purpose whatever, while another construction of the same language will avoid all incongruity and make the entire instrument sensible and consistent, the latter construction will prevail.⁷

England. — Page *v.* Faucet, Cro. Eliz. 227; Tutton *v.* Darke, 5 H. & N. 647, *per* Pollock, C. B.

Alabama. — Brennan *v.* Vogt, 97 Ala. 647.

Indiana. — Swales *v.* Grubbs, 126 Ind. 106; Williamson *v.* Brandenburg, 6 Ind. App. 97.

Iowa. — McIntosh *v.* Lee, 57 Iowa 358.

Maine. — Bar Harbor First Nat. Bank *v.* Kingsley, 84 Me. 111.

Maryland. — Philadelphia, etc., R. Co. *v.* Lehman, 56 Md. 226, 40 Am. Rep. 415.

New Jersey. — Reed *v.* Wilson, 41 N. J. L. 29.

New York. — Cohn *v.* Kahn, 14 Misc. Rep. (N. Y. City Ct.) 255.

Pennsylvania. — Wilson *v.* Van Leer, 127 Pa. St. 371, 14 Am. St. Rep. 854.

Judicial Notice of Date Falling on Sunday. — In Reed *v.* Wilson, 41 N. J. L. 29, there was a declaration on a note dated August 12th at four months, and on demurrer assigning *inter alia* that the declaration showed demand and protest on December 14th, one day too soon, the court took judicial notice that December 15th was Sunday, and therefore that the demand was made on the proper day.

And in McIntosh *v.* Lee, 57 Iowa 358, it was said by the court: "The petition alleges that the defendant entered into the written lease in question on March 10, 1878. Courts take judicial notice that the 10th day of March, 1878, was Sunday. The petition, therefore, in effect alleges that the lease was executed on Sunday," and it was therefore held that, under the pleadings, evidence was not admissible that the lease was executed on Monday. See also Brennan *v.* Vogt, 97 Ala. 647; Bar Harbor First Nat. Bank *v.* Kingsley, 84 Me. 111; Morgan *v.* Burrow, (Miss. 1894) 16 So. Rep. 432; Ecker *v.* New Windsor First Nat. Bank, 64 Md. 292.

Federal Courts — Dates of Conventions, Elections, etc. — The United States courts take judicial notice of the dates of public general elections of members of the legislature or of the

constitutional convention of a state, as well as of the time of the commencement of its sitting, and of the dates when its acts take effect. Mills *v.* Green, 159 U. S. 651.

Date of Organization of County — Conflicting Decisions. — In Iowa it has been held that judicial notice will be taken of the date of the organization of a county. Ellsworth *v.* Nelson, 81 Iowa 57; Pitts *v.* Lewis, 81 Iowa 51.

In other states some limitations to this rule are asserted. See the title COUNTIES, vol. 7, p. 908.

1. Expert Evidence Admissible to Prove Date. — Stone *v.* Hubbard, 7 Cush. (Mass.) 595; Dresler *v.* Hard, 127 N. Y. 235, reversing 57 N. Y. Super. Ct. 192. See the title EXPERT AND OPINION EVIDENCE.

2. Date of Ancient Handwriting. — Tracy Peerage, 10 Cl. & F. 154. See also the title ANCIENT DOCUMENTS, vol. 2, p. 331, note.

3. Taylor on Evidence, § 1480.

4. Day of the Month Governs. — Ingersoll *v.* Kirby, Walk. (Mich.) 27; State Sav. Bank *v.* Hosmer, 95 Mich. 100.

Date at Conclusion of Deed Controls. — In Morrison *v.* Caldwell, 5 T. B. Mon. (Ky.) 426, 17 Am. Dec. 84, the date at the conclusion of a deed exactly one year subsequent to that in the body of the instrument was held to be the true date of the execution of the deed.

5. Davis *v.* Loftin, 6 Tex. 489.

6. Jefferson County *v.* Savory, 2 Greene (Iowa) 238; Fenderson *v.* Owen, 54 Me. 372, 92 Am. Dec. 551; Armstrong *v.* Burrows, 6 Watts (Pa.) 266.

7. Thus, where a promissory note bearing date July 20th was expressed to be payable "one year August 15th after date," it was held that the note should be read as if written "on the 15th day of August, one year after date," or "one year from the 15th of August after date," either of which is equivalent to "one year from the 15th of August next." Washington County Bank *v.* Jerome, 8 Mich. 490.

DATIVE. (See also the title GUARDIANSHIP.) — Dative tutorship, or dative curatorship, is that which is conferred by a family meeting on a person having charge of a minor, or of an interdict.¹

DAUGHTER. (See also the title WILLS.) — “Daughter,” taken by itself, means a female child; a legitimate female descendant in the first degree.²

1. Bothwick's Interdiction, 43 La. Ann. 550.

2. **Legitimacy.** (See generally the titles CHILD—CHILDREN, vol. 5, p. 1095; LEGITIMACY; WILLS.)—*Laker v. Hordern*, 1 Ch. Div. 644. But in that case it was held, where a testator had no legitimate child, and it appeared from the evidence that prior to the marriage his wife had had three children, *daughters*, who were then living, and who had always been acknowledged by the testator and treated by him as his children, that the three daughters were entitled under a bequest to *daughters*. But in *In re Herbert*, 29 L. J. Ch. 870, it is said, “It cannot be said that the word *daughters* is at all more appropriate to describe illegitimate *daughters* than the word children” would be to describe illegitimate

children.” See also *Dorin v. Dorin*, L. R. 7 H. L. 568.

Same — Incest. (See also the title INCEST.) — *Daughter* has been held to include an illegitimate *daughter*. *State v. Lawrence*, 95 N. Car. 659.

Grandchild. (See also the title CHILD—CHILDREN, vol. 5, p. 1085.) — Under a bequest to the “sons and *daughters*” of A, who had had eight children, all but one of whom were dead at the time of the making of the will, and all but three of whom were known to the testator to be dead, descendants of the deceased sons and *daughters* were allowed to take their deceased parents' shares. *Jamison v. Hay*, 46 Mo. 546. The expression “sons and *daughters*” was also held to include grandchildren in *Smith's Will*, 2 Desaus. (S. Car.) 123, note.

DAY.

BY WALTER CARRINGTON.

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CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the titles *AGE*, vol. 1, p. 927; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *DE MINIMIS NON CURAT LEX*, *post*; *INTERPRETATION AND CONSTRUCTION*; *JUDGMENTS AND DECREES*; *LEASES*; *LIENS*; *MORTGAGES*; *PAYMENT*; *RECORDING ACTS*; *RELATION*; *STATUTES*; *SUNDAY*; *TERM*; *TIME (COMPUTATION OF)*; *USAGES AND CUSTOMS*.

I. DEFINITION. — The term "day" is sometimes used in jurisprudence in its astronomical sense, of the space of time in which the earth makes one revolution upon its axis, or of the time between one midnight and the next.¹ Some-

1. Blackstone Defines a Day to be the space of time which elapses between two successive midnights. 2 Black. Com. 141. See also *Cummins v. Holmes*, 11 Ill. App. 161; *Towell v. Hollweg*, 81 Ind. 158; *Follett v. Hall*, 16 Ohio 112, 47 Am. Dec. 365; *Haines v. State*, 7 Tex. App. 33.

In the Construction of Statutes. — In the construction of statutes and constitutional provisions the term "day" is usually held to mean the natural day of twenty-four hours, commencing and terminating at midnight. Thus in the case of *People v. Hatch*, 33 Ill. 137, it was held that under the provisions of the state constitution relating to the presentation of bills to the governor for his approval, which provides that "if any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law," etc., the governor will be allowed the full period of ten days of twenty-four hours each, excluding Sundays, within which to perform his constitutional duty.

An *Illinois* statute declares that a person desiring to contest an election shall within thirty days after the person whose election is contested is declared elected file with the clerk a

statement in writing of the grounds upon which he will contest the election. It was held that under this statute the contestant is not restricted, as to the time in the day on which he may file such statement, to the hours during which the clerk is required by statute to keep his office open — that is from eight o'clock A. M. to six o'clock P. M. — but the day contemplated by the statute is an ordinary day of twenty-four hours, which does not expire until twelve o'clock midnight. *Zimmerman v. Cowan*, 107 Ill. 631, 47 Am. Rep. 476.

The word "day," as used in a *Pennsylvania* statute prohibiting the sale of liquors on election day, includes the whole twenty-four hours beginning at midnight of election morning and ending at midnight of election night. *Kane v. Com.*, 89 Pa. St. 522, 33 Am. Rep. 787.

The phrase, "during the entire day of any election," used in a *Texas* statute, means the natural day of twenty-four hours, commencing and terminating at midnight. It is not to be understood as denoting only the hours during which the polls are open. *Haines v. State*, 7 Tex. App. 30.

By the mode of computing time established by the Revised Statutes of *New York*, a day

times it is used in the popular sense of the time between sunrise and sunset.¹ And again it is employed in a conventional sense, of those hours and that recurring time which are by usage or law allotted to and deemed sufficient for the discharge of some duty or performance of some business, as where one speaks of a day's work, the whole of the business day, etc.²

II. DIES NON JURIDICUS. — This phrase means a non-judicial day — a day on which no judicial proceedings can be taken, such as Sunday or any legal holiday. Such days are frequently termed by abbreviation *dies non*.³

III. FRACTIONS OF A DAY — 1. General Rule. — In the legal computation of time there are no fractions of a day, and the day on which an act is done or an event happens must be entirely included or excluded.⁴

consists of twenty-four hours, and commences and ends at midnight. *Campbell v. International L. Assur. Soc.*, 4 Bosw. (N. Y.) 310; *Pulling v. People*, 8 Barb. (N. Y.) 384; *Haden v. Buddensick*, 49 How. Pr. (N. Y. C. Pl.) 246. Whenever, therefore, a statute forbids an act to be done on a particular day, it has reference to this mode of computation by the calendar, unless there is some express declaration to the contrary. Accordingly, where a cause pending before the court of special sessions was submitted to the jury at two o'clock in the morning of Sunday, and the jury returned their verdict about three o'clock, it was held that the conviction was erroneous, and it was reversed. *Pulling v. People*, 8 Barb. (N. Y.) 384.

1. Distinction Between Artificial and Natural Days. — Coke says that days are either natural or artificial. The natural day 'consists of twenty-four hours, and includes the solar day and the lunar day which are artificial days. The solar day is from the rising to the setting of the sun. The lunar day, or night, is from the setting to the rising of the sun. Co. Litt. 135a; *Pulling v. People*, 8 Barb. (N. Y.) 385. See also *Fox v. Abel*, 2 Conn. 546; *People v. Hatch*, 33 Ill. 136.

A day in its legal as well as its plain or ordinary and usual sense means a period of time consisting of twenty-four hours and including the solar day and the night. *Helphinstine v. Vincennes Nat. Bank*, 65 Ind. 589; 32 Am. Rep. 86.

Artificial or Solar Day. — The period during which the sun is above the horizon or shines continuously upon any portion of the earth's surface; the interval of light, in contradistinction to that of darkness or night. The period between the rising and setting of the sun, of varying length, and called by astronomers the artificial day. 2 Century Dictionary 1465.

In Connecticut the Lord's Day, on which service of civil process is prohibited by statute, comprises the solar day only. *Fox v. Abel*, 2 Conn. 541.

2. By Usage or Custom. — 1 Abbott's Law Dictionary 239. In *Cochran v. Retberg*, 3 Esp. N. P. 121, it was held that where there is a clause in a bill of lading that the cargo shall be taken out in a certain number of days or pay demurrage, it means working days, not running days.

In an action to recover compensation for causing certain repairs to be made upon the defendant's house, it appeared that he had promised to pay the plaintiff, who was a carpenter, twelve shillings per day for every man

employed by him about the work. The plaintiff insisted at the trial that ten hours' labor constituted a day's work, and that he was entitled to charge one day and a quarter for each natural day during which the men worked twelve hours and a half, and he offered evidence of a custom among carpenters to that effect. The court admitted evidence of the custom, and in delivering its opinion, said: "Now here the plaintiff was to be paid for his workmen at the rate of twelve shillings per day, but the parties have not told us by their contract what they meant by a day's work. It has not been pretended that it necessarily means the labor of twenty-four hours; how much, then, does it mean? Evidence of the usage or custom was let in to answer that question; and when we find a universal usage in this business to call ten hours' labor a day's work, we have arrived at the true meaning of the word 'day' as used in this contract. The parties intended that the sum of twelve shillings should be paid for every ten hours' labor." *Hinton v. Locke*, 5 Hill (N. Y.) 437.

An Order to Give Twenty Days' Notice by publication in a newspaper means publication each day. *Allen v. Kerr*, 13 Lea (Tenn.) 256.

3. Dies Non Juridicus. — 1 Abbott's Law Dictionary 377. See also 3 Chitty's Gen. Pr. 104; *Swann v. Broome*, 3 Burr. 1600; *Fox v. Abel*, 2 Conn. 541; *Michie v. Michie*, 17 Gratt. (Va.) 109. See also the title SUNDAY.

4. The Law Will Not Recognize Fractions of a Day. — 2 Black. Com. 141.

England. — *Vin. Abr.*, Time, A. 17; *Bellasis v. Hester*, Ld. Raym. 281; *Porchester's Case*, cited by Buller, J., in *Pugh v. Robinson*, 1 T. R. 117; *Clayton's Case*, 5 Coke 1; *Combe v. Pitt*, 3 Burr. 1434; *Dowling v. Foxall*, 1 B. & B. 193; *Field v. Jones*, 9 East 151; *Lester v. Garland*, 15 Ves. Jr. 248; *Reg. v. St. Mary*, 1 El. & Bl. 816, 72 E. C. L. 816; *Wright v. Mills*, 4 H. & N. 488; *Howard's Case*, 2 Salk. 625; *Tomlinson v. Bullock*, 4 Q. B. Div. 232.

Canada. — *Cole v. Porteous*, 19 Ont. App. 111; *Converse v. Michie*, 16 U. C. C. P. 167; *Mitchell v. Dobson*, 3 U. C. L. J. 185; *Sweetland v. Neville*, 21 Ont. Rep. 412.

United States. — *Louisville v. Portsmouth Sav. Bank*, 104 U. S. 469; *M'Gill v. U. S. Bank*, 12 Wheat. (U. S.) 511; *National Bank v. Burkhardt*, 100 U. S. 686; *Pearpoint v. Graham*, 4 Wash. (U. S.) 232; *Griffith v. Bogert*, 18 How. (U. S.) 158.

Alabama. — *Lang v. Phillips*, 27 Ala. 311.

Arkansas. — *Fears v. Merrill*, 9 Ark. 559, 50 Am. Dec. 226.

Colorado. — *Denver v. Pearce*, 13 Colo. 383;

2. Specific Applications of the Rule — *a*. JUDICIAL PROCEEDINGS. — It is a general rule that in judicial proceedings fractions of a day are not regarded, but such proceedings take effect in law from the earliest period of the day upon which they originated and came in force.¹

Smith v. Jefferson County, 10 Colo. 17; *Matter of Senate Resolution*, 9 Colo. 632.

Connecticut. — *Sands v. Lyon*, 18 Conn. 18.

Delaware. — *Alricks v. Thompson*, 5 Harr. (Del.) 435.

Illinois. — *Faulds v. People*, 66 Ill. 210; *Levy v. Chicago Nat. Bank*, 158 Ill. 88.

Indiana. — *Brown v. Buzan*, 24 Ind. 194; *Towell v. Hollweg*, 81 Ind. 158; *Vogel v. State*, 107 Ind. 374.

Kentucky. — *Revill v. Claxon*, 12 Bush (Ky.) 553.

Massachusetts. — *Bemis v. Leonard*, 118 Mass. 505, 19 Am. Rep. 470; *Bigelow v. Willson*, 1 Pick. (Mass.) 485; *Seekonk v. Rehoboth*, 8 Cush. (Mass.) 371; *Portland Bank v. Maine Bank*, 11 Mass. 204; *Wiggin v. Peters*, 1 Met. (Mass.) 127.

Missouri. — *Kimm v. Osgood*, 19 Mo. 60.

New York. — *Blydenburgh v. Cothel*, 4 N. Y. 418; *Clute v. Clute*, 3 Den. (N. Y.) 263, 4 Den. (N. Y.) 241; *Columbia Turnpike Road v. Haywood*, 10 Wend. (N. Y.) 422; *Cornell v. Moulton*, 3 Den. (N. Y.) 12; *Haden v. Buddensick*, 49 How. Pr. (N. Y. C. Pl.) 246; *Hughes v. Patton*, 12 Wend. (N. Y.) 234; *Jones v. Porter*, 6 How. Pr. (N. Y. Supreme Ct.) 286; *Phelan v. Douglass*, 11 How. Pr. (N. Y. Supreme Ct.) 193; *Rusk v. Van Benschoten*, 1 How. Pr. (N. Y. Supreme Ct.) 149; *Small v. McChesney*, 3 Cow. (N. Y.) 19.

Ohio. — *Jones v. Ealer*, 8 West. L. J. (Ohio) 500.

Pennsylvania. — *Duffy v. Ogden*, 64 Pa. St. 240; *Sims v. Hampton*, 1 S. & R. (Pa.) 412.

South Carolina. — *Williamson v. Farrow*, 1 Bailey L. (S. Car.) 611, 21 Am. Dec. 492.

Tennessee. — *Murfree v. Carmack*, 4 Verg. (Tenn.) 295, 26 Am. Dec. 232; *Plowman v. Williams*, 3 Tenn. Ch. 181.

Texas. — *Haines v. State*, 7 Tex. App. 33; *Linhart v. State*, 33 Tex. Crim. Rep. 504; *Speer v. State*, 2 Tex. App. 246.

Vermont. — *Matter of Welman*, 20 Vt. 653.

Virginia. — *Neale v. Utz*, 75 Va. 480.

For general purposes the law regards a day which is a continuous period of twenty-four hours commencing at midnight as the unit of measure, and takes no note of its fractions; or, perhaps more accurately, as a point, and therefore indivisible. Hence the time so designated is in general the whole of the day on which the event occurs. *Cummins v. Holmes*, 11 Ill. App. 161.

In Contracts. — Fractions of a day will not be recognized to defeat the manifest intention of the parties to a contract. *Denver v. Pierce*, 13 Colo. 383.

In the Computation of Time Prescribed for the Performance of Official Acts. — In the computation of time prescribed by constitutional or statutory provisions for the performance of official acts, the general rule is that fractions of a day are not to be noticed, but each fraction is to be considered in the computation as a full day. Thus the constitution of *Colorado* provides that if any bill shall not be returned

by the governor within ten days after it shall have been presented to him, the same shall be a law in like manner as though he had signed it, etc. In the computation of the time prescribed by this provision, it was held to be immaterial at what precise hour the bill was presented to the governor on the first, or at what hour he returned the same on the last, day of the period prescribed. *Matter of Senate Resolution*, 9 Colo. 632.

When the Law Provides a Per Diem Compensation for the time necessarily devoted to the duties of an office, the officer is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance. *Smith v. Jefferson County*, 10 Colo. 22.

No Presumption that One Act Was Done the Fraction of a Day Before Another. — To prove that a defendant was the owner of certain corporate stock at the time when an assessment on such stock was made, it is sufficient to show that the assessment was made on the day the defendant purchased the stock, as it will not be presumed that the assessment was made a fraction of a day before the purchase. *San Gabriel Valley Land, etc., Co. v. Dennis*, (Cal. 1893) 34 Pac. Rep. 441.

In Assessment of Taxes. — A *Tennessee* statute provided that all real estate subject to taxation "shall be assessed to the person who is the owner or reputed owner of the same on the first day of April of the year of the assessment." Land being sold on the first day of April, it was held that under the statute the burden of the taxes should be borne by the vendor and vendee equally. The court said: "There is nothing in the law of assessment for taxes which requires the assessor to select the owner in the early part of the day in preference to the owner at the end of the day, nor *vice versa*. There might be several owners in one day. Upon which one of them must the burden fall? It seems to me that we cannot do better in this particular case than to adhere to the letter of the law and treat the day as *punctum temporis*, a mere point. In this view, any number of owners of the same property during the same day would be as one owner and must bear the burden jointly." *Plowman v. Williams*, 3 Tenn. Ch. 181.

1. In Judicial Proceedings Fractions of a Day Are Not Regarded. — *Shelley's Case*, 1 Coke 93b; *Porchester v. Petrie*, 3 Doug. 261, 26 E. C. L. 100; *Buller, J.*, in *Pugh v. Robinson*, 1 T. R. 116; *Edwards v. Reg.*, 9 Exch. 628; *Wright v. Mills*, 4 H. & N. 488; *Converse v. Michie*, 16 U. C. C. P. 167; *Cole v. Porteous*, 19 Ont. App. 111; *Alricks v. Thompson*, 5 Harr. (Del.) 432; *Murfree v. Carmack*, 4 Verg. (Tenn.) 270, 26 Am. Dec. 232.

It Is a Principle of the Common Law that in judicial and other public proceedings there are no fractions of a day, and that all transactions of the same day are in general regarded as

b. HIRING AND SERVICE—DEMISE.—In cases of hiring and service a portion of a day is, for purposes of computation, to be reckoned a whole day.¹ And this is also the rule in reckoning the period of a demise.²

occurring at the same instant of time. This principle has been established from necessity and from a regard for public convenience. In most cases it is a matter of indifference at what particular instant of time an event took place. The day of its occurrence is an approximation to exactness, which in general answers all necessary purposes in administering justice. It frequently happens that the circumstances of a case take place at points distant from each other and so near the same instant of time that neither timepieces nor human memory can be relied on to determine the exact order of their occurrence. For this reason the law does not permit the inquiry unless under the pressure of absolute necessity to prevent gross injustice. *Long's Appeal*, 23 Pa. St. 297.

An Order Proving a Guardian's Bond in an action for the sale of an infant's land, being entered on the same day of the judgment sale, was held to be effectual although entered on the record after judgment. The court, by Cofer, J., in delivering the opinion, said: "The law takes no note of a fraction of a day, and will, when necessary to uphold judicial proceedings, treat the orders of a single day as having been made in the order in which the law required them to be made." *Revill v. Claxon*, 12 Bush (Ky.) 558.

Appeals.—The court will not regard fractions of a day in judicial proceedings unless to prevent injustice. Thus in *Blydenburgh v. Cotheal*, 4 N. Y. 418, where an appeal was taken to the court of appeals from a judgment rendered by the supreme court before the costs were adjusted and the judgment roll filed, though on the same day, the court of last resort refused to dismiss the appeal, holding that the fraction of a day ought to be disregarded.

And so where the plaintiffs in a cause made an affidavit and secured the judge's order requiring the defendant to appear and answer and an injunction to issue, etc., about two hours before the execution returned *nulla bona* by the sheriff had been actually filed in the clerk's office, but on the same day, the plaintiffs supposing that the execution had been filed (it having been delivered to a messenger for that purpose, but he having neglected to file it as soon as was intended), it was held that the fractions of a day should be disregarded and the plaintiffs' proceeding considered valid. *Jones v. Porter*, 6 How. Pr. (N. Y. Supreme Ct.) 286.

Judgments Entered on Same Day.—Generally, unless the law provides for fractions of days, all judgments entered on the same day will be regarded as if entered at the same time, and as creating liens equal in point of priority.

United States.—*Rockhill v. Hanna*, 15 How. (U. S.) 189, 4 McLean (U. S.) 554.

Iowa.—*Cook v. Dillon*, 9 Iowa 407, 74 Am. Dec. 354.

Missouri.—*Bruce v. Vogel*, 38 Mo. 100.

New York.—*Waterman v. Haskin*, 11 Johns. (N. Y.) 228.

Pennsylvania.—*Mechanics' Bank v. Gor-*

man, 8 W. & S. (Pa.) 304; *Neff v. Barr*, 14 S. & R. (Pa.) 171; *Metzler v. Kilgore*, 3 P. & W. (Pa.) 245, 23 Am. Dec. 76; *Claason's Appeal*, 22 Pa. St. 363; *Long's Appeal*, 23 Pa. St. 299; *Lanning v. Pawson*, 38 Pa. St. 480; *Boyer's Estate*, 51 Pa. St. 432, 91 Am. Dec. 129; *Ladley v. Creighton*, 70 Pa. St. 490.

Tennessee.—*Murfree v. Carmack*, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232.

Virginia.—*Janney v. Stephens*, 2 Patt. & H. (Va.) 11.

See also *Burney v. Boyett*, 1 How. (Miss.) 41; *Adams v. Dyer*, 8 Johns. (N. Y.) 350, 5 Am. Dec. 344. And see the title JUDGMENTS AND DECREES.

"There are in legal proceedings no fractions of a day. The judgments, if in the same court, are in contemplation of law at the same instant. There could be no inquiry which was first entered when both were entered on the same day; in a common case, for instance, if there be different judgments by different plaintiffs against the same defendant, on the same day, in the same court." *Neff v. Barr*, 14 S. & R. (Pa.) 171.

Service of Process, Notices, or Pleadings.—In the service of process or of notices or pleadings in any cause, fractions of a day are not regarded. *Reynolds v. Nelson*, 5 Madd. 60; *Westbrook Mfg. Co. v. Grant*, 60 Me. 88, 11 Am. Rep. 181; *Columbia Turnpike Road v. Haywood*, 10 Wend. (N. Y.) 422; *Hughes v. Patton*, 12 Wend. (N. Y.) 234; *Rusk v. Van Benschoten*, 1 How. Pr. (N. Y. Supreme Ct.) 149.

Thus, when six days' service of a summons is required, service in the afternoon of the second day of April of a summons returnable on the eighth of that month is good. *Columbia Turnpike Road v. Haywood*, 10 Wend. (N. Y.) 422.

The Texas Code of Criminal Procedure directs that "no defendant in a capital case shall be brought to trial until he has had one day's service of a copy of the names of persons summoned under a special *venire facias*." It was held that in the one day's service fractions of a day must be excluded, and therefore that at least one entire day must intervene between the day on which the service was had and the day on which the trial begins. *Speer v. State*, 2 Tex. App. 246.

1. Fractions of a Day Not Regarded—In Cases of Hiring and Service.—"It has been often held, and very properly, that a hiring on one day to the day next before the anniversary of that day, and a service for that time, are a hiring and a service for a year, although during a fraction of the first and last days there is no actual service." Lord Campbell, C. J., in Reg. v. St. Mary, 1 El. & Bl. 827, 72 E. C. L. 827.

Hiring and service from the day after Old Martinmas day until Old Martinmas day following is a hiring and service for a year. *Rex v. Skiplam*, 1 T. R. 490.

2. In Reckoning the Period of a Demise.—In *Clayton's Case*, 5 Coke 1, where a lease was for "three years from henceforth," and bore

c. AGE. — In computing the age of a person fractions of a day are excluded.¹

d. PAYMENT OF DEBTS. — In the case of mortgages, bonds, and a variety of other instruments whereby parties obligate themselves to the performance of certain duties, as to pay money within a certain time, the rule is that the party bound has till the last moment of the day to deliver himself from the obligation by paying.² And this rule has been held applicable to the payment of rent.³ But it has been held that bills of exchange and promissory notes are payable any time on the last day of grace, on demand, provided that demand be made within reasonable hours.⁴

date the 26th of May, it appearing to have been delivered at four o'clock in the afternoon of the 20th of June, it was held that the lease should end the 19th of June in the third year. The court said: "The law in this computation doth reject all fractions and divisions of a day for the uncertainty, which is always the mother of confusion."

The date of a lease or other deed is not the hour and minute when the lease or deed was executed, but a memorandum of the day when the deed was delivered. This day, in a legal sense, is an indivisible point of time, there being no fraction of a day. *Bigelow v. Willson*, 1 Pick. (Mass.) 494.

1. See for a discussion of this subject the title AGE, vol. 1, p. 927.

2. Day on Which Debt Is Payable; How Particular Hour Is Material. — 2 Black. Com. 141; *Ld. Kenyon*, C. J., in *Leftley v. Mills*, 4 T. R. 173; *Hudson v. Barton*, 1 Rolle 189; *Cabell v. Vaughan*, 1 Saund 288; *Treby*, C. J., in *Bel-lasis v. Hester*, 2 Lutw. 1593; *Osborn v. Mon-cure*, 3 Wend. (N. Y.) 172; *Gibson*, C. J., in *Taylor v. Jacoby*, 2 Pa. St. 497, 45 Am. Dec. 615; *Williamson v. Farrow*, 1 Bailey L. (S. Car.) 618, 21 Am. Dec. 492.

Illustrations. — In a case in *South Carolina*, in which an order provided that the sheriff should proceed to sell certain mortgaged premises on a credit of six months as to one moiety and twelve months as to the residue, and that if the amount of the purchase money was not paid when due the sheriff should resell, it was considered that the purchaser at a sale made the fourth of June had the whole of the fourth of December to make the payment, and that a resale made on the day last mentioned was without authority. *Williamson v. Farrow*, 1 Bailey L. (S. Car.) 618, 21 Am. Dec. 492.

The time for completing commercial contracts is not limited to banking hours. The party has the whole business day to deliver or to pay. *Price v. Tucker*, 5 La. Ann. 514.

3. In the Payment of Rent. — *Duppa v. Mayo*, 1 Saund. 287; *Clun's Case*, 10 Coke 127; *Rockingham v. Oxenden*, 2 Salk. 578; *Gibson*, C. J., in *Taylor v. Jacoby*, 2 Pa. St. 497, 45 Am. Dec. 615.

But when it was urged before the Court of Queen's Bench that rent was not due till the end of the day, *Lord Campbell*, C. J., said: "In some sense that is so, but it may be demanded at sunset." *Reg. v. St. Mary*, 1 El. & Bl. 827, 72 E. C. L. 825.

And in *Haldane v. Johnson*, 20 Eng. L. & Eq. 499, *Martin*, B., said: "There is no doubt at common law, in order to entitle a lessor to re-enter and avoid the estate for forfeiture by

breach of the condition for nonpayment of rent, it is incumbent upon the lessor to demand the rent on the land on the day when it becomes due a sufficient time before sunset to enable the payment to be made. This is distinctly laid down in *Co. Litt.* 211*b*, and the earlier statute 4 Geo. II., c. 28 (re-enacted by the late Common-law Procedure Act), was founded on the ground that such was the common law."

So in *Tinckler v. Prentice*, 4 Taunt. 540, where a tenant pleaded that he was at the premises ready to pay, *Gibbs*, J., said: "It is necessary that the tenant should stay on the land to the very last time at which the thing can be done. * * * It is not sufficient to state that he was there at and shortly before the setting of the sun. He ought to have plead he was there long enough before to have counted the money."

4. Bills and Notes Payable Any Time on the Last Day of Grace. — *Buller*, J., in *Leftley v. Mills*, 4 T. R. 174 (but see the opinion of *Ld. Kenyon*, C. J., in this case); *Burbridge v. Manners*, 3 Campb. 193; *Haynes v. Birks*, 3 B. & P. 599; *Shed v. Brett*, 1 Pick. (Mass.) 401, 11 Am. Dec. 209; *Taylor v. Jacoby*, 2 Pa. St. 497, 45 Am. Dec. 615.

In *Taylor v. Jacoby*, 2 Pa. St. 497, 45 Am. Dec. 615, *Gibson*, C. J., said: "It is indisputable that a bond cannot be put in suit on the day appointed for the payment of it, and that the obligor has the whole of it for performance of the condition. * * * It is a general principle of the common law, and it is applicable not only to cases in which payment is performance of a condition to save a forfeiture, but also to rent. * * * The only exception to it is the case of a bill of exchange, which may be protested within a reasonable time before the end of the last day of grace, but the exception stands, as the days of grace themselves stand, on arbitrary and inveterate usage, which makes up the body of the commercial law."

In *Osborn v. Moncure*, 3 Wend. (N. Y.) 170, the court said: "The demand upon the maker should be made on third day of grace, and within a reasonable time before the expiration of the day (*Devoe v. Elliot*, 2 Cai. (N. Y.) 244; *Griffin v. Goff*, 12 Johns. (N. Y.) 424), and if he then refuses payment, the holder has done all that is incumbent upon him to do, and may treat it as a dishonored bill, so far as immediately to give notice to the indorser. But still I apprehend the maker has the whole of the day to pay in, if he thinks proper to seek the holder. It is undoubtedly true, in relation to other contracts, that the party has until the last instant of the day to make payment, and

3. Rule Not Absolute — Exceptions. — But the general rule above stated is not absolute, and where from the nature of the case justice requires it fractions of a day are reckoned.¹

I perceive no reason for making negotiable paper an exception to the general rule." See also *Thomas v. Shoemaker*, 6 W. & S. (Pa.) 179. And see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65.

1. Fractions of a Day Reckoned where Justice Requires It — *England*. — *Vin. Abr.*, Time, A 17; *Bellasis v. Hester*, *Ld. Raym.* 281; *Field v. Jones*, 9 East 151; *Combe v. Pitt*, 3 Burr. 1434; *Whitaker v. Wisbey*, 12 C. B. 44, 74 E. C. L. 44; *Reg. v. St. Mary*, 1 El. & Bl. 827, 72 E. C. L. 827; *Swain v. Morland*, 1 Brod. & B. 370, 5 E. C. L. 122; *Symons v. Low*, *Styles* 72.

Canada. — *Sweetland v. Neville*, 21 Ont. Rep. 412.

United States. — *Maine v. Gilman*, 11 Fed. Rep. 214; *Matter of Richardson*, 2 Story (U. S.) 571; *Pearpont v. Graham*, 4 Wash. (U. S.) 232; *National Bank v. Burkhardt*, 100 U. S. 686; *Louisville v. Portsmouth Sav. Bank*, 104 U. S. 469; *Matter of Ankrum*, 3 McLean (U. S.) 285; *Taylor v. Brown*, 147 U. S. 645.

Colorado. — *Denver v. Pierce*, 13 Colo. 383.

Connecticut. — *Brainard v. Bushnell*, 11 Conn. 161; *Sands v. Lyon*, 18 Conn. 18.

Illinois. — *Ferris v. Ward*, 9 Ill. 499; *Grosvenor v. Magill*, 37 Ill. 239; *Levy v. Chicago Nat. Bank*, 158 Ill. 88; *Cummins v. Holmes*, 11 Ill. App. 158.

Indiana. — *Towell v. Hollweg*, 81 Ind. 158.

Louisiana. — *Tufts v. Carradine*, 3 La. Ann. 430.

Maine. — *Westbrook Mfg. Co. v. Grant*, 60 Me. 88, 11 Am. Rep. 181.

Massachusetts. — *Bigelow v. Willson*, 1 Pick. (Mass.) 485.

Missouri. — *Kimm v. Osgood*, 19 Mo. 60.

New York. — *Clute v. Clute*, 3 Den. (N. Y.) 263, 4 Den. (N. Y.) 241; *Blydenburgh v. Cothéal*, 4 N. Y. 418; *Small v. McChesney*, 3 Cow. (N. Y.) 19; *Lemon v. Staats*, 1 Cow. (N. Y.) 592; *Jones v. Porter*, 6 How. Pr. (N. Y. Supreme Ct.) 286.

Ohio. — *Follett v. Hall*, 16 Ohio 111, 47 Am. Dec. 365.

Pennsylvania. — *Collins v. McKee*, (Pa. 1886) 5 Cent. Rep. 178; *Small's Appeal*, 24 Pa. St. 398; *Maynard v. Esher*, 17 Pa. St. 226.

South Carolina. — *Williamson v. Farrow*, 1 Bailey L. (S. Car.) 611, 21 Am. Dec. 492.

Tennessee. — *Plowman v. Williams*, 3 Tenn. Ch. 181; *Murfree v. Carmack*, 4 Yerg. (Tenn.) 295, 26 Am. Dec. 232.

Vermont. — *Matter of Welman*, 20 Vt. 655.

Virginia. — *Neale v. Utz*, 75 Va. 480; *Hill v. Com.*, 2 Gratt. (Va.) 594; *Mendum v. Com.*, 6 Rand. (Va.) 704.

In *Combe v. Pitt*, 3 Burr. 1434, Lord Mansfield said: "But though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so too, where it is necessary and can be done, for it is not like a mathematical point which cannot be divided."

Said Justice Story, in *Matter of Richardson*, 2 Story (U. S.) 577: "I am aware that it is often laid down that in law there is no fraction

of a day. But this doctrine is true only *sub modo*, and in a limited sense, where it will promote the right and justice of the case. It is a mere legal fiction, and therefore, like all other legal fictions, is never allowed to operate against the right and justice of the case. On the contrary, the very truth and facts, in point of time, may always be averred and proved in furtherance of the right and justice of the case; and there may be even a priority in an instant of time; or, in other words, it may have a beginning and an end. * * * Common sense and common justice equally sustain the propriety of allowing fractions of a day whenever it will promote the purposes of substantial justice. Indeed, I know of no case where the doctrine of relation, which is a mere fiction of law, is allowed to prevail, unless it be in furtherance and protection of rights, *pro bono publico*."

Fractions of a Day Inquired Into to Reconcile Conflicting Rights. — In cases where conflicting rights are claimed to exist in consequence of different things having been done on one and the same day, it becomes indispensable, in order to do justice between the parties, to ascertain the precise time when the events occurred, and for this purpose the fractional parts of a day may be inquired into. Upon this principle the authorities all agree, and it has been applied to a great variety of transactions. *Clute v. Clute*, 4 Den. (N. Y.) 244.

The rule that there are in law no divisions or fractions of a day does not prevail in questions concerning merely the acts of parties where it becomes necessary to distinguish and ascertain which of several persons has a priority of right, as where a bond and release are executed on the same day, where the disseizin is done the same day the writ is tested, or where the question is as to the time of suing out a writ or delivering a declaration. *Matter of Welman*, 20 Vt. 653.

The legal fiction that there is no smaller fraction of time than a day is generally, if not entirely, confined to judicial and other public proceedings, and does not apply to transactions between parties whose priority of right becomes a question of fact. *Maynard v. Esher*, 17 Pa. St. 226.

In **Estimating the Amount of Damages** caused by obstructing a public way, the jury may consider fractions of a day. *Ferris v. Ward*, 9 Ill. 499.

Where **Process Was Served upon a Defendant in an Action of Debt**, on the day on which he was convicted of a felony, but before the conviction had taken place, it was held that the court had fairly acquired jurisdiction of the cause, that the conviction would not relate back to the beginning of the day and override and render void the process. *Neale v. Utz*, 75 Va. 480.

In **Construing a Statute** which as between different acts gives a preference and priority to that which is first done, the rule that fractions of a day are not recognized does not apply. *Lang v. Phillips*, 27 Ala. 311.

False Representations. — The plaintiffs alleged that the defendants had received from them a

Hour of Marriage or Death May Be Shown. — Where, in order to do justice between parties, it becomes necessary to ascertain the time of a marriage or death, inquiry will be made as to the precise hour of such marriage or death.¹

Hour of Performance of a Contract May Be Shown. — Where time is material to a contract, the exact hour of performance may be shown.²

Time When Liens Attached or Conveyances Were Executed May Be Shown. — In order to ascertain the priority of liens or conveyances, the law will take notice of the fractions of a day,³ and will inquire into the precise time when a judgment is entered or docketed, a mortgage or other conveyance executed or recorded,⁴

sum of money on the false representations that a similar sum was due them from the United States government, as and for a drawback, and that they would pay to the plaintiffs the amount of the drawback when the sum should be paid to them by the United States. The evidence showed that the defendants made the representations and received the money from the plaintiffs, and also received the drawback on the same day. It was held that this was not sufficient, that the plaintiffs, in order to recover, were bound to show that the drawback was received before the representations were made. *Richards v. Fox*, 52 N. Y. Super. Ct. 36.

1. Inquiry Will Be Made as to the Precise Time of a Marriage or Death. — *Viner's Abr.*, Time, A 17; *Roe v. Hersey*, 3 Wils. 274; *Chick v. Smith*, 8 D. P. C. 337; *Matter of Richardson*, 2 Story (U. S.) 578; *Lanning v. Pawson*, 38 Pa. St. 480; *Patterson's Appeal*, 96 Pa. St. 93; *Matter of Welman*, 20 Vt. 655.

If the ancestor died at five o'clock in the morning, and the heir entered his land at six o'clock, and made a lease at seven o'clock of the same day, the lease is good. *Roe v. Hersey*, 3 Wils. 274.

"If a woman makes a deed of her land in the morning, and is afterwards married or dies on the same day, the deed is good. * * * So if the ancestor and his immediate heir both die on the same day, and the inheritance would pass to different persons according to the survivorship of the ancestor or the heir, then the actual fact which survived the other may be proved so as to pass the inheritance to the proper party entitled thereto. Nay, the question of survivorship may often, in the absence of direct proof, be decided by mere presumption, from age, sex, constitution, and other circumstances, where both perish by the same common calamity, as by the foundering of the ship, at sea, in which they are both embarked." *Matter of Richardson*, 2 Story (U. S.) 578.

2. When Material the Precise Time of the Performance of a Contract May Be Shown. — *Grosvenor v. Magill*, 37 Ill. 239. In this case it was held that when parties contracted for the performance of an act during the first half of August, they contracted that it should be performed by noon of the 16th of that month; consequently, an offer to perform the act at a quarter before one o'clock P. M. on the 16th of August was not a fulfilment of the contract.] See the title INTERPRETATION AND CONSTRUCTION.

3. Haden v. Buddensick, 49 How. Pr. (N. Y. C. Pl.) 246; *Clute v. Clute*, 4 Den. (N. Y.) 244. See the title LIENS; RECORDING ACTS.

4. Precise Time of Judgment May Be Shown. — While, as a general rule, judgments entered

on the same day will be regarded as entered at the same time, the rule is not universal, and in many instances courts have inquired as between different judgments of the same date the precise time when they were rendered or docketed. *Clute v. Clute*, 4 Den. (N. Y.) 244; *Bates v. Hinsdale*, 65 N. Car. 423; *Biggam v. Merritt*, Walk. (Miss.) 430, 12 Am. Dec. 576. See the title JUDGMENTS AND DECREES.

In *Patterson's Appeal*, 96 Pa. St. 93, it is held that where a judgment is entered on the same day but after the death of the defendant debtor, the legal fiction of a relation of judgments does not apply, and it is not entitled to priority of payment out of the proceeds of the sale of real estate over the claims of general creditors.

In an issue as to whether a judgment upon a warrant of attorney was entered before the death of the defendant therein, it was held not error to admit the testimony of the clerk who entered the judgment, that it could not have been entered earlier than eight o'clock in the morning. *Lanning v. Pawson*, 38 Pa. St. 480.

But in an *English* case, where judgment was signed at the opening of the office at the usual hour, eleven A. M., and the defendant died at half-past nine A. M. on the same morning, it was held that the judgment was regular. *Wright v. Mills*, 4 H. & N. 488. See the title RELATION.

In Pennsylvania it has been held that when a judgment and a mortgage are entered on the same day, they will be regarded as taking effect simultaneously, and as entitled to be paid *pro rata*. *Claason's Appeal*, 22 Pa. St. 359; *Hendrickson's Appeal*, 24 Pa. St. 363. See the title RELATION.

In *Alrichs v. Thompson*, 5 Harr. (Del.) 432, it was held that a judgment is a lien during the entire day of its entry, and has priority over a mortgage recorded on that day.

As Between Judgment and Conveyances. — Where a conveyance of land is made on the same day on which a judgment lien attaches, proof of the time when the judgment was rendered or docketed, and of the time of the execution of the conveyance, may be received to determine which has priority. *Duke v. Clark*, 58 Miss. 465; *Clark v. Duke*, 59 Miss. 576; *Hoppock v. Ramsey*, 28 N. J. Eq. 413; *Mechanics' Bank v. Gorman*, 8 W. & S. (Pa.) 304; *Long's Appeal*, 23 Pa. St. 301; *Small's Appeal*, 24 Pa. St. 400; *Boyer's Estate*, 51 Pa. St. 432, 91 Am. Dec. 129; *Ladley v. Creighton*, 70 Pa. St. 490; *Miller v. Estill*, Meigs (Tenn.) 483; *Murfree v. Carmack*, 4 Yerg. (Tenn.) 270, 26 Am. Dec. 232; *Berry v. Clements*, 9 Humph. (Tenn.) 312.

As Between Different Conveyances. — When different mortgages or conveyances are re-

or an execution or attachment issued.¹

Precise Time of Bringing Action May Be Shown. — It is no objection to an action that it was brought on the same day that the cause thereof accrued, provided it was brought after such event.²

When a Statute Goes into Operation. — In *England* and *Canada* it has been held that a statute which takes effect from and after its passage goes into operation the day on which it is approved, and has relation to the first moment of that day.³

In the *United States* the decisions are not harmonious, some of them supporting the rule as stated,⁴ while others hold that a legislative act takes effect from

recorded on the same day, the precise time when each is recorded will be inquired into, and the one first recorded will be entitled to priority. *Lemon v. Staats*, 1 Cow. (N. Y.) 592; *Clute v. Clute*, 4 Den. (N. Y.) 244. See also *Naylor v. Throckmorton*, 7 Leigh (Va.) 98, 30 Am. Dec. 492. See generally the title RECORDING ACTS.

1. As Between Different Executions or Attachments. — As between two executions or attachments on the same day, the court will notice the fractions of a day in order to ascertain which has priority. *Swain v. Morland*, 1 Brod. & B. 370, 5 E. C. L. 122; *Brainard v. Bushnell*, 11 Conn. 16; *Tufts v. Carradine*, 3 La. Ann. 430; *Bigelow v. Willson*, 1 Pick. (Mass.) 485; *Lemon v. Staats*, 1 Cow. (N. Y.) 592; *Columbia Turnpike Road v. Haywood*, 10 Wend. (N. Y.) 422; *Clute v. Clute*, 4 Den. (N. Y.) 241; *Miffin v. Will*, 2 Yeates (Pa.) 177; *Ulrich v. Dreyer*, 2 Watts (Pa.) 303; *Callahan v. Hallowell*, 2 Bay (S. Car.) 8; *Matter of Welman*, 20 Vt. 655. See the titles ATTACHMENT, vol. 3, p. 225; EXECUTIONS.

Executions issued upon the same day, and delivered to the sheriff at different periods of the day, must be paid out of the proceeds of the sale of personal property in the order as to time in which they came into the sheriff's hands. *Ulrich v. Dreyer*, 2 Watts (Pa.) 303. See *Converse v. Michie*, 16 U. C. C. P. 167; *Barrett v. Merchants' Bank*, 26 Grant's Ch. (U. C.) 409.

As Between an Act of Bankruptcy and an Execution or Attachment. — Where there is an act of bankruptcy and also an execution or attachment against the goods of the bankrupt on the same day, and the question arises as to which has priority, the court will inquire, as to each, into the actual time of the day to determine which is prior. *Ex p. D'Obree*, 8 Ves. Jr. 82; *Sadler v. Leigh*, 4 Campb. 197; *Thomas v. Desanges*, 2 B. & Ald. 586; *Ulrich v. Dreyer*, 2 Watts (Pa.) 303; *Matter of Welman*, 20 Vt. 655.

So where a bankrupt's goods had been seized on execution or attachment, and the question is whether more or less than a certain number of months had elapsed between the seizure and the time when he went into bankruptcy, the court will, in making the computation, notice the fractions of a day. *Godson v. Sanctuary*, 4 B. & Ad. 255, 24 E. C. L. 53; *Westbrook Mfg. Co. v. Grant*, 60 Me. 88, 11 Am. Rep. 181.

As Between an Attachment and a Bill of Sale. — So where an attachment was served and a bill of sale executed on the same day, it may be shown that the attachment was served before the execution of the bill of sale. *Williams v. Cheesebrough*, 4 Conn. 356.

As Between an Execution and a Petition for Winding Up a Company. — When an execution was levied on the property of a company on the same day on which a petition was presented for winding up the company, the court will inquire as to the exact hour at which the latter was made. *In re London, etc., Biscuit Co.*, L. R. 12 Eq. 190.

Courts Will Inquire as to the Precise Time of Bankruptcy. — If an act of bankruptcy was completed at one period of the day on which a commission of bankruptcy issued, and it can be shown that the act of bankruptcy was completed before the commission was sealed, the commission would be valid. *Ex p. Dufrène*, 1 Ves. & B. 51; *Wydown's Case*, 14 Ves. Jr. 80.

Where a bankruptcy was closed before four o'clock in the afternoon, and after five o'clock on the same day the bankrupt acquired property, the property belonged to him, and not to the trustee in bankruptcy. *In re Pettit*, 1 Ch. Div. 478.

2. Time of Bringing Action. — *Symons v. Low*, Styles 72; *Pugh v. Robinson*, 1 T. R. 116; *Clarke v. Bradlaugh*, 8 Q. B. Div. 63, affirming 7 Q. B. Div. 151; *Stanton v. Blossom*, 14 Mass. 116, 7 Am. Dec. 198; *Shed v. Brett*, 1 Pick. (Mass.) 411, 11 Am. Dec. 209; *New England Bank v. Lewis*, 2 Pick. (Mass.) 125.

Illustration. — A writ of summons in an action was issued on the second of July, and the cause of action arose on the same day, but before the issue of the writ. The statement of claim was demurred to on the ground that the issuing of the writ was a judicial act, and must, therefore, be presumed to have taken place at the earliest moment of the day before the cause of action accrued. It was held that the court could inquire whether or not the writ was, in fact, issued after the cause of action accrued. *Clarke v. Bradlaugh*, 8 Q. B. Div. 63.

3. The Taking Effect of Statutes. — *Tomlinson v. Bullock*, 4 Q. B. Div. 230; *Cole v. Porteous*, 19 Ont. App. 111; *Converse v. Michie*, 16 U. C. C. P. 167. See the title STATUTES.

4. Arnold v. U. S., 9 Cranch (U. S.) 104; *Mallory v. Hiles*, 4 Metc. (Ky.) 53; *Matter of Welman*, 20 Vt. 653; *Matter of Howes*, 21 Vt. 619. See also *U. S. v. Williams*, 1 Paine (U. S.) 261; *Lapeyre v. U. S.*, 17 Wall. (U. S.) 198.

A Proclamation of the President of the United States takes effect as of the beginning of the day upon which it is issued. *U. S. v. Norton*, 97 U. S. 170; *Lapeyre v. U. S.*, 17 Wall. (U. S.) 198.

In *U. S. v. Norton*, 97 U. S. 170, it was held that the President's proclamation of June 13, 1865, removing all restrictions upon internal,

the time of its approval, and when the rights of persons are affected by it the precise time of its approval may be shown.¹

IV. PARTICULAR PERIODS OF TIME CONSIDERED AS ONE DAY—1. Term of Court.—By a fiction of law the whole term of court is sometimes considered as one day, and all judgments and other proceedings within the term are referred to the first day of the term.² But this fiction has been very generally abolished in the United States.³

2. Twenty-eighth and Twenty-ninth of February in Leap Year.—In leap year the twenty-eighth and twenty-ninth of February are sometimes counted as one day. As long ago as the middle of the thirteenth century the English Parliament, by the statute of 21 Henry III., declared that "the day occurring in leap year and the next going before shall be counted as one day." In some of the states there are similar statutes.⁴

domestic, and coast-wise intercourse in trade, took effect at the beginning of June 13th, and covered all the transactions of that day to which it was applicable.

1. *Matter of Richardson*, 2 Story (U. S.) 571; *In re Wynn*, Chase's Dec. (U. S.) 227; *Burgess v. Salmon*, 97 U. S. 381; *Louisville v. Portsmouth Sav. Bank*, 104 U. S. 469; *People v. Clark*, 1 Cal. 406; *Kennedy v. Palmer*, 6 Gray (Mass.) 316. See the title **STATUTES**, for a full discussion.

2. Term of Court Sometimes Considered as One Day.—*Roe v. Hersey*, 3 Wils. 274; *Combe v. Pitt*, 3 Burr. 1423; *Rockhill v. Hanna*, 15 How. (U. S.) 195; *Clements v. Berry*, 11 How. (U. S.) 398, 9 Humph. (Tenn.) 312; *Cunningham v. Ashley*, 13 Ark. 653; *Cutler v. Wadsworth*, 7 Conn. 6; *Follett v. Hall*, 16 Ohio 11, 47 Am. Dec. 365; *Leiper v. Levis*, 15 S. & R. (Pa.) 108; *Murfree v. Carmack*, 4 Verg. (Tenn.) 270, 26 Am. Dec. 232. See the titles **RELATION; TERM**.

But the Priority of Action or Judgment May Be Shown when Material.—Yet when the priority of action becomes essential and necessary to be ascertained, the particular day may be shown. *Combe v. Pitt*, 3 Burr. 1423; *Roe v. Hersey*, 3 Wils. 274; *Hutchinson v. Thomas*, 2 Lev. 141.

The day on which a judgment is rendered or any act is done within the term of the court may be shown when justice requires it. *Littleton v. Cross*, 3 B. & C. 317, 10 E. C. L. 93; *Whitaker v. Wisbey*, 12 C. B. 44, 74 E. C. L. 44; *Cutler v. Wadsworth*, 7 Conn. 6; *Morgan v. Sims*, 26 Ga. 283; *Leiper v. Levis*, 15 S. & R. (Pa.) 108; *Murfree v. Carmack*, 4 Verg. (Tenn.) 270, 26 Am. Dec. 232; *Berry v. Clements*, 9 Humph. (Tenn.) 312.

3. The Fiction Generally Abolished in the United States.—The common-law fiction assigning the same period of time to the entry of all judgments of a single term is very generally abolished in the United States, either by statutory enactments or by a long course of practice grown up in defiance of the common law of England. 2 Freeman on Judgments, § 370. See *Alrichs v. Thompson*, 5 Harr. (Del.) 432; *Murfree v. Carmack*, 4 Verg. (Tenn.) 270, 26 Am. Dec. 232.

In Arkansas by legal fiction the time between the submission and decision of the cause is considered as but one day. Thus, although a party may die between the time of the decision in the cause by the Supreme Court of

Arkansas, and the filing of the mandate of the Supreme Court of the United States reversing that decision, no change of parties in the lower court is necessary before carrying the mandate into effect. *Cunningham v. Ashley*, 13 Ark. 653.

Session of Parliament Formerly Considered as One Day.—Formerly in England the whole session of Parliament was considered as one day, and its acts took effect from the commencement of the session. Bac. Abr., 636c; *Roe v. Hersey*, 3 Wils. 274; *Rex v. Thurston*, 1 Leon. 91; *Panter v. Atty.-Gen.*, 6 Bro. P. C. 553; *Tomlinson v. Bullock*, 4 Q. B. Div. 232; *Matter of Ankrin*, 3 McLean (U. S.) 285. See the title **STATUTES**.

But this was afterwards remedied by the statute of 33 Geo. III., c. 13, which declared that statutes should have effect only from the time they received the royal assent. *Tomlinson v. Bullock*, 4 Q. B. Div. 232; *Matter of Ankrin*, 3 McLean (U. S.) 285.

4. 1 Abb. Law Dict. 150, title *Bissextile*. In *Indiana* in several cases it has been held that the English statute was in force in that state. *Swift v. Tousey*, 5 Ind. 196; *Craft v. State Bank*, 7 Ind. 219; *Kohler v. Montgomery*, 17 Ind. 220; *Porter v. Holloway*, 43 Ind. 35.

But in *Helphenstine v. Vincennes Nat. Bank*, 65 Ind. 582, 32 Am. Rep. 86, it was held that where the 28th and 29th days of February in a leap year occur in any period of days less than one year, they must be regarded and computed as two days, and not as one day for any purpose. And further, that § 57 of Rev. Stat. of 1824, p. 299, declaring that "in every leap year the 28th and 29th days of February shall be considered in law as one day," which was re-enacted by § 52 of Rev. Stat. of 1831, p. 409, and by Rev. Stat. of 1838, p. 454, was repealed by § 4, c. 59, Rev. Stat. of 1843, p. 1023, and has not since been in force in the state. In so far as the cases above conflict with this decision they are *overruled* by it. The court in this case said: "It will be seen, we think, from this statute, which we have set out in full, that it simply provides that the 28th and 29th days of February, as parts of a year which, at common law, consisted of three hundred and sixty-five days, should be accounted for one day, in computing the year and day that were wont to be assigned unto sick persons being impleaded." The statute makes no provision as to how the two days

DAY LABORER. (See also LABORER.) — See note 1.

DAYLIGHT. — See note 2.

DAYS OF GRACE. — See the titles BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 366; CHECKS, vol. 5, p. 1032; COUPONS, *ante*.

DAY'S WORK. — See note 3.

DAYTIME. (See also DAYLIGHT; NIGHT.) — That portion of the twenty-four hours in which there is sufficient daylight to distinguish a man's person and features or countenance.⁴

DE ADMENSURATIONE. — *De admensuratione*, the writ of admeasurement of dower, is a writ which lies where the widow has assigned to her more land as dower than she is entitled to.⁵

DE BENE ESSE. — See ENCYC. OF PLEADING AND PRACTICE, titles BILL DE BENE ESSE, vol. 3, p. 329; PERPETUATION OF TESTIMONY.

DE BONIS NON ADMINISTRATIS. (See also the title EXECUTORS AND ADMINISTRATORS.) — Where, in consequence of the death or removal of an administrator, the administration of the estate of an intestate is left unfinished, and a new administrator is appointed, the latter is termed an administrator *de bonis non administratis*.

DE DONIS. (See generally the title ESTATES.) — The Statute of Westminster 2 (13 Edw. I., c. 1), the object of which was to prevent the alienation of estates by those who held only a part of the estate, in such a manner as to defeat the estate of those who were to take subsequent, was called the statute *de donis conditionalibus*. The effect of the statute was to convert conditional fees into fees tail.

DE FACTO. (See also the titles DE FACTO CORPORATIONS, *post*; DE FACTO OFFICERS, *post*; and see DE FACTO GOVERNMENT, *post*.) — *De facto* means in law, as well as elsewhere, of fact; from, arising out of, or founded on fact; in fact, in deed; in point of fact; actually, really.⁶

should be accounted, in computing a number of days, less than one year, in which they might occur; and therefore it seems to us that the English statute, conceding it to be in force in this state whenever applicable, is not decisive of the question we are now considering."

In *Pennsylvania* it has been held that the statute 21st of Henry III. has no relation to the computation of time, when a rule or statute fixes a certain number of days. *Harker v. Addis*, 4 Pa. St. 515.

1. **Garnishment.** (See also the title GARNISHMENT.) — Within a statute exempting *day laborers* from garnishment, a locomotive engineer was held a *day laborer*. *Sanner v. Shivers*, 76 Ga. 335.

2. **Fire Insurance.** (See also the title FIRE INSURANCE.) — An insurance policy stipulated that "lamps were to be filled and trimmed by daylight." In construing this provision, the court said: "The words 'by daylight' are intended, not to denote daytime as opposed to night time, but to prevent the use of any artificial light from which the oil might catch fire." *Gunther v. Liverpool, etc., Ins. Co.*, 134 U. S. 110.

3. A statute provided that in a contract for labor ten hours of actual labor should be a legal *day's work*, unless the contract stipulated for a longer time. It was held that this statute was applicable to labor in a gristmill where the labor is hired at a *per diem* compensation. *Bachelder v. Bickford*, 62 Me. 526.

By Day Work. — See BY, vol. 5, p. 24.

4. *Trull v. Wilson*, 9 Mass. 154; *Rex v. Tandy*, 1 C. & P. 297, 11 E. C. L. 398. In the

first of these cases the word occurs in a statute by which a certain class of persons, on giving bond, are allowed the liberty of the prison-yard in the *daytime*. In the other, its use in an act imposing a penalty on house-breaking in the *daytime* is defined. See generally the titles BURGLARY, vol. 5, p. 57; ESCAPE; PRISONS.

Statutory Definition. — In the Game Act, 9 Geo. IV., c. 69, *daytime* is defined, in section 34, which treats of poaching, to commence at the beginning of the last hour before sunrise and to conclude at the expiration of the first hour after sunset. 1 Ch. Gen. Pr. 403.

By the Penal Code of Texas *daytime* is defined as any time of the twenty-four hours from thirty minutes before sunrise until thirty minutes after sunset. *Laws v. State*, 26 Tex. App. 655.

5. 3 Bl. Com.; 1 Steph. Com. 254. See generally the title DOWER.

6. *Burrill's Law Dict.*, quoted in *McCahon v. Leavenworth County*, 8 Kan. 437; dissenting opinion in *Matter of Gunn*, 50 Kan. 270.

De Facto Contract. — By a *de facto* contract of sale is meant one which has purported to pass the property from the owner to another. *Farmers, etc., Nat. Bank v. Logan*, 74 N. Y. 568, citing *Cundy v. Lindsay*, L. R. 3 App. 459.

De Facto Wife. — Referred to in 4 Kent's Com. 36, as one whose marriage is voidable by decree.

De Facto Schools. (See generally the title SCHOOLS.) — There may be *de facto* schools and schoolmasters. *Kidder v. Chellis*, 59 N. H. 473. And *de facto* schoolhouses. *Chapin v. School Dist. No. 2*, 30 N. H. 25.

DE FACTO CORPORATIONS.

BY EPAPHRODITUS PECK.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the title CORPORATIONS, ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 5, p. 52.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles CORPORATIONS (PRIVATE), vol. 7, p. 620, and cross-references there given; COUNTIES, vol. 7, p. 898; DE FACTO OFFICERS, post; ESTOPPEL; MUNICIPAL CORPORATIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PROMOTERS; STOCK; STOCKHOLDERS; ULTRA VIRES.

I. DEFINITION. — A *de facto* corporation is an association of persons assuming to be, and acting as, a corporation, under color of authority so to do, but without legal right.¹

Distinguished from Corporation De Jure. — It is distinguished from a *de jure* corporation by the lack of such legal right to corporate existence as will stand the test of judicial investigation, while it has such color of corporate authority as distinguishes it from a mere unincorporated organization of persons.

1. **Other Definitions.** — "A corporation actually in existence, but having no legal right to exist." Morawetz on Priv. Corp., § 778.

"An association of persons assuming to act in a corporate capacity, under color of authority so to do." Beach on Priv. Corp., § 13.

"An apparent corporate organization, asserted to be a corporation by its members and

actually acting as such, but lacking the creative fiat of the law." Gibbs's Estate, 157 Pa. St. 59.

A corporation *de facto* is "not a corporation legally constituted, but a corporation organized and operated under color of the law." American Salt Co. v. Heidenheimer, 80 Tex. 344, 26 Am. St. Rep. 743.

De Facto Corporation a Real Existence. — A *de facto* corporation, so long as it exists, is a reality; it has an actual and substantial legal existence.¹

Effect of Dissolution on Prior Acts. — The fact that a corporation has at length been dissolved by quo warranto proceedings does not alter its previous status as a corporation *de facto*, and its prior acts have such incidents as belong to the acts of a corporation *de facto*.²

The Term Used with Different Meanings. — There is a lack of harmony in the use of the term "*de facto* corporation," some courts confining it to such corporations as are valid for every purpose, except in defense to a suit by the state to test the validity of the incorporation; and others applying it to such associations as are treated as having corporate existence only by virtue of the doctrine of estoppel. This varying use of the phrase partly explains the lack of harmony in the cases as to what elements are essential to the existence of a *de facto* corporation. The former seems to be the more accurate use of the term; and a body is not necessarily entitled to be called a corporation *de facto* because a particular individual is estopped to question its corporate existence.

II. THE REQUISITE ELEMENTS — 1. **Generally.** — The requisite elements to constitute a corporation *de facto* are three: a charter or general law under which such a corporation as it purports to be might lawfully be organized, an attempt to organize thereunder, and actual user of the corporate franchise. An association having all these elements would be everywhere treated as a *de facto* corporation, and in many cases corporations have been recognized as existing *de facto* though some of the above elements were lacking.³

1. **Has a Real Legal Existence.** — "The theory that a *de facto* corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a corporation." *Perun Soc. v. Cleveland*, 43 Ohio St. 481, quoted in *Kleckner v. Turk*, 45 Neb. 188.

Corporations *de facto* are under the protection of the same law and governed by the same legal principles as those *de jure*, so long as the state acquiesces in their existence and exercise of corporate functions. *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 887. See also *Lamming v. Galusha*, 81 Hun (N. Y.) 247; *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172; *People v. La Rue*, 67 Cal. 526.

2. *Perun Soc. v. Cleveland*, 43 Ohio St. 481; *American Salt Co. v. Heidenheimer*, 80 Tex. 344, 26 Am. St. Rep. 743.

Proof of De Facto Corporate Existence. — The introduction of the charter of the corporation, coupled with proof of the exercise under it of the franchises and powers thereby granted, is sufficient to establish the existence of the corporation *de facto*. *St. Louis, etc., R. Co. v. Belleville City R. Co.*, 158 Ill. 390; *Way v. Billings*, 2 Mich. 397; *Abbott v. Omaha Smelting, etc., Co.*, 4 Neb. 416. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 661.

Upon a plea of *null tiel corporation*, the burden of proving corporate existence is cast upon the plaintiff corporation; but it is only required to make proof of a *de facto* corporate existence. *Cozzens v. Chicago Hydraulic Press Brick Co.*, 166 Ill. 213.

So in actions against a corporation it is

ordinarily sufficient to prove the existence of a corporation *de facto*. *New York L. Ins. Co. v. Aitkin*, (Super. Ct.) 11 N. Y. Supp. 349.

3. **The Elements of a Corporation De Facto** are stated substantially as in the text, in:

Alabama. — *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 887; *Cory v. Lee*, 93 Ala. 468.

Colorado. — *Duggan v. Colorado Mortg., etc., Co.*, 11 Colo. 113; *Jones v. Aspen Hardware Co.*, 21 Colo. 263.

Florida. — *Duke v. Taylor*, 37 Fla. 64.

Illinois. — *Hudson v. Green Hill Seminary Corp.*, 113 Ill. 618; *Cozzens v. Chicago Hydraulic Press Brick Co.*, 166 Ill. 216.

Kansas. — *Pape v. Capitol Bank*, 20 Kan. 445, 27 Am. Rep. 183.

Massachusetts. — *Barrett v. Mead*, 10 Allen (Mass.) 337.

Minnesota. — *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. St. Rep. 552; *Johnson v. Schulz*, (Minn. 1897) 73 N. W. Rep. 147.

Nebraska. — *Haas v. Bank of Commerce*, 41 Neb. 754.

New Jersey. — *Stout v. Zulick*, 48 N. J. L. 599; *Vanneman v. Young*, 52 N. J. L. 403.

New York. — *Lamming v. Galusha*, 81 Hun (N. Y.) 247, affirmed in 151 N. Y. 648.

Pennsylvania. — *Gibbs's Estate*, 157 Pa. St. 59.

Texas. — *McLeary v. Dawson*, 87 Tex. 524. See also *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151.

"Acting as a corporation for any length of time not being sufficient to make a corporation, it is necessary to show a charter or law which of itself creates upon its acceptance a corporation, or, if the law provides that a corporation may be formed upon a subsequent compliance with prescribed regulations and forms, that some of those regulations and forms must have been observed, although

2. A Valid Law Essential under Which Organization Possible. — It has often been held that an indispensable element to the recognition of a corporation

others have been omitted." *De Witt v. Hastings*, 40 N. Y. Super. Ct. 463.

Other cases state the requirements less fully, but with more apparent than real difference, the elements omitted in the statement being commonly assumed; thus it is said that a charter, or a general corporation law, and user thereunder constitute a corporation *de facto*, in *Abbott v. Omaha Smelting, etc., Co.*, 4 Neb. 416; *Kleckner v. Turk*, 45 Neb. 176; *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482; *Jones v. Dana*, 24 Barb. (N. Y.) 395; *McFarlan v. Triton Ins. Co.*, 4 Den. (N. Y.) 392; *People v. Beigler, Hill & D. Supp.* (N. Y.) 133; *Welch v. Old Dominion Min., etc., Co.*, (Supreme Ct.) 10 N. Y. Supp. 174; *Buncombe Turnpike Co. v. M'Carson*, 1 Dev. & B. L. (18 N. Car.) 306; *Wilmington, etc., R. Co. v. Saunders*, 3 Jones L. (48 N. Car.) 126; *Wilmington, etc., R. Co. v. Thompson*, 7 Jones L. (52 N. Car.) 387; *Elizabeth City Academy v. Lindsey*, 6 Ired. L. (28 N. Car.) 476, 45 Am. Dec. 500; *Spahr v. Farmers' Bank*, 94 Pa. St. 429; *Searsburgh Turnpike Co. v. Cutler*, 6 Vt. 315; *Manchester Bank v. Allen*, 11 Vt. 302; *Montpelier, etc., River R. Co. v. Langdon*, 46 Vt. 284. See also *Yakima Nat. Bank v. Knipe*, 6 Wash. 349.

"Two things are necessary to be shown in order to establish the existence of a corporation *de facto*, viz.: (1) the existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law." Mere acting as a corporation, however long, is not enough. "The degree of proof required on this subject [user] depends to some extent upon the nature of the incorporation, and the law under which it is organized. Where no provision is made for any permanent evidence of the fact of organization, more proof of user would be necessary than where * * * the essential steps by which the organization is accomplished are required to be made a matter of record. In such cases, if the record is perfect, then perhaps nothing else need be shown; but if imperfect, it may still stand in place of and be equivalent to a very considerable degree of evidence of user. * * * If the law exists, and the record exhibits a *bona fide* attempt to organize under it, very slight evidence of user beyond this is all that can be required." *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482.

Simple usurpation of corporate name and function does not make a *de facto* corporation. *People v. Volcano Canyon Toll-Road Co.*, 100 Cal. 87.

Other cases omit the mention of an enabling law, though assuming its existence, and declare that a colorable organization followed by user of corporate powers is sufficient. *Central Agricultural, etc., Assoc. v. Alabama Gold L. Ins. Co.*, 70 Ala. 120; *Bibb v. Hall*, 101 Ala. 79; *Marsh v. Astoria Lodge No. 112*, 27 Ill. 421; *Willard v. Methodist Episcopal Church*, 66 Ill. 55; *Mix v. National Bank*, 91

Ill. 20, 33 Am. Rep. 44; *Ewing v. Robeson*, 15 Ind. 26; *Eaton v. Aspinwall*, 19 N. Y. 119; *Toledo Bank v. International Bank*, 21 N. Y. 542; *Buffalo, etc., R. Co. v. Cary*, 26 N. Y. 75; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Perun Soc. v. Cleveland*, 43 Ohio St. 481; *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568.

Existence of Elements — Illustrations. — A charter may be presumed to have been given to persons who have long acted as a corporation and assumed the exercise of corporate power. *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64.

In a suit by a corporation, to a plea of *null tiel corporation*, it is sufficient to prove that "it is known and transacts business under that name." *Osborn v. People*, 103 Ill. 224.

That the plaintiff was recognized in the community as a corporation, pursued corporate forms of action, and held corporate meetings, is sufficient proof of corporate existence in a collateral action. *Lakeside Ditch Co. v. Crane*, 80 Cal. 181.

When, after the date when the charter went into effect, "persons were found with the consent and under the authority of the designated corporators, and without objection on the part of the sovereign power, actually exercising the corporate powers, and claiming and using the franchise, they constituted a corporation *de facto*," *Appleton Mut. F. Ins. Co. v. Jesser*, 5 Allen (Mass.) 446.

A corporation which has taken all statutory steps except to publish its articles of association in two newspapers, as required before beginning business, is a corporation *de facto*, and can sue for a debt. *Holmes v. Gilliland*, 41 Barb. (N. Y.) 568.

If the corporators named in the charter, or any one or more of them, without creating any shares of stock, or organizing in any way, or paying in the corporate fund required by law, pretend to be incorporated and hold themselves out to the world as a corporation, they will be estopped, as to those who dealt with them on the faith of those representations, to deny them. *Atty.-Gen. v. Simonton*, 78 N. Car. 57.

A *de facto* organization, formed and operated in good faith, under color of the charter, is an organization "under the charter," within the meaning of a statute imposing liability on stockholders. *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 295.

When the corporators named in a charter meet, subscribe to stock, make checks for the first payment, and elect officers and directors, they become a corporation *de facto*, though the checks are afterward returned and no business is done. They may enjoin other parties from usurping their franchises. *Union Water Co. v. Kean*, 52 N. J. Eq. 111.

Where the members of a society assuming to be a corporation are sued for injury received from acts done by the society, and they set up as a defense that the acts were corporate acts, they must clearly show full compliance with the enabling act, there being no element of

de facto was the existence of a valid law, either a special charter or a general incorporation law, under which such a corporation as the one in question has assumed to be might be lawfully organized.¹

estoppel in the case. *Vredenburg v. Behan*, 33 La. Ann. 635.

Difference Between Corporations under General and Special Laws. — There is a manifest difference between a corporation created by special charter, followed by acts of user, and one formed under general laws. In the latter case it is only by compliance with the terms of the statute that corporate existence is acquired. *Beach on Priv. Corp.*, § 16; *Bigelow v. Gregory*, 73 Ill. 197. "And there would seem to be a distinction between the case where, in a suit between a corporation and a stockholder or other individual, the plea of *nul tiel corporation* is set up to defeat a liability which the one may have contracted with the other, and the case of a suit against individuals who claim exemption from individual liability on the ground of their having become a corporation formed under the provisions of a general statute. In the latter case a stricter measure of compliance with statutory requirements will be required than in the former." *Bigelow v. Gregory*, 73 Ill. 197.

1. Necessity of Law Permitting Organization — United States. — *In re Mendenhall*, 9 Nat. Bank. Reg. 497, 17 Fed. Cas. No. 9425.

Colorado. — *Jones v. Aspen Hardware Co.*, 21 Colo. 263.

Florida. — *Taylor v. Branham*, 35 Fla. 297, 48 Am. St. Rep. 249; *Duke v. Taylor*, 37 Fla. 64.

Georgia. — *Georgia Southern, etc., R. Co. v. Mercantile Trust, etc., Co.*, 94 Ga. 306, 47 Am. St. Rep. 153.

Illinois. — *Pettis v. Atkins*, 60 Ill. 454; *American L. & T. Co. v. Minnesota, etc., R. Co.*, 157 Ill. 641.

Indiana. — *Harriman v. Southam*, 16 Ind. 190; *Heaston v. Cincinnati, etc., R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Snyder v. Studebaker*, 19 Ind. 462, 81 Am. Dec. 415; *Brownlee v. Ohio, etc., R. Co.*, 18 Ind. 68; *Bartholomew County v. Bright*, 18 Ind. 93; *Williams v. Franklin Tp. Academical Assoc.*, 26 Ind. 310.

Kansas. — *Krutz v. Paola Town Co.*, 20 Kan. 403.

Michigan. — *Green v. Graves*, 1 Dougl. (Mich.) 351; *Hurlbut v. Britain*, 2 Dougl. (Mich.) 191; *State v. How*, 1 Mich. 512; *Burton v. Schildbach*, 45 Mich. 504; *Eaton v. Walker*, 76 Mich. 579.

Missouri. — *St. Louis Colonization Assoc. v. Hennessy*, 11 Mo. App. 555.

New Jersey. — *Hill v. Beach*, 12 N. J. Eq. 31.

North Carolina. — *Tar River Nav. Co. v. Neal*, 3 Hawks (10 N. Car.) 520.

Oklahoma. — *Guthrie v. Territory*, 1 Okla. 188.

Wisconsin. — *Evenson v. Ellingson*, 67 Wis. 634.

See also the cases cited in the last note, *supra*.

In *Georgia Southern, etc., R. Co. v. Mercantile Trust, etc., Co.*, 94 Ga. 306, 47 Am. St. Rep. 153, the court, by Lumpkin, J., said: "Where there cannot lawfully be a corporation *de jure*, there cannot be one *de facto*." And, after citing and analyzing authorities, he

proceeded: "We may assume, without further citation of authorities, and without attempting any argument on the subject, that where the existence of a corporation of a given kind is positively forbidden by law, or where there is no valid, constitutional law authorizing the creation of such a corporation, it cannot exist even as a corporation *de facto*."

Norton v. Shelby County, 118 U. S. 425, holds, in an elaborate opinion, the analogous doctrine that a *de facto* officer cannot exist unless there was a constitutional law creating the office.

In some of the above cases the courts follow the doctrine stated to extreme results. Thus in *Michigan* it is held that if a general corporation law was not passed validly, as if a proper two-thirds majority vote was not given for it in the legislature (*Green v. Graves*, 1 Dougl. (Mich.) 351; *Hurlbut v. Britain*, 2 Dougl. (Mich.) 191), or it recited a prior statute by title (*Burton v. Schildbach*, 45 Mich. 504), a corporation organized thereunder is a complete nullity, and notes and mortgages given to it cannot be collected by suit.

A rifle club, organized under an act authorizing corporations for scientific purposes, was held to have no corporate existence, because rifle shooting is not a science. *Vredenburg v. Behan*, 33 La. Ann. 635.

Consolidated Corporation Where There Is No Law Permitting Consolidation. — In *Continental Trust Co. v. Toledo, etc., R. Co.*, 82 Fed. Rep. 642, the principle that there can be no *de facto* corporation where there cannot lawfully be a corporation *de jure* was asserted as invalidating the existence of a corporation formed by the consolidation of three other corporations where there was no law under which such consolidation was authorized. It was held, however, that the principle was not applicable; that in this case there was no want of authority for a *de jure* corporation, but a mere lack of capacity in the constituent elements of which the consolidated corporation was formed to form such consolidated corporation. The case was likened to that of a *de facto* officer who is in fact ineligible to the office which he fills, but whose acts are nevertheless valid. The court, by Taft, J., said: "It may be safely stated as the rule that when persons assume to act as a body, and are permitted by acquiescence of the public and the state to act as if they were legally a particular kind of corporation, for the organization, existence, and continuance of which there is express recognition by general law, such body of persons is a corporation *de facto*, although the particular persons thus exercising the franchise of being a corporation may have been ineligible and incapacitated by the law to do so."

Organization under Assigned Charter. — An assignment of a corporation charter under which no organization has been effected is an absolute nullity, and the assignees acquire no standing, either as a corporation *de jure* or one *de facto*, by an attempted organization under

Cases Contra. — But in other cases corporations are recognized as existing *de facto* though the statutes under which they were organized were unconstitutional or otherwise invalid.¹

such assigned charter. User alone is not sufficient to make a *de facto* corporation, and persons cannot take a charter with which they have no concern, and which belongs to other people, and effect a corporation *de facto* by a pretense of user thereunder. *Welch v. Old Dominion Min., etc., Co.*, (Supreme Ct.) 10 N. Y. Supp. 174.

Nonresident Corporation Acting Without Authority. — If a corporation assumes to act in a state under a charter granted by another state, but without authority from the state of its location, its corporate existence is a nullity. *Taylor v. Branham*, 35 Fla. 297, 48 Am. St. Rep. 249; *Duke v. Taylor*, 37 Fla. 64; *Hill v. Beach*, 12 N. J. Eq. 31; *Empire Mills v. Alston Grocery Co.*, 4 Tex. App. Civ. Cas., § 221. *Contra*, *Wright v. Lee*, 4 S. Dak. 237. See generally the title FOREIGN CORPORATIONS.

Corporation Prohibited by Letter or Policy of Law. — Where the existence of certain corporations is prohibited by the letter or policy of the law, no such corporations can be recognized as existing *de facto*. *Oregonian R. Co. v. Oregon R., etc., Co.*, 23 Fed. Rep. 232, 27 Fed. Rep. 277; *Jones v. Aspen Hardware Co.*, 21 Colo. 263; *Georgia Southern, etc., R. Co. v. Mercantile Trust, etc., Co.*, 94 Ga. 306, 47 Am. St. Rep. 153; *St. Louis Colonization Assoc. v. Hennessy*, 11 Mo. App. 555; *Empire Mills v. Alston Grocery Co.*, 4 Tex. App. Civ. Cas., § 221.

As to corporations for illegal purposes, see *infra*, this section, *Effect of Illegal Corporate Purposes*.

In Absence of Law Permitting Corporation, There Is No Estoppel. — In the absence of a valid law authorizing the corporation, there is no estoppel on one who has contracted with it to deny its existence. *Harriman v. Southam*, 16 Ind. 190; *Heaston v. Cincinnati, etc., R. Co.*, 16 Ind. 275, 79 Am. Dec. 430; *Brownlee v. Ohio, etc., R. Co.*, 18 Ind. 68; *Bartholomew County v. Bright*, 18 Ind. 93; *Snyder v. Studebaker*, 19 Ind. 462, 81 Am. Dec. 415; *Williams v. Franklin Tp. Academical Assoc.*, 26 Ind. 310; *Krutz v. Paola Town Co.*, 20 Kan. 403; *Empire Mills v. Alston Grocery Co.*, 4 Tex. App. Civ. Cas., § 221; *Oregonian R. Co. v. Oregon R., etc., Co.*, 23 Fed. Rep. 232, 27 Fed. Rep. 277; *In re Mendenhall*, 9 Nat. Bank. Reg. 497.

1. Corporations Formed under Unconstitutional or Invalid Laws Recognized — United States. — *Smith v. Sheeley*, 12 Wall. (U. S.) 358.

Illinois. — *Winget v. Quincy Bldg., etc., Assoc.*, 128 Ill. 67.

Maine. — *McClinch v. Sturgis*, 72 Me. 288.

Missouri. — *St. Louis v. Shields*, 62 Mo. 247; *Catholic Church v. Tobbein*, 82 Mo. 418.

New Hampshire. — *Saunders v. Farmer*, 62 N. H. 572.

New York. — *Coxe v. State*, 144 N. Y. 396.

Wisconsin. — *Black River Imp. Co. v. Holway*, 85 Wis. 344.

Party Contracting with Corporation So Formed Estopped. — A party who is a member of or has contracted with a corporation as such will

be estopped to deny its legal existence, though the defect relied on be the invalidity of the enabling law. *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 401; *McCarthy v. Lavasche*, 89 Ill. 270, 31 Am. Rep. 83; *Dows v. Naper*, 91 Ill. 44; *Winget v. Quincy Bldg., etc., Assoc.*, 128 Ill. 67; *Evansville, etc., Straight Line R. Co. v. Evansville*, 15 Ind. 395 (but this case is *overruled* in *Snyder v. Studebaker*, 19 Ind. 462, 81 Am. Dec. 415); *East Pascagoula Co. v. West*, 13 La. Ann. 545; *St. Louis v. Shields*, 62 Mo. 247; *Platte Valley Bank v. Harding*, 1 Neb. 461; *Exchange Nat. Bank v. Capps*, 32 Neb. 242, 29 Am. St. Rep. 433; *Weinman v. Wilkinsburg, etc., R. Co.*, 118 Pa. St. 192; *Building, etc., Assoc. v. Chamberlain*, 4 S. Dak. 271; *Black River Imp. Co. v. Holway*, 85 Wis. 344.

As to the general rules of estoppel, see *infra*, this title, *Incidents of a De Facto Corporation — Estoppel to Deny Corporate Existence*.

Mr. Morawetz does not approve the cases which declare the necessity of an enabling law. He says: "It is undoubtedly true that proof of a charter or general incorporation law, and of the desire and intention to form a corporation in pursuance thereof, is in nearly every instance necessary to establish the existence of a corporation *de facto*, but the reason of this is that corporations *de facto* are in almost all cases formed by an attempt to obtain the benefit of some charter or act of incorporation, and proof of the attempt to obtain the benefit of the law by complying with its conditions is material only for the purpose of showing the actual existence and character of the corporation." *Morawetz on Priv. Corp.*, § 778; see also § 746.

A corporation that has organized and assumed and exercised corporate powers under an act of the legislature is a *de facto* corporation, though the act be unconstitutional, and it requires the judgment of a competent court or an express act of the legislature to terminate its existence. *Coxe v. State*, 144 N. Y. 396.

A bank organized under an act of the territorial legislature and acting as such is a corporation *de facto* though its charter has not been approved by Congress, which is necessary before it transacts any business. *Smith v. Sheeley*, 12 Wall. (U. S.) 358.

A corporation has been held to be such *de facto* when its term of incorporation, having originally expired, had been renewed by a new act, though the latter act was unconstitutional. *Black River Imp. Co. v. Holway*, 85 Wis. 344.

Distinction Between De Facto Corporations and Corporations Recognized by Estoppel. — A comparison of the cases in this and the preceding section will show how utterly at variance the courts are in their definition of a corporation *de facto*, and consequently in their treatment of the acts and contracts of such companies as are within the disputed class. The true line of distinction would seem to be that where a litigant must show the existence or action of a corporate body in order to make out his action

3. A Bona Fide Attempt to Organize. — In order to constitute a *de facto* corporation there must be a *bona fide*, colorable attempt to organize.¹

or defense, and he is not assisted by the doctrine of estoppel, he must show the necessary elements that constitute a corporation, to wit, an enabling law and an organization thereunder; and while there may be a *de facto* organization, which nevertheless is not a complete and legal one, there can be no *de facto* law, and an actual, that is, a valid, law must be shown to exist. But in the frequent cases where there is no corporation *de facto* or *de jure*, but the parties have acted and incurred obligations on the assumption of the existence of the corporation, so that they are equitably estopped to deny its existence, the same results may flow from the estoppel of the parties that would flow from the actual existence of the corporation. In this case, however, the corporate existence would rather be imputed between the parties because of their inability to deny it than held to exist *de facto*.

It is evident that the cases, however, are not reconcilable on this or on any other theory.

1. Attempt to Organize Necessary. — *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197; *Oroville, etc., R. Co. v. Plumas County*, 37 Cal. 354; *Martin v. Deetz*, 102 Cal. 55, 41 Am. St. Rep. 151; *McLennan v. Hopkins*, 2 Kan. App. 260; *Montgomery v. Forbes*, 148 Mass. 249; *Booth v. Wonderly*, 36 N. J. L. 250; *Empire Mills v. Alston Grocery Co.*, 4 Tex. App. Civ. Cas., § 221; *Allen v. Long*, 80 Tex. 261, 26 Am. St. Rep. 735; *McLeary v. Dawson*, 87 Tex. 524.

The rule as to the requisites of a corporation *de facto* stated in *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482 (quoted *supra*, this section, *The Requisite Elements — Generally*, note 1), is criticised in *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. St. Rep. 552, because "it leaves out of account any attempt to organize under the charter or law."

Judge Brewer has stated the law as follows: "I think the true rule is this: that where persons knowingly and fraudulently assume a corporate existence, or pretend to have a corporate existence, they can be held liable as individuals; but where they are acting in good faith, and suppose that they are legally incorporated, * * * and where the corporation assumes to transact business for a series of years, and the assumed corporate existence is not challenged by the state, then they cannot be held liable, as individuals, as members of the corporation." *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197.

Where an individual obtained certain associates, who were only nominal, took all the stock himself, but paid in only a part, and never had any intention of locating at the place stated in the articles, the incorporation is a nullity, and the party is personally liable for the debts, though he believed it a valid incorporation. *Montgomery v. Forbes*, 148 Mass. 249.

Where an insurance company was chartered to be located at Trenton, and afterward some persons other than the incorporators attempted to organize under it at Jersey City, but no stock was *bona fide* subscribed and paid, the

organization was entirely outside of the act, and had no existence *de jure* or *de facto*. *Booth v. Wonderly*, 36 N. J. L. 250.

Paterson v. Arnold, 45 Pa. St. 410, holds that when a company is organized under a charter, or by commissioners designated by the legislature, the charter or commissioners' certificate is conclusive against all persons dealing with it. But where the parties themselves pretend to organize under a general law, a creditor may show that the proceedings were fraudulent, in order to hold the original members, who were privy to the fraud, as partners, but not as against later *bona fide* stockholders. But this case has been overruled in *Cochran v. Arnold*, 58 Pa. St. 399.

The requirement of the Civil Code of California is that the company should be "claiming in good faith to be a corporation under the laws of this state, and doing business as such." *Dannebrog Gold Quartz Min. Co. v. Allment*, 26 Cal. 286; *People v. Leonard*, 106 Cal. 302.

Contra. — On the other hand, it is held that even fraud in procuring apparent incorporation does not prevent a company from being a corporation *de facto*, so long as the state fails to proceed against it. *Duke v. Cahawba Nav. Co.*, 16 Ala. 372; *Pattison v. Albany Bldg., etc., Assoc.*, 63 Ga. 373; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344; *Buffalo, etc., R. Co. v. Hatch*, 20 N. Y. 157; *McConahy v. Centre, etc., Turnpike Road Co.*, 1 P. & W. (Pa.) 426; *Cochran v. Arnold*, 58 Pa. St. 399; *Garrett v. Dillsburg, etc., R. Co.*, 78 Pa. St. 465.

"To deny the corporate existence of a *de facto* corporation, and to hold as partners those who were guilty of fraud in obtaining the charter, is to confound an action *ex contractu* with one essentially for a tort." *Cochran v. Arnold*, 58 Pa. St. 399.

Substantial Compliance Required. — Mere irregularities in organizing under a charter will not deprive the members of its benefit; but the provisions of the act must be substantially complied with. *Bartholomew v. Bentley*, 1 Ohio St. 37; *Williams v. Hewitt*, 47 La. Ann. 1076; *McLennan v. Hopkins*, 2 Kan. App. 260. But compare *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. St. Rep. 552. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 655.

In the Louisiana case, just cited, the court places itself in apparent and supposed hostility to the acknowledged current of authority, by its erroneous use of the term *de facto*. It speaks of a mere pretended corporation, with no color of legal authority, as a *de facto* bank, and then argues vigorously that the privileges given by other courts to real *de facto* corporations cannot justly be given to it. If the court had been more precise in its use of the term, no inconsistency with other cases would have existed.

De facto corporate existence has been denied where the proper papers were filed, but there was no actual subscription or payment of stock. *Wechselberg v. Flour City Nat. Bank*, 64 Fed. Rep. 90.

Filing the Statutory Certificate. — Where the incorporation is under a general law, the final act of organization required by the statute, which is commonly the filing of a certificate of incorporation in the office of the secretary of state, or some other record office, is often held to be essential.¹

4. Unequivocal Acts of User. — Where acts of user are relied upon to prove the existence of a corporation *de facto*, they must be such as unequivocally indicate a corporation, and could not have been performed by an individual or partnership.²

A company which has filed the proper certificate and begun business is a corporation *de facto*, though the twenty per cent. required by statute has not been paid in. *Canfield v. Gregory*, 66 Conn. 9.

Persons assuming to act under an incorporation, invalid because some positive requirement of the law has not been complied with, are liable as individuals. *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 45 Am. St. Rep. 700.

The nonperformance of an act not made by the statute a condition precedent to the assumption of corporate powers cannot be taken advantage of collaterally. *Granby Min.*, etc., *Co. v. Richards*, 95 Mo. 106.

1. Filing Certificate. — *Marshall v. Harris*, 55 Iowa 182; *McLennan v. Hopkins*, 2 Kan. App. 260; *Johnson v. Corser*, 34 Minn. 355; *Abbott v. Omaha Smelting, etc., Co.*, 4 Neb. 416; *Guckert v. Hacke*, 159 Pa. St. 304; *Childs v. Hurd*, 32 W. Va. 99; *Bergeron v. Hobbs*, (Wis. 1897) 71 N. W. Rep. 1056.

If the act provides that no corporation shall have or exercise any corporate powers until the certificate is filed, it is not even a *de facto* corporation until this is done, and a contractor with it can attack the corporate existence in a suit on the contract. *Jones v. Aspen Hardware Co.*, 21 Colo. 263.

Under a general act which requires certain things to be done before the corporation can be considered *in esse*, any material omission will be fatal to the existence of the corporation, and may be taken advantage of in any collateral action in which the issue of incorporation is properly raised. Such acts as are required, but not made prerequisites to the assumption of corporate powers, cannot be taken advantage of except by the government, in a direct proceeding to destroy the corporation. *Mokelumne Hill Canal, etc., Co. v. Woodbury*, 14 Cal. 424, 73 Am. Dec. 658. As to the distinction between conditions precedent and directory requirements, see the title CORPORATIONS (PRIVATE), vol. 7, p. 655. See also *infra*, this title, *Incidents of a De Facto Corporation — Its Existence Cannot Be Attacked Collaterally*, note 2.

Sufficiency of Certificate. — And the certificate must be sufficient to meet the requirements of the statute. A *bona fide* attempt to obtain organization will not be sufficient if the certificate does not contain the things required. *Kaiser v. Lawrence Sav. Bank*, 56 Iowa 104, 41 Am. Rep. 85.

If the published articles do not state the maximum of debt to which the corporation may be subjected, the stockholders are individually liable. *Heuer v. Carmichael*, 82 Iowa 288; *Stivers v. Carmichael*, 83 Iowa 759.

Notwithstanding the *California* statute

quoted in the last note *supra*, a corporation not a party to the suit was adjudged to be no corporation, and a title in it to be a nullity, because the certificate stated where "the operations of the company are to be carried on," instead of "the principal place of business." *Harris v. McGregor*, 29 Cal. 124.

The attempted organization of a corporation, but without filing the certificate which is the incorporating act, or any act of user, does not constitute a corporation *de facto* so as to make a member who has contracted to pay another member \$25,000 on the formation of the corporation liable therefor. *Childs v. Smith*, 55 Barb. (N. Y.) 45.

Cases Contra. — A *de facto* corporation may exist though no certificate is filed. *McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 575; *Tarbell v. Page*, 24 Ill. 46; *Baker v. Backus*, 32 Ill. 79; *Bushnell v. Consolidated Ice Mach. Co.*, 138 Ill. 67; *Matter of Shakopee Mfg. Co.*, 37 Minn. 91; *Leonardsville Bank v. Willard*, 25 N. Y. 575; *Harrod v. Hamer*, 32 Wis. 162.

The insertion in the articles of association of an unauthorized provision for the increase of the capital stock, while void in itself, does not affect the validity of the corporation. *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546.

Where a railroad company has filed its articles, built and begun to operate its road, and has been recognized by the legislature, it is a *de facto* corporation, though the certificate failed to state its termini or route as required. *Cayuga Lake R. Co. v. Kyle*, 64 N. Y. 185.

Filing the required certificate with the county clerk is sufficient as to those dealing with the corporation as such, though no duplicate is filed with the secretary of state. *Raisbeck v. Desterreicher*, 18 Alb. L. J. 211.

Though the act says that "no association shall be organized" with less than \$25,000 paid-up capital, or shall do business until it has filed a statement, and received a certificate, it is a corporation *de facto*, though there was no paid-up capital, statement, or certificate. *Stokes v. Findlay*, 4 McCrary (U. S.) 205.

2. Acts of User. — *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58; *Kirkpatrick v. United Presb. Church*, 63 Iowa 372; *De Witt v. Hastings*, 40 N. Y. Super. Ct. 463.

Acts done before the attempted formation of the company, those not within the objects for which the company was to be formed, and those done by persons not acting within the scope of any authority conferred by the associates will not be sufficient acts of corporate user. *De Witt v. Hastings*, 40 N. Y. Super. Ct. 463.

If the law exist, and the record show a *bona fide* attempt to organize under it, very slight

5. Effect of Illegal Corporate Purposes. — A corporation formed for the purpose of violating the law is a nullity.¹

III. INCIDENTS OF A DE FACTO CORPORATION — 1. Its Existence Cannot Be Attacked Collaterally — *a.* GENERALLY. — The elementary rule governing the courts in dealing with a *de facto* corporation is that the legality of its incorporation cannot be questioned in a collateral proceeding; it derives its corporate existence from the state, the question of its full compliance with the requirements of the law is a question solely between it and the state, and no one but the state can inquire into the regularity of its organization. Its legal existence, therefore, can be questioned only by the state in a direct proceeding, usually by quo warranto, instituted by the proper law officer of the state.²

evidence of user will suffice. *Merriman v. Magiveny*, 12 Heisk. (Tenn.) 494.

Under a charter by the legislature, very slight evidence of user is sufficient; *e. g.*, the receipt of a deed. *Augusta Mfg. Co. v. Ver-trees*, 4 Lea (Tenn.) 75.

User alone is insufficient to establish *de facto* corporate existence. *Eaton v. Walker*, 76 Mich. 579; *Welch v. Old Dominion Min., etc., Co.* (Supreme Ct.) 10 N. Y. Supp. 174.

See also the title CORPORATIONS (PRIVATE), vol. 7, pp. 661, 665, 668.

Presumption from Acts of User. — Where there has been a body corporate *de facto* for a considerable length of time, claiming at least to be such, and holding and enjoying property as a corporation, it will be presumed that every mere formal requisite to the due creation of the corporation has been complied with. All *Saints Church v. Lovett*, 1 Hall (N. Y.) 191; *Whitney v. Robinson*, 53 Wis. 316; *Ricketson v. Galligan*, 89 Wis. 400. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 661.

1. **Corporation for Illegal Purpose.** — A corporation chartered by a Confederate state for the purpose of running the blockade and importing arms and ammunition has no legal existence, and cannot maintain a suit. *Chicora Co. v. Crews*, 6 S. Car. 243.

A corporation organized ostensibly to deal in grain, but with the real object of doing an illegal wagering business, is a nullity, and the members are liable as partners. *McGrew v. City Produce Exch.*, 85 Tenn. 572, 4 Am. St. Rep. 771.

A corporation has a valid existence, though chartered by an act of the legislature of a Confederate state, if the purposes of the incorporation were not hostile to the Union or in aid of the rebellion. *U. S. v. Home Ins. Co.*, 22 Wall. (U. S.) 99.

See also the title CORPORATIONS (PRIVATE), vol. 7, p. 649.

2. **Cannot be Collaterally Attacked** — *United States.* — *Douglas County v. Bolles*, 94 U. S. 104; *Macon County v. Shores*, 97 U. S. 272; *Whitney v. Wyman*, 101 U. S. 392; *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568; *Dallas County v. Huidekoper*, 154 U. S. 654; *Shapleigh v. San Angelo*, 167 U. S. 646; *Ashley v. Presque Isle County*, 60 Fed. Rep. 55; *American Cable R. Co. v. New York*, 68 Fed. Rep. 227; *Andrews v. National Foundry, etc., Works*, 77 Fed. Rep. 774.

Alabama. — *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 16 Ala. 372; *Lehman v. Warner*, 61 Ala. 455; *Central Agricultural, etc., Assoc. v.*

Alabama Gold L. Ins. Co., 70 Ala. 120; *Mer-chants, etc., Line v. Waganer*, 71 Ala. 586; *Snider's Sons' Co. v. Troy*, 91 Ala. 230, 24 Am. St. Rep. 887; *Bibb v. Hall*, 101 Ala. 79.

Arkansas. — *Niemeyer v. Little Rock Junction R. Co.*, 43 Ark. 111.

California. — *Mokelumne Hill Canal, etc., Co. v. Woodbury*, 14 Cal. 424, 73 Am. Dec. 658; *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *Dannebrog Gold Quartz Min. Co. v. Allment*, 26 Cal. 286; *Rondell v. Fay*, 32 Cal. 354; *People v. Leonard*, 106 Cal. 302 (citing the code).

Colorado. — *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673; *Humphreys v. Mooney*, 5 Colo. 282; *Denver v. Mullen*, 7 Colo. 345; *Duggan v. Colorado Mortg., etc., Co.*, 11 Colo. 113; *Grand River Bridge Co. v. Rollins*, 13 Colo. 4.

Connecticut. — *New Haven Wire Co. Cases*, 57 Conn. 394.

Georgia. — *Pattison v. Albany Bldg., etc., Assoc.*, 63 Ga. 373.

Idaho. — *Boise City Canal Co. v. Pinkham*, 1 Idaho 790.

Illinois. — *Mendota v. Thompson*, 20 Ill. 197; *Tarbell v. Page*, 24 Ill. 46; *Mitchell v. Deeds*, 49 Ill. 416, 95 Am. Dec. 621; *Cincinnati, etc., R. Co. v. Danville, etc., R. Co.*, 75 Ill. 113; *Louisville, etc., R. Co. v. Shires*, 108 Ill. 617; *Hudson v. Green Hill Seminary Corp.*, 113 Ill. 626.

Indiana. — *Aurora, etc., R. Co. v. Lawrence-burgh*, 56 Ind. 80; *Baker v. Neff*, 73 Ind. 68; *Hon v. State*, 89 Ind. 249; *Williamson v. Kokomo Bldg., etc., Assoc.*, 89 Ind. 389; *Hasselman v. U. S. Mortgage Co.*, 97 Ind. 368; *Williams v. Citizens' R. Co.*, 130 Ind. 71, 30 Am. St. Rep. 201.

Kansas. — *Chicago, etc., R. Co. v. Stafford County*, 36 Kan. 121; *Mendenhall v. Burton*, 42 Kan. 575.

Kentucky. — *Hughes v. Somerset Bank*, 5 Litt. (Ky.) 47; *Wright v. Shelby R. Co.*, 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522.

Maine. — *McClinch v. Sturgis*, 72 Me. 288.

Maryland. — *Taggart v. Western Maryland R. Co.*, 24 Md. 563, 89 Am. Dec. 760; *Lafin, etc., Powder Co. v. Sinsheimer*, 46 Md. 315, 24 Am. Rep. 522; *Keene v. Van Reuth*, 48 Md. 184.

Massachusetts. — *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344.

Michigan. — *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389; *Clement v. Everest*, 29 Mich. 19; *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, 24 Am. Rep. 585; *Wilcox v.*

Applications of Rule. — Under this rule, individuals have been denied the right to question the validity of the organization of a corporation *de facto*, not only

Toledo, etc., R. Co., 43 Mich. 584; Toledo, etc., R. Co. v. Johnson, 55 Mich. 456.

Minnesota. — East Norway Lake Church v. Froislie, 37 Minn. 447.

Missouri. — Smith v. Clark County, 54 Mo. 58; Fredericktown v. Fox, 84 Mo. 59; Granby Min., etc., Co. v. Richards, 95 Mo. 106; Finch v. Ullman, 105 Mo. 255, 24 Am. St. Rep. 383; Crenshaw v. Ullman, 113 Mo. 633.

Nebraska. — Lincoln Bldg., etc., Assoc. v. Graham, 7 Neb. 173; Haas v. Bank of Commerce, 41 Neb. 754; Kleckner v. Turk, 45 Neb. 176.

New Hampshire. — State v. Carr, 5 N. H. 367; Ossipee Hosiery, etc., Mfg. Co. v. Cannev, 54 N. H. 295; Saunders v. Farmer, 62 N. H. 572.

New Jersey. — Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548; Union Water Co. v. Kean, 52 N. J. Eq. 111; Bell v. Pennsylvania, etc., R. Co., (N. J. 1887) 10 Atl. Rep. 741; Stout v. Zulick, 48 N. J. L. 599; Vanneman v. Young, 52 N. J. L. 403; Mueller v. Egg Harbor City, 55 N. J. L. 245.

New York. — Buffalo, etc., R. Co. v. Hatch, 20 N. Y. 157; Cox v. State, 144 N. Y. 396; Persse, etc., Paper Works v. Willett, 19 Abb. Pr. (N. Y.) 416, 1 Robt. (N. Y.) 131; Jones v. Dana, 24 Barb. (N. Y.) 395; Doyle v. Peerless Petroleum Co., 44 Barb. (N. Y.) 239; McFarlan v. Triton Ins. Co., 4 Den. (N. Y.) 392.

North Carolina. — Tar River Nav. Co. v. Neal, 3 Hawks (10 N. Car.) 520.

Ohio. — Perun Soc. v. Cleveland, 43 Ohio St. 481; Durrell v. Belding, 9 Ohio Cir. Ct. Rep. 74.

Pennsylvania. — McConahy v. Centre, etc., Turnpike Road Co., 1 P. & W. (Pa.) 426; Cochran v. Arnold, 58 Pa. St. 399; Garrett v. Dillsburg, etc., R. Co., 78 Pa. St. 465; Hamilton v. Clarion, etc., R. Co., 144 Pa. St. 34.

Utah. — Tarpey v. Deseret Salt Co., 5 Utah 494.

Vermont. — Searsburgh Turnpike, Co. v. Cutler, 6 Vt. 315.

Wisconsin. — Independent Order, etc., v. United Order, etc., 94 Wis. 234; Ashland v. Wheeler, 88 Wis. 617.

"It is often said that when a corporation sues, its corporate existence must be shown if it is controverted. When the action is against one contracting with it in its corporate capacity, the contract furnishes the evidence. If the action is against a stranger, the user of the corporate power and franchise and the color of right afforded by a legislative grant is conclusive." Lehman v. Warner, 61 Ala. 455.

"Corporations may exist either *de jure* or *de facto*. If of the latter class, they are under the protection of the same law, and governed by the same legal principles, as those of the former, so long as the state acquiesces in their existence and exercise of corporate functions. A private citizen whose rights are not invaded, who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the state." Snider's Sons' Co. v. Troy, 91 Ala. 230, 24 Am. St. Rep. 887.

A corporation *de facto*, "at least where there is a law under which a corporation might have been legally formed with such power, is capable of taking and holding property as grantee as well as a corporation *de jure*, and conveyances to it are valid as to all the world, except the state in proceedings in quo warranto." East Norway Lake Church v. Froislie, 37 Minn. 447.

It is well settled that a transfer of property to or by a corporation *de facto* will be held binding and valid as against all parties but the state. Finch v. Ullman, 105 Mo. 255, 24 Am. St. Rep. 383; Crenshaw v. Ullman, 113 Mo. 633; Tarpey v. Deseret Salt Co., 5 Utah 494.

A corporation filed a certificate of organization, began business, and incurred debts, which passed into judgments; later it perfected its organization, and mortgaged the property. It was held that the judgments took precedence over the mortgages. Bergen v. Porpoise Fishing Co., 41 N. J. Eq. 238.

As to a contract made before the completion of organization, see Whitney v. Wyman, 101 U. S. 392.

Where a charter has been granted on a condition precedent, and persons are found in the quiet possession or exercise of corporate powers, as against all but the sovereign, the condition precedent shall be taken as performed. Tar River Nav. Co. v. Neal, 3 Hawks (10 N. Car.) 520.

"The Cases in Which It Is Necessary to Give Strict Proof of Incorporation, that is, to prove not only the being, but the right to be, are: 1, actions by the state to ascertain or to put an end to corporate existence; 2, proceedings by a private corporation in the exercise of a franchise in derogation of common right, *e. g.*, to divest title to private property; 3, proceedings of a penal character by [against?] a private corporation; 4, actions on contracts, like subscriptions for stock, if the very consideration is the organization of a corporation having a right to existence; in such cases the inquiry may extend to the due compliance with all the requirements of the law, but often in these cases it is narrowed or precluded by estoppel or admission; 5, where the question is whether there is corporate power to take by will, sufficient regularity of origin to show an attempt in good faith to comply with the law may be required." Abbott on Trial Evidence, p. 19, § 3, as quoted in Hudson v. Green Hill Seminary Corp., 113 Ill. 626.

Contra. — On the other hand, the Supreme Court of Rhode Island held that the failure to pay one hundred dollars to the state, as required by the general law, can be set up in defense in any action where there is no estoppel. "We know of no rule which precludes inquiry into the question whether a company which assumes to act as a corporation has ever been incorporated, in any case, in the absence of any matter of estoppel to prevent the inquiry." Slocum v. Providence Steam, etc., Pipe Co., 10 R. I. 112.

Failure to Comply with Conditions Precedent. — It has been held in many cases that a distinc-

in suits on contracts, in which the doctrine of estoppel might apply,¹ but also in actions for the protection of its property and rights, as in ejectment,² actions for injury,³ for infringement of patents,⁴ for the recovery of tolls,⁵ to sustain actions of injunction to restrain the corporate operations,⁶ as a defense to

tion exists between those steps in obtaining corporate existence which are made conditions precedent to such existence by statute, and such steps as are merely directory, and that, in the case of an omission in regard to such a condition precedent, the validity of the corporation may be attacked collaterally. See the title CORPORATIONS (PRIVATE), vol. 7, p. 655.

But in the case of *Lamming v. Galusha*, 81 Hun (N. Y.) 247, affirmed in 151 N. Y. 648, this distinction is questioned, the court saying: "A distinction between corporations having their charter directly from legislative enactment and those created pursuant to general laws is observed by the courts in some cases, where it is held that failure of the former to perform certain conditions imposed to enable them to take the benefit of the charter will not subject their corporate character to attack by third persons, while it is otherwise in respect to corporations sought to be created under general laws when there is a failure to comply fully with the conditions precedent to their creation. That distinction may be well founded so far as relates to the organization of them, as in the one case they are created by the statute and in the other their creation is authorized by it. But when, by proceedings taken for the purpose, there has been an attempt to comply with the statute under which it is sought to incorporate the company, and articles of association have been filed, it, by user as such, becomes a corporation *de facto*, with all the rights as to third persons which that imports, although its articles filed are in some particular defective. I see no reason why it does not then stand on the same footing as does a corporation *de facto* whose charter has come directly from legislative enactment, and by which certain conditions made requisite to its creation or organization have not been performed."

See also *Finnegan v. Noerenberg*, 52 Minn. 239, 38 Am. St. Rep. 552; *Johnson v. Schulin*, (Minn. 1897) 73 N. W. Rep. 147.

Public Corporations and Quasi Corporations. — The same principle applies in the case of public corporations or quasi corporations, and where such organizations have a *de facto* existence their legality cannot be collaterally attacked. *Ashley v. Presque Isle County*, 60 Fed. Rep. 55; *State v. Leatherman*, 38 Ark. 81; *Hamilton v. San Diego County*, 108 Cal. 273; *Reclamation Dist. No. 542 v. Turner*, 104 Cal. 334; *Coles County v. Allison*, 23 Ill. 437; *Matter of Short*, 47 Kan. 253; *Mendenhall v. Burton*, 42 Kan. 570; *School Dist. No. 2 v. School Dist. No. 1*, 45 Kan. 543; *Fractional School Dist. No. 1 v. Joint Board of School Inspectors*, 27 Mich. 3; *Speck v. State*, 7 Baxt. (Tenn.) 46. See also the title COUNTIES, vol. 7, p. 907.

A Court of Equity, in the absence of statutory authority, has no jurisdiction at the suit of a private party to try and determine the question whether a corporation *de facto* is a corporation

de jure, or to decree a forfeiture of its franchises or its dissolution, or to exclude it from the exercise of its corporate franchises. The remedy in all such cases is at law, and exists only in favor of the state. *Independent Order, etc. v. United Order, etc.*, 94 Wis. 234.

1. See *infra*, this section. *Estoppel to Deny Corporate Existence — By Contract Relations.*

2. Actions Brought to Protect Corporate Rights. — *Bakersfield Town Hall Assoc. v. Chester*, 55 Cal. 98; *Oakland Gas Light Co. v. Dameron*, 67 Cal. 663; *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673; *East Norway Lake Church v. Froislie*, 37 Minn. 447; *Augusta Mfg. Co. v. Vertrees*, 4 Lea (Tenn.) 75.

Proof of the existence of a corporation *de facto* is all that is requisite in an action against a trespasser. *Remington Paper Co. v. O'Dougherty*, 65 N. Y. 570; *Golden Gate Mill, etc., Co. v. Machine Works*, 82 Cal. 184.

3. Action to Recover for Injuries. — *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568; *Stockton, etc., Gravel Road R. Co. v. Stockton, etc., R. Co.*, 45 Cal. 680; *Cincinnati, etc., R. Co. v. Danville, etc., R. Co.*, 75 Ill. 113; *Persse, etc., Paper-works v. Willett*, 19 Abb. Pr. (N. Y. Super. Ct.) 416; *Searsburg Turnpike Co. v. Cutler*, 6 Vt. 315.

Corporate existence *de facto* is all that is necessary to enable the plaintiff to maintain an action against any one other than the state who has contracted with it or done it a wrong. *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 137 U. S. 568.

4. Infringement of Patents. — *American Cable R. Co. v. New York*, 68 Fed. Rep. 227; *Young Reversible Lock-Nut Co. v. Young Lock-Nut Co.*, 72 Fed. Rep. 62.

5. Recovery of Tolls. — *Pontiac, etc., Plank-road Co. v. Hilton*, 69 Mich. 115; *Canal St. Gravel-Road Co. v. Paas*, 95 Mich. 372.

6. Injunction against Corporation. — A railroad or canal company cannot be enjoined from constructing its line (*Aurora, etc., R. Co. v. Lawrenceburgh*, 56 Ind. 80; *Society, etc., v. Morris Canal, etc., Co.*, 1 N. J. Eq. 157; *Atty.-Gen. v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755), or a city from collecting its taxes (*Mullikin v. Bloomington*, 72 Ind. 161; *Atchison, etc., R. Co. v. Wilson*, 33 Kan. 223; *Kayser v. Bremen*, 16 Mo. 88; *Stamper v. Roberts*, 90 Mo. 683; *compare Knight v. Flatrock, etc., Turnpike Co.*, 45 Ind. 134), on the ground of its defective organization, if it exists *de facto*. See also *Evans v. Lewis*, 121 Ill. 478.

In *Niemeyer v. Little Rock Junction R. Co.*, 43 Ark. 111, 20 Am. & Eng. R. Cas. 174, it was held that where the organization of a corporation is the result of a fraudulent combination of individuals to procure powers under circumstances and for purposes not within the scope and purpose of the legislative intent, an injunction will lie at the instance of a private person about to be injured by the exercise of such powers to restrain such exercise.

criminal prosecutions for acts directed against it,¹ and in many other cases.²

b. FORFEITURE CANNOT BE DECLARED COLLATERALLY. — The same rule applies to a forfeiture of the corporate franchise by breach of some condition subsequent of the charter, or by some nonuser or misuser of the corporate franchise. The enforcing of such forfeiture belongs peculiarly to the state, by the direct proceeding appropriate to that purpose, and, however manifest the violation of the enabling law or the misuser of the corporate powers may be, the forfeiture cannot be asserted by an individual in a collateral action.³

1. Prosecution for Acts against Corporation — *United States.* — U. S. *v.* Amedy, 11 Wheat. (U. S.) 392.

California. — *People v. Frank*, 28 Cal. 507; *People v. Hughes*, 29 Cal. 257; *People v. Schwartz*, 32 Cal. 160; *People v. Ah Sam*, 41 Cal. 651; *People v. Leonard*, 106 Cal. 302; *People v. Oldham*, 111 Cal. 648.

Connecticut. — *State v. Byrne*, 45 Conn. 273.

Florida. — *Thalheim v. State*, 38 Fla. 169.

Indiana. — *White v. State*, 69 Ind. 273; *Smith v. State*, 28 Ind. 321.

Massachusetts. — *Com. v. Bakeman*, 105 Mass. 53.

New Hampshire. — *State v. Carr*, 5 N. H. 367.

North Carolina. — *State v. Shaw*, 92 N. C. 768.

Ohio. — *Sasser v. State*, 13 Ohio 453; *Reed v. State*, 15 Ohio 217.

See also the title CORPORATIONS (PRIVATE), vol. 7, p. 668.

And this is so though the indictment alleges the due incorporation of the corporation. *People v. Hughes*, 29 Cal. 257; *People v. Schwartz*, 32 Cal. 160; *People v. Ah Sam*, 41 Cal. 651; *People v. Oldham*, 111 Cal. 648; *Com. v. Bakeman*, 105 Mass. 53.

Contra. — A corporation organized under a law not passed by a two-thirds vote, as required by the constitution, has no legal existence, and conviction of passing forged notes with intent to defraud it is erroneous. *De Bow v. People*, 1 Den. (N. Y.) 9.

On the trial of an indictment for forging bank bills purporting to be issued by the Massachusetts Bank, a corporation duly authorized by the state of Massachusetts, there must be proof that there was an incorporated institution called the Massachusetts Bank. *State v. Newlands*, 7 Iowa 242, 71 Am. Dec. 444.

2. Other Cases Wherein De Facto Organization Not Questionable. — Defective organization of a corporation *de facto* cannot be set up as a defense in a bill by stockholders for alleged breach of trust. *Merchants', etc., Line v. Waganer*, 71 Ala. 586.

The validity of a corporate contract cannot be attacked for defects of its organization in a suit between third parties, *New Haven Wire Co. Cases*, 57 Conn. 394; *Smith v. Mayfield*, 163 Ill. 447; nor in an action by the corporation to prevent the construction of a bridge interfering with its franchise, *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344; nor in a suit on a guaranty, by a municipality, of the bonds of the corporation *de facto*, *Smith v. Clark County*, 54 Mo. 58; *Macon County v. Shores*, 97 U. S. 272; *Dallas County v. Huidekoper*, 154 U. S. 654; or to collect a fine for violation of a corporation ordinance, *Fredericktown v. Fox*, 84 Mo. 59.

The organization of a county cannot be attacked by habeas corpus on a conviction by the county court. *Matter of Short*, 47 Kan. 250.

Even the state cannot attack the corporate organization in a collateral action, as in a suit against it for a claim on behalf of the corporation. *Coxe v. State*, 144 N. Y. 396.

Aggrieved stockholders cannot institute proceedings to establish the invalidity or nonexistence of an alleged corporation. "This seems to be the peculiar prerogative of the state." *Bell v. Pennsylvania, etc., R. Co.*, (N. J. 1887) 10 Atl. Rep. 741.

If a contractor is sued on a contract with a corporation by the assignee of another corporation which is claimed to have succeeded to the rights of the former by consolidation, the strict regularity of the consolidation must be proved, to show title in the successor. *Brown v. Dibble*, 65 Mich. 520.

3. Forfeiture Not to Be Collaterally Declared — *United States.* — *Macon County v. Shores*, 97 U. S. 272; *Dallas County v. Huidekoper*, 154 U. S. 654; *Kanawha Coal Co. v. Kanawha, etc., Coal Co.*, 7 Blatchf. (U. S.) 391; *Wallamet Falls Canal, etc., Co. v. Kittridge*, 5 Sawy. (U. S.) 44.

Alabama. — *Selma, etc., R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Harris v. Nesbit*, 24 Ala. 398; *Georgia Importing, etc., Co. v. Locke*, 50 Ala. 332; *Lehman v. Warner*, 61 Ala. 455.

Arkansas. — *West v. Carolina L. Ins. Co.*, 31 Ark. 476; *Searcy v. Yarnell*, 47 Ark. 269.

California. — *Spring Valley Water Works v. San Francisco*, 22 Cal. 434.

Connecticut. — *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 46; *Kellogg v. Union Co.*, 12 Conn. 7; *Pearce v. Olney*, 20 Conn. 544.

Georgia. — *Young v. Harrison*, 6 Ga. 130; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 106.

Illinois. — *Wilmans v. State Bank*, 6 Ill. 667; *Baker v. Backus*, 32 Ill. 79.

Indiana. — *John v. Farmers', etc., Bank*, 2 Blackf. (Ind.) 367, 20 Am. Dec. 119; *Brookville, etc., Turnpike Co. v. McCarty*, 8 Ind. 392, 65 Am. Dec. 768; *Stoops v. Greensburgh, etc., Plank-road Co.*, 10 Ind. 47; *Logan v. Vernon, etc., R. Co.*, 90 Ind. 552; *Barren Creek Ditching Co. v. Beck*, 99 Ind. 247; *Cincinnati, etc., R. Co. v. Clifford*, 113 Ind. 460.

Kentucky. — *Gallipolis Bank v. Trimble*, 6 B. Mon. (Ky.) 599; *Jones v. Tennessee Bank*, 8 B. Mon. (Ky.) 122; *Hughes v. Somerset Bank*, 5 Litt. (Ky.) 45; *Portland, etc., Turnpike Co. v. Bobb*, 88 Ky. 226.

Louisiana. — *State v. Fagan*, 22 La. Ann. 545.

Maine. — *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec. 656.

2. **Legislative Recognition Cures Defects.** — From the principle that the regularity of corporate organization is a matter between the corporation and the state alone, it further follows that the state may waive its rights against the

Maryland. — Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. (Md.) 121; Planters' Bank v. Alexandria Bank, 10 Gill & J. (Md.) 346; Hamilton v. Annapolis, etc., R. Co., 1 Md. Ch. 107.

Massachusetts. — Com. v. Union F. & M. Ins. Co., 5 Mass. 230, 4 Am. Dec. 50; Little v. O'Brien, 9 Mass. 423; Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71.

Michigan. — Montgomery v. Merrill, 18 Mich. 338; Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 24 Am. Rep. 585; Toledo, etc., R. Co. v. Johnson, 49 Mich. 148.

Mississippi. — Bayless v. Orne, Freem. (Miss.) 161; Grand Gulf Bank v. Archer, 8 Smed. & M. (Miss.) 151; Bohannon v. Binns, 31 Miss. 355.

Missouri. — State Bank v. Snelling, 35 Mo. 190; Smith v. Clark County, 54 Mo. 59; Hill v. Rich Hill Coal Min. Co., 119 Mo. 9.

New Hampshire. — Sewall's Falls Bridge v. Fisk, 23 N. H. 171; Peirce v. Somersworth, 10 N. H. 369; State v. Fourth New Hampshire Turnpike, 15 N. H. 162, 41 Am. Dec. 690.

New Jersey. — Jersey City Gaslight Co. v. Consumers Gas Co., 40 N. J. Eq. 427; Elizabethtown Gas Light Co. v. Green, 46 N. J. Eq. 118; State v. Paterson, etc., Turnpike Co., 21 N. J. L. 9; New Jersey Southern R. Co. v. Long Branch Com'rs., 39 N. J. L. 28.

New York. — Eastern Plank Road Co. v. Vaughan, 14 N. Y. 546; Eaton v. Aspinwall, 19 N. Y. 119; Merrick v. Van Santvoord, 34 N. Y. 220; Matter of New York El. R. Co., 70 N. Y. 338; *In re* Brooklyn, etc., R. Co., 75 N. Y. 335; Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524; Matter of Kings County El. R. Co., 105 N. Y. 97; Day v. Ogdensburgh, etc., R. Co., 107 N. Y. 129; Matter of State Reservation, 122 N. Y. 177; Matter of Brooklyn El. R. Co., 125 N. Y. 434; Demarest v. Flack, 128 N. Y. 205; Towar v. Hale, 46 Barb. (N. Y.) 361; Ormsby v. Vermont Copper Min. Co., 65 Barb. (N. Y.) 360; Vernon Soc. v. Hills, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429; Mechanics' Bldg. Assoc. v. Stevens, 5 Duer (N. Y.) 676; Matter of Reformed Presb. Church, 7 How. Pr. (N. Y. Supreme Ct.) 476; Port Jefferson Bank v. Darling, 91 Hun (N. Y.) 236; Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366; Mickles v. Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103; Niagara Bank v. Johnson, 8 Wend. (N. Y.) 645; People v. Manhattan Co., 9 Wend. (N. Y.) 351.

North Carolina. — Asheville Div. No. 15, etc., v. Aston, 92 N. Car. 578.

Ohio. — Webb v. Moler, 8 Ohio 548; McIntire Poor School v. Zanesville Canal, etc., Co., 9 Ohio 203; Johnson v. Bentley, 16 Ohio 97; Perun Soc. v. Cleveland, 43 Ohio St. 481.

Pennsylvania. — Murphy v. Farmers' Bank, 20 Pa. St. 415; Dyer v. Walker, 40 Pa. St. 157; Coil v. Pittsburgh Female College, 40 Pa. St. 439; Western Pennsylvania R. Co.'s Appeal 104 Pa. St. 399; Com. v. Morris, 1 Phila. (Pa.) 411; Lehigh River Bridge Co. v. Lehigh Coal, etc., Co., 4 Rawle (Pa.) 9; Centre, etc., Turnpike Road Co. v. McConaby, 16 S. & R.

(Pa.) 140; Irvine v. Lumbermen's Bank, 2 W. & S. (Pa.) 190.

Tennessee. — La Grange, etc., R. Co. v. Rainey, 7 Coldw. (Tenn.) 420; East Tennessee Iron Mfg. Co. v. Gaskell, 2 Lea (Tenn.) 742; State v. Butler, 15 Lea (Tenn.) 104.

Texas. — Moseby v. Burrow, 52 Tex. 396.

Vermont. — Manchester Bank v. Allen, 11 Vt. 302.

Virginia. — Crump v. U. S. Mining Co., 7 Gratt. (Va.) 352, 56 Am. Dec. 116; State Bank v. Poitiaux, 3 Rand. (Va.) 136.

West Virginia. — Moore v. Schoppert, 22 W. Va. 282; Greenbrier Lumber Co. v. Ward, 30 W. Va. 43; Childs v. Hurd, 32 W. Va. 66.

See also the title DISSOLUTION OF CORPORATIONS.

"A corporation can be judicially determined to have ceased to exist only in a suit to which the commonwealth is a party. The act of incorporation is a contract between the commonwealth and the corporation; whether the corporation has complied with the conditions is a question of fact to be judicially determined. The commonwealth may waive a strict compliance with the terms of the act, and may elect whether it will insist upon a forfeiture, if there has been a breach of condition." Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71.

"A corporation, by omitting to perform a duty imposed by its charter or to comply with its provisions, does not *ipso facto* lose its corporate character, or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in an action instituted for that purpose by the attorney-general." Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524.

"In cases almost innumerable it has been decided that the forfeiture of a corporate franchise cannot be collaterally taken advantage of in a private action. The doctrine is as old as the Year Books, and at this late day one would scarcely be listened to who should venture to question it." Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 24 Am. Rep. 585.

A forfeiture of a charter by nonuser cannot be determined in an action by an individual, even under an act which authorizes individual suits to question the exercise of particular powers by a chartered corporation. Western Pennsylvania R. Co.'s Appeal, 104 Pa. St. 399.

An information in quo warranto will not be granted against a corporation to dissolve on the relation of stockholders, but only by the authority of the commonwealth, exercised by its legislature or proper law officer. Com. v. Union F. & M. Ins. Co., 5 Mass. 230, 4 Am. Dec. 50.

A landowner cannot reclaim his land, which has been acquired by a railroad company, on the ground of the forfeiture of the company's charter. Logan v. Vernon, etc., R. Co., 90 Ind. 552; Cincinnati, etc., R. Co. v. Clifford, 113 Ind. 460.

Expriation of Charter. — A cause of forfeiture cannot be taken advantage of collaterally; but

corporation; and a recognition of the corporation as existing, in a legislative act passed after the irregularities or acts of forfeiture, constitutes such waiver and cures all existing defects.¹

3. Exercise of Extraordinary Statute Powers. — But where a corporation, instead of suing to recover a debt or obtain redress for a wrong by proceedings in which it asserts the same rights that an individual might assert, seeks

its expiration by limitation of time fixed by the charter ends its life as to all persons. *Asheville Div. No. 15, etc., v. Aston*, 92 N. Car. 578; *La Grange, etc., R. Co. v. Rainey*, 7 Coldw. (Tenn.) 420.

A corporation whose charter has expired by limitation of time has no existence, and a note and deed made to it are nullities. *White v. Campbell*, 5 Humph. (Tenn.) 38.

The fact that the charter of a corporation had expired before it executed a bond which was guaranteed by the defendant is no defense to a suit on the guarantee. *Macon County v. Shores*, 97 U. S. 272; *Dallas County v. Huidekoper*, 154 U. S. 654; *Smith v. Clark County*, 54 Mo. 59.

The Particular Terms of the Charter. — The rule that a forfeiture cannot be asserted collaterally applies, though the language of the charter is that on the given contingency the "corporate powers shall * * * cease" (*Wallamet Falls Canal, etc., Co. v. Kittridge*, 5 Sawy. (U. S.) 44); the charter shall become void (*Sewall's Falls Bridge v. Fisk*, 23 N. H. 171); it shall "be wholly void" (*Manchester Bank v. Allen*, 11 Vt. 302); "this corporation shall thereupon cease to exist" (*Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71); the "privileges herein granted shall utterly cease and be forfeited" (*Oakland R. Co. v. Oakland, etc., R. Co.*, 45 Cal. 365, 13 Am. Rep. 181).

Where, however, the statute expressly provides that if any corporation pass and receive bank notes of less than five dollars, it shall forfeit its franchises, and persons sued by it may plead the forfeiture or any violation or evasion of the act, the violation may be pleaded in defense to a collateral suit. *Christian University v. Jordan*, 29 Mo. 68; *North Missouri R. Co. v. Winkler*, 33 Mo. 354.

The New York Cases. — The New York Court of Appeals held, in *Matter of Brooklyn, etc., R. Co.*, 72 N. Y. 245, 75 N. Y. 335, that where an act provided that, upon noncompletion of a company's road in ten years, "its corporate existence and powers shall cease," the statute executes itself, and the nonexistence of the corporation may be asserted by one whose land is sought to be appropriated by it. This was followed in *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524, where the language was: "This act, and all the powers, rights, and franchises herein and hereby granted, shall be deemed forfeited and terminated." But in *Day v. Ogdensburgh, etc., R. Co.*, 107 N. Y. 129, under a provision that "said corporation shall be dissolved," dissolution was held not to result without judicial proceeding and judgment, and in *Matter of Brooklyn El. R. Co.*, 125 N. Y. 434, the general rule was emphatically restated, and a forfeiture held not to result *ipso facto* from a provision that the railroad company should "forfeit the rights acquired" by it. The court, referring to the *Brooklyn, etc., R.*

Co. and Brooklyn Steam Transit Co. cases, said: "They are border cases, and the doctrine laid down in them should not be applied to cases where the legislative intent of a self-executing forfeiture is not equally plain."

The Validity of the Grant of a Franchise cannot be questioned collaterally on any other way than upon proceedings by quo warranto for alleged usurpation of such franchise at the suit of the state. *Ashland v. Wheeler*, 88 Wis. 607.

1. Recognition of Corporation as Existing — *United States.* — *Comanche County v. Lewis*, 133 U. S. 198; *Andes v. Ely*, 158 U. S. 312; *Kanawha Coal Co. v. Kanawha, etc., Coal Co.*, 7 Blatchf. (U. S.) 391; *Oregonian R. Co. v. Oregon R., etc., Co.*, 10 Sawy. (U. S.) 464; *Western Union Tel. Co. v. Union Pac. R. Co.*, 3 Fed. Rep. 721.

Colorado. — *Cowell v. Colorado Springs Co.*, 3 Colo. 82.

Illinois. — *Illinois River R. Co. v. Zimmer*, 20 Ill. 659; *Rice v. Rock Island, etc., R. Co.*, 21 Ill. 93; *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237; *McAuley v. Columbus, etc., R. Co.*, 83 Ill. 348; *Hudson v. Green Hill Seminary Corp.*, 113 Ill. 619.

Kansas. — *State v. Pawnee County*, 12 Kan. 426; *State v. Stevens*, 21 Kan. 210.

Maryland. — *Basshor v. Dressel*, 34 Md. 503; *Koch v. North Ave. R. Co.*, 75 Md. 222.

Missouri. — *Atlantic, etc., R. Co. v. St. Louis*, 66 Mo. 228.

New Hampshire. — *State v. Fourth New Hampshire Turnpike*, 15 N. H. 162, 41 Am. Dec. 690.

New York. — *Riker v. Cornwell*, 113 N. Y. 115; *White v. Coventry*, 29 Barb. (N. Y.) 305; *Black River, etc., R. Co. v. Barnard*, 31 Barb. (N. Y.) 258; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351.

Pennsylvania. — *Com. v. West Chester R. Co.*, 3 Grant's Cas. (Pa.) 200.

When a legislature has full power to create corporations, its act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization, and makes a *de jure* corporation out of what was before only *de facto*. There must be a *de facto* corporation upon which this recognition may act. *Comanche County v. Lewis*, 133 U. S. 198.

A statute recognizing a corporation as legally existing is sufficient to prove it a corporation *de facto* though the recognizing statute itself is unconstitutional. *Hudson v. Green Hill Seminary Corp.*, 113 Ill. 619.

A plain recognition by the crown, in a royal charter, of the existence of a corporation, confers the franchise if it did not previously exist. *Society, etc., v. Pawlet*, 4 Pet. (U. S.) 480.

See also the title CORPORATIONS (PRIVATE), vol. 7, p. 662.

to exert extraordinary statutory powers, specially conferred upon itself or upon a class of corporations, as in proceedings under the power of eminent domain, its acts are in derogation of common right, and all the facts necessary to clothe it with the asserted power must be shown, including a legal corporate organization. Upon this principle it is held in some cases that the rule which prevents an individual from attacking the regularity of the organization in collateral action does not apply to a proceeding in eminent domain,¹ or under other extraordinary statute powers.² The cases are not in agreement, however, on this point.³

4. Estoppel to Deny Corporate Existence — *α*. BY CONTRACT RELATIONS. — The question of the legal organization of a corporation is often removed from a case by the operation of the doctrine of estoppel. Thus, one who has contracted with a corporation, as such, is estopped, in a suit on the contract, to deny the corporate existence of the other party at the time of the contract.⁴

1. Right to Exert Power of Eminent Domain. — *Henry v. Centralia*, etc., R. Co., 121 Ill. 264; *Orrick School Dist. v. Dorton*, 125 Mo. 439; *St. Joseph, etc., R. Co. v. Shambaugh*, 106 Mo. 557; *Matter of Broadway, etc., R. Co.*, 73 Hun (N. Y.) 7; *Syracuse v. Benedict*, 86 Hun (N. Y.) 343; *Matter of Brooklyn, etc., R. Co.*, 72 N. Y. 245; *Atlantic, etc., R. Co. v. Sullivan*, 5 Ohio St. 276; *Atkinson v. Marietta, etc., R. Co.*, 15 Ohio St. 21; *Powers v. Hazelton, etc., R. Co.*, 33 Ohio St. 429.

That one has resided for ten years in a school district, attended meetings, and paid taxes, does not estop him from denying that it was incorporated by law so as to have the power of eminent domain. *Orrick School Dist. v. Dorton*, 125 Mo. 439.

A corporation seeking to exercise eminent domain must prove its organization in strict compliance with the requirements of the law. *Atlantic, etc., R. Co. v. Sullivan*, 5 Ohio St. 276; *Powers v. Hazelton, etc., R. Co.*, 33 Ohio St. 429.

2. Collecting Assessments for Benefits to Lands. — In a proceeding to collect assessments for benefit done to land by the corporate operations (*McIntire v. McLain Ditching Assoc.*, 40 Ind. 104), or by the landowner to restrain such collection (*Piper v. Rhodes*, 30 Ind. 309; *Newton County Draining Co. v. Nofsinger*, 43 Ind. 566), any defects in the corporate organization may be taken advantage of by the landowner.

In *California* it has been held that, upon a suit brought by a corporation formed under the provisions of the Political Code for the purpose of reclaiming swamp and overflowed land to recover the amount of an assessment made upon lands for the purpose of constructing the necessary reclaiming works, the validity of the corporation could not be attacked. *Reclamation Dist. No. 542 v. Turner*, 104 Cal. 334, where the court said: "This court has repeatedly held that corporations similar to the plaintiff in this case are of a quasi-public character, and that the legality and regularity of the proceedings leading up to their final creation cannot be attacked collaterally."

3. De Facto Corporation Held Empowered to Bring Eminent Domain Proceeding. — A corporation *de facto* can bring proceedings in eminent domain. *McAuley v. Columbus, etc., R. Co.*, 83 Ill. 348; *Peoria, etc., Union R. Co. v. Peoria, etc., R. Co.*, 105 Ill. 110; *Chicago,*

etc., R. Co. v. Chicago, etc., R. Co., 112 Ill. 589; *Ward v. Minnesota, etc., R. Co.*, 119 Ill. 287; *Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co.*, 149 Ill. 272; *Thomas v. St. Louis, etc., R. Co.*, 164 Ill. 634; *Aurora, etc., R. Co. v. Miller*, 56 Ind. 88; *Reisner v. Strong*, 24 Kan. 410. See also *Wellington, etc., R. Co. v. Cashie, etc., R., etc., Co.*, 114 N. Car. 690.

Henry v. Centralia, etc., R. Co., 121 Ill. 264, seems to state the rule directly contrary to the earlier cases cited above; but the statement is only a dictum, as the action at bar was held not to divest the title of the landowner, but only to adjust the amount of damage, and a distinction was made in that respect.

In *Buncombe Turnpike Co. v. McCarson*, 1 Dev. & B. L. (18 N. Car.) 306, the right to question the due existence of a corporation was denied in an action to compel the defendant to work the road two days under a statute; and in *Osborn v. People*, 103 Ill. 224, the same rule was applied in a proceeding to collect a benefit assessment, the case being directly opposed to the *Indiana* drainage cases cited in the last note *supra*.

4. One Who Contracts with Corporation Estopped to Deny Its Existence — *United States*. — *Frost v. Frostburg Coal Co.*, 24 How. (U. S.) 278; *Smith v. Sheeley*, 12 Wall. (U. S.) 358; *Leavenworth County v. Barnes*, 94 U. S. 70; *Casey v. Galli*, 94 U. S. 673; *Close v. Glenwood Cemetery*, 107 U. S. 466; *McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 593; *Andes v. Ely*, 158 U. S. 312; *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197; *Oregonian R. Co. v. Oregon R., etc., Co.*, 22 Fed. Rep. 245, 10 Sawy. (U. S.) 464; *Andrews v. National Foundry, etc., Works*, 77 Fed. Rep. 774.

Alabama. — *Montgomery R. Co. v. Hurst*, 9 Ala. 513; *Eppes v. Mississippi, etc., R. Co.*, 35 Ala. 33; *Marion Sav. Bank v. Dunkin*, 54 Ala. 471; *Cahali v. Citizens' Mut. Bldg. Assoc.*, 61 Ala. 232; *Lehman v. Warner*, 61 Ala. 455; *Central Agricultural, etc., Assoc. v. Alabama Gold L. Ins. Co.*, 70 Ala. 120; *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695; *Snider's Sons' Co. v. Troy*, 91 Ala. 231, 24 Am. St. Rep. 887; *Cory v. Lee*, 93 Ala. 468; *Bibb v. Hall*, 101 Ala. 79.

Arkansas. — *Searcy v. Yarnell*, 47 Ark. 269.
California. — *Fresno Canal, etc., Co. v. Warner*, 72 Cal. 379; *Pacific Bank v. De Ro*, 37 Cal. 538.

Colorado. — Jones *v.* Aspen Hardware Co., 21 Colo. 263; Cowell *v.* Colorado Springs Co., 3 Colo. 82; Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190.

Connecticut. — West Winsted Sav. Bank, etc., Assoc. *v.* Ford, 27 Conn. 282, 71 Am. Dec. 66; Canfield *v.* Gregory, 66 Conn. 9.

Dakota. — School Dist. No. 61 *v.* Alderson, 6 Dakota 145.

Florida. — Jackson Sharp Co. *v.* Holland, 14 Fla. 384; Booske *v.* Gulf Ice Co., 24 Fla. 550.

Georgia. — Planters', etc., Bank *v.* Padgett, 69 Ga. 159; Georgia Southern, etc., R. Co. *v.* Mercantile Trust, etc., Co., 94 Ga. 306, 47 Am. St. Rep. 153.

Illinois. — Illinois Grand Trunk R. Co. *v.* Cook, 29 Ill. 237; Goodrich *v.* Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Mitchell *v.* Deeds, 49 Ill. 416, 95 Am. Dec. 621; Ramsey *v.* Peoria M. & F. Ins. Co., 55 Ill. 311; Lombard *v.* Chicago Sinai Congregation, 64 Ill. 477; Brown *v.* Scottish-American Mortg. Co., 110 Ill. 235; Hudson *v.* Green Hill Seminary Corp., 113 Ill. 619; Winget *v.* Quincy Bldg., etc., Assoc., 128 Ill. 67; Miami Powder Co. *v.* Hotchkiss, 17 Ill. App. 622; Payette *v.* Free Home Bldg. Loan, etc., Assoc., 27 Ill. App. 307; Trogdon *v.* Cleveland Stone Co., 53 Ill. App. 206; Hickox, etc., Pub. Co. *v.* Dawes Mfg. Co., 64 Ill. App. 630.

Indiana. — John *v.* Farmers', etc., Bank, 2 Blackf. (Ind.) 367, 20 Am. Dec. 119; Morgan *v.* Lawrenceburgh Ins. Co., 3 Ind. 285; Judah *v.* American Live Stock Ins. Co., 4 Ind. 333; Ryan *v.* Vanlandingham, 7 Ind. 416; Brookville, etc., Turnpike Co. *v.* McCarty, 8 Ind. 392, 65 Am. Dec. 768; Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89; Blake *v.* Holley, 14 Ind. 383; Hubbard *v.* Chappel, 14 Ind. 601; Evansville, etc., Straight Line R. Co. *v.* Evansville, 15 Ind. 395; Meikel *v.* German Sav. Fund Soc., 16 Ind. 181; Brownlee *v.* Ohio, etc., R. Co., 18 Ind. 68; Bartholomew County *v.* Bright, 18 Ind. 93; Snyder *v.* Studebaker, 19 Ind. 462, 81 Am. Dec. 415; Williams *v.* Franklin Tp. Academical Assoc., 26 Ind. 310; McBroom *v.* Lebanon, 31 Ind. 268; Vater *v.* Lewis, 36 Ind. 288, 10 Am. Rep. 29; Ransom *v.* Priam Lodge No. 145, 51 Ind. 60; Beatty *v.* Bartholomew County Agricultural Soc., 76 Ind. 91; Smelser *v.* Wayne, etc., Straight Line Turnpike Co., 82 Ind. 417; Cravens *v.* Eagle Cotton Mills Co., 120 Ind. 6, 16 Am. St. Rep. 298; Brickley *v.* Edwards, 131 Ind. 3.

Iowa. — Washington College *v.* Duke, 14 Iowa 14; Howe Mach. Co. *v.* Snow, 32 Iowa 433.

Kansas. — Pape *v.* Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183; Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624.

Kentucky. — Hughes *v.* Somerset Bank, 5 Litt. (Ky.) 47; Depew *v.* Limestone Bank, 1 J. J. Marsh. (Ky.) 380; Galliopolis Bank *v.* Trimble, 6 B. Mon. (Ky.) 599; Jones *v.* Tennessee Bank, 8 B. Mon. (Ky.) 122; Walton *v.* Riley, 85 Ky. 413.

Louisiana. — Liverpool Ins. Co. *v.* Hunt, 11 La. Ann. 623; Pochelu *v.* Kemper, 14 La. Ann. 307, 74 Am. Dec. 433; Latolais *v.* Citizens' Bank, 33 La. Ann. 1444; American Homestead Co. *v.* Linigan, 46 La. Ann. 1118.

But see Louisiana cases denying this doctrine, *infra*.

Massachusetts. — Worcester Medical Inst. *v.* Harding, 11 Cush. (Mass.) 285; Williams *v.* Cheney, 3 Gray (Mass.) 215; Topping *v.* Bickford, 4 Allen (Mass.) 120; Butchers', etc., Bank *v.* McDonald, 130 Mass. 264.

Michigan. — Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124; Merchants', etc., Bank *v.* Stone, 38 Mich. 779; Chapman *v.* Colby, 47 Mich. 46; Estey Mfg. Co. *v.* Runnels, 55 Mich. 130; Stofflet *v.* Strome, 101 Mich. 197.

Minnesota. — French *v.* Donohue, 29 Minn. 111; Minnesota Gas Light Economizer Co. *v.* Denslow, 46 Minn. 171.

Mississippi. — Johnston *v.* Gumbel, (Miss. 1895) 19 So. Rep. 100.

Missouri. — Hamtramck *v.* Edwardsville Bank, 2 Mo. 169; Camp *v.* Byrne, 41 Mo. 525; Farmers, etc., Ins. Co. *v.* Needles, 52 Mo. 17; National Ins. Co. *v.* Bowman, 60 Mo. 252; St. Louis *v.* Shields, 62 Mo. 247; Stoutimore *v.* Clark, 70 Mo. 471; Studebaker Bros. Mfg. Co. *v.* Montgomery, 74 Mo. 101. See the limitation of the rule in the Missouri Appeal cases, *infra*, this note.

Nebraska. — Platte Valley Bank *v.* Harding, 1 Neb. 461; Exchange Nat. Bank *v.* Capps, 32 Neb. 242, 29 Am. St. Rep. 433; Globe Pub. Co. *v.* State Bank, 41 Neb. 175; Kleckner *v.* Turk, 45 Neb. 176; Hogue *v.* Capital Nat. Bank, 47 Neb. 929; Livingston Loan, etc., Assoc. *v.* Drummond, 49 Neb. 200; Nebraska Nat. Bank *v.* Ferguson, 49 Neb. 109.

New Hampshire. — Congregational Soc. *v.* Perry, 6 N. H. 164, 25 Am. Dec. 455; Nashua F. Ins. Co. *v.* Moore, 55 N. H. 48; Larned *v.* Beal, 65 N. H. 184.

New Jersey. — Stout *v.* Zulick, 48 N. J. L. 599; Vanneman *v.* Young, 52 N. J. L. 403.

New York. — Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482; Toledo Bank *v.* International Bank, 21 N. Y. 542; Leonardsville Bank *v.* Willard, 25 N. Y. 575; Phoenix Warehousing Co. *v.* Badger, 67 N. Y. 294; Whitford *v.* Laidler, 94 N. Y. 151, 46 Am. Rep. 131; Commercial Bank *v.* Pfeiffer, 108 N. Y. 242; U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537; White *v.* Coventry, 29 Barb. (N. Y.) 305; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459; Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179.

North Carolina. — Tar River Nav. Co. *v.* Neal, 3 Hawks (10 N. Car.) 520; Tuckasegee Min. Co. *v.* Goodhue, 118 N. Car. 981; Fayetteville Waterworks Co. *v.* Tillinghast, 119 N. Car. 343.

Ohio. — Lucas *v.* Greenville Bldg., etc., Assoc., 22 Ohio St. 339; Hagerman *v.* Ohio Bldg., etc., Assoc., 25 Ohio St. 186; Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343; Cincinnati Second Nat. Bank *v.* Hall, 35 Ohio St. 158; Durrell *v.* Belding, 9 Ohio Cir. Ct. Rep. 74.

Pennsylvania. — Dyer *v.* Walker, 40 Pa. St. 157; Cochran *v.* Arnold, 58 Pa. St. 399; Spahr *v.* Farmers' Bank, 94 Pa. St. 429; Wentz *v.* Lowe, (Pa. 1886) 3 Atl. Rep. 879.

South Dakota. — Building, etc., Assoc. *v.* Chamberlain, 4 S. Dak. 271.

Tennessee. — Merriman *v.* Magiveny, 12 Heisk. (Tenn.) 494.

Estoppel as Affecting Assignees and Vendees. — This estoppel exists in favor of an

Texas. — *Lamb v. Beaumont Temperance Hall Co.*, 2 Tex. Civ. App. 289.

Utah. — *McCord, etc., Mercantile Co. v. Glenn*, 6 Utah 139.

Washington. — *Washington Mill Co. v. Craig*, 7 Wash. 556.

West Virginia. — *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16; *Bon Aqua Imp. Co. v. Standard F. Ins. Co.*, 34 W. Va. 764.

Canada. — *Manitoba Mortg., etc., Co. v. Daly*, 10 Manitoba L. Rep. 425.

As to the estoppel against the maker of a mortgage, see *infra*, this section, *By Deed*.

One who has made a note to an association as a corporation cannot avoid the estoppel by alleging that when he made the note he supposed it was a corporation, but afterward learned that it was not. *Ransom v. Priam Lodge No. 145*, 51 Ind. 60.

Where a company's charter had been amended, and the company acted under the amended charter, and contracted with the plaintiff in the name conferred by it, he is estopped to deny its legal acceptance of the amended charter. *Eppes v. Mississippi, etc., R. Co.*, 35 Ala. 33.

As to What Time the Estoppel Operates. — The estoppel to deny incorporation only extends to the time of making the contract; but a forfeiture of corporate existence before the bringing of the suit, judicially declared in a proper proceeding, may be set up in defense to the suit. *Brookeville, etc., Turnpike Co. v. McCarty*, 8 Ind. 392, 65 Am. Dec. 768. See *Guaga Iron Co. v. Dawson*, 4 Blackf. (Ind.) 202; *Morgan v. Lawrenceburgh Ins. Co.*, 3 Ind. 285.

Distinctions and Qualifications. — Dealings with a corporation as such estop the party from denying the corporate existence, but not the existence of powers and privileges which are not necessarily implied by corporate existence. *Chapman v. Colby*, 47 Mich. 46.

A creditor, by dealing with the corporation as such, is not estopped to claim a statutory liability of the directors for failure to have the certificate of organization recorded within a certain time. *Loverin v. McLaughlin*, 161 Ill. 417.

One who has dealt with the corporation as such, and afterwards sued it, may thereafter sue the stockholders to enforce their statutory liability, since that does not involve a denial of corporate existence. *Heuer v. Carmichael*, 82 Iowa 288; *Slivers v. Carmichael*, 83 Iowa 759.

A contractor with a corporation is estopped to deny its legal existence when there is no fraud. *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333.

The admission by contract of the corporate capacity is said to be *prima facie* only in *Brown v. Scottish-American Mortg. Co.*, 110 Ill. 235; *Trogdon v. Cleveland Stone Co.*, 53 Ill. App. 206; *Montgomery R. Co. v. Hurst*, 9 Ala. 513.

If a person contracts with a corporation in a matter within its corporate powers, the mere making of such contract estops the promisor from disputing the corporation's regular and complete organization. The distinction is between an entire absence of authority in the

organic law itself, making the act *ultra vires*, and a failure to comply with some condition precedent to the exercise of the corporate powers. *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695; *Cory v. Lee*, 93 Ala. 468. *Paterson v. Arnold*, 45 Pa. St. 410, *overruled* in *Cochran v. Arnold*, 58 Pa. St. 399, holds that for fraud a contractor may impeach the organization of a corporation under a general law.

Use of Corporate Name. — The use of the corporate name, or of a name which of itself implies corporate powers, is held to show that the contract was made with the corporation as such.

Indiana. — *Meikel v. German Sav. Fund Soc.*, 16 Ind. 181; *Williams v. Franklin Tp. Academical Assoc.*, 26 Ind. 310; *Vater v. Lewis*, 36 Ind. 288, 10 Am. Rep. 29.

Kentucky. — *Gallipolis Bank v. Trimble*, 6 B. Mon. (Ky.) 599.

Massachusetts. — *Williams v. Cheney*, 3 Gray (Mass.) 215; *Topping v. Bickford*, 4 Allen (Mass.) 120.

Michigan. — *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124; *Estey Mfg. Co. v. Runnels*, 55 Mich. 130.

Minnesota. — *Minnesota Gas Light Economizer Co. v. Denslow*, 46 Minn. 171.

Missouri. — *Farmers, etc., Ins. Co. v. Needles*, 52 Mo. 17; *National Ins. Co. v. Bowman*, 60 Mo. 252; *Stoutimore v. Clark*, 70 Mo. 471; *Studebaker Bros. Mfg. Co. v. Montgomery*, 74 Mo. 101.

New York. — *Dutchess Cotton Manufactory v. Davis*, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459.

North Carolina. — *Tar River Nav. Co. v. Neal*, 3 Hawks (10 N. Car.) 520; *Ryan v. Martin*, 91 N. Car. 464.

One who has made a note payable to "S., treasurer of the I. M. B. Co.," is estopped to deny the existence of such a corporation. *Vater v. Lewis*, 36 Ind. 288, 10 Am. Rep. 29.

A note to "the president, directors, and company of the bank of G." estops the maker to deny the existence of such a corporation. *Gallipolis Bank v. Trimble*, 6 B. Mon. (Ky.) 599.

Dealing with Organization Whose Name Does Not Indicate Corporation. — One who dealt with persons claiming to be a corporation is not estopped to deny their corporate capacity where their name did not indicate that they were a corporation, and he supposed he was dealing with a partnership. *Eaton v. Walker*, 76 Mich. 579. See also *Rust-Owen Lumber Co. v. Wellman*, (S. Dak. 1897) 72 N. W. Rep. 89.

Where Neither Name nor Conduct Indicated Corporation. — One is not estopped to deny the corporate existence of a company and sue its members as partners, by his having done business with them, when neither their conduct nor the name used gave him notice of their assumed corporate character; nor by his afterwards accepting a note in the corporate name, since his rights were already fixed. *Guckert v. Hacke*, 159 Pa. St. 304.

Cases Wherein Doctrine of Estoppel Not Applied. — The fact that plaintiff received a note signed, "Florida O. H. F. Co., by its president, J. W. C.; J. A. K., as secretary and treasurer," does

assignee of the corporation,¹ and it has been held that a vendee on execution of the property affected by the contract takes the title to the property subject to the burden of the estoppel.²

Relations of De Facto Incorporation and Estoppel.—The language of many of the cases in which this rule has been stated seems to confine its application to corporations coming fully within the rules as to *de facto* incorporation heretofore stated.³ It will be readily seen that, as thus confined, the doctrine of estoppel

not estop him to deny legal incorporation, since there is no recital that the company was a corporation, and the signature does not create such a presumption. *Duke v. Taylor*, 37 Fla. 64.

One who loans money on a note signed by A, B, and C, as directors of the N. M., etc., Association, is not estopped to sue the directors personally and deny the incorporation of the company. *Hurt v. Salisbury*, 55 Mo. 310.

A contract made with a corporation by its corporate name does not estop the contractor from denying its corporate capacity; though if the contract expressly recited its character, it would estop him. *Williams v. Michigan Bank*, 7 Wend. (N. Y.) 540; *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 480, 24 Am. Dec. 51.

If one contract with a corporation as such, supposing it to be a corporation, and it is not such in fact, he can set up that fact and recover from the individuals who signed the contract. *Glenn v. Bergmann*, 20 Mo. App. 343; *Cleaton v. Emery*, 49 Mo. App. 356.

A contractor with a corporation may ignore the corporation and proceed against the members as partners by showing that the required method of incorporation was not complied with. "He is not estopped from so doing, since he is not repudiating a contract, but is enforcing it. The fact that he contracted with them under a corporate name is immaterial, since at common law parties may carry on business under any name they choose." *Cleaton v. Emery*, 49 Mo. App. 356.

Several of the *Louisiana* cases are in direct opposition to the rule supported by the great current of cases, as stated in the text. *Field v. Cooks*, 16 La. Ann. 153; *Workingmen's Accommodation Bank v. Converse*, 29 La. Ann. 369; *Glen v. Breard*, 35 La. Ann. 875; *Hincks v. Converse*, 37 La. Ann. 484.

See, however, the *Louisiana* cases which support the prevailing rule, cited at the beginning of this note.

In a *Michigan* case it has been said: "There are certainly many cases in which a recognition of corporate existence by dealing with the corporation will estop from questioning it. But this doctrine rests on the ground that such action creates relations and encourages conduct which there may be difficulty in undoing. * * * This rule is one originating in equitable principles, and cannot be applied universally. There would be no sense in applying it where no new rights have intervened, and where such recognition has itself been brought about by fraudulent dealings carried on for the very purpose of entrapping a party into the action on which such recognition is rested. If there was no corporation in fact, and if there are no facts which make it legally unjust to forbid its denial, it is difficult to un-

derstand what room there is for an estoppel." *Doyle v. Mizner*, 42 Mich. 332.

If any exceptions exist, they are only in cases where there are no facts which make it legally unjust to permit the corporate existence to be denied. *Estey Mfg. Co. v. Runnels*, 55 Mich. 130.

An accommodation indorser of a bill of exchange, the acceptor of which has it discounted by the plaintiff bank, without the maker's participation, is not estopped to deny the plaintiff's organization. *Marion Sav. Bank v. Dunkin*, 54 Ala. 471.

Party Who Has Received Benefit of Contract Estopped.—A party who has contracted with a corporation *de facto* as such cannot be permitted, after having received the benefit of the contract, to allege any defect in the organization of the corporation. *Winget v. Quincy Bldg., etc., Assoc.*, 128 Ill. 67; *Curtis v. Meeker*, 62 Ill. App. 49; *Dyer v. Walker*, 40 Pa. St. 157; *Building, etc., Assoc. v. Chamberlain*, 4 S. Dak. 271.

One who has contracted with a corporation, and retains the fruits of the contract, cannot deny its corporate capacity. *Newburg Petroleum Co. v. Weare*, 27 Ohio St. 343.

1. Estoppel in Favor of Assignee of Corporation.—*Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *Brickley v. Edwards*, 131 Ind. 3; *Camp v. Byrne*, 41 Mo. 525.

2. Vendee on Execution from One Estopped.—*Jackson Sharp Co. v. Holland*, 14 Fla. 384.

The Personal Representative of one who by dealings with a corporation has become estopped to question its existence is bound by such estoppel. *Curtis v. Meeker*, 62 Ill. App. 49.

3. Operation of De Facto Incorporation and of Estoppel Apparently Not Distinguished—*United States*.—*McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 593; *Frost v. Frostburg Coal Co.*, 24 How. (U. S.) 278.

Alabama.—*Central Agricultural, etc., Assoc. v. Alabama Gold L. Ins. Co.*, 70 Ala. 120; *Snider's Sons Co. v. Troy*, 91 Ala., 231, 24 Am. St. Rep. 887; *Bibb v. Hall*, 101 Ala. 79.

Colorado.—*Jones v. Aspen Hardware Co.*, 21 Colo. 263.

Kansas.—*McLennan v. Hopkins*, 2 Kan. App. 260.

Nebraska.—*Globe Pub. Co. v. State Bank*, 41 Neb. 175.

New York.—*Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482; *Leonardsville Bank v. Willard*, 25 N. Y. 574; *Whitford v. Laidler*, 94 N. Y. 151, 46 Am. Rep. 131.

Pennsylvania.—*Spahr v. Farmers' Bank*, 94 Pa. St. 429.

Texas.—*Empire Mills v. Alston Grocery Co.*, 4 Tex. App. Civ. Cas., § 221.

"It is claimed * * * that the tendency of more recent authority is that those who

gives no greater protection to the rights of acting corporations than is given by the rule which prohibits an attack on the corporate organization in collateral actions. That is, since all persons are prohibited from questioning the legal existence of a corporation *de facto* in a collateral action, one who has contracted with such a corporation suffers no greater disability because of his contract, and the rule of estoppel so frequently reiterated has no actual effect. It would seem that the true rule should be to protect all corporations having a colorable existence under the provisions of law against collateral attack from any source, and to apply estoppel, even in the case of organizations not having sufficient color of validity to entitle them to be classed as corporations *de facto*, where the relations of the parties are such as to make it inequitable to permit the adverse party to question the organization.

b. BY MEMBERSHIP, HOLDING OFFICE, ETC. — (1) Generally. — One Who Has Been a Stockholder, or otherwise a member, of a corporation is estopped to deny the corporate existence for the purpose of escaping the liabilities arising from such membership.¹

constitute themselves and do business as a *de facto* corporation cannot be held as individuals. If this is to be accepted, there is but limited, if any, necessity for our law providing for organization of private corporations. * * * It would be enough to assume the name, appoint officers, and receive deposits and pay checks. * * * We think that the organization proposed must conform to the substantial requisites of the law, or it will be abortive. * * * The fact, then, that the defendants assumed to be and did business as a *de facto* bank, * * * is manifestly no protection to defendants against liability in their individual capacities." *Williams v. Hewitt*, 47 La. Ann. 1076.

As to whether or not an attempted corporation, whose organization is justified by no valid law, can be recognized as existing, by the force of estoppel, see *supra*, this title, *The Requisite Elements — A Valid Law Essential under Which Organization Possible*.

1. Member of Corporation May Not Deny Its Existence — United States. — *Casey v. Galli*, 94 U. S. 673; *Upton v. Jackson*, 1 Flipp. (U. S.) 413; *Rockville, etc., Turnpike Road Co. v. Van Ness*, 2 Cranch (C. C.) 449; *Automatic Phonograph Exhibition Co. v. North American Phonograph Co.*, 45 Fed. Rep. 1; *Farmers' L. & T. Co. v. Toledo, etc.*, R. Co., 67 Fed. Rep. 49; *Phinizy v. Augusta, etc.*, R. Co., 62 Fed. Rep. 678.

Alabama. — *Lehman v. Warner*, 61 Ala. 455; *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 401.

District of Columbia. — *Keyser v. Hitz*, 2 Mackey (D. C.) 473.

Illinois. — *Wheelock v. Kost*, 77 Ill. 296; *McCarthy v. Lavasche*, 89 Ill. 270, 31 Am. Rep. 83; *Dows v. Naper*, 91 Ill. 44; *Hickling v. Wilson*, 104 Ill. 54; *Curtis v. Tracy*, 169 Ill. 233, *affirming* 62 Ill. App. 49; *Forest Glen Brick, etc., Co. v. Gade*, 55 Ill. App. 181; *Washburn v. Roesch*, 13 Ill. App. 268.

Indiana. — *Stoops v. Greensburgh, etc., Plankroad Co.*, 10 Ind. 47; *Ensey v. Cleveland, etc.*, R. Co., 10 Ind. 178; *Fort Wayne, etc., Turnpike Co. v. Deam*, 10 Ind. 563; *McLaughlin v. Citizens' Bldg., etc., Assoc.*, 62 Ind. 264; *North v. State*, 107 Ind. 356.

Kansas. — *Massey v. Citizens' Bldg., etc., Assoc.*, 22 Kan. 624.

Louisiana. — *American Homestead Co. v. Linigan*, 46 La. Ann. 1118.

Maine. — *McClinch v. Sturgis*, 72 Me. 288.

Maryland. — *Hammond v. Straus*, 53 Md. 1.

Massachusetts. — *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128.

Minnesota. — *Hause v. Mannheim*, 67 Minn. 194.

Missouri. — *Stamper v. Roberts*, 90 Mo. 683.

Ohio. — *Lucas v. Greenville Bldg., etc., Assoc.*, 22 Ohio St. 339; *Callender v. Painesville, etc.*, R. Co., 11 Ohio St. 516; *Gaff v. Flesher*, 33 Ohio St. 107; *Rowland v. Meader Furniture Co.*, 38 Ohio St. 270.

New Hampshire. — *Haynes v. Brown*, 36 N. H. 545; *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 295.

New York. — *Eaton v. Aspinwall*, 19 N. Y. 119, 6 Duer (N. Y.) 176; *Black River, etc., R. Co. v. Clarke*, 25 N. Y. 208; *Aspinwall v. Sacchi*, 57 N. Y. 331; *Whitford v. Laidler*, 94 N. Y. 151, 46 Am. Rep. 131; *White v. Ross*, 15 Abb. Pr. (N. Y. Ct. App.) 66; *Abbott v. Aspinwall*, 26 Barb. (N. Y.) 202; *White v. Coventry*, 29 Barb. (N. Y.) 305; *Hyatt v. Whipple*, 37 Barb. (N. Y.) 595; *Cooper v. Shaver*, 41 Barb. (N. Y.) 151; *Doyle v. Peerless Petroleum Co.*, 44 Barb. (N. Y.) 239; *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161.

North Carolina. — *Tar River Nav. Co. v. Neal*, 3 Hawks (10 N. Car.) 520; *Atty.-Gen. v. Simonton*, 78 N. Car. 57; *Tuckasegee Min. Co. v. Goodhue*, 118 N. Car. 981.

Pennsylvania. — *McHose v. Wheeler*, 45 Pa. St. 32; *Freeland v. Pennsylvania Cent. Ins. Co.*, 94 Pa. St. 504; *Kilgore v. Smith*, 122 Pa. St. 48.

Rhode Island. — *Slocum v. Providence Steam, etc., Pipe Co.*, 10 R. I. 112.

South Dakota. — *Building, etc., Assoc. v. Chamberlain*, 4 S. Dak. 271.

Vermont. — *Stone v. Congregational Soc.*, 14 Vt. 86; *Reynolds v. Myers*, 51 Vt. 444.

Wisconsin. — *Black River Imp. Co. v. Holway*, 85 Wis. 344.

Consolidated Corporation — Estoppel of Constituent Corporations. — Where a corporation has been formed by consolidation, a constituent corporation which participated in the consolidation, and has continued in it while large interests have become involved in its existence, cannot attack its incorporation for alleged in-

Estoppel of Director or Officer. — *A fortiori*, if he has been a director or officer of the corporation, or has participated in the corporate acts which gave rise to the action, he is estopped.¹

formalities of procedure. *Bradford v. Frankfort, etc., R. Co.*, 142 Ind. 383.

Stockholders — Unconstitutionality of Enabling Act. — Stockholders who have undertaken to organize and hold themselves out to the public as a corporation, and have obtained credit and issued policies, are estopped to deny the regular organization of the corporation although the claimed defect be the unconstitutionality of the enabling act. *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 401.

Policy-holders (and therefore members) in a mutual insurance company cannot deny its organization. *White v. Ross*, 15 Abb. Pr. (N. Y. Ct. App.) 66; *White v. Coventry*, 29 Barb. (N. Y.) 305; *Hyatt v. Whipple*, 37 Barb. (N. Y.) 595; *Cooper v. Shaver*, 41 Barb. (N. Y.) 151; *Freeland v. Pennsylvania Cent. Ins. Co.*, 94 Pa. St. 504.

Stockholder Who Became Such After Organization Effected. — An original associate who acted in the formation of a corporation cannot attack its valid existence for defects in the proceedings, and one purchasing his stock and assuming his obligations to the company is included in the estoppel. *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161.

Stockholder Cannot Bring Information. — The stockholders of a company cannot question its legal existence by information against it. *North v. State*, 107 Ind. 356.

Taxpayer in School District. — One who for four years has been a member of a school district, and paid taxes to it, is estopped to deny its legal existence and obtain an injunction against the collection of future taxes. *Stamper v. Roberts*, 90 Mo. 683.

Corporators Estopped though No Steps Taken to Perfect Corporation. — If the corporators named in the charter, or any one or more of them without creating any shares of stock, or organizing in any way, or paying into the corporate fund the capital required by law, pretend to be incorporated, and hold themselves out to the world as a corporation, they will be estopped, as to those who dealt with them on the faith of such representations, to deny them. *Atty.-Gen. v. Simonton*, 78 N. Car. 57.

Act Not Necessarily Implying Corporation Creates No Estoppel. — To warrant holding a person estopped from disputing the existence of a corporation on the ground that he has co-operated in its organization and action, the acts shown must be unmistakably corporate acts. If the act done or admission made is just as consistent with the existence of an unincorporated association as with that of one incorporated, it will be regarded as too equivocal to raise an estoppel. *Schloss v. Montgomery Trade Co.*, 87 Ala. 414, 13 Am. St. Rep. 51; *Frederburg v. Lyon Lake M. E. Church*, 37 Mich. 476. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 661.

A member of a corporation which has in fact ceased to exist, who has contracted with it, will not be held estopped to deny its corporate organization, in a suit by the corporation against him to recover moneys claimed to be

due, where such estoppel would deny him the right to show that on an accounting with its members, which should have been had when its capacity ceased, he would have a claim against them for more than the debt. *Krutz v. Paola Town Co.*, 20 Kan. 403.

Estoppel as Between Members of Corporation. — Defects in organization do not relieve the corporators from liability to those who have given the corporation credit; but as between themselves, all equally responsible for the non-performance of the act which creates the corporation, and without even user of the franchises, the members will be treated as constituting neither a *de jure* nor a *de facto* corporation. *Childs v. Smith*, 55 Barb. (N. Y.) 45; *Flagg v. Stowe*, 85 Ill. 164.

But the managing directors cannot sue stockholders for contribution as partners, though the corporation is too defective to be regarded as such as against outsiders. *Bushnell v. Consolidated Ice Mach. Co.*, 138 Ill. 67; *Heald v. Owen*, 79 Iowa 23. *Contra*, *Richardson v. Pitts*, 71 Mo. 128.

1. One Who Has Been Corporate Officer Estopped. — *Colorado.* — *Bates v. Wilson*, 14 Colo. 140.

Illinois. — *Bushnell v. Consolidated Ice Mach. Co.*, 138 Ill. 67; *Rutz v. Esler, etc., Mfg. Co.*, 3 Ill. App. 83; *Curtis v. Tracy*, 169 Ill. 233, affirming *Curtis v. Meeker*, 62 Ill. App. 49.

Iowa. — *Heald v. Owen*, 79 Iowa 23.

Maine. — *Beal v. Bass*, 86 Me. 325.

Massachusetts. — *Newcomb v. Reed*, 12 Allen (Mass.) 362; *Priest v. Essex Hat Mfg. Co.*, 115 Mass. 380.

Minnesota. — *Minnesota Gas Light Economy Co. v. Denslow*, 46 Minn. 171.

Missouri. — *Smith v. Heidecker*, 39 Mo. 163.

Nebraska. — *Macfarland v. West Side Imp. Assoc.*, (Neb. 1898) 73 N. W. Rep. 736.

New Hampshire. — *Haynes v. Brown*, 36 N. H. 545.

New York. — *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *All Saints Church v. Lovett*, 1 Hall (N. Y.) 191; *Sodus Bay, etc., R. Co. v. Hamlin*, 24 Hun (N. Y.) 390; *United Growers' Co. v. Eisner*, 22 N. Y. App. Div. 1.

Pennsylvania. — *Weinman v. Wilkinsburg, etc., R. Co.*, 118 Pa. St. 192.

Wisconsin. — *Black River Imp. Co. v. Holway*, 85 Wis. 344.

One who has not only dealt with a corporation as such, but himself acted as the corporation, making deeds and agreements in its behalf, is estopped to deny its legal organization though there was never any acceptance of the charter nor formal organization under it. *Close v. Glenwood Cemetery*, 107 U. S. 466.

One who has participated in organizing the corporation, and has acted as secretary and general agent, cannot deny its legal existence for the purpose of compelling other members to contribute with him as partners. *Bushnell v. Consolidated Ice Mach. Co.*, 138 Ill. 67; *Heald v. Owen*, 79 Iowa 23.

One who has been a stockholder and director

(2) *In Actions on Subscriptions for Stock.* — The estoppel against a member to deny the legality of a corporate organization in which he has himself participated, or when he has, after organization, acted as a member, director, or officer, applies in favor of the corporation itself, so as to prevent the member from refusing payment of his subscription for stock by reason of irregularities of organization.¹

of a corporation, and takes its notes, cannot sue the other members as copartners on the ground of irregular organization, nor can his executor so sue. *Curtis v. Mecker*, 62 Ill. App. 49.

One who has been a promoter of the organization of a company, and a director, is estopped to refuse to accept its stock, under a contract with a third party, on the ground of its nonexistence. *Minnesota Gas-Light Economicizer Co. v. Denslow*, 46 Minn. 171.

Contra. — One is not estopped from denying the corporate character of a *de facto* corporation by having acted as president of it. *Williams v. Michigan Bank*, 7 Wend. (N. Y.) 540.

1. *Estoppel in Suit on Stock Subscription* — *United States.* — *Sanger v. Upton*, 91 U. S. 56; *Chubb v. Upton*, 95 U. S. 665; *Upton v. Hansbrough*, 3 Biss. (U. S.) 417.

Alabama. — *Selma, etc., R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Schloss v. Montgomery Trade Co.*, 87 Ala. 414, 13 Am. St. Rep. 51.

Connecticut. — *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 435; *Naugatuck Water Co. v. Nichols*, 58 Conn. 403.

Georgia. — *Wood v. Coosa, etc., R. Co.*, 32 Ga. 273.

Illinois. — *Rice v. Rock Island, etc., R. Co.*, 21 Ill. 93; *Stone v. Great Western Oil Co.*, 41 Ill. 85; *Ramsey v. Peoria M. & F. Ins. Co.*, 55 Ill. 311; *Corwith v. Culver*, 69 Ill. 502.

Indiana. — *Mullen v. Beech Grove Driving Park*, 64 Ind. 202.

Kansas. — *McCune Min. Co. v. Adams*, 35 Kan. 193.

Louisiana. — *East Pascagoula Co. v. West*, 13 La. Ann. 545.

Maine. — *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

Michigan. — *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389; *Monroe v. Fort Wayne, etc., R. Co.*, 23 Mich. 272; *Parker v. Northern Cent. Michigan R. Co.*, 33 Mich. 23.

Minnesota. — *Hause v. Mannheimer*, 67 Minn. 194.

Missouri. — *Central Plankroad Co. v. Clemens*, 16 Mo. 359; *Ohio, etc., R. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464.

New York. — *Buffalo, etc., R. Co. v. Cary*, 26 N. Y. 75; *Cayuga Lake R. Co. v. Kyle*, 64 N. Y. 185; *U. S. Vinegar Co. v. Foehrenbach*, 148 N. Y. 58; *Phoenix Warehousing Co. v. Badger*, 6 Hun (N. Y.) 293; *Sodus Bay, etc. R. Co. v. Hamlin*, 24 Hun (N. Y.) 390; *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537; *United Growers' Co. v. Eisner*, 22 N. Y. App. Div. 1.

North Carolina. — *Wilmington, etc., R. Co. v. Saunders*, 3 Jones L. (48 N. Car.) 126; *Wilmington, etc., R. Co. v. Thompson*, 7 Jones L. (52 N. Car.) 387; *Elizabeth City Academy v. Lindsey*, 6 Ired. L. (28 N. Car.) 476, 45 Am. Dec. 500; *Wadesboro Cotton Mills Co. v. Burns*, 114 N. Car. 353.

Pennsylvania. — *Erie, etc., Plank-Road Co. v. Brown*, 25 Pa. St. 156; *Graff v. Pittsburgh, etc., R. Co.*, 31 Pa. St. 489; *Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532; *Clark v. Monongahela Nav. Co.*, 10 Watts (Pa.) 364.

South Carolina. — *Spartanburg, etc., R. Co. v. Ezell*, 14 S. Car. 281.

Utah. — *Ogden Clay Co. v. Harvey*, 9 Utah 497.

Vermont. — *Montpelier, etc., River R. Co. v. Langdon*, 46 Vt. 284.

West Virginia. — *Pittsburgh, etc., R. Co. v. Applegate*, 21 W. Va. 172; *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307.

The question whether subscriptions to corporate stock were illegal because made by other corporations is one to be raised through their proper officers, and in appropriate proceedings. A stockholder cannot raise it in a suit for his subscription. *U. S. Vinegar Co. v. Foehrenbach*, 148 N. Y. 58.

In a suit by a corporation on a stock note, the production of the charter and the note in question are sufficient. *Ramsey v. Peoria M. & F. Ins. Co.*, 55 Ill. 311; *Wilmington, etc., R. Co. v. Saunders*, 3 Jones L. (48 N. Car.) 126; *Wilmington, etc., R. Co. v. Thompson*, 7 Jones L. (52 N. Car.) 387; *Elizabeth City Academy v. Lindsey*, 6 Ired. L. (28 N. Car.) 476, 45 Am. Dec. 500.

That a company, contrary to the prohibition of the charter, entered into a contract before twenty-five per cent. of the stock had been paid, is no defense to an action for a stock subscription. The contract is void, but the contract of subscription is unimpaired. *Naugatuck Water Co. v. Nichols*, 58 Conn. 403.

Distinctions and Qualifications. — Though a consolidated corporation may be a corporation *de facto*, and entitled to sue as such on its contracts, it cannot enforce a subscription to the stock of one of its constituent corporations without showing strict compliance with all the requirements of law for its succession to the rights of the other company. *Mansfield, etc., R. Co. v. Drinker*, 30 Mich. 124; *Tuttle v. Michigan Air Line R. Co.*, 35 Mich. 247.

If the corporation is prohibited by the constitution, it cannot maintain an action on stock calls. *St. Louis Colonization Assoc. v. Hennessy*, 11 Mo. App. 555.

While a stockholder who deliberately aids in the formation of a pretended corporation, cannot deny its existence to avoid his voluntary undertaking to pay for stock, if his subscription was induced by fraud, and the corporation is a sham without legal authority, he can show that in a suit by the company on his subscription. *Occidental Ins. Co. v. Ganzhorn*, 2 Mo. App. 205.

So where the stock for the subscription to which the action is brought was issued in excess of the limit prescribed by law. *Scovill v. Thayer*, 105 U. S. 143.

Subscribers may by their acts be estopped

Where Suit Brought by Receiver or Assignee of Corporation. — And the equitable estoppel applies even more strongly where the suit for the subscription is brought by a receiver in insolvency or in behalf of creditors.¹

Prospective Stockholder Who Has Signed Merely Preliminary Subscription. — But if the stockholder has merely signed a preliminary subscription to the stock of a proposed corporation, the promise of payment is based wholly on the expectation of a valid organization being afterwards made, and any defects in organization which invalidate the company's existence and open it to attack by the state constitute a good defense to an action by the company on the subscription. Without a valid organization, the consideration of the subscription wholly fails.²

Incompleteness of Stock Subscription. — A specially important element in the corporate organization is the complete subscription of the amount of stock required by the charter or by-laws. To compel a subscriber to pay in his subscription while only a part of the required stock had been subscribed, would be to impose on him a liability different from and more onerous than that which he agreed to assume. The failure to obtain the full amount of the capital stock fixed by the charter, or by a by-law validly passed, therefore, is fatal to the right of action on stock subscriptions.³

to say that a corporation has not been legally established. But if a subscriber took no part in the meetings, though present, and all his acts showed a disinclination to pay his subscription, there is no estoppel. *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300.

That the members of an acting corporation never subscribed the articles of association, nor posted the required notices in the town (though they did publish a notice in a newspaper), is a good defense to a suit on a premium note. *Unity Ins. Co. v. Cram*, 43 N. H. 636, discussed and virtually overruled in *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 313.

1. Suit on Stock Subscription by Receiver or Assignee — *United States*. — *Sanger v. Upton*, 91 U. S. 56; *Chubb v. Upton*, 95 U. S. 665.

Connecticut. — *Canfield v. Gregory*, 66 Conn. 9.
Georgia. — *Beck v. Henderson*, 76 Ga. 370.
New Hampshire. — *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 295.

New York. — *Dorris v. French*, 4 Hun (N. Y.) 292; *Ruggles v. Brock*, 6 Hun (N. Y.) 164.

North Carolina. — *Marshall Foundry Co. v. Killian*, 99 N. Car. 501, 6 Am. St. Rep. 539.

Ohio. — *Trumbull County Mut. F. Ins. Co. v. Horner*, 17 Ohio 407; *Voorhees v. Circleville Bank*, 19 Ohio 463.

Pennsylvania. — *German Ins. Co. v. Strahl*, 13 Phila. (Pa.) 512.

In a suit by a corporation to recover assessments necessary for payment of its debts, no defense can be asserted unless it might have been made to a creditors' bill. *Ossipee Hosiery, etc., Mfg. Co. v. Canney*, 54 N. H. 295.

2. Signing Preliminary Subscription to Proposed Corporation. — *Wert v. Crawfordsville, etc., Turnpike Co.*, 19 Ind. 242; *Williams v. Franklin Tp. Academical Assoc.*, 26 Ind. 310; *Indianapolis Furnace, etc., Co. v. Herkimer*, 46 Ind. 142; *Nelson v. Blakey*, 47 Ind. 38, 54 Ind. 29; *Reed v. Richmond St. R. Co.*, 50 Ind. 342, 83 Ind. 9; *Rikhoff v. Brown's Rotary Shuttle Sewing Mach. Co.*, 68 Ind. 388; *Hudson v.*

Green Hill Seminary Corp., 113 Ill. 626; *Henry v. Centralia, etc., R. Co.*, 121 Ill. 264; *Capps v. Hastings Prospecting Co.*, 40 Neb. 470, 42 Am. St. Rep. 677; *Dorris v. Sweeney*, 60 N. Y. 463; *Burt v. Farrar*, 24 Barb. (N. Y.) 518.

In suit for a stock subscription, there must be proof of a corporation *de jure* as well as *de facto*. *Henry v. Centralia, etc., R. Co.*, 121 Ill. 264.

"The articles of association signed by the defendant, including his subscription for stock, were very clearly mere preliminary articles, contemplating a future perfection of the organization as a corporation. The defendant's contract did not purport to be with an existing corporation, but with one to be brought into existence in the future. * * * That contract was, in legal effect, that the defendant would take and pay for the stock subscribed for, in case the organization should be perfected and the corporation brought into legal existence, and not otherwise." *Indianapolis Furnace, etc., Co. v. Herkimer*, 46 Ind. 142. The same principle is tacitly assumed in *Buffalo, etc., R. Co. v. Hatch*, 20 N. Y. 157.

But when one subscribed for corporate stock, with a view to future organization, which was had, and the subscriber thereafter paid for one share and transferred others, he thereby affirmed his contract, and cannot deny the existence of the corporation. *Bell's Appeal*, 115 Pa. St. 88, 2 Am. St. Rep. 532.

A stockholder will not be estopped to deny the corporate existence by his payment of part assessments, unless it appears that they were called under color of corporate authority, and not as preliminary to organization. *Schloss v. Montgomery Trade Co.*, 87 Ala. 414, 13 Am. St. Rep. 51.

3. Where the Stock Has Not All Been Subscribed For — *Iowa*. — *Peoria, etc., R. Co. v. Preston*, 35 Iowa 118.

Kansas. — *Topeka Bridge Co. v. Cummings*, 3 Kan. 76.

Kentucky. — *Fry v. Lexington, etc., R. Co.*, 2 Metc. (Ky.) 314.

Taking Part in Organization Before Subscription Complete. — But if the stockholder, knowing that the stock is only partly subscribed, takes part in organizing and operating the company, he will be estopped to set up the incompleteness of the subscription to defeat his own liability.¹

c. **BY DEED.** — A party to a deed to or from a *de facto* corporation is estopped to deny the existence of the corporation in order to avoid the effect of the deed.²

Maine. — Kennebec, etc., R. Co. *v.* Jarvis, 34 Me. 360; Oldtown, etc., R. Co. *v.* Veazie, 39 Me. 571; Penobscot R. Co. *v.* Dummer, 40 Me. 172, 63 Am. Dec. 654; Somerset, etc., R. Co. *v.* Cushing, 45 Me. 524; Somerset R. Co. *v.* Clarke, 61 Me. 379.

Massachusetts. — Salem Mill Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 23, 9 Pick. (Mass.) 187; Newburyport Bridge *v.* Story, 6 Pick. (Mass.) 45; Central Turnpike Corp. *v.* Valentine, 10 Pick. (Mass.) 142; Cabot, etc., Bridge *v.* Chapin, 6 Cush. (Mass.) 50; Worcester, etc., R. Co. *v.* Hinds, 8 Cush. (Mass.) 110; Stoneham Branch R. Co. *v.* Gould, 2 Gray (Mass.) 277.

Michigan. — Shurtz *v.* Schoolcraft, etc., R. Co., 9 Mich. 269; Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389; Monroe *v.* Fort Wayne, etc., R. Co., 28 Mich. 272.

Nebraska. — Livesey *v.* Omaha Hotel Co., 5 Neb. 50; Macfarland *v.* West Side Imp. Assoc., (Neb. 1898) 73 N. W. Rep. 736.

Washington. — Birge *v.* Browning, 11 Wash. 249.

In *Illinois*, Allman *v.* Havana, etc., R. Co., 88 Ill. 521, which accords with these authorities, has been questioned in Peoria, etc., Union R. Co. *v.* Peoria, etc., R. Co., 105 Ill. 110, as follows: "That decision was under the general railroad law, and this is under a special charter. * * * If this does not distinguish that case from this, it must be limited to cases arising under the general railroad law, or must be overruled, as on more mature reflection we are convinced it is repugnant to the general doctrine applicable to cases like the present." But Hudson *v.* Green Hill Seminary Corp., 113 Ill. 627, and Henry *v.* Centralia, etc., R. Co., 121 Ill. 264, reaffirm the Allman case, without referring to the Peoria case.

How Number of Shares Fixed — Charter and By-laws. — Though a charter provision as to the number of shares would constitute a defense, such a provision in the by-laws would not. Kennebec, etc., R. Co. *v.* Jarvis, 34 Me. 360. But where the charter leaves the amount to be fixed by the corporation, and it has been so fixed, the full amount must be subscribed. Somerset, etc., R. Co. *v.* Cushing, 45 Me. 524. If the charter of a corporation does not fix the number of shares, this must be done by the directors or stockholders, and the number filed, before there can be any valid assessment. Somerset R. Co. *v.* Clarke, 61 Me. 379.

And the passing and acceptance of a charter amendment reducing the amount required will not avail to make the subscription binding. Nor will a corporator be estopped to set up the lack of legal organization by having acted in the organization. "If a vote had been passed by them with entire unanimity that they would waive all objection on account of a deficiency of capital, and that they would proceed to

make assessments, * * * it would have been but a violation of the charter, and illegal and void." Oldtown, etc., R. Co. *v.* Veazie, 39 Me. 571.

Stock Subscribed by Agent Without Authority — Subsequent Insolvency. — If thirty of five thousand shares are subscribed by one in behalf of another, without authority, the stock is incomplete, and no binding assessment can be made, though the person subscribing may be liable for the amount as damages. But the unexpected insolvency of some subscriber is not a defense. Salem Mill Dam Corp. *v.* Ropes, 9 Pick. (Mass.) 187.

Corporation Must Prove Stock Subscribed and Conditions Fulfilled. — The company must show that all the stock has been subscribed, and, if any subscriptions were conditional, that the conditions have been fulfilled or waived. Central Turnpike Corp. *v.* Valentine, 10 Pick. (Mass.) 142.

A Subscription to be Paid For in Stock of Another Company is not to be included. Cabot, etc., Bridge *v.* Chapin, 6 Cush. (Mass.) 50.

1. Taking Part in Organization Before Subscription Complete. — Litchfield Bank *v.* Church, 29 Conn. 137; Hager *v.* Cleveland, 36 Md. 476; International Fair, etc., Assoc. *v.* Walker, 83 Mich. 386; Macfarland *v.* West Side Imp. Assoc., (Neb. 1898) 73 N. W. Rep. 736. *Contra*, Oldtown, etc., R. Co. *v.* Veazie, 39 Me. 571, quoted in last note *supra*.

2. Estoppel by Deed to or from Corporation — United States. — Cowell *v.* Colorado Springs Co., 100 U. S. 55; Doyle *v.* San Diego Land, etc., Co., 46 Fed. Rep. 709.

Illinois. — Thompson *v.* Candor, 60 Ill. 244.

Indiana. — Baker *v.* Neff, 73 Ind. 68; Jones *v.* Kokomo Bldg. Assoc., 77 Ind. 340; Johnson *v.* Gibson, 78 Ind. 282; Hasselman *v.* U. S. Mortgage Co., 97 Ind. 365.

Kansas. — Sword *v.* Wickersham, 29 Kan. 746.

Missouri. — German Bank *v.* Stumpf, 6 Mo. App. 17; Broadwell *v.* Merritt, 87 Mo. 95; Ragan *v.* McElroy, 98 Mo. 349; Baker *v.* Atchison, etc., R. Co., 122 Mo. 396; Bradley *v.* Reppell, 133 Mo. 545.

Wisconsin. — Whitney *v.* Robinson, 53 Wis. 309; Ricketson *v.* Galligan, 89 Wis. 394.

One whose title to real estate comes from a deed from a corporation cannot deny the existence of the corporation in order to attack the validity of a mortgage executed by it prior to his own title. Hasselman *v.* U. S. Mortgage Co., 97 Ind. 365; Dooley *v.* Wolcott, 4 Allen (Mass.) 406; Wallace *v.* Loomis, 97 U. S. 146.

One who claims under a deed which recited a mortgage in favor of a party bearing a corporate name is estopped to deny the corporate character of the mortgagee. Hasenritter *v.* Kirchoffer, 79 Mo. 239.

One who sells real estate to a corporation *de*

d. BY OTHER FACTS. — So one who has sued a corporation as such,¹ or suffered a judgment in favor of such a corporation,² or filed a counterclaim against it,³ or gone to trial on the merits,⁴ or given a recognizance in the action,⁵ or given a bond to a third party, in which a corporation is named as such as the principal,⁶ or a town which has levied a tax on a corporation as such, in a suit to recover back the tax,⁷ is estopped to deny the corporate existence which has thus been recognized and affirmed.

e. ESTOPPEL OF THE CORPORATION ITSELF. — And an association which has assumed to be and acted as a corporation, and incurred obligations in that capacity, is estopped to deny its own corporate existence in order to relieve itself or its members from such liabilities.⁸

facto cannot question its right to take title after it has paid the consideration. *Smith v. Sheeley*, 12 Wall. (U. S.) 358.

One who has made a mortgage to a corporation cannot defeat foreclosure by denying the corporate existence of the mortgagee. *Grangers' Business Assoc. v. Clark*, 67 Cal. 634; *Shasta Bank v. Boyd*, 99 Cal. 604; *Payette v. Free Home Bldg. Loan, etc., Assoc.*, 27 Ill. App. 307; *Franklin v. Twogood*, 18 Iowa 515; *Den v. Van Houten*, 10 N. J. L. 270; *Franz v. Teutonia Bldg. Assoc. No. 2*, 24 Md. 259.

One who has bought land mortgaged to a corporation, assuming payment of the mortgage, is estopped to deny the existence of the corporation as a bar to a foreclosure action. *People's Sav. Bank, etc., Assoc. v. Collins*, 27 Conn. 142.

One who has borrowed money, and given a mortgage to the plaintiff in its corporate name, cannot deny the legal incorporation of the plaintiff in an action for correction of the deed. *West Winsted Sav. Bank, etc., Assoc. v. Ford*, 27 Conn. 282, 71 Am. Dec. 66.

1. Suing Corporation as Such. — *Lester v. Georgia*, etc., R. Co., 90 Ga. 802; *Cresswell v. Oberly*, 17 Ill. App. 281; *Pochelu v. Kemper*, 14 La. Ann. 307, 74 Am. Dec. 433; *McClinch v. Sturgis*, 72 Me. 288. See *Heuer v. Carmichael*, 82 Iowa 288; *Stivers v. Carmichael*, 83 Iowa 759.

2. Suffering Judgment in Corporation's Favor. — *Trogdon v. Cleveland Stone Co.*, 53 Ill. App. 206; *Estey Mfg. Co. v. Runnels*, 55 Mich. 130.

3. Filing Counterclaim Against Corporation. — *Ward v. Minnesota*, etc., R. Co., 119 Ill. 287; *McKnight v. Mineral Point*, 1 Pin. (Wis.) 99; *Black River Imp. Co. v. Holway*, 85 Wis. 344.

4. Going to Trial on Merits. — *Ward v. Minnesota*, etc., R. Co., 119 Ill. 287.

As to admitting proof without objection that the property for the recovery of which the action was brought belonged to the plaintiff corporation, see *Remington Paper Co. v. O'Dougherty*, 65 N. Y. 570.

5. Giving Recognizance in Action. — *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1535.

Action on Bond Given to Prevent Replevin. — In an action on a bond given by the defendant to the plaintiff in a former action between the same parties, conditioned for the delivery of certain personal property in case of judgment in favor of the plaintiff, the defendant is estopped to deny the legality of the corporation. *Loaners' Bank v. Jacoby*, 10 Hun (N. Y.) 143.

In an Action by a Corporation upon a Bond the production of the bond to the plaintiff by its corporate name and its "successors and assigns" is sufficient *prima facie* proof of the plaintiff's incorporation. *Williamsburg City F. Ins. Co. v. Frothingham*, 122 Mass. 391, citing *Williams v. Cheney*, 3 Gray (Mass.) 215; *Topping v. Bickford*, 4 Allen (Mass.) 120; *Conard v. Atlantic Ins. Co.*, 1 Pet. (U. S.) 386.

6. Giving Bond Wherein Corporation Is Principal. — *Jefferson v. McCarthy*, 44 Minn. 26.

Giving Bond for Attachment of Corporation Property. — When persons are joined in giving a bond for the attachment of the property of a corporation, they are not in a position to deny its corporate existence. *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 36 Am. St. Rep. 156.

7. Action to Recover Taxes Against Corporation. — *Monroe Water Co. v. Frenchtown Tp.*, 98 Mich. 431.

8. When Corporation Estopped — United States. — *Handley v. Stutz*, 139 U. S. 417 (relying on the *Kentucky* statute); *Shapleigh v. San Angelo*, 167 U. S. 646; *Aller v. Cameron*, 3 Dill. (U. S.) 198; *Phinizy v. Augusta*, etc., R. Co., 62 Fed. Rep. 678; *Farmers' L. & T. Co. v. Toledo*, etc., R. Co., 67 Fed. Rep. 49; *Blackburn v. Selma*, etc., R. Co., 2 Flipp. (U. S.) 525.

Alabama. — *McCullough v. Talladega Ins. Co.*, 46 Ala. 376.

Georgia. — *Southern Bank v. Williams*, 25 Ga. 534; *Imboden v. Etowah*, etc., Min. Co., 70 Ga. 86; *Georgia Ice Co. v. Porter*, 70 Ga. 637; *Stewart Paper Mfg. Co. v. Rau*, 92 Ga. 511; *Georgia Southern*, etc., R. Co. v. *Mercantile Trust*, etc., Co., 94 Ga. 306, 47 Am. St. Rep. 153.

Illinois. — *U. S. Express Co. v. Bedbury*, 34 Ill. 459; *Racine*, etc., R. Co. v. *Farmers' L. & T. Co.*, 49 Ill. 346, 95 Am. Dec. 595; *Independent Order*, etc., v. *Paine*, 122 Ill. 625; *Fitzpatrick v. Rutter*, 160 Ill. 282; *Clarkson v. Erie*, etc., Dispatch, 6 Ill. App. 284; *Fields v. United Brotherhood*, etc., 60 Ill. App. 258; *Forest Glen Brick*, etc., Co. v. *Gade*, 55 Ill. App. 181.

Indiana. — *Tipton F. Co. v. Barnheisel*, 92 Ind. 88; *Ewing v. Robeson*, 15 Ind. 26; *Adams Express Co. v. Hill*, 43 Ind. 157.

Iowa. — *Quinn v. Shields*, 62 Iowa 138, 49 Am. Rep. 141 (relying on a statute).

Kentucky. — *Walton v. Riley*, 85 Ky. 413 (relying on a statute).

Maryland. — *Hammond v. Straus*, 53 Md. 1. *Massachusetts.* — *Dooley v. Cheshire Glass Co.*, 15 Gray (Mass.) 494.

IV. INDIVIDUAL LIABILITY OF MEMBERS OF DEFECTIVELY ORGANIZED CORPORATION.—The authorities with reference to the individual liability of the members or stockholders in corporations defectively organized are confused and not easily reconcilable. The whole question is fully discussed under another title in this work.¹

DE FACTO COURT.—See the title *DE FACTO OFFICERS, post.*

DE FACTO GOVERNMENT. (See the titles *DE FACTO OFFICERS, post*; *DE FACTO CORPORATIONS, ante.*)—A government *de facto* in the legal sense is a government that unlawfully gets the possession and control of the rightful government, and maintains itself there by force of arms against the will of the rightful government, and claims to exercise the powers thereof.²

DE FACTO JUDGE.—See the title *DE FACTO OFFICERS, post.*

Michigan.—*Empire Mfg. Co. v. Stuart*, 46 Mich. 482.

Minnesota.—*Jewell v. Grand Lodge, etc.*, 41 Minn. 405; *Scheufler v. Grand Lodge, etc.*, 45 Minn. 256; *Perine v. Grand Lodge, etc.*, 48 Minn. 82; *Cornfield v. Order Brith Abraham*, 64 Minn. 261. See also *Foster v. Moulton*, 35 Minn. 458.

Missouri.—*Roll v. St. Louis, etc., Smelting, etc., Co.*, 52 Mo. App. 60; *Real Estate Sav. Inst. v. Fisher*, 9 Mo. App. 593; *Knapp v. Joy*, 9 Mo. App. 575.

New York.—*Castle v. Lewis*, 78 N. Y. 131.

North Carolina.—*Rush v. Halcyon Steamboat Co.*, 84 N. Car. 702; *Dobson v. Simonton*, 86 N. Car. 492.

Ohio.—*Callender v. Painesville, etc., R. Co.*, 11 Ohio St. 516.

Tennessee.—See *East Tennessee, etc., R. Co. v. Evans*, 6 Heisk. (Tenn.) 607.

Utah.—*Liter v. Ozokerite Min. Co.*, 7 Utah 487.

Vermont.—*Stone v. Congregational Soc.*, 14 Vt. 86.

Wisconsin.—*Williams v. Stevens Point Lumber Co.*, 72 Wis. 487.

An association which exercises corporate functions, and has a name implying corporate existence, cannot, when sued as a corporation, deny its corporate existence. *U. S. Express Co. v. Bedbury*, 34 Ill. 459; *Fitzpatrick v. Rutter*, 160 Ill. 282; *Clarkson v. Erie, etc., Dispatch*, 6 Ill. App. 284; *Fields v. United Brotherhood, etc.*, 60 Ill. App. 258. See also *Grand River Bridge Co. v. Rollins*, 13 Colo. 4.

A corporation cannot repudiate acts which it performed as a corporation, on the ground that it was not at that time organized so as to have corporate capacity, though it has since perfected its organization. *Georgia Ice Co. v. Porter*, 70 Ga. 637; *Independent Order, etc., v. Paine*, 122 Ill. 625; *Empire Mfg. Co. v. Stuart*, 46 Mich. 482.

Estoppel of Creditors Intervening to Prevent Enforcement of Corporation Obligations.—Creditors intervening in a suit brought by the mortgage bondholders of a railroad to foreclose the mortgage are estopped, just as the corporation itself would be, from asserting the illegality of the corporation as a defense to the enforcement of the bonds. *Continental Trust*

Co. v. Toledo, etc., R. Co., 82 Fed. Rep. 642.

Distinctions and Qualifications.—An association which has done business as a corporation, under an attempted organization, has the burden of proof to show any irregularity in the publication of the certificate. *Wood v. Wiley Constr. Co.*, 56 Conn. 87.

A *de facto* corporation is estopped to deny its existence at the time of making the contract, but not the subsequent cessation of its corporate functions, both *de facto* and *de jure*. *Dobson v. Simonton*, 86 N. Car. 492.

Where goods were sold to a person under the designation of "manager of the South Publishing Company," when there was at the time no such company, and no association of individuals doing business as such, and no attempt at an organization or incorporation, it was held that, in an action against a corporation subsequently organized under that name by the individual to whom the goods were sold, the corporation was not estopped from denying its corporate liability, none of the goods ever having come into its possession. *Bradley Fertilizer Co. v. South Pub. Co.*, 6 Misc. Rep. (N. Y. C. Pl.) 128.

Doctrine Denied.—*Boyce v. Towsontown Station, etc.*, 46 Md. 359, denies the whole doctrine of estoppel of an acting corporation to deny its own existence, the court saying: "We think it would be extending the doctrine of estoppel to an extent not justified by the principles of public policy, to allow it to operate through the conduct of the parties concerned to create substantially a *de facto* corporation, with just such powers as the parties may by their acts give to it. This would be substituting the dealings of the parties for compliance with the requirements of the law. * * * To permit parties indirectly, or upon the principle of estoppel, virtually to create a corporation for any purpose, * * * would be in manifest opposition to the statute law, and clearly against its policy, and justified upon no sound principle in the administration of justice." See also the dictum in *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 484, 24 Am. Dec. 51.

1. See the title *STOCKHOLDERS*.

2. *Chisholm v. Coleman*, 43 Ala. 204. See also *Scheible v. Bacho*, 41 Ala. 434; *Thorington v. Smith*, 8 Wall. (U. S.) 8.

DE FACTO OFFICERS.

BY JOSEPH WALKER MAGRATH.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS)*; *PUBLIC OFFICERS*; *QUO WARRANTO*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *AMOTION*, vol. 2, p. 310; *COUNTIES*, vol. 7, p. 808; *DE FACTO CORPORATIONS*, ante; *DEPUTY; MUNICIPAL CORPORATIONS; OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS); OFFICIAL BONDS; PUBLIC OFFICERS*; and such titles as *INJUNCTION; QUO WARRANTO*; and the titles treating of specific officers, such as *JUDGE; JUSTICE OF THE PEACE; SHERIFFS, MARSHALS, AND CONSTABLES*.

I. DE FACTO OFFICERS OF PRIVATE CORPORATIONS — 1. Who Are — a. DEFINITION. — *De facto* officers of a private corporation are those persons who are in possession of the corporation's property and are exercising the corporate franchises and powers,¹ with an apparent right to do so,² though they are

1. Definition. — *Mahony v. East Holyford Min. Co.*, L. R. 7 H. L. 869.

"The expression 'officer *de facto*' has been used to designate an agent actually occupying the position claimed by him and exercising its incidental powers. It is said that only the rightful representatives of the corporation, under a proper election or appointment, are officers *de jure*." *Morawetz on Corp.*, § 640.

2. Apparent Right to Office. — One who is appointed assistant secretary of a corporation, and for over a year acts as secretary and performs all the duties of the office, with the knowledge of most, if not all, of the directors,

is secretary *de facto*, whether he is assistant secretary *de jure* or not. *Augusta, etc., R. Co. v. Kittel*, 52 Fed. Rep. 63.

One who was appointed manager of a mine by the promoters of a mining company, before it was registered, and whose name as such manager appeared on the prospectus issued by the promoters, and who acts as manager, is manager *de facto*, where, after the company is registered, the prospectus is submitted and approved. *Browning v. Great Cent. Min. Co.*, 5 H. & N. 856. See also *Wilson v. Kings County El. R. Co.*, 114 N. Y. 487. And see *infra*, this section, *What May or May Not Give Color of Title*.

ineligible to the offices they assume to hold¹ or have been irregularly or illegally chosen.²

b. WHAT MAY OR MAY NOT GIVE COLOR OF TITLE — (1) *Mere Claim to Office Not Sufficient.* — A mere claim to be an officer is not sufficient to constitute the claimant an officer *de facto*; there must be an apparent title to the office, or such a continued exercise of its functions as to justify the presumption that the person in possession is a lawful officer.³

(2) *Acceptance of Office and Acting as an Officer.* — Acceptance of the office and acting as an officer are necessary to constitute a person an officer *de facto*.⁴

(3) *Possession of the Corporation's Property.* — Possession of the corporation's property is necessary to constitute persons officers *de facto*, for without such possession they cannot acquire the necessary reputation of being officers.⁵

1. Ineligible Persons. — Central Trust Co. v. Wabash, etc., R. Co., 23 Fed. Rep. 858; The Vigilancia, 73 Fed. Rep. 452; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Mechanics' Nat. Bank v. Burnet Mfg. Co., 32 N. J. Eq. 236; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548.

An officer *de facto* is a person who is such officer by color of election, though ineligible. M'Gargell v. Hazleton Coal Co., 4 W. & S. (Pa.) 424.

A person not eligible to be a *de jure* director of a bank, but who comes into office through the forms of law, may become a *de facto* director and president. Smith v. State Bank, 18 Ind. 327.

A person duly elected and acting as cashier of a bank is such *de facto*, though he does not possess the qualification required by the charter of being a director. Lionberger v. Krieger, 88 Mo. 160, 14 Am. & Eng. Corp. Cas. 87. See also *infra*, this section, *Ineligible Persons*.

2. Persons Irregularly or Illegally Chosen — *United States.* — Central Trust Co. v. Wabash, etc., R. Co., 23 Fed. Rep. 858.

Maryland. — Smith v. Erb, 4 Gill (Md.) 437. *Michigan.* — Cahill v. Kalamazoo Mut. Ins. Co., 2 Dougl. (Mich.) 124.

New Hampshire. — Hughes v. Parker, 20 N. H. 58.

New Jersey. — Mechanics' Nat. Bank v. Burnet Mfg. Co., 32 N. J. Eq. 236; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548.

New York. — Vernon Soc. v. Hills, 6 Cow. (N. Y.) 23; Partridge v. Badger, 25 Barb. (N. Y.) 146.

Texas. — Hamm v. Drew, 83 Tex. 77.

Virginia. — Burr v. M'Donald, 3 Gratt. (Va.) 206.

See also *infra*, this section, *Persons Irregularly Chosen*.

3. Mere Claim Not Sufficient. — McCall v. Byram Mfg. Co., 6 Conn. 428; Rochester, etc., R. Co. v. Clarke Nat. Bank, 60 Barb. (N. Y.) 234. In the latter case the court said: "It is well settled that there must be color for the claim, and a colorable title to the office."

In Moses v. Tompkins, 84 Ala. 613, the court, per Clopton, J., said: "To constitute an officer *de facto* there must be a color of election or appointment, or an exercise of the functions of the office under such circumstances, and for such length of time without interference, as to justify the presumption of a due election or appointment. Cary v. State, 76 Ala. 78. The mere exercise of the func-

tions of the office is in itself insufficient. The bills allege only two official acts of the defendants as directors, and it may well be doubted whether the allegations make a *prima facie* case of directors *de facto*."

4. Acceptance of Office and Acting as Officer Necessary. — A person does not become a *de facto* director of a corporation by a mere election as such, where he neither accepts the office nor holds himself out nor acts as a director in any way, and is never consulted as such by the officers of the corporation; and where, when he is notified of a meeting of the directors some years after his election, he expressly repudiates the office. Rozecrans Gold Min. Co. v. Morey, 111 Cal. 114.

5. Necessity for Possession of Corporate Property. — Johnston v. Jones, 23 N. J. Eq. 216.

In Orr Water Ditch Co. v. Reno Water Co., 17 Nev. 166, the trustees of a water company, together with the stockholders, had sold the entire stock and delivered the property of the corporation to a purchaser, who took possession thereof. Three years afterwards, no intermediate act as trustees having been done by them, a majority of the trustees met and allowed an account against the company, which was paid by a check signed by the president and secretary, who were two of the trustees. In a suit on the check it was held that, as the sale and delivery of the property of the corporation were notorious, and the subsequent possession and exclusive management and control thereof by the purchaser were continuous and open, the former trustees were not trustees *de facto*, and had no power to bind the corporation. The court said: "The reasons for the rule which invokes the protection of the law in sustaining the acts of *de facto* officers in order that the ends of justice may be attained do not exist in this case."

In Waterman v. Chicago, etc., R. Co., 139 Ill. 658, persons who claimed to have been elected directors of a corporation met, the day after such election, at a place other than that designated for directors' meetings. They did not have possession or control of the corporation's property; and they had performed no official act save to accept the resignation of one of their number and appoint another person to fill his place, when they elected a certain person president of the corporation. It was held that they were not a *de facto* board of directors, and that the person whom they had elected president derived no rights from such election.

(4) *Holding Over*. — An officer who continues to act as such after his term of office has expired is generally regarded as an officer *de facto*.¹

(5) *Forcible Intrusion*. — Forcible intrusion into an office does not constitute the intruder an officer *de facto*, where there is no acquiescence in his acting as such officer.²

(6) *Unconstitutional Law or Void Resolution of Corporation*. — A person may be a *de facto* officer of a corporation though his claim to office is founded on an unconstitutional law or a void resolution of the corporation.³

c. INELIGIBLE PERSONS — (1) *Residence Qualification*. — A person ineligible to office in a corporation, because not a resident of the state by which it is incorporated, may yet become an officer *de facto*.⁴

(2) *Stock Qualification*. — It has been held that where it is required that officers of a corporation shall be stockholders, a person not a stockholder who is chosen and acts as a director is such *de facto*.⁵ The same principle applies to a director who, though duly qualified when elected, continues to exercise his office with the acquiescence of the corporation after he has ceased to be a stockholder,⁶ and to a president who continues to act as such after becoming bankrupt.⁷

d. PERSONS IRREGULARLY CHOSEN — (1) *Election to Office Not Vacant*. — One who is elected and acts as a trustee of a corporation is such *de facto* though his election was illegal, there being no vacancy in the office.⁸

1. *Holding Over*. — A trustee of a corporation who continues to act as such after the term for which he was elected has expired, no successor having been elected, is at least a trustee *de facto*. *Deming v. Puleston*, 35 N. Y. Super. Ct. 399, affirmed in 55 N. Y. 655.

Where directors continue to manage the affairs of a corporation after their successors have been elected, and their acts are approved and ratified by the corporation, they are directors *de facto* and their acts are valid. *Penobscot, etc., R. Co. v. Dunn*, 39 Me. 587.

Directors of a corporation who continue to act as such after their term has ended are directors *de facto*, and their acts are valid, though the charter of the corporation provides that they shall be capable of serving for a certain term "and no longer." *Thorington v. Gould*, 59 Ala. 461.

2. *Forcible Intrusion*. — In *First African M. E. Zion Church v. Hillery*, 51 Cal. 155, it was held that persons claiming to have been elected trustees of a church did not become trustees *de facto* where they effected an entrance into the church building by violence, but were afterwards ejected therefrom, and where the only act done by them as trustees was to serve a notice of dismissal on the pastor of the church.

In *State v. Curtis*, 9 Nev. 325, the court held that a person who claimed to have been elected to fill a vacancy in the board of trustees of a corporation, but who had not received a majority of the votes for such office, did not become a *de facto* trustee by intruding himself by force and actually voting at a subsequent meeting of the board, where the trustees who had voted against him did not acquiesce in his claim of election, endeavored to prevent his voting, and protested against his being allowed to vote or take any part in the proceedings of the board. The court, *per* Hawley, J., said: "Although the law does not always take into consideration the mode by which the office was obtained, yet in order to make a person

an officer *de facto* it does require that he should in some way be put into the office, and that he should also have secured such a holding thereof as to be considered really in peaceable possession and actually exercising the functions of an officer."

3. *Unconstitutional Law or Void Resolution*. — Where a corporation reduced the number of directors from thirteen to five, and elected that number of directors and permitted them to transact its business, such directors were held to be officers *de facto*, whether or not the law under which the change was made was constitutional, and whether or not the meeting at which the change was made was properly called. *Bradford v. Frankfort, etc., R. Co.*, 142 Ind. 383.

4. *Residence Qualification*. — *Humphreys v. Money*, 5 Colo. 282; *Delaware, etc., Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131.

5. *Stock Qualification*. — *In re Canadian Land Reclaiming, etc., Co.*, 14 Ch. Div. 660, 42 L. T. 559, 28 W. R. 775; *Hamilton Trust Co. v. Clemes*, 17 N. Y. App. Div. 152.

Contrary Doctrine. — In *In re Newcomb*, (Supreme Ct.) 18 N. Y. Supp. 16, it was held that persons elected directors of a railroad company ten days after acquiring stock therein were not officers *de facto* where the law relative to such companies (2 N. Y. Rev. Stat., 6th ed., p. 520, § 5) forbade the election of any person as a director unless he was a stockholder, qualified to vote for directors at the election at which he was chosen, and required that stockholders should own the shares voted on for thirty days before the election.

6. *Disposing of Stock*. — *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179; *Kuser v. Wright*, 52 N. J. Eq. 825; *Wile, etc., Co. v. Rochester, etc., Land Co.*, 4 Misc. Rep. (N. Y. Supreme Ct.) 570; *Beardsley v. Johnson*, 121 N. Y. 224.

7. *Bankruptcy*. — *Atlas Nat. Bank v. F. B. Gardner Co.*, 8 Biss. (U. S.) 537.

8. *Election to Office Not Vacant*. — *Easterly v.*

(2) *Election at Improper Time.* — Persons elected officers of a corporation at a time other than that prescribed by the charter for elections may become officers *de facto*, if they obtain possession of the corporation's property and act as officers,¹ but not otherwise.²

(3) *Election at Improper Place.* — It has been held that persons elected directors of a corporation at a stockholders' meeting held outside of the state in which the corporation is incorporated may become *de facto* directors where they take possession of their offices and act as directors.³

(4) *Election at Meeting Without Quorum.* — The color of title necessary to constitute an officer *de facto* cannot be acquired from an election at a meeting of stockholders at which no quorum for the transaction of business was present.⁴

(5) *Election by Less than Quorum of Directors.* — A person may become a *de facto* director of a corporation by an election at a meeting of the board of directors at which a legal quorum for the transaction of some business is present, although there are not enough members present to constitute a legal quorum to fill vacancies in the board, as such election gives him color of right.⁵

(6) *Failure to File Certificate of Election.* — Persons elected officers of a corporation may be such officers *de facto* though no certificate of election has been filed as required by law.⁶

Barber, 65 N. Y. 252; M'Gargell v. Hazleton Coal Co., 4 W. & S. (Pa.) 424.

1. *Election at Improper Time.* — Persons who are elected and act as trustees of a church are such *de facto* though they are not elected "six days before the vacancies should happen" which they are elected to fill, as required by the charter of the church. People v. Runkle, 9 Johns. (N. Y.) 147.

2. *Limitation.* — Persons unlawfully elected directors of a corporation at a meeting held at a time not authorized by the charter, and not called by the directors, do not become officers *de facto* where an opposing lawfully elected board has possession of the books, funds, and property of the corporation. Johnston v. Jones, 23 N. J. Eq. 216.

3. *Election at Improper Place.* — Ohio, etc., R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128.

But in Franco-Texan Land Co. v. Laigle, 59 Tex. 339, the court, *per* Willie, C. J., said: "A *de facto* authority cannot arise when there has been absolutely no election or appointment, or, what is equivalent, one that is absolutely null and void, and not merely irregular or informal [in this case an election at a stockholders' meeting held outside the state in which the company was incorporated], and where there has been no assertion of the right to exercise the office except in the very instance where it is questioned, and where there has been no acquiescence in the official acts of the person claiming such authority, either on the part of the body for whom he professes to act or of any one else. Otherwise the simple bold assertion of a right to an office would bind such corporation or body by the acts of the usurper, and parties suffering from his unlawful acts could never question them."

4. *Election at Meeting Without Quorum.* — Persons elected directors of a corporation at a stockholders' meeting at which are represented less than the number of shares required by the law to be represented in order for the meeting to transact business are not *de facto*

directors as against a board claiming to hold over by virtue of a previous valid election. Ellsworth Woolen Mfg. Co. v. Faunce, 79 Me. 440.

Election by Minority Acting Separately. — In East Norway Lake Church v. Halvorson, 42 Minn. 503, a minority of the congregation, acting in opposition to the regular organization, met and assumed to elect trustees. It was held that this had not the color of an election by the congregation, and that therefore the persons so elected were not trustees even *de facto*.

5. *Election by Less than Quorum of Directors.* — Baird v. Washington Bank, 11 S. & R. (Pa.) 411.

Limitation of Elective Power of Directors. — The Code of Alabama, § 1924, provides that a majority of the directors of a street railway company "shall form a board and be competent to fill vacancies in their board," etc. But where five of the seven directors designated by the act of incorporation of such a company became disqualified, and the two remaining directors elected directors to fill their places, the court held that the persons so elected were not even directors *de facto*. Moses v. Tompkins, 84 Ala. 613.

Appointment by Managing Director. — Persons acting as directors of a corporation are such *de facto* where they were appointed by the managing director, who, with another shareholder, carried on the business at the registered office of the company and had allotted shares, though the directors named in the articles of association had refused to act and passed a resolution that the corporation should not carry on business or allot shares. *In re* County L. Assur. Co., L. R. 5 Ch. 288.

6. *Failure to File Certificate.* — In Roberts v. Hill, 137 Ind. 215, it was held that persons elected trustees of a lodge of Free Masons, and acting as such, were trustees *de facto*, though the clerk of the lodge had failed to file a certificate of their election within ten days thereafter, as required by Rev. Stat. Indiana 1881, § 3819 (Rev. Stat. Ind. 1894, § 5019).

c. **EFFECT OF DECISION AGAINST TITLE.** — A person cannot be a *de facto* officer of a corporation after it has been determined in quo warranto proceedings that he is not entitled to hold the office, as the necessary presumption that he is rightfully in office cannot then exist.¹

2. Rights and Powers — *a.* **MAY CONDUCT BUSINESS.** — *De facto* officers of a private corporation have the right to conduct the ordinary business of the corporation² and to take charge of its property and funds.³

b. **MAY SUE IN CORPORATE NAME.** — Persons who claim to be the lawful officers of a corporation, and are in possession of the corporate franchises and property, may use the corporate name and seal in the prosecution of an action respecting the corporate property,⁴ and they do not put their title in issue by so doing.⁵

c. **ACTS FOR OWN BENEFIT VOID.** — The acts of a *de facto* officer will not be sustained when they are for his own benefit, for he cannot take advantage of his apparent title when he must be cognizant of his want of legal title.⁶

Exception. — There may, however, be an exception to this rule in the case of a person holding office while a judicial decree in favor of his right thereto is in force, though such decree is afterwards reversed.⁷

d. **CANNOT ACQUIRE RIGHTS AS CREDITOR BY NEGLIGENCE OF DUTY AS OFFICER.** — One who has wrongfully acted as a trustee of a corporation loses thereby any right which might otherwise have accrued to him, as a creditor of

1. Effect of Decision Against Title. — *Rochester, etc., R. Co. v. Clarke Nat. Bank*, 60 Barb. (N. Y.) 234.

Status Before Filing of Decree. — Officers of a corporation whose election has been declared illegal and void by the decree of a court are officers *de facto* until the decree is filed, and their acts as such bind the corporation. *Anglo-Californian Bank v. Mahoney Min. Co.*, 5 Sawy. (U. S.) 255, *affirmed* in 104 U. S. 192.

2. Right to Conduct Business. — *Walker v. Flemming*, 70 N. Car. 483, wherein it was held that pending an action to determine who were the lawful officers of a railroad company, the *de facto* president had power to do such acts as were necessary for the ordinary purposes of the company to keep its machinery in motion.

Limitation. — In the same case it was also held that the *de facto* president could not make preferences among creditors, or assign a valuable security belonging to the company to one creditor as collateral security for his debt. *Walker v. Flemming*, 70 N. Car. 483.

3. Right to Corporate Funds. — *De facto* churchwardens may maintain an action against a former churchwarden for money received by him for the use of the parish. *Turner v. Baynes*, 2 H. Bl. 559.

A corporation cannot maintain an action against its *de facto* treasurer for funds of the corporation in his hands on the ground that he has ceased to be treasurer and that his successor has been elected and qualified and has taken possession of the office, where it appears that the *de facto* treasurer is in possession of the office, claiming that his successor has not been elected and qualified. *Hunt v. Pleasant Hill Cemetery Assoc.*, 27 Kan. 734.

4. Right to Sue in Corporate Name. — *Atlantic, etc., R. Co. v. Johnston*, 70 N. Car. 348.

5. Title Not Put in Issue. — In an action by the managers of a corporation against a subscriber for the amount due on his shares, it is

not incumbent on the plaintiffs to prove that they were elected by a majority of votes. *Rockville, etc., Turnpike Road Co. v. Van Ness*, 2 Cranch (C. C.) 449.

Where a corporation consists of ten trustees, and persons are acting as such trustees and exercising the corporate franchises, it is not necessary, in order to sustain an action by them in the corporate name, that they should show a regular and unbroken succession of trustees from the original incorporation to the time of the action. *Elizabeth City Academy v. Lindsey*, 6 Ired. L. (28 N. Car.) 476.

6. Acts for Own Benefit Void. — *Thorington v. Gould*, 59 Ala. 461.

The action of a *de facto* board of directors in canceling a subscription for stock and allotting part of such stock to themselves is void. *Shellenberger v. Patterson*, 168 Pa. St. 30.

Where officers of a corporation, after their successors have been elected and assumed their official duties, execute to one of their number a note in the name of the corporation, such note is not binding. *Lebanon, etc., Gravel Road Co. v. Adair*, 85 Ind. 244.

7. Exception. — In *Ebaugh v. German Reformed Church*, 3 E. D. Smith (N. Y.) 60, the plaintiff sought to recover his salary as pastor of the church. There had been two bodies claiming to be the lawful board of trustees, and the plaintiff was employed as pastor by one of the bodies, which was in office at the time under a decree of the chancellor that it was the rightful board. This decree was afterwards reversed. A recovery was objected to on the ground that the plaintiff was a member of the board of trustees and had full knowledge of the facts, and therefore could not be treated as an innocent person dealing with officers *de facto*. But it was held that, as at the time when the plaintiff was employed the trustees had every reason to suppose themselves rightfully in office, the plaintiff was entitled to recover.

the corporation, by reason of neglect of duty on the part of the board of trustees during the time he was so acting.¹

c. NO RIGHT TO HOLD OVER IN DEFAULT OF APPOINTMENT OF SUCCESSORS. — Where new directors are not appointed at the proper time, the title of *de facto* incumbents is not bettered by a statutory provision that in such case the incumbents shall hold over.²

3. Liabilities — *a.* PERSONAL LIABILITY. — Persons acting without right as directors or other corporate officers are subject to all the personal liability which attaches to the rightful incumbents of such offices, whether by the common, the equitable, or the statute law.³

b. LIABILITY OF SURETIES. — The liability of the sureties of an officer of a corporation is not affected by the fact that he is such officer *de facto* merely.⁴

4. Validity of Acts — *a.* GENERAL RULE. — As a general rule the acts of *de facto* officers of a corporation, within the powers of the offices they assume to hold, are valid, and binding upon the corporation.⁵ It follows that neither

1. Cannot Acquire Right as Creditor by Neglect of Duty as Officer. — *Easterly v. Barber*, 65 N. Y. 252. In this case a person who had acted as a trustee of a corporation, though not legally elected, attempted to repudiate his office, and, as a creditor of the corporation, enforce against the other trustees a statutory liability for the corporation's debts, resulting from their neglect to publish a report of its condition as required by law. The court held that he could not recover, for he had participated in such negligence.

2. No Right to Hold Over. — In *John Morley Bldg. Co. v. Barras*, (1891) 2 Ch. 386, it was held that article 62 of the English Companies Act of 1862, providing that, if directors are not appointed at the yearly ordinary meeting, the "vacating directors" shall continue in office until the next ordinary meeting, did not apply to *de facto* directors so as to confer upon them any better title than they had before, and that they did not derive any authority from that clause as against directors duly appointed.

3. Personal Liability. — 3 Thompson on Corp., § 3901.

"In this they are, like executors *de son tort*, subject to the burdens of the office, but without being entitled to any of its benefits, if such there be. The reason is that, in order to escape personal responsibility for their official acts, they will not be permitted to set up their own wrong in holding an office to which they were not elected or appointed, or to which they were ineligible." 3 Thompson on Corp., § 3901, note.

Liability as Stockholder. — A *de facto* president of a bank cannot deny that he was qualified to hold that office, where one who has dealt with the bank while he was acting as such officer seeks to hold him liable as a stockholder for the bank's indebtedness. *St. Mary's Bank v. St. John*, 25 Ala. 566.

Liability Resulting from Neglect of Duty. — The fact that persons who have acted as officers of a corporation were not legally entitled to exercise their offices, but were merely *de facto* officers, cannot relieve them from a statutory liability for the corporation's debts, resulting from their failure to make, file, and publish a report of its condition. *Steam-Engine Co. v. Hubbard*, 101 U. S. 188; *Thayer v. New England Lithographic Steam Printing*

Co., 108 Mass. 523; *Sanborn v. Lefferts*, 16 Abb. Pr. N. S. (N. Y. Ct. App.) 42; *Deming v. Puleston*, 35 N. Y. Super. Ct. 309, *affirmed* in 55 N. Y. 655; *Halstead v. Dodge*, 51 N. Y. Super. Ct. 169, *affirmed* in 103 N. Y. 636. See also *Newcomb v. Reed*, 12 Allen (Mass.) 362; *Deming v. Puleston*, 33 N. Y. Super. Ct. 231; *Reed v. Keese*, 37 N. Y. Super. Ct. 269, *affirmed* in 60 N. Y. 616.

Limitation. — But they are liable only for debts which have accrued while they were so acting. *Steam-Engine Co. v. Hubbard*, 101 U. S. 188.

4. Sureties on the bond of a bank cashier are not relieved from liability by the fact that when he was elected he was not a director, as required by the charter. *Lionberger v. Krieger*, 88 Mo. 160, 14 Am. & Eng. Corp. Cas. 87.

5. Acts Binding on Corporation — *England.* — *Smith v. Hull Glass Co.*, 11 C. B. 897, 73 E. C. L. 897; *In re County L. Assur. Co.*, L. R. 5 Ch. 288.

Canada. — *School Trustees v. Neil*, 28 Grant's Ch. (U. C.) 408.

United States. — *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64; *Atlas Nat. Bank v. F. B. Gardner Co.*, 8 Biss. (U. S.) 537; *Anglo-Californian Bank v. Mahoney Min. Co.*, 5 Sawy. (U. S.) 255, *affirmed* in 104 U. S. 192; *Augusta, etc., R. Co. v. Kittel*, 52 Fed. Rep. 63; *The Vigilancia*, 73 Fed. Rep. 452.

Alabama. — *Dillard v. Webb*, 55 Ala. 463; *Thorington v. Gould*, 59 Ala. 461.

California. — *San Jose Sav. Bank v. Sierra Lumber Co.*, 63 Cal. 179.

Georgia. — *Hall v. Carey*, 5 Ga. 239.

Maine. — *Penobscot, etc., R. Co. v. Dunn*, 39 Me. 587.

Maryland. — *Smith v. Erb*, 4 Gill (Md.) 437.

Michigan. — *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124.

New Hampshire. — *Despatch Line v. Bel-lamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Hughes v. Parker*, 20 N. H. 58; *Goodwin v. Union Screw Co.*, 34 N. H. 378.

New Jersey. — *Doremus v. Dutch Reformed Church*, 3 N. J. Eq. 332; *Savage v. Ball*, 17 N. J. Eq. 142; *Mechanics' Nat. Bank v. Burnet Mfg. Co.*, 32 N. J. Eq. 236; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548; *Kuser v. Wright*, 52 N. J. Eq. 825.

the corporation nor those claiming under it can avoid any liability resulting

New York. — *People v. Runkle*, 9 Johns. (N. Y.) 147; *Partridge v. Badger*, 25 Barb. (N. Y.) 146; *Matter of Mohawk, etc.*, R. Co., 19 Wend. (N. Y.) 135; *Matter of Chenango County Mut. Ins. Co.*, 19 Wend. (N. Y.) 635; *Wiley, etc.*, Co. v. Rochester, etc., Land Co., 4 Misc. Rep. (N. Y. Supreme Ct.) 570; *Hamilton Trust Co. v. Clemes*, 17 N. Y. App. Div. 152.

North Carolina. — *Ellis v. North Carolina Deaf, etc., Inst.*, 68 N. Car. 423.

Pennsylvania. — *Baird v. Washington Bank*, 11 S. & R. (Pa.) 411; *M'Gargell v. Hazleton Coal Co.*, 4 W. & S. (Pa.) 424; *Com. v. Smith*, 45 Pa. St. 59; *Zearfoss v. Farmers', etc.*, Institute, 154 Pa. St. 449; *Shellenberger v. Patterson*, 168 Pa. St. 30.

Texas. — *Hamm v. Drew*, 83 Tex. 77.

Virginia. — *Burr v. M'Donald*, 3 Gratt. (Va.) 206.

Illustrations. — A policy executed by *de facto* directors of an insurance company and countersigned by a *de facto* secretary or president is binding upon the company. *In re County L. Assur. Co.*, L. R. 5 Ch. 288; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124.

The act of *de facto* managers of a corporation in fixing a date for a corporate election, where none is fixed by the charter or by-laws, is valid, and managers chosen at such election are officers *de jure*. *Dillard v. Webb*, 55 Ala. 468; *Com. v. Smith*, 45 Pa. St. 59.

A note of a corporation is binding though the directors who authorized its execution were such officers *de facto* only. *Savage v. Ball*, 17 N. J. Eq. 142.

An election of directors of a corporation will not be set aside on the ground that the inspectors of election were not sworn in the form prescribed by statute, and were, therefore, *de facto* officers merely. *Matter of Mohawk, etc.*, R. Co., 19 Wend. (N. Y.) 135. See also *Matter of Chenango County Mut. Ins. Co.*, 19 Wend. (N. Y.) 635.

A corporation is bound by a contract of employment made in its name by persons who, though never legally appointed officers, yet acted and were treated as such, and were designated as such in a printed circular which purported to contain the names of the officers, and who were subsequently actually appointed such officers. *Wilson v. Kings County El. R. Co.*, 114 N. Y. 487.

In *Richards v. Farmers', etc., Institute*, 154 Pa. St. 453, an agricultural society was held liable for premiums offered by *de facto* directors for exhibits at an agricultural fair. And in *Zearfoss v. Farmers', etc., Institute*, 154 Pa. St. 455, the same society was held liable for lumber used in constructing buildings for the fair, which was conducted by the *de facto* directors.

The principle of holding the acts of *de facto* directors binding upon a corporation was applied in *Mahoney Min. Co. v. Anglo-Californian Bank*, 104 U. S. 192, affirming *Anglo-Californian Bank v. Mahoney Min. Co.*, 5 Sawy. (U. S.) 255, to uphold a note executed by the order of persons who acted as directors of a corporation, after judgment of ouster had been rendered against them, but before such judgment was filed.

A court may acquire jurisdiction of a corporation by service of summons on its *de facto* president. *Stillman v. Associated Lace Makers' Co.*, 14 Misc. Rep. (N. Y.) 503, citing 5 AM. and ENG. ENCYC. OF LAW (1st ed.) 94.

Principles on Which Acts Are Sustained. — In some cases the courts have considered that the principle of sustaining the acts of *de facto* officers was the same whether applied to officers of private corporations or to public officers. Thus in *Baird v. Washington Bank*, 11 S. & R. (Pa.) 411, the court, *per Gibson, J.*, said that the act of an officer *de facto* is good wherever it concerns a third person who had a previous right to it, or had paid a valuable consideration for it; and this whether it concerns the preservation of the corporation or not. "As to the position that the acts of none but a public officer *de facto* are valid, it is sufficient to say that all the authorities are at variance with it, most of the cases in which a question about the validity of the acts of an officer *de facto* has risen being those of corporations. * * * I take it, then, Mr. Baird was an officer *de facto*, and that his acts are valid, at least, as between the bank and a third party; because, as it is said in the books, the law favors the acts of one in reputed authority."

And in *Richards v. Farmers', etc., Institute*, 154 Pa. St. 454, the court said: "The learned counsel for defendant, in a very able and ingenious argument, contended that there is a distinction between *de facto* officers of public corporations and *de facto* officers of private corporations. While such a distinction appears to be recognized in some of the cases cited and relied on by him, we are not convinced that it is sound. The weight of authority, in this country especially, is decidedly against it. In the case of public corporations, the reasons for holding the acts of *de facto* officers binding on the corporations they represent are doubtless stronger than in the case of private corporations; but, to some extent at least, they are the same in both, differing only in degree."

But Mr. Morawetz, in his work on Corporations, § 640, expresses a different view, as follows: "It has sometimes been suggested that a *de facto* officer of a private corporation occupies a position similar to that of a *de facto* government officer, or other public official, in possession of his office under color of right. But the two cases rest on different principles. Directors and other managers of a private corporation are merely agents, and the corporation can be charged with their acts only in accordance with the established doctrines of the law of agency. It is clear that if a person assumes to act as agent for another without any authority, he does not thereby become the agent of such person, either in fact or in law. An agency can never be created by the act of the agent alone. It is clear, also, that an appointment made by another person, assuming to act as agent for the common principal, does not bind the latter unless the appointing agent had authority. Hence, if a person assumes to act as agent of a corporation under an informal, and therefore unauthorized, appointment by a superior agent, the corpora-

from the acts of such officers by denying their lawful title to office;¹ nor can any person avail himself of such officer's lack of legal title in order to avoid liability to the corporation.²

The Reason for the Rule is that persons acting publicly as officers of a corporation are presumed to be rightfully in office;³ and persons dealing with a cor-

poration will not be responsible for the acts of the person so charged."

1. Lack of Title Not Available as a Defense by Corporation. — *The Vigilancia*, 73 Fed. Rep. 452; *Sampson v. Bowdoinham Steam Mill Corp.*, 36 Me. 78; *Merchants' Nat. Bank v. Citizens' Gas Light Co.*, 159 Mass. 505, 38 Am. St. Rep. 453.

A judgment in an action prosecuted by trustees of a lodge of Free Masons, before a certificate of their election has been filed according to law, cannot be attacked by such trustees on the ground that they acted without authority in prosecuting the action. *Roberts v. Hill*, 137 Ind. 216.

Persons Claiming under the Corporation. — *Atlas Nat. Bank v. F. B. Gardner Co.*, 8 Biss. (U. S.) 537.

2. Liability to Corporation — Strangers — Colorado. — *Humphreys v. Mooney*, 5 Colo. 282.

Maine. — *Simpson v. Garland*, 76 Me. 203.

Massachusetts. — *Charitable Assoc. v. Baldwin*, 1 Met. (Mass.) 359.

New Jersey. — *Mechanics Nat. Bank v. Burnett Mfg. Co.*, 32 N. J. Eq. 236.

North Carolina. — *Atlantic, etc., R. Co. v. Johnston*, 70 N. Car. 348. See also *Wilmington, etc., R. Co. v. Thompson*, 7 Jones L. (52 N. Car.) 387.

Pennsylvania. — *Delaware, etc., Canal Co. v. Pennsylvania Coal Co.*, 21 Pa. St. 131.

Virginia. — *Burr v. M'Donald*, 3 Gratt. (Va.) 206.

A person who has been treasurer of a corporation, and has been removed, cannot defeat an action against him for money of the corporation in his hands by impeaching the title of the *de facto* trustees who removed him and who are conducting the action. *All Saints Church v. Lovett*, 1 Hall (N. Y.) 191.

Debtors of a bank cannot avoid their contracts on the ground that the directors were not chosen according to law, or that they did not, in appointing a cashier, comply in all respects with the law defining and regulating their duties. *Cooper v. Curtis*, 30 Me. 488.

Stockholders. — The legality of the election of *de facto* directors of a corporation cannot be questioned in a suit against a stockholder for assessments called by such directors, without showing judgment of ouster against them in a direct proceeding by the government for that purpose. *Ohio, etc., R. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128. See also *Thames Haven Dock, etc., Co. v. Hall*, 3 Eng. Ry. & C. Cas. 441; *Vernon Soc. v. Hills*, 6 Cow. (N. Y.) 23.

Conflicting Case. — In *Moses v. Tompkins*, 84 Ala. 613, the court, *per* Clopton, J., said: "We shall proceed to consider the right of a stockholder to set up the illegality of the election, though the persons may have become directors *de facto*, in resistance to an assessment and call on subscriptions to the capital stock. We are cognizant that some courts of the highest authority have held that the power

of persons to act in behalf of the corporation, who have become directors *de facto*, cannot be collaterally questioned by a stockholder, without a judgment of ouster against them in a direct proceeding for that purpose. An analysis of the cases would show, we think, that in a majority of them the election was not illegal and void, but irregular and voidable, because of ineligibility or other cause; or, if originally illegal, that the shareholder assailing its validity has affirmatively acquiesced in their acts as directors. The doctrine of the validity of the acts of officers *de facto* rests on public policy and justice. The official dealings of directors *de facto* with third persons are sustained as rightful and valid, on the ground of continuous acquiescence by the corporation, and suffering them to hold themselves out as having such authority; thereby inducing others to deal with them in such capacity. The theory of the doctrine of officers *de facto*, and the principles sustaining the validity of their official acts, are that, though wrongfully in office, yet exercising power and functions appertaining to such office, justice and necessity require, for the protection and preservation of the rights and interests of third persons, that their acts, within the scope of official authority and duty, shall be sustained. The stockholders are not third persons in their relation to the corporation. If persons undertake to exercise the functions and discharge the duties of directors in opposition to the will of a majority of the stockholders, they are mere usurpers, and their acts cannot be deemed valid when invoked for their own protection. Otherwise, the wrongful assumption of official authority and its exercise would operate to constitute the usurpers, as between themselves and the corporation and shareholders, a board invested with the power to transact its business and administer its affairs. In such case the necessity and justice of the rule as to the validity of the acts of directors *de facto* do not exist, and the rule itself is inapplicable. The acts of officers *de facto* are only valid when third persons have rights and interests to be protected. By the terms of their contract an assessment or call, made by directors duly appointed, is essential to create a liability on the stockholders. The validity of the acts of directors *de facto* and their authority may be called in question by a stockholder whenever such acts are destructive or affect his property rights, or impose a liability on him as such, and the rights of third persons do not intervene. *Thorington v. Gould*, 59 Ala. 461; *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.) 440."

3. Presumption of Right to Office — Canada. — *Dimock v. New Brunswick Marine Assur. Co.*, 6 New Bruns. 398.

United States. — *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64; *Rockville, etc., Turnpike Road Co. v. Van Ness*, 2 Cranch (C. C.) 449.

poration are not required to examine into the title of the officers who conduct its business,¹ even though they know that there have been irregularities in the election of such officers.²

b. LIMITATION. — But the rule that a corporation is bound by the acts of its *de facto* officers does not apply to protect persons who know that the election of the officers with whom they deal was positively illegal.³

c. EFFECT OF ILLEGAL ACTS. — The act of a *de facto* officer binds the corporation even though its effect be to subject the corporation to a penalty.⁴

II. DE FACTO PUBLIC OFFICERS — 1. Who Are —*a. DEFINITIONS.* — (1) *Lord Ellenborough's Definition.* — Lord Ellenborough defined an officer *de facto* as follows: "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law."⁵

(2) *Chief Justice Butler's Definition.* — A fuller definition has been given by Chief Justice Butler,⁶ as follows: "An officer *de facto* is one whose acts,

Georgia. — Hall *v.* Carey, 5 Ga. 239.

Maryland. — Susquehanna Bridge, etc., Co. *v.* General Ins. Co., 3 Md. 305, 56 Am. Dec. 740.

Michigan. — Walker *v.* Detroit Transit R. Co., 47 Mich. 338.

Pennsylvania. — M'Gargell *v.* Hazleton Coal Co., 4 W. & S. (Pa.) 424.

Where by the deed of settlement of a joint-stock company the directors are authorized to appoint a manager, a person who acts as manager with the knowledge of the company may be presumed to be properly appointed, and the company is bound by his acts in the transaction of its business, Smith *v.* Hull Glass Co., 11 C. B. 897, 73 E. C. L. 897; although no written proof is or can be adduced of his appointment, School Trustees *v.* Neil, 28 Grant's Ch. (U. C.) 408.

1. Strangers Not Bound to Examine Title. — Scanlan *v.* Snow, 2 App. Cas. (D. C.) 137; St. Luke's Church *v.* Mathews, 4 Desaus. (S. Car.) 578, 6 Am. Dec. 619.

Bankers who have funds of a company in their hands may lawfully honor the checks of the directors of the company signed according to a form sent by them to the bank, without being bound first to inquire whether the persons signing as directors have been duly appointed to office in conformity with the provisions of the memorandum and articles of association. Mahony *v.* East Holyford Min. Co., L. R. 7 H. L. 869, 33 L. T. 383.

2. Knowledge of Irregularity of Election. — One is entitled to deal with *de facto* officers of a corporation when there are no other persons claiming to be the legal officers, even though he should know that there were grave irregularities attending their election. Scanlan *v.* Snow, 2 App. Cas. (D. C.) 137.

3. Persons Knowing Illegality of Election Not Protected. — St. Luke's Church *v.* Mathews, 4 Desaus. (S. Car.) 578, 6 Am. Dec. 619; State *v.* Curtis, 9 Nev. 325.

In People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 385, the court, *per* Smith, J., said: "There can be no * * * officer *de facto* [of a corporation], as against the people, in an action at the suit of the people to try the title to the office. The doctrine in respect to officers *de facto* only applies to and in favor of third persons, and to protect innocent parties who have trusted to the apparent title of an officer."

4. Illegal Acts. — In M'Gargell *v.* Hazleton Coal Co., 4 W. & S. (Pa.) 424, a corporation was held liable to a penalty prescribed by law for illegally issuing notes, where such notes were issued in its name by its *de facto* president.

5. Lord Ellenborough's Definition was given in Rex *v.* Bedford Level, 6 East 356. Though the definition is generally accredited to Lord Ellenborough, it is a mere generalization of Lord Holt's definition in Parker *v.* Kett, 1 Ld. Raym. 658, which was as follows: "A steward *de facto* is no other than he who has the reputation of being such steward, and yet is not a good steward in point of law."

The Definition Given in the Text Has Been Cited with Approval by many American cases, notably by:

Alabama. — Thorington *v.* Gould, 59 Ala. 461.

Florida. — State *v.* Gleason, 12 Fla. 190.

Illinois. — Mapes *v.* People, 69 Ill. 523; Barlow *v.* Standford, 82 Ill. 298.

Maine. — Brown *v.* Lunt, 37 Me. 423.

Massachusetts. — Petersilea *v.* Stone, 119 Mass. 465, 20 Am. Rep. 335; Atty.-Gen. *v.* Crocker, 138 Mass. 214.

Missouri. — State *v.* Sutton, 3 Mo. App. 388; Simpson *v.* McGonegal, 52 Mo. App. 540.

Nevada. — State *v.* Curtis, 9 Nev. 325.

New Jersey. — Mechanics Nat. Bank *v.* Burnet Mfg. Co., 32 N. J. Eq. 236.

Pennsylvania. — M'Gargell *v.* Hazleton Coal Co., 4 W. & S. (Pa.) 424.

6. Chief Justice Butler's Definition was given in State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409, after an exhaustive examination of the cases on the subject, and is very generally recognized by the courts as being correct and full. In that case M., a justice of the peace, had been requested by the clerk of the city court to act as judge of the police court during the absence of the regular judge. This request was made in accordance with a statute providing that in case of the sickness or absence of a judge of a city court, a justice of the peace should be called in by the clerk to hold the court. M. accordingly held the court, and a person convicted before him appealed on the ground that M. was not lawfully the judge of the court. It was urged that the statute above referred to was unconstitutional. The Supreme Court held that the circumstances under which M. acted constituted him

though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons,¹ where the duties of the office were exercised: first, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be;² second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like;³ third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public;⁴ fourth, under color of an election or

an officer *de facto*, and declined to pass upon the constitutionality of the act, considering it unnecessary for the purposes of the case. The learned judge reviews many early English cases.

1. See *Zearfoss v. Farmers', etc., Institute*, 154 Pa. St. 449; *Simpson v. McGonegal*, 52 Mo. App. 540.

As to the validity of acts, see *infra*, this section, *Validity of Acts*.

2. **Reputation or Acquiescence.** — *Rouleau v. St. Lambert*, 10 Quebec L. R. Super. Ct. 85, citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 96, 101. Color of title by election, appointment, or commission is not essential, as between other parties, to constitute officers *de facto*. *Pierce v. Edington*, 38 Ark. 150.

In *Wilcox v. Smith*, 5 Wend. (N. Y.) 231, the court, *per Sutherland, J.*, said: "There must be some color of an election or appointment, or an exercise of the office and an acquiescence on the part of the public for a length of time which would afford a strong presumption of at least a colorable election or appointment." This language was quoted with approval in *Mallett v. Uncle Sam Gold, etc., Min. Co.*, 1 Nev. 188, 90 Am. Dec. 484, and *Cary v. State*, 76 Ala. 78. In the latter case the court, *per Somerville, J.*, said: "The better and more modern view * * * is that no color of election or appointment is needed to constitute one an officer *de facto*."

A *de facto* officer is one who is without lawful right to exercise the functions of the office which he is exercising. He must show that he is acting under such circumstances of reputation as are calculated to induce people to submit to or invoke his action, supposing him to be the officer he assumes to be. *State v. Murphy*, 32 Fla. 138, 44 Am. & Eng. Corp. Cas. 166. See also *infra*, this section, *Persons Acting Without Appointment or Election*.

3. **Failure to Qualify or Defect in Qualification.** — In *Ex p. Strahl*, 16 Iowa 369, the court said: "An officer *de facto* is one who comes in by the forms of an election or an appointment, and who thus acts under claim and color of right, but who, in consequence of some informality, omission, or want of qualification, could not hold his office if his right was tried in a direct proceeding by an information in the nature of a quo warranto."

In *City of Central v. Sears*, 2 Colo. 588, a person who had been elected city treasurer, had filed his bond, obtained the approval of

one of two sets of aldermen, each of which claimed to be the city council, and who acted as treasurer, was held to be invested *de facto* with the powers and duties of the office.

In *McCraw v. Williams*, 33 Gratt. (Va.) 510, the court, *per Christian, J.*, said: "An officer *de facto* is one who comes in by the power of an election or appointment, but in consequence of some informality, or want of qualification, or by reason of the expiration of his term of service (or it may be said also by entering upon the duties of his office before his term of service fixed by law begins), cannot maintain his position when called upon by the government to show by what title he holds his office. He is one who exercises the duties of an office under claim and color of title, being distinguished on the one hand from a mere usurper, and on the other from an officer *de jure*. A mere usurper is one who intrudes himself into an office which is vacant and ousts the incumbent without any color of title whatever, and his acts are void in every respect."

See also *infra*, this section, *Persons Not Properly Qualified*.

4. **Illegal or Irregular Election or Appointment.**

— A *de facto* officer is one who is in possession of an office and discharging its duties under color of authority, by which is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer. *State v. Oates*, 86 Wis. 634, 39 Am. St. Rep. 912.

An officer *de facto* is one who comes in by the forms of an election, but, in consequence of some informality or want of qualification, is incapable of holding the office. *McGregor v. Balch*, 14 Vt. 428, 39 Am. Dec. 231.

The official canvass of an election held under a law authorizing the election of a "justice of the peace" for a certain village showed that a certain person received a majority of the votes for "justice." The ballots attached to the canvass bore the name of such person "for police justice" only, but it was not certified that the ballots attached were all the different kinds of ballots cast. The election of the person who had received such majority was certified to by the clerk, he took the oath of office and gave the requisite bond, which was approved by the town supervisors. He also acted as justice of the peace for some time and was reputed to be such. It was held that he was a *de facto* justice of the peace. *People v. Terry*, 108 N. Y. 1.

appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." ¹

(3) *Other Definitions.* — Although the two preceding definitions are generally accepted as the correct ones, there have been numerous other attempts to define a *de facto* officer. These are given in the note. ²

b. PERSONS ACTING WITHOUT APPOINTMENT OR ELECTION — (1) *There Must Be Appearance of Rightful Authority.* — To constitute a person an officer *de facto* there must be some facts, circumstances, or conditions which would reasonably lead persons who have relations or business with the office to recognize and treat him as the lawful incumbent, and submit to or invoke his

Unauthorized Appointment. — In *Douglass v. Wickwire*, 19 Conn. 489, the court, *per* Hinman, J., said on this subject: "It is enough if the officer acts under color of an election or appointment by the only body which has the power to make it." It was considered in *Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89, and *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, that this language was intended to apply only to the particular case then before the court. In the latter case it was said that if it was intended for a general definition of a *de facto* officer it was inaccurate. The principle laid down in *Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89, is that to constitute an officer *de facto* it is not necessary that he have color of appointment from some power having actual authority to make the appointment, but it is sufficient that he has had appointment from some power having color of authority to make it.

In *Erwin v. Jersey City*, 60 N. J. L. 141, Magie, C. J., after citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 96, and referring to the cases therein collected, gave the following definition of an officer *de facto*: "When an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon and performs the duties of such office, his acts will be held valid in respect to the public whom he represents, and to third persons with whom he deals officially, notwithstanding there was a want of power to appoint him in the person or body which professed to do so." This was a case of a person who was appointed corporation attorney by the board of finance. It was contended that the act under which the appointment was made was unconstitutional, but the appointee was held to be an officer *de facto*. See also *infra*, this section, *Persons Not Eligible; Lack of Power in Electing or Appointing Body; Persons Irregularly Elected or Appointed*.

1. See *infra*, this section, *Persons Elected or Appointed under Unconstitutional Law*.

2. **Other Definitions.** — An officer *de facto* is not a mere usurper, nor yet within the sanction of the law, but one who, *colore officii*, claims and assumes to exercise official authority, is reputed to have it, and in whose acts the community acquiesces. *Hussey v. Smith*, 99 U. S. 20.

In *Williamson v. Woolf*, 37 Ala. 298, the court, *per* R. W. Walker, J., said: "It is not always easy to determine what is necessary to constitute an officer *de facto*. The general definition is that he is one who exercises the

duties of an office under color of an appointment or election to that office."

One who is exercising a public office with all the legal *indicia* of title is a *de facto* officer. *Jeffords v. Hine*, (Arizona 1886) 11 Pac. Rep. 351.

An officer *de facto* is one who comes into the particular office by color of title. *Twombly v. Kimbrough*, 24 Ark. 474.

In *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574, the court, *per* Storrs, J., said: "An officer *de facto* is one who exercises the duties of an office under color of an appointment or election to that office. He differs on the one hand from a mere usurper of an office, who undertakes to act as an officer without any color of right, and on the other from an officer *de jure*, who is in all respects legally appointed and qualified to exercise the office. These distinctions are very obvious, and have always been recognized." The definition given in this case was *quoted with approval* in *Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89, but was *criticised* in *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, as being not sufficiently comprehensive.

A *de facto* officer is one who exercises the duties of an office, claiming the right to do so under some commission or appointment. *Smith v. Cansler*, 83 Ky. 367.

An officer *de facto* is one who actually performs the duties of an office, with apparent right, and under claim and color of an appointment or election. *Brown v. Lunt*, 37 Me. 423.

An officer *de facto* is one who executes the duties of an office under some color of right, some pretense of title, either by election or appointment. *Hooper v. Goodwin*, 48 Me. 79.

An officer *de facto* is one who assumes the functions of an officer under color of title to the office. *Atty.-Gen. v. Crocker*, 138 Mass. 218.

A person actually obtaining office with the legal *indicia* of title is a legal officer until ousted, so far as to render his official acts as valid as if his title were not disputed. *Wayne County v. Benoit*, 20 Mich. 176.

In *People v. White*, 24 Wend. (N. Y.) 520, Chancellor Walworth said: "An officer *de facto* is one who comes into a legal and constitutional office by color of a legal appointment or election to that office." This language was *cited with approval* in *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, and *Mallett v. Uncle Sam Gold, etc.*, Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

One who comes into office under color of an appointment by competent authority, and dis-

official action without inquiry as to his title.¹

(2) *Reputation of Being Officer.* — To constitute a person an officer *de facto* it is necessary that he should have acquired the reputation of being the officer he assumes to be.²

How Such Reputation May Be Acquired. — A person may become an officer *de facto* by continually acting as such officer,³ but he cannot be held to be a *de facto* officer where the only official act shown to have been performed by him is that in regard to which the controversy arises.⁴ Nor does a person acquire such reputation for being an officer as will make him an officer *de facto* where he has done only a few unimportant official acts, has been in office but a short time, and his claim to the office has never been acquiesced in.⁵

A Deputy Cannot Become the Principal Officer De Facto by assuming to act as such after the death of his principal, for he cannot have the reputation of being more than deputy.⁶

As to What Offices Such Reputation Can Be Acquired. — In order for a person to acquire,

charges the duties thereof, is a *de facto* officer. *Terhune v. New York*, 88 N. Y. 247.

1. There Must Be Appearance of Rightful Authority. — *State v. Pinkerman*, 63 Conn. 176, 44 Am. & Eng. Corp. Cas. 233; *Williams v. Boynton*, 71 Hun (N. Y.) 309, *affirmed* in 147 N. Y. 426; *Van Amringe v. Taylor*, 108 N. Car. 196; *Cox v. Houston*, etc., R. Co., 68 Tex. 226.

2. Must Have Reputation of Being Officer. — *Lacasse v. Labonte*, 10 Quebec L. R. Super. Ct. 104.

3. One May Become an Officer De Facto by Acting as Such. — *Hutchings v. Van Bokkelen*, 34 Me. 126; *People v. New York*, etc., Bridge, (Supreme Ct.) 7 N. Y. Supp. 806; *State v. Elliott*, 13 Utah 471.

A person will be considered a *de facto* deputy clerk of court, and his signature of the clerk's name by himself as deputy is valid, where the clerk was required by law to appoint a deputy, and the evidence shows that the person who made the signature acted as deputy, and was recognized as such, though there is no record of his appointment, and he does not remember, seventeen years after the signature was made, being appointed or acting as deputy. *Burke v. Cutler*, 78 Iowa 209.

Acting as Officer Evidence of Right to Office. — The fact that a person is notoriously acting as a public officer is *prima facie* evidence that he is entitled to the office. *Bryan v. Walton*, 14 Ga. 185; *Carter v. Sympton*, 8 B. Mon. (Ky.) 155; *Tomlinson v. Darnall*, 2 Head (Tenn.) 538; *Callison v. Hedrick*, 15 Gratt. (Va.) 244.

4. There Must Be Acts Other than the One in Dispute. — *State v. Wilson*, 7 N. H. 543; *Goulding v. Clark*, 34 N. H. 148.

Although it is enough, in cases where the authority of selectmen comes incidentally in question, and in which they are not parties to the action, to show that they were acting officers, without producing the record of their election, yet to show them acting selectmen it is not enough to show merely that they acted in that capacity in the particular instance in which their authority is questioned. *Hall v. Manchester*, 39 N. H. 295.

5. When Reputation of Being an Officer Is Not Acquired. — In *Erwin v. Jersey City*, 60 N. J. L. 141, a corporation attorney was appointed by the board of finance, and the

retiring corporation attorney turned over the business of the office to the appointee. Afterwards the mayor refused to approve the finance committee's appointment and requested the former incumbent to continue to act. He expressed a reluctance to "take up" the work again, but afterwards did for the city some work, consisting of the approval of a few contracts. The Court of Errors and Appeals held that these facts did not constitute him an officer *de facto*, thereby *overruling* the decision of the Supreme Court in *Jersey City v. Erwin*, 59 N. J. L. 282.

In *People v. Peabody*, 6 Abb. Pr. (N. Y. Supreme Ct.) 228, also reported as *Conover v. Devlin*, 15 How. Pr. (N. Y. Supreme Ct.) 470, it was held that a person did not acquire such reputation of being an officer as would make him such officer *de facto* where, under a claim of having been legally appointed, he was for two days in the place where the official business was transacted, and performed one official act, claiming to be such officer, but his claim was not acquiesced in, and he was forcibly put out at the end of two days. But in *Conover's Case*, 5 Abb. Pr. (N. Y. Supreme Ct.) 73, it was held that such person, having assumed possession of the office so far as was in his power, was an officer *de facto*.

In *Montgomery v. O'Dell*, 67 Hun (N. Y.) 160, it was held that a person who claimed to have been elected a member of a board of excise commissioners, but who had not in fact been so elected, could not become an officer *de facto* by attending meetings of the board, where the former incumbent also attended and acted as a member, as in such case the defect in the claimant's title was notorious and his title to the office was so publicly questioned that persons dealing with him must know the facts.

In *Murphy v. Moies*, 18 R. I. 100, a town council which had been declared elected and had qualified and organized, but whose election was invalid and whose title was challenged by quo warranto proceedings begun by the state the day after the members were sworn in, was held to be not such a *de facto* council that a claim presented to it by one who was aware of the facts would bind the town.

6. Deputy Cannot Acquire Reputation of Being Principal. — *Rex v. Bedford Level*, 6 East 356.

by merely acting as an officer, such reputation as will constitute him an officer *de facto*, the office claimed by him must be of such a nature that it cannot be exercised without the fact of such exercise being publicly known.¹

(3) *Acquiescence — In General.* — A person who assumes to act as an officer without any original color of title may become a *de facto* officer when there has been a continued exercise of the office by him, and a continued acquiescence in his acting as such officer by the public authorities and the public generally, for such length of time as to lead people to suppose that he is rightfully in office.²

Acquiescence of De Jure Officer or Former Incumbent. — A failure of a *de jure* officer to dispute the title of another person who assumes to execute his office strengthens the position of the latter as a *de facto* officer;³ and the fact that the former incumbent of an office has surrendered possession thereof to a claimant who is not the officer *de jure* has the same effect.⁴

1. *As to What Offices Such Reputation Can Be Acquired.* — In *Lambert v. People*, 76 N. Y. 220, 32 Am. Rep. 293, Earl, J., said: "The *de facto* character of officers is never established by simple proof that they have acted as such. In addition to such proof, it must be shown that they had color of office, or some semblance of competent authority. This is generally shown by proof of some election or appointment, formal, but irregular or defective, under which the officer has assumed to act. I am not, however, prepared to deny that an officer may have sufficient color, in some cases, without any appointment or election whatever; as when he takes possession of the public building or room where the duties are to be discharged, and has possession of the public property pertaining to the office, and is thus clothed with all the *indicia* of official position, and has for a considerable time, with the acquiescence of the public, and without dispute, openly and notoriously exercised the duties of the office. Such a case could rarely, if ever, occur in this country; but if it should occur, it might give color of office. To illustrate more clearly my meaning: if one should take possession of a county clerk's office, claiming to be clerk, and should there act as clerk for a considerable time, by the general acquiescence of the public, there being no one else to exercise the duties of the office, he might have sufficient color of office to make him clerk *de facto*. But a notary public having no public office, clothed with none of the symbols or outward tokens of official position, being one of thousands who may, anywhere in the same county, exercise the duties of the same office, cannot get color of office by simply acting from time to time as he might have opportunity. He can get color of office only by an appointment emanating from the appointing power, or from some power having, at least, a colorable right to make the appointment. If the governor should commission him, without confirmation by the senate, or while he was a nonresident, and he should then act, he would be in office under color of appointment, and thus become a notary *de facto*."

2. *Acquiescence — United States.* — *Nofire v. U. S.*, 164 U. S. 657; *U. S. v. Alexander*, 46 Fed. Rep. 728.

Arkansas. — *Pierce v. Edington*, 38 Ark. 150; *Chiles v. State*, 45 Ark. 143.

Illinois. — *People v. Ammons*, 10 Ill. 105.

Michigan. — *Zabel v. Harshman*, 68 Mich. 273; *Auditor Gen. v. Menominee County*, 89 Mich. 552.

Mississippi. — *Kimball v. Alcorn*, 45 Miss. 151.

New York. — *Wilcox v. Smith*, 5 Wend. (N. Y.) 231; *People v. Peabody*, 6 Abb. Pr. (N. Y. Supreme Ct.) 228; *Conover v. Devlin*, 15 How. Pr. (N. Y. Supreme Ct.) 470; *Snyder v. Schram*, 59 How. Pr. (Montgomery County Ct.) 404; *Williams v. Boynton*, 147 N. Y. 426.

North Carolina. — *Burton v. Patton*, 2 Jones L. (47 N. Car.) 124, 62 Am. Dec. 194; *State v. Speaks*, 95 N. Car. 689; *Van Amringe v. Taylor*, 108 N. Car. 196.

Oregon. — *Hamlin v. Kassafer*, 15 Oregon 456, 3 Am. St. Rep. 176.

Virginia. — *Callison v. Hedrick*, 15 Gratt. (Va.) 244.

One who has notoriously acted as constable for about six months is such officer *de facto* whether regularly appointed or not. *Burke v. Elliott*, 4 Ired. L. (26 N. Car.) 355.

A person who has acted as a judge *pro tem.* without objection, and has been recognized as such, is an officer *de facto*, though he was not duly elected and qualified, and the circumstances authorizing the election of such a judge did not exist. *Higby v. Ayres*, 14 Kan. 331.

A person is an officer *de facto* when, claiming a legal appointment, he assumes the office of town clerk at a town meeting, is duly sworn as such, makes a record of his appointment and qualification, presides at the choice of the moderator, and performs the duties of clerk until adjournment of the meeting, the meeting acquiescing in his assumption and treating him as its lawful officer. *Atty.-Gen. v. Crocker*, 138 Mass. 214.

In *Dugan v. Farrier*, 47 N. J. L. 383, the court said that where the power of electing a president of a board of chosen freeholders belonged exclusively to the board, and it was for the board also to determine in what mode the power should be exercised, its acquiescence in a person's presidency and proceeding to business with him in the chair gave him sufficient appearance of title to render him president *de facto*.

3. *Acquiescence of De Jure Officer.* — *People v. McDowell*, 70 Hun (N. Y.) 1.

4. *Acquiescence of Former Incumbents.* — The members of a board of directors of a state institution who are in office under color of an

Acquiescence in Acts Not a Ratification of Title. — Silence of the government in regard to the occupation of a public office by a person not legally entitled thereto is a ratification of the acts only of the *de facto* officer, not of his title, and can create no estoppel to dispute his title at any subsequent time.¹

(4) *Possession of Office Necessary.* — To constitute a person an officer *de facto*, it is necessary that he should be in actual possession of the office and in the exercise of its functions and the discharge of its duties.²

c. PERSONS NOT PROPERLY QUALIFIED — (1) *Irregularities in Form of Qualification.* — A person who has been lawfully elected to an office, and has taken possession thereof, is an officer *de facto*, though he has never gone through the regular form of installation,³ or though there were irregularities in his qualification.⁴

(2) *Irregularities Concerning Oath of Office.* — A person may become a *de facto* officer though his oath of office was taken before a person who was not authorized to administer such oath,⁵ or was not taken within the time allowed by law therefor,⁶ or was not administered in the proper form,⁷ or though the oath taken was not the proper one,⁸ or though the oath was not filed within the time allowed by law in which to file it,⁹ or was never filed,¹⁰ or though he has not taken all the oaths required by the Constitution,¹¹ or has neglected to take any oath of office whatever.¹²

act of the legislature, to whom the members of the former board have surrendered their positions, and who, under the law, as they suppose, are exercising and discharging the duties devolving upon them, are officers *de facto*, even though they be not officers *de jure*. *Ellis v. North Carolina Deaf, etc.*, Inst., 68 N. Car. 423.

1. **Acquiescence in Acts Not a Ratification of Title.** — *Kimball v. Alcorn*, 45 Miss. 151.

2. **Possession of Office Necessary.** — *Neeland v. State*, 39 Kan. 160; *Hamlin v. Kassafer*, 15 Oregon 456, 3 Am. St. Rep. 176.

A person cannot be a street commissioner *de facto*, though he has been appointed and claims to have acted as such officer, where his predecessor, who came into office lawfully, claims to hold over, and refuses to deliver up the property, books, and papers of the office, and continues to act as commissioner. *Hallgren v. Campbell*, 82 Mich. 255, 21 Am. St. Rep. 557.

In *Ex p. Norris*, 8 S. Car. 408, the court, *per Willard, J.*, said: "To constitute an officer *de facto* he must have a presumptive or an apparent right to exercise the office, resulting from either full and peaceable possession of the powers of such office or reasonable color of title with actual use of the office."

3. **Governor in Office Though Never Installed.** — In *Ex p. Norris*, 8 S. Car. 408, a person who had been lawfully elected governor of South Carolina, and was in possession of the office, was held to be governor *de facto* though he had never gone through the form of installation required by law.

4. **Irregular Qualification.** — In *Ramsey County v. Brisbin*, 17 Minn. 451, it was held that a person who has been duly elected sheriff, and has taken the oath of office, executed the proper bond, and entered upon the discharge of the duties of the office, is sheriff *de facto*, though he may not have qualified at a regular session of the county board as required by law, and the requirement that the oath of office should be subscribed by him, and certified on the back of his certificate of election, and filed

and recorded in the office of the register of deeds, may not have been complied with, and though no approval may have been indorsed on the bond, and such bond may not have been filed in the register's office.

5. **Oath Administered by Unauthorized Person.** — *Wright v. U. S.*, 158 U. S. 232; *State v. Powell*, (Iowa 1897) 70 N. W. Rep. 592; *Dows v. Irvington*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 162.

6. **Oath Not Taken Within Time Allowed Therefor.** — *People v. Covert*, 1 Hill (N. Y.) 674.

7. **Oath Not in Proper Form.** — *Moore v. Graves*, 3 N. H. 408.

8. **Improper Oath.** — One who was elected a clerk of court in Tennessee during the civil war, and held and exercised the functions of his office, was held to be an officer *de facto* although he took the oath to support the Confederate States, instead of the Constitution of the United States and the state of Tennessee. *Ward v. State*, 2 Coldw. (Tenn.) 605.

9. **Oath Not Filed Within Time Allowed Therefor.** — *Tower v. Welker*, 93 Mich. 332; *People v. Payment*, (Mich. 1896) 67 N. W. Rep. 689; *Sprague v. Brown*, 40 Wis. 612.

10. **Oath Never Filed.** — *State v. Miller*, 111 Mo. 542.

Certificate of Oath Not Filed. — Persons may be *de facto* commissioners of highways though they have not filed a certificate of their oath of office as required by law. *People v. Collins*, 7 Johns. (N. Y.) 549.

11. **Failure to Take All Required Oaths.** — Public officers who have been duly elected, and have taken the oath of office and entered upon the discharge of the duties of their offices, are officers *de facto* though they have not taken the oath of allegiance required by the state constitution. *Koontz v. Hancock*, 64 Md. 134.

12. **Failure to Take Any Oath Whatever** — *Alabama*. — *Pentecost v. State*, 107 Ala. 81; *Walker v. State*, 107 Ala. 5.

Arkansas. — *Murphy v. Shepard*, 52 Ark. 356.

Connecticut. — *Trinity College v. Hartford*, 32 Conn. 452.

(3) *Irregularities Concerning Official Bond.* — The doctrine as to the giving of bonds is analogous to that with respect to taking oaths. Thus one may be a *de facto* officer although his bond is defective,¹ or was not given within the time allowed by law in which to give such bond,² or was not filed within the time allowed for filing.³ An officer's failure to renew his bond at any time during his term of office, though required to do so by law, or upon his re-election, does not prevent his being an officer *de facto*.⁴ And one who is otherwise entitled to an office may be such officer *de facto* though he has failed altogether to give the bond required by law.⁵

(4) *Failure to File Appointment, Commission, or Acceptance of Office.* — One who has been duly elected or appointed to an office may be an officer *de facto* though he has not filed or recorded his appointment or commission, or an acceptance of the office, as required by law.⁶

Georgia. — Gunn v. Tackett, 67 Ga. 725.

Illinois. — Guyer v. Andrews, 11 Ill. 494;

Sharp v. Thompson, 100 Ill. 447, 39 Am. Rep. 61.

Indiana. — Mowbray v. State, 88 Ind. 324.

Kentucky. — Com. v. Arnold, 3 Litt. (Ky.)

309.

Louisiana. — Citizens' Bank v. Bry, 3 La. Ann. 630.

Maine. — Whiting v. Ellsworth, 85 Me. 301.

Massachusetts. — Bucknam v. Ruggles, 15 Mass. 180, 8 Am. Dec. 98.

Mississippi. — Rhodes v. McDonald, 24 Miss. 418; Alabama, etc., R. Co. v. Bolding, 69

Miss. 255, 30 Am. St. Rep. 541.

Missouri. — State v. Dierberger, 90 Mo. 369.

New Hampshire. — Cavis v. Robertson, 9 N. H. 524; Lisbon v. Bow, 10 N. H. 167; Merrill

v. Palmer, 13 N. H. 184.

New York. — Weeks v. Ellis, 2 Barb. (N. Y.) 320; Greenleaf v. Low, 4 Den. (N. Y.) 170;

Schoharie County v. Pindar, 3 Lans. (N. Y.) 8.

Pennsylvania. — Parker v. Luffborough, 10 S. & R. (Pa.) 249; Keyser v. M'Kissan, 2

Rawle (Pa.) 139.

Tennessee. — Farmers', etc., Bank v. Chester,

6 Humph. (Tenn.) 458, 44 Am. Dec. 318; Kelley v. Story, 6 Heisk. (Tenn.) 202; Douglas v. Neil, 7 Heisk. (Tenn.) 437.

Vermont. — Lyndon v. Miller, 36 Vt. 329.

Where it is provided by law that a township supervisor must take the oath of office before entering upon the duties of his office, and that if he fails to give a bond within one month after his election the office shall be declared vacant, a supervisor who enters into office without taking the oath or giving bond is an officer *de facto* until the expiration of the time allowed him in which to give such bond. Gregg Tp. v. Jamison, 55 Pa. St. 468.

1. *Defective Bond.* — Elliott v. Willis, 1 Allen (Mass.) 461; Sprague v. Brown, 40 Wis. 612.

A person who has been commissioned as a pilot is such *de facto* though his bond recites that each of his two sureties is bound for half the penal sum thereof, whereas the law requires that each surety shall be bound for the whole penal sum. Dolliver v. Parks, 136 Mass. 499.

2. *Bond Not Given Within Time Allowed Therefor.* — Georgia. — Crawford v. Howard, 9 Ga.

314.

Mississippi. — State v. Cooper, 53 Miss. 615.

Nevada. — State v. Rhoades, 6 Nev. 352.

Vermont. — Weston v. Sprague, 54 Vt. 395.

Virginia. — Montieth v. Com., 15 Gratt. (Va.)

172.

One who is elected county treasurer, but fails to give bonds within the time required by statute, is an officer *de facto*, where he subsequently gives bonds and executes the duties of his office, though the statute declares that the failure to give bonds within the required time shall vacate the office and makes it the duty of the county commissioner to make a new appointment in such case. Kelly v. State, 25 Ohio St. 567.

3. *Bond Not Filed Within Time Allowed Therefor.* — People v. Payment, (Mich. 1896) 67 N. W. Rep. 689; Sprague v. Brown, 40 Wis. 612.

4. *Failure to Renew Bond.* — Under a statute providing that a sheriff must renew his bond annually, and if he fails to do so his office shall immediately become vacant and his official acts shall be void, a sheriff who continues to act as such after failing to renew his bond is a *de facto* officer until judgment of forfeiture is pronounced in due form; and a service and return made by him in that time are valid. Clark v. Ennis, 45 N. J. L. 60.

An officer who is re-elected, but fails to renew his bond, is a *de facto* officer after the expiration of his first term. Wapello County v. Bigham, 10 Iowa 39; People v. Coierick, 67 Mich. 362.

5. *Failure to Give Bond.* — Connecticut. — State v. Brennan's Liquors, 25 Conn. 278; Soudant v. Wadhams, 46 Conn. 218.

Georgia. — Gunn v. Tackett, 67 Ga. 725.

Illinois. — Sharp v. Thompson, 100 Ill. 447, 39 Am. Rep. 61.

Iowa. — Wheeler, etc., Mfg. Co. v. Sterrett, 94 Iowa 158.

Maine. — Bliss v. Day, 68 Me. 201.

Massachusetts. — Nason v. Dillingham, 15 Mass. 170.

Mississippi. — Rhodes v. McDonald, 24 Miss. 418.

Missouri. — Powers v. Braley, 41 Mo. App. 556.

New York. — Greenleaf v. Low, 4 Den. (N. Y.) 170.

South Carolina. — McBee v. Hoke, 2 Spears. L. (S. Car.) 138.

Tennessee. — Kelley v. Story, 6 Heisk. (Tenn.) 202; Douglas v. Neil, 7 Heisk. (Tenn.) 437.

Texas. — Aulanier v. Governor, 1 Tex. 653.

6. *Failure to File Appointment, Commission, or Acceptance of Office.* — One who has received a

(5) *Omission to Qualify*. — It is the general rule that where it is provided by statute that a failure by one elected to an office to do anything necessary to qualify him for such office, as to give bonds or take oaths, shall "vacate" the office, such a failure does not operate *ipso facto* to vacate the office, but the incumbent remains a *de facto* officer until the forfeiture of his office is judicially declared.¹ In *New York* it is said that in such case the incumbent remains a lawful officer with a defeasible title, rather than a *de facto* officer.²

d. PERSONS NOT ELIGIBLE. — A person who comes into office in a regular manner and executes the duties thereof is an officer *de facto* until his disability is judicially declared by a competent tribunal, though he may be in fact ineligible to the office he assumes to hold,³ as, for instance, where he is not a householder as required by law,⁴ or is rendered incapable of holding office by

written appointment as deputy sheriff may be such officer *de facto* though he has neglected to record his appointment as required by law. *Weatherford v. State*, 31 Tex. Crim. Rep. 530. See also *Dane v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 661, citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.), 107.

One who is appointed a notary public and acts as such is a notary *de facto* though he fails to record his commission as required by law. *Keeney v. Leas*, 14 Iowa 464.

One who is elected an overseer of highways and acts as such is overseer *de facto* though he has not filed any acceptance of the office as required by law. *Bentley v. Phelps*, 27 Barb. (N. Y.) 524.

1. Defect in Qualification Does Not Ipso Facto Work a Forfeiture of Office. — *Alabama*. — *Sprowl v. Lawrence*, 33 Ala. 674.

Georgia. — *Crawford v. Howard*, 9 Ga. 314. *Louisiana*. — *State v. Jackson*, 27 La. Ann. 541.

New Jersey. — *Clark v. Ennis*, 45 N. J. L. 69. *Compare Hoagland v. Culvert*, 20 N. J. L. 387. See also *State v. Potts*, 4 N. J. L. 396.

New York. — *Cronin v. Gundy*, 16 Hun (N. Y.) 524.

Ohio. — *Kelly v. State*, 25 Ohio St. 567.

A justice of the peace who acts as such without having taken the oath of office is an officer *de facto* until his forfeiture of the office is declared in a proper proceeding, though under the law the neglect to take such oath amounts to forfeiture of the office, and acting without having so qualified is a misdemeanor. *Weeks v. Ellis*, 2 Barb. (N. Y.) 320.

2. New York Doctrine. — In *Foot v. Stiles*, 57 N. Y. 399, the court, *per* Dwight, C., said: "There are many loose expressions in the law books concerning an officer *de facto* and *de jure*. Under the former term judges have frequently grouped together persons who were mere usurpers with those who had a colorable title, and even with those who were regularly inducted into office and yet had committed some act which would justify a forfeiture. This last case is, however, not properly a case of an officer *de facto*. It is an instance of a rightful officer holding by a defeasible title. His acts are in all respects lawful until the state interferes by a proceeding in the nature of a quo warranto. It only tends to confusion to style him an officer *de facto* whose acts are only valid as to the public and third persons, and cannot be sustained as to himself."

In *Horton v. Parsons*, 37 Hun (N. Y.) 43, an overseer of the poor who had not taken the oath of office was held to have power to bring an action which the court expressly said could not be brought by a mere *de facto* officer, although a statute provided that a failure to take such oath should be deemed a refusal to serve. The court, *per* Bradley, J., said: "But it has been held in effect that the statute is not self-executing, and does not work a forfeiture for the cause it affords; but that it must come from some act, judicial or otherwise, which effectually ousts him and severs his relation to the office, and that until then he is practically an officer *de jure*, having a defeasible title to the office."

3. Ineligible Person May Be De Facto Officer. — *Alabama*. — *Heath v. State*, 36 Ala. 273; *Lockhart v. Troy*, 48 Ala. 579.

Arizona. — *Hawke v. McAllister*, (Arizona 1894) 36 Pac. Rep. 170.

California. — *People v. Hecht*, 105 Cal. 621, 45 Am. St. Rep. 96.

Colorado. — *Darrow v. People*, 8 Colo. 417.

Connecticut. — *Trinity College v. Hartford*, 32 Conn. 452.

Kansas. — *Hunter v. Ferguson*, 13 Kan. 462.

Louisiana. — *Monroe v. Hoffman*, 29 La. Ann. 651.

Michigan. — *Donough v. Dewey*, 82 Mich. 309.

New Jersey. — *State v. Anderson*, 1 N. J. L. 366, 1 Am. Dec. 207; *Dugan v. Farrier*, 47 N. J. L. 383.

New York. — *Ostrander v. People*, 29 Hun (N. Y.) 513.

Texas. — *Ex p. Call*, 2 Tex. App. 497.

Washington. — *State v. Fountain*, 14 Wash. 236.

Contrary Doctrine. — In *Creighton v. Com.*, 83 Ky. 142, 4 Am. St. Rep. 143, it was held that one who was elected to an office, and, without having qualified or attempted to qualify, assumed to exercise its duties after his failure to qualify had rendered him ineligible according to law, was without color of title, and was not a *de facto* officer.

4. Person Not a Householder. — One who is appointed a collector of revenue of a county and acts as such is a collector *de facto* though he does not possess the necessary qualification of being a householder. *St. Louis County Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355.

reason of being a defaulter,¹ or is under the required age,² or is an alien,³ or is not a resident within the territorial division of the state to which the office held by him appertains,⁴ or holds an office incompatible with that which he assumes to exercise.⁵ So one originally a *de jure* officer may continue in office as a *de facto* officer after he has become ineligible to the office on account of a constitutional limitation of the length of time during which the office may be held by one person,⁶ or on account of having assigned all his property for the benefit of creditors.⁷

e. LACK OF POWER IN ELECTING OR APPOINTING BODY — (1) *In General*. — A person in possession of an office under a claim of having been

1. **Defaulter.** — One who is elected a sheriff and duly inducted into office is sheriff *de facto* though he is by law ineligible to the office, being a defaulter. *Jones v. Scanland*, 6 Humph. (Tenn.) 195, 44 Am. Dec. 300; *Bates v. Dyer*, 9 Humph. (Tenn.) 162.

2. **Person under Required Age.** — One who is appointed and commissioned as a judge and acts as such is a judge *de facto* though he is under the age of thirty years required by the Constitution to render a person eligible to such office. *Blackburn v. State*, 3 Head (Tenn.) 690.

A special constable properly appointed by a justice of the peace is an officer *de facto* though he is ineligible to the position by reason of being a minor. *Floyd v. State*, 79 Ala. 39.

The same principle was applied in the case of a deputy sheriff in *Irving v. Edrington*, 41 La. Ann. 671; and of a deputy circuit clerk in *Wimberly v. Boland*, 72 Miss. 241, *citing* 5 AM. AND ENG. ENCYC. OF LAW (1st ed.), title DE FACTO OFFICERS.

3. **Alien.** — One who has been duly commissioned as a notary, and qualified by giving bond as required by law, and entered upon the duties of such office, is a notary *de facto* though he is ineligible to the office on account of being an alien. *Wilson v. Kimmel*, 109 Mo. 260.

The same principle was applied in the case of an alderman in *Satterlee v. San Francisco*, 23 Cal. 314; of a school trustee in *Morrison v. Sayre*, 40 Hun (N. Y.) 465; and of a justice of the peace in *Fancher v. Stearns*, 61 Vt. 616.

4. **Nonresident.** — One who is elected and qualifies as sheriff and acts as such is sheriff *de facto* though he is constitutionally ineligible to the office by reason of not being a resident of the county for which he was elected. *Patterson v. Miller*, 2 Metc. (Ky.) 493.

Change of Residence. — A justice of the peace who, after moving his residence out of the state, or the county or district for which he was appointed, continues to have an office and act as a justice of the peace within such county or district, is a justice *de facto*. *Hinton v. Lindsay*, 20 Ga. 746; *Lexington, etc., Turnpike Road Co. v. McMurtry*, 6 B. Mon. (Ky.) 214; *Prescott v. Hayes*, 42 N. H. 56.

The same principle was applied to a constable in *Case v. State*, 69 Ind. 46; and to a member of a town council who had moved his residence beyond the corporate limits, in *Roche v. Jones*, 87 Va. 484.

Loss of Residence by Operation of Law. — County commissioners who continue to act as such and have control of the books and papers of the office, after they have lost their residence in the county for which they act, by reason of

being included in the limits of a new county, are officers *de facto*. *State v. Jacobs*, 17 Ohio 143.

The same principle was applied to judges of a county court in *State v. Alling*, 12 Ohio 16.

In *Walnut Tp. v. Jordan*, 38 Kan. 562, it was held that where a portion of a township was declared by proclamation of the governor to be a city of the second class, the remainder of such township still retained its organization, and the members of the township board were still officers *de facto* at least, although they might reside within the limits of the newly organized city.

5. **Holding Incompatible Office.** — One who was elected a district treasurer while holding the incompatible office of district counselor was held to be the former officer *de facto* in *Reg. v. Smith*, 4 U. C. Q. B. 322. The same was held as to a postmaster who was commissioned as a justice of the peace, in *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 224; *McGregor v. Balch*, 14 Vt. 428, 39 Am. Dec. 231; and a collector of taxes who was elected a selectman of a town, in *Atty.-Gen. v. Marston*, 66 N. H. 485. See also *Hoglan v. Carpenter*, 4 Bush (Ky.) 89.

A judge or justice of the peace who continues to exercise his office after having become disqualified therefor by taking a seat in Congress or in the state legislature remains a *de facto* judicial officer. *Green v. Wardwell*, 17 Ill. 278, 63 Am. Dec. 366; *Woodside v. Wagg*, 71 Me. 207; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374.

The same is true of a justice of the peace who continues to act as such after having accepted the incompatible office of constable, *Johnson v. McGinly*, 76 Me. 432; *Com. v. Kirby*, 2 Cush. (Mass.) 577; or coroner, *Maddox v. Ewell*, 2 Va. Cas. 59; or clerk of court, *Adam v. Mengel*, (Pa. 1887) 8 Atl. Rep. 606; of a deputy sheriff or constable who has accepted the office of justice of the peace, *Wilson v. King*, 3 Litt. (Ky.) 457; *Pooler v. Reed*, 73 Me. 129; of a school director who has accepted the office of commissioner of an incorporated district, *Hagner v. Heyberger*, 7 W. & S. (Pa.) 104, 42 Am. Dec. 220; of a supervisor of roads who has accepted the office of township trustee, *Creighton v. Piper*, 14 Ind. 182; and of a notary public who has accepted the office of deputy county recorder, *Davidson v. State*, 135 Ind. 254.

6. **Limitation of Time of Holding Office.** — *Gosman v. State*, 106 Ind. 203.

7. **Assignment.** — A person who was duly elected a member of council is an officer *de facto*, where he continues to act as such after assigning his property for the benefit of credit-

appointed thereto may be an officer *de facto* though the officer by whom or body by which he was appointed was without authority to make any appointment to such office.¹ The same is true of a person in whose appointment as an officer all those in whom the appointing power was vested did not participate.² A person elected and commissioned as an officer may be such *de facto* though the county in which he was elected had, under the Constitution, no power to elect such officer.³

ors, though it is provided by law that the seat of a member of council shall become vacant in such case. *Reg. v. Cornwall*, 25 U. C. Q. B. 293.

1. Appointment by Unauthorized Officer or Body — *England*. — *Seymour v. Bennett*, 2 Atk. 483.

Canada. — *Rouleau v. St. Lambert*, 10 Quebec L. R. Super. Ct. 85, *citing* 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 103.

Arizona. — *Behan v. Prison Com'rs*, (Arizona 1892) 31 Pac. Rep. 521.

California. — *People v. Sassovich*, 29 Cal. 480; *Hamilton v. San Diego Co.*, 108 Cal. 273, *citing* 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 103.

Connecticut. — *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

Louisiana. — *Monroe v. Hoffman*, 29 La. Ann. 651.

Kentucky. — *Justices v. Clark*, 1 T. B. Mon. (Ky.) 82.

Nevada. — *Mallett v. Uncle Sam Gold, etc.*, Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

North Carolina. — *State v. Turner*, 119 N. Car. 841; *State v. Lewis*, 107 N. Car. 967.

Ohio. — *Ex p. Strang*, 21 Ohio St. 610.

Washington. — *State v. Seavey*, 7 Wash. 562.

Wisconsin. — *Laver v. McGlachlin*, 28 Wis. 364.

In *McDowell v. U. S.*, 159 U. S. 596, a district judge who, under an apparently regular order of the circuit judge, held court in a district in which the office of judge was vacant, was held to be an officer *de facto* whether the circuit judge had power to appoint any one to hold court in case of a vacancy or not.

In *Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89, a person who had been appointed a judge by the common council of a city under a law providing for such appointment was held to be a judge *de facto*, though under the constitution of the state judges of all courts could be appointed only by the general assembly.

In *Ray v. Murdock*, 36 Miss. 692, it was held that one who was appointed commissioner of lands by the board of police, which had power to appoint a commissioner under certain circumstances, was commissioner *de facto* although those circumstances did not exist when he was appointed, and the board exceeded its power in appointing him. See also *Hunter v. Ferguson*, 13 Kan. 462; *Hoagland v. Culvert*, 20 N. J. L. 387.

In *McLean v. State*, 8 Heisk. (Tenn.) 22, persons who were acting and were recognized as tax assessors under an appointment by a board of county commissioners were held to be tax assessors *de facto* though such officers could be lawfully appointed only by the county court, or, in certain cases, by the chairman.

In *Roche v. Jones*, 87 Va. 484, persons who were appointed councilmen of a city by the

act incorporating such city, and who had entered upon the duties of their office, were held to be officers *de facto*, even though the legislature had no right to appoint them.

New York Cases. — In *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451, it was held that persons who acted as inspectors of an election, and whose appointment was signed by one justice of the peace, were inspectors *de facto* although it was provided by law that such appointment should be signed by two justices.

In *Palmer v. Foley*, 36 N. Y. Super. Ct. 14, it was held that one who was appointed by the chamberlain of New York city as a deputy chamberlain, and took possession of the office and discharged its duties, was an officer *de facto*, though the right to appoint a deputy chamberlain might have been in the comptroller and not in the chamberlain.

In *People v. Orleans County Ct.*, 28 Hun (N. Y.) 14, it was held that persons who were appointed drainage commissioners by a county judge, entered into their office under color of title, and were officers *de facto*, though according to law such officers should have been appointed by the County Court.

Conflicting New York Cases. — In *People v. Carter*, 29 Barb. (N. Y.) 208, the court said that if the governor had no power to fill a vacancy in the office of justice of the peace he could not bestow upon one appointed by him the outward signs and symbols of the office, and therefore such appointee could not be said to be in by color of title; and in *People v. Brennan*, 30 How. Pr. (N. Y. Supreme Ct.) 417, it was held that persons who were appointed commissioners of taxes and assessments by the comptroller were not officers *de facto*, where the comptroller had no power to appoint them, as in such case they had no color of title.

2. Appointment Without Concurrence of All Having Authority to Appoint. — In *Merchants' Nat. Bank v. McKinney*, 2 S. Dak. 106, it was held that, where the county commissioners were required by law to appoint a register of deeds, an appointment to such office by two county commissioners' out of three appointed by the governor, the third not having qualified, gave color of title, and the appointee was a *de facto* officer, not an intruder. It was further held, in the same case, that where it was provided by law that a vacancy in the office of county commissioner should be filled by the remaining commissioners, the register of deeds, and the probate judge, an appointment without the presence of the probate judge conferred a *de facto* title on the appointee, as the appointing officers were not constituted a board, and an appointment by the persons who acted would have been valid even had the probate judge been present and voted for some other person.

3. Unauthorized Election. — *Campbell v. Com.*, 96 Pa. St. 344.

(2) *Appointment to Elective Office, or Vice Versa.* — It has been held that one who is in possession of an office, claiming under an appointment thereto, may be an officer *de facto* though such office can be lawfully filled only by election;¹ and also that an election to an office which should be filled by appointment may constitute the person so elected an officer *de facto*.²

f. PERSONS IRREGULARLY ELECTED OR APPOINTED — (1) *In General.* — A person in possession of an office under a claim of being entitled thereto is an officer *de facto* though he may have been illegally or irregularly elected³ or appointed.⁴

1. *Appointment to Elective Office.* — Officers who are appointed by the governor and enter upon the duties of their offices are officers *de facto* though the act providing for their appointment violates a constitutional provision that such officers shall be elected. Chicago, etc., R. Co. v. Langlade County, 56 Wis. 614; *In re Ah Lee*, 6 Sawy. (U. S.) 410.

But in *People v. Albertson*, 8 How. Pr. (Greene County Ct.) 363, it was held that an appointment as justice of the peace did not give even color of title to the appointee when under the Constitution the office could be filled only by election.

2. *Election to Fill Vacancy where Appointment Is Proper.* — A person who is elected to fill a vacancy in the office of prudential committee, and who acts as such officer, is an officer *de facto*, whether such vacancy was rightfully filled by election or should have been filled by appointment by the selectmen of the town. Goodwin v. Perkins, 39 Vt. 598.

3. *Illegal or Irregular Election — Alabama.* — Butler v. Walker, 98 Ala. 358, 39 Am. St. Rep. 61.

Connecticut. — Duane v. McDonald, 41 Conn. 517.

Maine. — Belfast v. Morrill, 65 Me. 580.

Massachusetts. — Sudbury v. Heard, 103 Mass. 543; Atty.-Gen. v. Crocker, 138 Mass. 214.

New Hampshire. — Atty.-Gen. v. Megin, 63 N. H. 378, 9 Am. & Eng. Corp. Cas. 68.

New Jersey. — Kimball v. Hendee, 57 N. J. L. 307.

New York. — People v. Albertson, 8 How. Pr. (Greene County Ct.) 363; Wilcox v. Smith, 5 Wend. (N. Y.) 231.

North Carolina. — Trenton v. McDaniel, 7 Jones L. (52 N. Car.) 107.

Election at Improper Time. — Officers of a town elected at a time other than that prescribed for elections by the act incorporating the town are officers *de facto*. Coles County v. Allison, 23 Ill. 437.

Irregular Town Meeting. — Persons who are elected and act as selectmen of a town are officers *de facto* though the town meeting at which they are elected be invalid because of a defect in the constable's return upon the warrant therefor. Cushing v. Frankfort, 57 Me. 541. See also School Directors v. National School Furnishing Co., 53 Ill. App. 254.

Office Auctioned Off. — One who was duly elected a tax collector, and acted as such, is such *de facto* though his election was illegal in that the office was auctioned off to the person who would serve for the smallest compensation. Tucker v. Aiken, 7 N. H. 131.

Unauthorized Votes Received. — One who is

elected a justice of the peace and acts as such is a *de facto* officer, though he was elected by the electors of a town and village, whereas the electors of the village only should have participated in the election. Baker v. State, 69 Wis. 32.

Illegality Must Not Be Fraudulent. — In Leeds v. Atlantic City, 52 N. J. L. 332, the court, per Garrison, J., said: "While it is true that the illegality of the election by virtue of which an incumbent has gained entrance to an office does not prevent the office from being full of him *de facto*, it is also to be noted that from the earliest periods it has been held requisite that the illegality in question must be consistent with honesty of purpose. Elections based upon mistakes of fact or misconceptions of law may impart a color of right which will bar the allowance of a mandamus, but palpable disregard of law renders the action by which an office is seized merely colorable, and in a clear case will be brushed aside as affording no obstruction to the exercise of a plain legal duty." See also Rouleau v. St. Lambert, 10 Quebec L. R. Super. Ct. 85.

4. *Illegal or Irregular Appointment — Florida.* — Rushing v. Thompson, 20 Fla. 583.

Illinois. — People v. Lieb, 85 Ill. 484.

Indiana. — State v. Murdock, 86 Ind. 124; Rogers v. Beauchamp, 102 Ind. 33.

Kentucky. — Rice v. Com., 3 Bush (Ky.) 14.

Louisiana. — State v. Brooks, 39 La. Ann. 817.

Michigan. — Dingwall v. Detroit, 82 Mich. 568; Tower v. Welker, 93 Mich. 332.

Mississippi. — Vicksburg v. Lombard, 51 Miss. 111.

New Jersey. — State v. Meyers, 29 N. J. L. 392.

New York. — Wilcox v. Smith, 5 Wend. (N. Y.) 231; Dolan v. New York, 68 N. Y. 274.

An appointment to office by the proper appointing power gives color of title thereto though such appointment be voidable by reason of fraud or defects therein. People v. Albertson, 8 How. Pr. (Greene County Ct.) 363.

Form of Appointment. — One who is commissioned as a special deputy sheriff and acts as such is a deputy *de facto* whether his commission is in the proper form or not. Moore v. Graves, 3 N. H. 408.

One who is appointed by the sheriff a special deputy for the service and return of a writ, and who acts under such appointment, is a deputy *de facto* though his appointment is not under seal as required by law. Jewell v. Gilbert, 64 N. H. 13, 10 Am. St. Rep. 357, followed in State v. Barnard, (N. H. 1892) 29 Atl. Rep. 410.

A person who is appointed a deputy county

(2) *Office Not Vacant.* — A person who has been elected or appointed to an office which is not vacant may become an officer *de facto*.¹ But an appointment to an office not legally vacant can never make the appointee more than an officer *de facto*, or confer upon him any rights beyond those possessed by such officer, even though it is supposed that the office is legally vacant when he is appointed.²

(3) *Appointment for Too Long a Term.* — A person appointed to office for a

attorney and qualifies and enters upon the duties of the office is such officer *de facto* though his appointment is irregular in that the Commissioners' Court has not formally consented thereto and the appointment has not been recorded. *Dane v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 661. See also *Youngblood v. Cunningham*, 38 Ark. 571; *Wheeler, etc., Mfg. Co. v. Sterrett*, 94 Iowa 158.

A clerk of a Circuit Court who is appointed a master in chancery without any reason therefor being set forth in the order appointing him is an officer *de facto* though it is provided by 20 U. S. Stat. at L. 415, that a clerk of a Circuit Court shall not be so appointed unless special reasons therefor exist. *Northwestern Mut. L. Ins. Co. v. Seaman*, 80 Fed. Rep. 357.

But in *Dolan v. Topping*, 51 Kan. 321, it was held that a special officer appointed to serve process in an attachment proceeding was not an officer *de facto* where he was appointed by the clerk of the District Court upon an application which did not make the showing necessary for such appointment, as in such case the appointment was void.

A **Verbal Appointment** to an office may constitute the appointee an officer *de facto* though under the law such appointment should be in writing.

Kentucky. — *Com. v. Arnold*, 3 Litt. (Ky.) 309.

Mississippi. — *Cockerham v. State*, (Miss. 1895) 19 So. Rep. 195.

Missouri. — *Buis v. Cooper*, 63 Mo. App. 196, 1 Mo. App. Rep. 746.

New York. — *Hamlin v. Dingman*, 5 Lans. (N. Y.) 61.

South Carolina. — *State v. Sellers*, 7 Rich. L. (S. Car.) 368.

Texas. — *Thompson v. Johnson*, 84 Tex. 548.

1. **Office Not Vacant** — *Alabama.* — *Thompson v. State*, 21 Ala. 48; *Diggs v. State*, 49 Ala. 311.

Arizona. — *Hawke v. McAllister*, (Arizona 1894) 36 Pac. Rep. 170.

Ohio. — *State v. Constable*, 7 Ohio, pt. i. 7.

Texas. — *Ex p. Call*, 2 Tex. App. 497.

Vermont. — *Goodwin v. Perkins*, 39 Vt. 598.

Wisconsin. — *State v. Bloom*, 17 Wis. 521.

A person who is appointed to an office which is not vacant may become an officer *de facto* where he acts as such officer after the expiration of the term of the lawful incumbent, no other person exercising or claiming the office. *State v. Martin*, 46 Conn. 479.

One who has been elected by a board of aldermen to fill an alleged vacancy in the board and who has taken possession of the office is an alderman *de facto* though the board had no power to make the removal which caused such alleged vacancy. *Ellison v.*

Raleigh, 89 N. Car. 125. See also *Watkins v. Inge*, 24 Kan. 612.

A person who enters upon and exercises the office of judge under an appointment by and commission from the governor is a judge *de facto* though the governor had no legal authority to make the appointment, the office being filled by an incumbent whom the governor has no power to remove. *Brady v. Howe*, 50 Miss. 607.

But in *Woods v. Bristol*, 84 Me. 358, it was held that where a person had been legally elected school agent another person subsequently elected for the same term could not become an officer *de facto* though he obtained possession of the schoolhouse by force.

Temporary Appointment. — One who is appointed sheriff *pro tem.* during the suspension of the *de jure* sheriff is sheriff *de facto*. *Chowning v. Boger*, (Tex. 1885) 9 Am. & Eng. Corp. Cas. 91.

Appointment of More than Proper Number. — Where the governor has power to commission notaries public, one holding his commission is a *de facto* officer, though under the law there can be only one notary public in each district, and there was already one in the district for which such person was appointed when he received his commission. *Pool v. Perdue*, 44 Ga. 454.

A Certificate of Inspectors of Election that three persons are elected to fill one vacancy in a board of excise commissioners cannot give color of title to any one of such persons. *Montgomery v. O'Dell*, 67 Hun (N. Y.) 169.

2. **Appointment to Office Not Legally Vacant.** — In the case of *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, the plaintiff, Nichols, was appointed police commissioner of the city of New York for a term of six years and entered on the duties of the office. The mayor preferred charges of official delinquency against Nichols, upon which proceedings were had, and the mayor removed him from his office. The governor approved in writing of such removal. The mayor then appointed MacLean police commissioner. Nichols applied for a writ of certiorari, and in this proceeding judgment was rendered reversing the mayor's judgment of removal. Nichols thereupon resumed his office. In an action against MacLean for the salary received by him he invoked as protection the doctrine which protects rights acquired on the faith of a judgment notwithstanding its subsequent reversal. The court held that the doctrine was not applicable, and that the appointment of the mayor and MacLean's assumption of office made him an officer *de facto* merely, as he did not acquire his title under the co-called judgment rendered by the mayor, but under a distinct proceeding subsequent thereto.

longer term than that for which the power appointing him is authorized to appoint is an officer *de facto*.¹

(4) *Person Wrongfully Declared Elected*. — A person declared by the canvassing board to have been elected to an office may become an officer *de facto* though he did not in fact receive a majority of the votes cast.²

(5) *Possession Pending Contest of Election*. — A person in possession of an office claimed by him, pending a contest over the validity of his election, is an officer *de facto*.³

(6) *Appointment for Political Reasons*. — The fact that an officer was appointed to office on account of his political beliefs will not deprive him of the character of a *de facto* officer.⁴

g. PERSONS ELECTED OR APPOINTED UNDER UNCONSTITUTIONAL LAW — (1) *Unconstitutional Mode of Filling Office*. — A person holding a legally existing office may be an officer *de facto* though the statute under the provisions of which he was elected or appointed be unconstitutional.⁵

1. *Appointment for Too Long a Term* — *Cocke v. Halsey*, 16 Pet. (U. S.) 71.

One who is appointed a judge and acts as such is a judge *de facto* though the governor in appointing him exceeds his power by making the appointment to fill a vacancy for the unexpired term, instead of only until an election to fill such vacancy can be ordered and held. *Calloway v. Sturm*, 1 Heisk. (Tenn.) 764.

2. *Person Wrongfully Declared Elected*. — One who is declared by the common council, acting as a board of canvassers, to have been elected mayor of a city, and who qualifies and enters on the discharge of the duties of the office, is mayor *de facto* though he did not in fact receive a majority of the votes cast, and the council exceeded its power in refusing to count certain votes. *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 72.

3. *Possession Pending Contest*. — One who is declared elected to an office, and qualifies and performs the duties of the office, is an officer *de facto* though his title is contested on the ground that he was not legally elected, and proceedings to oust him are pending. *Henderson v. Glynn*, 2 Colo. App. 303.

4. *Appointment for Political Reasons*. — Atty.-Gen. v. Parsell, 99 Mich. 381.

5. *Appointment or Election under Unconstitutional Law* — *United States*. — *In re Ah Lee*, 6 Sawy. (U. S.) 410.

Connecticut. — *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

Illinois. — *People v. Bangs*, 24 Ill. 184; *Samuels v. Drainage Com'rs*, 125 Ill. 536.

Montana. — *Parks, Petitioner*, 3 Mont. 426.

Nevada. — *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478.

New York. — *Curtin v. Barton*, 139 N. Y. 505; *Demarest v. New York*, 147 N. Y. 203.

Ohio. — *Ex p. Strang*, 21 Ohio St. 610; *Kirker v. Cincinnati*, 48 Ohio St. 507.

South Carolina. — *Taylor v. Skrine*, 2 Treadw. (S. Car.) 696.

Wisconsin. — *State v. Bartlett*, 35 Wis. 287; *Cole v. Black River Falls*, 57 Wis. 110.

Judges who have acted as a board of commissioners to fix the boundaries of a proposed district are commissioners *de facto*, and their acts as such are valid on collateral attack, whether or not the law which provides for their so acting conflicts with the constitutional

provision that no person belonging to one department of the government shall exercise power properly belonging to either of the others. *People v. Nelson*, 133 Ill. 565.

Persons acting as county commissioners under an appointment by an act of the legislature are officers *de facto*, whether such act be constitutional or not. *Carland v. Custer County*, 5 Mont. 579.

Persons who have been appointed associate judges of a court and who have entered upon their duties are judges *de facto* although the law which directed such appointment be void, not having been passed by a constitutional vote. *Morris v. People*, 3 Den. (N. Y.) 381.

But in *State v. Fritz*, 27 La. Ann. 689, it was held that a lawyer who was appointed by a judge who was sick, to preside in his stead, was not a judge *de facto* where the statute authorizing such appointment in case of sickness of the judge was in conflict with a constitutional provision allowing such appointment in cases where the judge was recused, and impliedly prohibiting such appointment in all other cases; and a conviction before and judgment by such lawyer claiming to act as judge were held void.

Law Affecting Number of Officers. — A person may be a *de facto* judge though the statute increasing the number of judges under which he was appointed be unconstitutional. *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478.

An unconstitutional law reducing the number of members of a county board of supervisors from fifteen to five is sufficient to give color of title to five persons who are elected and qualify and act under such law. *Leach v. People*, 122 Ill. 420.

Legislators elected under an unconstitutional law redistricting a state for legislative purposes, before the same is declared unconstitutional, are officers *de facto*. *Parker v. State*, 133 Ind. 178.

Law Affecting Eligibility. — A woman who is elected a school inspector, under a law making females eligible to such office, is an officer *de facto* whether such law be unconstitutional or not. *Donough v. Dewey*, 82 Mich. 309.

City Ordinance. — City councilmen elected under an ordinance redistricting the city are officers *de facto* though such ordinance is void because not legally passed. *State v. Gray*, 23 Neb. 365.

(2) *Office Purporting to Be Created by Unconstitutional Law.* — It has been held that the incumbent of an office purporting to have been created by an unconstitutional statute is not an officer *de facto*, because there can be no officer without a corresponding office lawfully existing,¹ and an unconstitutional law can create no office whatever.² The courts have gone so far as to hold that when the law creating an office is declared unconstitutional, such decision has a retroactive effect, and the office is to be regarded as never having had any existence whatever.³ But, on the other hand, it has been held that until the act creating an office is judicially declared unconstitutional a person occupying such office is an officer *de facto*.⁴

h. WHAT MAY GIVE COLOR OF TITLE. — (1) *Significance of Term.* — Color of title to an office is defined to be "that which in appearance is title, but which in reality is no title."⁵ It is this color of title, or, it has been said, color of authority,⁶ which distinguishes the *de facto* officer from a mere intruder or usurper, whose acts are absolutely void.⁷

1. *There Must Be a Lawful Office* — *California.* — *People v. Hecht*, 105 Cal. 621, 45 Am. St. Rep. 96.

Illinois. — *Lewistown v. Proctor*, 23 Ill. 533.

Mississippi. — *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169.

Missouri. — *Ex p. Snyder*, 64 Mo. 58.

New Jersey. — *Kirby v. State*, 57 N. J. L. 320.

New York. — *People v. Terry*, 42 Hun (N. Y.) 273.

Texas. — *Daniel v. Hutcheson*, 4 Tex. Civ. App. 239.

2. *Unconstitutional Law Can Create No Office.* — *Norton v. Shelby County*, 118 U. S. 425; *Lewistown v. Proctor*, 23 Ill. 533; *Flaucher v. Camden*, 56 N. J. L. 244; *New York v. Flagg*, 6 Abb. Pr. (N. Y. Supreme Ct.) 302. See also *infra*, this section, *As to Existence of Office*.

3. In *Norton v. Shelby County*, 118 U. S. 425, it was sought to enforce payment of bonds issued by a board of commissioners created by an act which was afterwards declared unconstitutional. It was held that the *de facto* doctrine did not apply, as, there being no *de jure* offices, there could be no *de facto* incumbents.

In *Flaucher v. Camden*, 56 N. J. L. 244, it was held that county license commissioners appointed under the *New Jersey* act "to create county boards of license commissioners," which was declared unconstitutional after their appointment, were not officers *de facto*, as no such office as that of "license commissioner" ever legally existed.

4. *Limitation of Rule.* — While it is true that there cannot be an officer *de facto* unless there be an office to fill, yet the rule is modified, so far as offices have been created by the legislature, while the statute creating them has not been declared unconstitutional. *Donough v. Dewey*, 82 Mich. 309; *Riley v. Garfield Tp.*, (Kan. 1897) 49 Pac. Rep. 85.

5. *What Is Meant by Color of Title.* — In *Wright v. Mattison*, 18 How. (U. S.) 50, the court, *per Daniel, J.*, gave the definition in the text, saying that the courts had concurred therein without an exception, and adding: "They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title." Quoted in *Dugan v. Farrier*, 47 N. J. L. 383.

In *In re Ah Lee*, 6 Sawy. (U. S.) 410, the court, *per Deady, J.*, said: "Color of title to an office is analogous to color of title to land. The latter does not mean a good title, or even a defective conveyance from one having title, but only the appearance of title, that is, a deed to the premises in due form of law."

6. *Color of Authority.* — Mr. Throop in his work on Public Officers says: "Color of title is a very different thing from color of authority; for the former expression implies that the person must be in by virtue of an election or appointment which is at least colorable." Throop on Public Officers, § 623.

This distinction seems to be rather too finely drawn in view of Chief Justice Lord's definition of color of right, which seems to be a term used as synonymous with color of title. He says, in *Hamlin v. Kassafer*, 15 Oregon 456, 3 Am. St. Rep. 176: "The color of right which constitutes one an officer *de facto* may consist in an election or appointment, or in holding over after the expiration of one's term, or acquiescence by the public in the acts of such officer for such a length of time as to raise the presumption of colorable right by election or appointment."

7. *Distinction Between Officer De Facto and Usurper.* — In *Thompson v. State*, 21 Ala. 46, the court, *per Ligon, J.*, said: "The true distinction between those irregular appointments to office which are void, and those which are voidable only, I apprehend to be this: where the authority under which the officer assumes to act shows upon its face that it emanates from a power which had no right to confer it, it is void; but where it is regular on its face, and emanates from a source which has the legal or constitutional right to bestow it, and it requires a reference to facts not disclosed in the commission or order of appointment to show that the power of appointment has been illegally or irregularly exercised, the appointment is voidable only. In the former case all the acts of the appointee done in reference to such appointment are void for every purpose, while in the latter they are valid as to the public and third persons; and this for the reason, as it has been well said, that 'the affairs of society cannot be carried on upon any other principle.'"

Examples of Circumstances Giving Color of Title. — One who is elected intendant of a town,

(2) *Presumption of Right to Office.* — It is presumed that a person who is in undisputed possession of an office, and is exercising its functions and performing its duties, has come into office lawfully, and has a right to continue therein.¹

(3) *Entering Office Before Term Begins.* — It has been held that one who has been elected to an office may become an officer *de facto* by taking possession of the office before the term for which he was elected begins.²

and, assuming that by the charter of the town the intendant is *ex officio* a justice of the peace, acts as such officer, is a justice *de facto*, though his claim be not well founded in law. *Williamson v. Woolf*, 37 Ala. 298.

Where it is shown that a person was duly commissioned as a commissioner of deeds and acted as such, and there is no fact from which the court can draw judicial notice that he has been removed, he is presumed to be an officer *de facto*, and not a usurper. *Kaufman v. Stone*, 25 Ark. 336.

Members of a legislature seated by less than a constitutional quorum have color of title to their seats. *State v. Smith*, 44 Ohio St. 348.

Examples of Circumstances Not Giving Color of Title. — Where a member of a city council, who has qualified, but whose election is contested, retires from a meeting of council, with no intention of abandoning his office, but only for the purpose of leaving the council without a quorum, and the contestant is then sworn in as a member of the council and the meeting proceeds to business, the contestant does not thereby become an officer *de facto*. *Braidv. Theritt*, 17 Kan. 468.

A judge of one county who, without any appointment or commission, undertakes to act and take jurisdiction of cases in another county, in which the office of judge is vacant, does not become an officer *de facto* as to such county, but is a mere intruder. *Denny v. Mattoon*, 2 Allen (Mass.) 361, 79 Am. Dec. 784.

Where the charter of a city requires city officers to be elected, persons who take possession of the offices and act as officers without ever being elected or installed into office, or having held office in any previous year, are not officers *de facto* but usurpers. *Keeler v. Newbern*, Phil. L. (61 N. Car.) 505.

One who is appointed a clerk by the duly appointed registrar of votes, and who fraudulently gets possession of the registration books, refuses to surrender them, and proceeds to appoint judges of election, and holds elections, notwithstanding the protest of the registrar and his demand for the surrender of the books, is not an officer *de facto*, but a mere usurper. *Van Amringe v. Taylor*, 108 N. Car. 196. In this case the court, *per* Merri-
mon, C. J., said: "A mere intruder or usurper is not ordinarily, but may become, an officer *de facto* in some cases. * * * But when without color of authority he simply assumes to act, to exercise authority as an officer, and the public know the fact, or reasonably ought to know that he is a usurper, his acts are absolutely void for all purposes. The mere fact that, apart from his usurpation, his supposed official acts were fair and honest could not impart to them validity and efficiency."

At a school district meeting, some one suggested that A be made trustee. A thereupon

arose and said: "All in favor of A being trustee say 'Aye.'" One person responded "Aye," and A declared himself elected. The chairman of the meeting was not requested to, and did not, call for any vote on the subject. The meeting then elected B trustee in an orderly manner, and his election was entered on the minutes, no reference being made to A. A, by means of threats, afterwards obtained possession of the office, and acted as trustee for about a month. It was held that A had no color of right to the office and was not an officer *de facto*. *Hand v. Deady*, 79 Hun (N. Y.) 75.

In *Herring v. Lee*, 22 W. Va. 661, it was held that a person who, during the civil war, assumed to act as deputy clerk of a county court without any appointment from the clerk was not a deputy *de facto*, where at the time he acted the county seat was in possession of the Federal forces, but the clerk was within the Confederate lines. The court, *per* Snyder, J., said: "The idea that there could be such an officer as a *de facto* deputy is an absurdity of itself. It is to assume that there may be an agent acting for and creating liabilities against a principal who has conferred no authority, has no control over, and who may have no knowledge of the existence of, the agent or deputy so acting."

1. Person Acting as Officer Presumed to Be Lawfully in Office — *Colorado.* — *Quimby v. Boyd*, 8 Colo. 194; *Pueblo County v. Gould*, 6 Colo. App. 44.

Georgia. — *Allen v. State*, 21 Ga. 217, 68 Am. Dec. 457.

Kansas. — *State v. Nield*, 4 Kan. App. 626.

Maine. — *Lowell v. Flint*, 20 Me. 401.

Massachusetts. — *Gilmore v. Holt*, 4 Pick. (Mass.) 258.

New Hampshire. — *Bishop v. Cone*, 3 N. H. 513; *Northwood v. Barrington*, 9 N. H. 369.

New York. — *McCoy v. Curtice*, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113.

Vermont. — *Willard v. Pike*, 59 Vt. 202.

Canada. — *Crookshank v. Macfarlane*, 7 New Bruns. 544.

An Apparently Lawful Appointment by the proper authorities gives the appointee *prima facie* title to the office. *State v. Rost*, 47 La. Ann. 53; *Conklin v. Cunningham*, 7 N. Mex. 445.

2. Entering Office Before Term Begins. — In *McCraw v. Williams*, 33 Gratt. (Va.) 510, a person who had been elected a judge was commissioned as such and entered upon the duties of his office, believing that his term commenced immediately. He was held to be a *de facto* officer, though his term did not really commence until some time later, and his predecessor's term had not expired. But see *Dabney v. Hudson*, 68 Miss. 292, 24 Am. St. Rep. 276.

Appointment until Term under Election Begins. — Where the act creating an office provides that it shall go into effect a considerable time before the first term under an election to the office begins, the officer elect becomes an officer *de facto* where he is appointed by the power authorized to fill vacancies in the office, to serve during the interim.¹

Premature Election. — The same rule applies to officers who are chosen for and inducted into their offices after the law creating such offices is passed, but before it goes into effect.²

(4) **Holding Over — General Rule.** — As a general rule, one who comes into office legally, and continues to hold possession of the office and exercise the functions and duties thereof after the term for which he was elected or appointed has expired, is an officer *de facto*.³

1. Appointment until Term under Election Begins. — A state law which establishes a court was published March 15, 1889, and provided that it should be in force from the time of its publication. It also provided that a judge of the court should be elected in April, 1889, to hold office from the first Monday in January succeeding his election. A certain person was duly elected judge, and was appointed by the governor, who had power to fill vacancies in the office, to fill the office of judge until the beginning of his term under his election. It was held that the person so appointed was judge *de facto*. *In re Burke*, 76 Wis. 357; *In re Manning*, 76 Wis. 365; *Baker v. State*, 80 Wis. 416.

2. Premature Election. — *Carleton v. People*, 10 Mich. 250.

Officers who are elected before the law establishing their offices goes into effect, and enter upon the actual discharge of their duties, are officers *de facto* after the law takes effect by publication. *In re Boyle*, 9 Wis. 264; *Dean v. Gleason*, 16 Wis. 1.

An act of the legislature, approved March 10, 1876, provided for the organization of a certain town, and directed that town officers should be elected "on the first Tuesday of April next." On that day, being the 4th of April, town officers were elected, and qualified and acted as such. The act was, however, not published until April 8. It was held that as the town had a legal existence after April 8, the officers previously elected were its officers *de facto*. *Vorty v. Paine*, 62 Wis. 154.

3. Holding After Term Expires — *Alabama*, — *Cary v. State*, 76 Ala. 78.

Kansas. — *Hale v. Bischoff*, 53 Kan. 301.

Maine. — *Brown v. Lunt*, 37 Me. 423.

Massachusetts. — *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335.

Nebraska. — *Magneau v. Fremont*, 30 Neb. 843, 27 Am. St. Rep. 436.

New Jersey. — *Dugan v. Farrier*, 47 N. J. L. 383.

New York. — *People v. Kings County*, 89 Hun (N. Y.) 38.

North Carolina. — *Gilliam v. Reddick*, 4 Ired. L. (26 N. Car.) 368.

Ohio. — *Kreidler v. State*, 24 Ohio St. 22.

Oregon. — *Hamlin v. Kassafer*, 15 Oregon 456, 3 Am. St. Rep. 176.

Pennsylvania. — *Com. v. Waller*, (Pa. C. Pl.) 28 W. N. C. (Pa.) 252, 8 Lanc. L. Rev. 276, 48 Leg. Int. (Pa.) 312, 10 Pa. Co. Ct. Rep. 111.

Tennessee. — *Galbraith v. McFarland*, 3 Coldw. (Tenn.) 267, 91 Am. Dec. 281.

A district judge who is appointed by the circuit judge to hold the terms of court in the district of another judge who is disabled by sickness, and who holds such terms, is a judge *de facto* of such district where he holds a term therein after the death of the regular judge of the district, though the circuit judge has no authority to fill a vacancy in the office. *Ball v. U. S.*, 140 U. S. 118.

A sheriff who serves a writ twelve days after his successor has qualified is, as to such act, an officer *de facto*. *Flournoy v. Clements*, 7 Ala. 535.

A justice of the peace who holds over after his term has expired, under a claim that no successor has been legally elected is an officer *de facto*. *Morris v. People*, 5 Colo. App. 138. See also *Barrett v. Sayer*, (Supreme Ct.) 34 N. Y. St. Rep. 325, 58 Hun (N. Y.) 608; *People v. Kings County*, 89 Hun (N. Y.) 38.

Where a justice of the peace after the expiration of his term under his appointment continues to hold over, and refuses, upon the demand of his successor in office, to deliver up the books, papers, and dockets of the office, and retains full charge and control of the same, and continues to discharge the duties of the office, and is generally recognized by a large portion of the people of the township where he holds his office as such officer, he is a justice of the peace *de facto*. *Morton v. Lee*, 28 Kan. 286. See also *Hamlin v. Kassafer*, 15 Oregon 456, 3 Am. St. Rep. 176.

In *Fleming v. Mulhall*, 9 Mo. App. 71, a justice of the peace who had been deprived of his office by an act of the legislature, and whose successor had been elected, was held to be a *de facto* officer, where he continued to act as a justice, under an honest belief that the act depriving him of his office was not valid. *Compare State v. Perkins*, 139 Mo. 106, *infra*, this note.

In *U. S. v. Alexander*, 46 Fed. Rep. 728, the court, *per Beatty, J.*, said: "When one has been elected or appointed to an office which he continues to hold, and of which he continues to perform the duties even after the expiration of his term, but under some contest or claim of title, and he not only performs the duties but is generally recognized by the public as the officer, and his acts are acquiesced in, he is a *de facto* officer. Or even if there were no contest, and the old officer continues to be regarded as the officer, and to act as such even after his successor is elected or appointed, and, without his knowledge, qualifies, his acts, so performed in good faith, may still be

His Holding Must Be Continuous; for if he lays down his authority at the end of his term, he cannot become a *de facto* officer by attempting to resume it a considerable length of time afterwards, he having performed no official act in the interim.¹

Ignorance of Expiration of Term. — Where an officer exercises some of the functions of his office after his term has expired, both he and those with whom he deals being ignorant of that fact, he will be regarded as to those transactions as an officer *de facto*.²

Holding until Successor Takes Possession. — An officer who continues to exercise the duties of his office after his term has expired, but before his successor has qualified and taken possession of the office, is an officer *de facto*.³

held valid; but if the new officer has qualified and assumed the duties of his office, and is generally known and recognized as the officer, the acts thereafter of the old officer, even if performed in good faith, cannot be held as official or legal, for the reason that such facts make the new officer not only a *de jure* but also a *de facto* officer, and there cannot be two *de facto* officers at the same time."

Cases Holding the Contrary. — It has been held in several states that an officer whose term has expired, and whose successor has been elected or appointed and has qualified, cannot become an officer *de facto* by continuing to hold possession of the office under a claim of right so to hold. *Becker v. People*, 156 Ill. 301; *State v. Callahan*, 4 N. Dak. 481; *State v. Oates*, 86 Wis. 634, 39 Am. St. Rep. 912.

One who has served out his term as an officer cannot be an officer *de facto* after his successor has qualified and taken possession of the office. *Steinback v. State*, 38 Ind. 483.

In *Edison v. Almy*, 66 Mich. 329, it was held that a person appointed to office under a statute providing that the appointee should hold office only until a certain time was not an officer *de facto* where he continued to act after such time.

In *State v. Perkins*, 139 Mo. 106, it was held that a circuit judge who attempted to transact the business of the court after his term had ended was not a judge *de facto*, where he and all parties concerned knew that his successor had qualified. Compare *Fleming v. Mulhall*, 9 Mo. App. 71, *supra*, this note.

In *State v. Lane*, 16 R. I. 620, it was held that a person, though acting in good faith in attempting to hold over after the term for which he was elected had expired, could not be an officer *de facto* where the vacancy caused by such expiration had been filled by the election of his successor.

In *La Pointe v. O'Malley*, 46 Wis. 35, it was held that a town treasurer who refused, for a few days after his term had expired, to deliver up to his successor the books and papers, and during that time performed some duties pertaining to the office, did not thereby become a *de facto* treasurer, where there was no unreasonable delay on the part of the newly elected treasurer or of the town in protesting against the right of the treasurer so holding over to exercise the functions of the office.

1. Holding Must Be Continuous. — In *Gilliam v. Reddick*, 4 Ired. L. (26 N. Car.) 368, one who for fourteen years had acted as register notoriously and without his right being questioned,

was held to be such officer *de facto* though the appointment under which he entered into office was for four years only, and he had never been reappointed.

But in *Hughes v. Long*, 119 N. Car. 52, a person who attempted to act as a notary public nearly two years after his commission had expired was held not an officer *de facto*, where he had not attempted any official act in the interim, and was not recognized as such officer in the community in which he lived.

2. Ignorance of Expiration of Term. — Where a circuit judge, during his term of office, heard a case, and wrote, signed, and dated his decree, but did not file it until after his term had expired, he and all parties concerned being at the time ignorant of such expiration, it was held that the decree was valid, as the judge was a *de facto* officer when the decree was filed. *Cromer v. Boinest*, 27 S. Car. 436.

A judge who rendered a judgment on the day when his successor's term commenced was held to be a judge *de facto* where both he and his successor believed that the latter's term did not commence until the following day, and the successor appeared as attorney in the case. *Merced Bank v. Rosenthal*, 99 Cal. 39.

If, after the expiration of the term for which a commercial notary was appointed, and before that fact was discovered, he attested an affidavit, both parties acting in good faith, he would, if not an officer *de jure*, be in such transaction an officer *de facto*. *Smith v. Meador*, 74 Ga. 416.

3. Holding until Successor Takes Possession. — *Merced Bank v. Rosenthal*, 99 Cal. 39; *Threadgill v. Carolina Cent. R. Co.*, 73 N. Car. 178.

A Jury Commissioner who continues to act and be recognized as such after his term of office has expired and his successor has been appointed, but before such successor has qualified, is an officer *de facto*. *State v. Lee*, 35 S. Car. 192.

A Clerk of Court whose resignation has been accepted, and whose successor has been appointed, is an officer *de facto* where he continues to hold the office and discharge its duties for several days, until his successor qualifies. *Cook v. State*, 91 Ala. 53.

Members of a City Council whose successors have been elected and qualified, but have not taken their seats, are officers *de facto* where they continue to act as councilmen, and their names appear in the roll of members, and they are recognized as such by the other members of council and the mayor and city clerk. Mag-

Where There Is No Successor. — An officer who continues to hold and exercise his office after the expiration of his term, no successor having been elected or appointed, is an officer *de facto*.¹

Change in Form of Municipal Government. — When the form of government of a municipality is changed, the officers under the old government remain officers *de facto* under the new form of government until other officers are elected.²

Deputy. — As a general rule, a deputy who continues to act as such without reappointment, after his principal has gone out of office or entered on a second term, is considered an officer *de facto*.³

Commissioner of Court. — A commissioner who is appointed by a district court having circuit court powers, and who, after the creation of a circuit court of the district, continues to act as commissioner with the approval of the circuit court, is an officer *de facto* though he has never been reappointed by the latter court.⁴

(5) **Extension of Officer's Jurisdiction.** — One who has been elected judge of a certain district is *de facto* judge of a county which is afterwards added to his district by the legislature.⁵

(6) **Decision in Favor of Right.** — One who enters into office under a certificate of election duly issued, or under a judgment of a court of competent jurisdiction that he is entitled to the office, is an officer *de facto* though the election officers afterwards change their decision and declare another person elected, or though the judgment be reversed on appeal.⁶

(7) **Commission Intended for Another Person.** — A person acting as an officer under a regular commission as such is an officer *de facto* though the commis-

neau *v.* Fremont, 30 Neb. 843, 27 Am. St. Rep. 436. See also *Thrower v. State*, 52 Ala. 22; *Carli v. Rhener*, 27 Minn. 292.

Justice of the Peace. — In *Read v. Buffalo*, 3 Keyes (N. Y.) 447, a justice of the peace had been elected to serve until the first day of January. During his term of office the legislature designated the first Monday in January as the day on which the terms of justices should begin. The justice retained his office and discharged his duties from the first day of January until the first Monday thereof. It was held that during such time he was an officer *de facto*.

1. **Where There Is No Successor** — *Georgia*. — *Garrett v. State*, 89 Ga. 446; *Bohannon v. State*, 89 Ga. 451.

Illinois. — *Pritchett v. People*, 6 Ill. 525; *People v. Beach*, 77 Ill. 52.

Indiana. — *Milford School Town v. Zeigler*, 1 Ind. App. 138.

South Carolina. — *State v. McJunkin*, 7 S. Car. 21.

Trustees of a Village who hold over after the term for which they were elected has expired, they having neglected to notify and hold an election for their successors, are officers *de facto* until ousted. *People v. Bartlett*, 6 Wend. (N. Y.) 1422.

2. **Change in Form of Municipal Government.** — Where a town becomes a city, the town officers are city officers *de facto* until other city officers are elected according to law. *Perkins v. Fielding*, 119 Mo. 149.

Where an Act Consolidating Two Cities into One provided that the aldermen in office in such cities should serve out the terms for which they were elected, it was held that such aldermen were at least officers *de facto*. *Carlisle v. Saginaw*, 84 Mich. 134.

3. **A Deputy Sheriff** who acts as such after the successor to the sheriff has been selected and qualified, but before either the sheriff or his deputies know of that fact, is an officer *de facto*. *Barlow v. Standford*, 82 Ill. 298.

Where a sheriff resigns and the under sheriff takes possession of the office, a deputy of the former sheriff who continues to act as a deputy with the knowledge and consent of the under sheriff, but without any new appointment by him, will be considered as deputy *de facto* to such under sheriff, as in such case an oral appointment by the under sheriff may be inferred. *Boardman v. Halliday*, 10 Paige (N. Y.) 223.

In *Maley v. Tipton*, 2 Head (Tenn.) 403, it was held that a deputy register who continued to act as such after the register had been removed was an officer *de facto*.

One who is regularly appointed and acts as deputy sheriff during the first term of a sheriff, and continues to act as deputy during the sheriff's second term, is a deputy *de facto* though no new appointment is on file. *Rheinhardt v. State*, 14 Kan. 318.

Contrary Doctrine. — In *Smith v. Cansler*, 83 Ky. 367, it was held that one who had been a deputy clerk of a county court during the first term of the clerk, and continued to act as deputy, without a reappointment, after the clerk had entered upon a second term, was not an officer *de facto*.

4. **Commissioner of Court.** — *Starr v. U. S.*, 164 U. S. 627.

5. **Extension of Jurisdiction.** — *Clark v. Com.*, 29 Pa. St. 129.

6. **Decision in Favor of Right.** — *Rex v. Winchester*, 7 Ad. & El. 215, 34 E. C. L. 81; *Saline County v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171.

sion received by him was not intended for him, but for another person of the same name.¹

i. WHEN THERE CAN BE NO COLOR OF TITLE — (1) *More than One Claimant*. — A person cannot become a *de facto* officer in regard to an office which is filled and exercised by a *de jure* incumbent,² even though he performs some of the duties of the office, and his acts in that connection are generally acquiesced in.³ Neither can there be two *de facto* officers for the same office at the same time.⁴

(2) *Person in Hiding*. — A person who is in hiding cannot be a *de facto* officer.⁵

(3) *Judicial Decision Against Right*. — A person cannot be a *de facto* officer after judgment of ouster has been rendered against him,⁶ or there has been any other judicial decision against his right to hold the office.⁷

j. AS TO EXISTENCE OF OFFICE — (1) *There Must Be an Office in Existence*. — There can be no *de facto* officer unless there is a corresponding office in existence.⁸ Thus, a person assuming to hold an office which has been

1. *Commission Intended for Another*. — Coolidge v. Brigham, 1 Allen (Mass.) 333.

2. *Office Filled by De Jure Incumbent* — *United States*. — U. S. v. Alexander, 46 Fed. Rep. 728.

Illinois. — School Directors v. National School Furnishing Co., 53 Ill. App. 254.

Kansas. — McCahon v. Leavenworth County, 8 Kan. 437.

Mississippi. — Cohn v. Beal, 61 Miss. 398.

Nevada. — State v. Blossom, 19 Nev. 312.

New York. — Boardman v. Halliday, 10 Paige (N. Y.) 223; Cronin v. Gundy, 16 Hun (N. Y.) 524; Cronin v. Stoddard, 97 N. Y. 271.

Pennsylvania. — White v. School Dist., (Pa. 1887) 7 Cent. Rep. 155.

Vermont. — School Dist. No. 13 v. Smith, 67 Vt. 566, citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 105.

There cannot be a *de facto* house of representatives when a *de jure* house is in being and is holding its sessions and transacting its business in the hall provided for that purpose. Matter of Gunn, 50 Kan. 155.

A governor of a state who is a candidate for re-election and is defeated, but gets himself inaugurated and gets partial possession of the office, is not governor *de facto* as against the candidate who was elected and who is also exercising some of the powers and functions of the office. *Ex p. Norris*, 8 S. Car. 408.

3. *Acquiescence in Acts*. — The surveyor of one county who assumes in violation of law to make surveys in another county, in which another officer is alone empowered to make surveys, cannot be *de facto* the surveyor of such other county, even though his acts as such be generally acquiesced in and be sanctioned by the commissioner of the general land office. Cox v. Houston, etc., R. Co., 68 Tex. 226.

4. *There Cannot Be Two De Facto Officers* — *United States*. — U. S. v. Alexander, 46 Fed. Rep. 728.

Florida. — State v. Murphy, 32 Fla. 138, 44 Am. & Eng. Corp. Cas. 166.

Kansas. — McCahon v. Leavenworth County, 8 Kan. 437.

Missouri. — Dickerson v. Butler, 27 Mo. App. 9.

New York. — Morgan v. Quackenbush, 22 Barb. (N. Y.) 72.

Limitation. — Jersey City v. Erwin, 59 N. J. L. 282, was a case where two persons claimed to be city attorney, and each exercised the functions of the office. Chief Justice Beasley, delivering the opinion of the Supreme Court, quoted the rule set forth in the text, and added: "This seems to be the true doctrine so far as concerns such intruders and the public authorities, whatever the effect of such dual holding may be with respect to strangers dealing with either of such officers." In another part of the opinion he said: "It seems unquestionable that, with respect to third persons, each of such counsel was an official *de facto*." But in Erwin v. Jersey City, 60 N. J. L. 141, the Court of Errors and Appeals decided that one of the claimants was not an officer *de facto*.

Best Apparent Right. — Where there are two persons claiming to be governor of a state, and each is partly in possession of the office and is exercising some of its functions, the one who has the better apparent right to the office is the *de facto* governor, the other a mere usurper. *Ex p. Norris*, 8 S. Car. 408.

5. *Person in Hiding*. — Williams v. Clayton, 6 Utah 86. In this case the court said, *per Boreman, J.*: "We do not think that N. was a *de facto* officer during the year 1886. A man who holds a public office cannot discharge the duties of such office when he is in hiding. He cannot conceal himself from the public and yet claim to be a public officer. N. was so concealing himself, presumably to escape from some criminal charge. He had no place of business, his whereabouts were unknown, and he could not be found after diligent search, and could not be communicated with even by letter addressed to him through the postoffice. Whatever communication he had with his friends was in secret."

6. *Judicial Decision Against Right*. — Portsmouth's Petition, 19 N. H. 115; Hugg v. Ivins, 59 N. J. L. 139.

7. Williams v. Boynton, 147 N. Y. 426.

8. *There Must Be an Office in Existence*. — People v. Toal, 85 Cal. 333; Buck v. Eureka, 109 Cal. 504; Blackburn v. Oklahoma City, 1 Okla. 292.

There cannot be *de facto* mayor, recorder, and trustees of a town to the organic law of

abolished cannot be an officer *de facto*.¹

(2) *Office Irregularly Created*. — A person may be a *de facto* officer where he holds and exercises an office which has an irregular or merely potential existence; as, for instance, an office which the legislature has given a city council power to create, but in creating which the city council did not follow the mode prescribed by the statute;² or a town office created by a general

which there are no such offices known, and to which the law under which persons are elected and act as such officers does not apply. *Decora v. Bullis*, 25 Iowa 12.

There can be no *de facto* "additional constable" of a township, where the law provides for only one constable and that office is filled by a *de jure* incumbent. *Jester v. Spurgeon*, 27 Mo. App. 477.

In *Hawver v. Seldenridge*, 2 W. Va. 274, the court said, *per* Maxwell, J.: "No case has been cited, nor have I been able to find one, in which the acts of a *de facto* officer have been held valid unless it was where he was exercising the functions of either a *de jure* or *de facto* officer. Most of the cases cited are where the offices were legal and constitutional, but where there was some irregularity in the eligibility, election, or qualification of the officers."

1. *Abolished Office*. — *Ayers v. Latimer*, 57 Mo. App. 78; *Matter of Quinn*, 152 N. Y. 89; *Daniel v. Hutcheson*, 4 Tex. Civ. App. 239.

When a Township Is Abolished, the township officers go with it, and thereafter there can be no township officers *de facto*. *Matter of Hinkle*, 31 Kan. 712.

Contrary Doctrine. — In Missouri it was held that there might be an officer *de facto* as to an office the legal existence of which had ceased, where the determination of the existence of such office depended upon the result of a popular election, and it was wrongly supposed and announced that the result of such election had been to continue the existence of the office. *Adams v. Lindell*, 5 Mo. App. 197, *affirmed* in 72 Mo. 198. In this case an ordinance of the city council of St. Louis was attacked on the ground that a new charter which had been accepted by a popular election abolished the city council and vested the legislative power in the municipal assembly of the city of St. Louis. It was therefore claimed that there being no such body in existence as the city council, the doctrine of upholding the acts of *de facto* officers did not apply. This contention was not sustained.

In *Simpson v. McGonegal*, 52 Mo. App. 540, the validity of a city ordinance was attacked on the ground that four wards, which were not a part of the city, were represented in the council, and the representatives from such wards voted in the council, their votes being necessary to pass it. Gill, J., in delivering the opinion of the court, said that the general weight of authority was against sustaining the ordinance, but that the rule in Missouri as established by *Adams v. Lindell*, 5 Mo. App. 197, was otherwise. He then added: "While now, as already intimated, I regard *Adams v. Lindell* as an innovation or modification of the rule announced by a majority of the decided cases, I cheerfully advise that it be followed in the determination of the case at hand. Few cases, I imagine, will ever arise where a wise

public policy and proper sense of justice will be better served than by adopting the *de facto* rule here. A contrary holding would be most disastrous in its results. If the courts should proclaim the invalidity of all such acts of the city council whilst the same was by the common understanding composed of fourteen members — four more than should have been — by strict legal right, such a course would tend not only to disorganize the municipal government but to seriously wrong those who had taken contracts and expended money on the faith of the apparent condition of things. We are pleased that the law is not so helpless under such difficulties."

2. *Office Irregularly Created*. — *Buck v. Eureka*, 109 Cal. 504. In delivering the opinion of the court in this case, Henshaw, J., said: "The cases are numerous and uniform in treating the incumbents of such offices as *de facto* officers. In *Gibb v. Washington*, 1 McAll. (U. S.) 430, dealing with the question of the creation of the office of appraiser, the court say: 'If such an office has been even colorably created, then any irregularity which does not render the creation of the office void cannot be availed of.' In *In re Ah Lee*, 6 Sawy. (U. S.) 410, the Constitution of Oregon provided that when the population reached two hundred thousand, the legislature should district the state into designated circuits, and provided for the election of judges to the Circuit Courts therein. The legislature passed the act before the state attained the requisite population, and before election the governor, without authority, appointed the judge whose act was under review. The court held that admitting the act to be unconstitutional and the appointment of the governor to be invalid, still the judge was a judge *de facto*, since the office in effect was created by the Constitution. * * * In *Fowler v. Bebee*, 9 Mass. 231, 6 Am. Dec. 62, the legislature had created a new county and the offices thereof. The governor appointed officers before the law went into effect. It was held that their acts were binding as *de facto* officers, though the appointments themselves were afterwards declared void by the same court when the question was presented upon direct attack. *Com. v. Fowler*, 10 Mass. 291. Here too, therefore, the potential existence of the office was recognized. In *Leach v. People*, 122 Ill. 420, an unconstitutional law regulating township organizations provided for the number of members, mode of election, etc., of the board of supervisors, and under this law a board was selected whose acts were under consideration. It was held that, notwithstanding the invalidity of the law, there was still 'such a legal official body known to the law as the board of supervisors of Wayne county,' and the acting board, though in number and in mode of selection illegal, was upheld as a *de facto* body. The case of *Smith v. Lynch*, 29

law, the provisions of which have not been accepted by a town which assumes to be entitled to have such an office;¹ or an office which the town for which the officer acts is not entitled to have, by reason of not having a sufficient number of inhabitants, though the office exists throughout the state by force of law;² or county or school offices in a county or school district which has been illegally formed.³

(3) *Conflicting Doctrines as to Whether a De Facto Office Can Exist.* — It has been said that "the notion that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law."⁴ And the view that there cannot be a *de facto* office under a constitutional government is supported by the preponderance of authority.⁵

Ohio St. 261, is nearly a parallel case with the one at bar. The legislature of Ohio authorized villages and towns to establish boards of health and appoint members. The village of West Cleveland, by a void ordinance, attempted to do this. The members appointed qualified and entered upon the discharge of their duties, and were accepted and regarded by the public as such members. The opinion of the court, delivered by Welch, C. J., is as follows: 'The questions argued by counsel are: 1. Had the Superior Court jurisdiction? 2. Are the requirements of the statute as to the manner of passing the ordinance mandatory, or are they merely directory? 3. If these requirements are mandatory, are the persons so acting to be regarded as a board of health *de facto*? We are satisfied that the last named of these questions must be answered in the affirmative. It is unnecessary, therefore, to consider the first and second questions. In other words, we think that under the circumstances the board is to be regarded as a board *de facto*. Whether it was a board *de jure*, and whether the Superior Court had jurisdiction of the case, became, therefore, immaterial questions. It is claimed by counsel for the plaintiff that this is not a case where an office has been filled and its duties performed by parties not legally appointed or qualified, but a case where there was no office to be filled. We do not so understand the law. The statute (60 Ohio Laws 200) creates the office. It authorizes the council to "establish" the board, and to fill it by appointment. True, until the council act in the premises it is a mere potentiality in their hands; yet it is none the less an office known to the law. Where the council assume to establish the board under the law and to appoint its members there is no good reason why an irregularity or illegality in the act of establishing the office, any more than an irregularity or illegality in the appointment of the officers, should be held as rendering the acts of the officers void, and themselves mere trespassers. The reasons — the considerations of public policy — which exist in one case exist equally in the other. It is enough that the office is one provided for by law, and that the parties have the color of appointment, assumed to be and act as such officers, and that they are accepted and acknowledged by the public as such to the exclusion of all others. Such was the case here. There was both the color and the fact of office.' The office under consideration was given a potential existence by the acts of the legislature. * * * The plaintiff, having accepted the appointment to it, and re-

ceived the emoluments of it, is estopped from endeavoring to show to his own advantage that the council did not follow a prescribed mode in perfecting that potential existence."

1. **Legislation Creating Office Not Accepted.** — Road commissioners who have been regularly elected by a town and have acted as such are officers *de facto* though the town has never accepted the provisions of the state laws relating to such office. The office exists by force of the general law, and the failure of the town to accept the provisions thereof is merely an irregularity or illegality in the election. *Clark v. Easton*, 146 Mass. 43.

2. **Town Not Entitled to Have Officer.** — One who is elected and commissioned as a police magistrate or justice of the peace, and acts as such, is an officer *de facto*, whether or not the town in which he acts has the requisite number of inhabitants to entitle it to have such officer. *Lewistown v. Proctor*, 23 Ill. 533.

3. **County or School District Illegally Formed.** — Where a new county is formed, and the governor, in accordance with the provisions of the state code, appoints county commissioners therefor, who qualify and enter upon their duties, such appointees are officers *de facto*, even though the county does not contain the number of voters required to form a new county. *Merchants' Nat. Bank v. McKinney*, 2 S. Dak. 106.

Persons elected and acting as school directors are such *de facto* though the school district for which they act was illegally formed. *Trumbo v. People*, 75 Ill. 561.

4. **Doctrine That There Can Be No De Facto Office.** — 1 *Dillon's Municipal Corporations*, § 276.

5. *Lewistown v. Proctor*, 23 Ill. 533; *Ayers v. Lattimer*, 57 Mo. App. 78.

In *Norton v. Shelby County*, 118 U. S. 425, the court, *per* Field, J., considered that the portion of Chief Justice Butler's definition in *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409, in which it is stated that an officer *de facto* is one who acts "under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such," refers "not to the unconstitutionality of the act creating the office, but to the unconstitutionality of the act by which the officer is appointed to an office legally existing." This case is the leading authority for the doctrine that there can be no *de facto* office. In *Hildreth v. McIntire*, 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61, the court, *per* Robertson, J., said: "When the constitution or form of government remains unaltered and supreme,

But the doctrine is also laid down that when a court or office is established by a legislative act which is apparently valid, and has never been declared unconstitutional, and the court has gone into operation, or the office is filled and exercised, it is a *de facto* court or office, and its existence cannot be collaterally attacked.¹

2. Rights — a. RIGHT TO ACT. — A *de facto* officer has a right to exercise the duties and functions of his office, without interference,² and to have possession of the office and all the property belonging or appertaining thereto,³ until

there can be no *de facto* department or *de facto* office. The acts of the incumbents of such department or office cannot be enforced conformably to the constitution, and can be regarded as valid only when the government is overturned. Where there is a constitutional executive and legislature, there cannot be any other than a constitutional judiciary. Without a total revolution, there can be no such political solecism in Kentucky as a *de facto* Court of Appeals. There can be no such court whilst the constitution has life and power. There has been none such." In this case an attempt of the legislature to abolish the Court of Appeals established by the constitution, and create in its stead a new Court of Appeals, was held ineffectual for want of legislative power, and the act creating the new court was held unconstitutional.

In *Hawer v. Seldenridge*, 2 W. Va. 274, the court, *per* Maxwell, J., said: "A *de facto* office cannot exist under a constitutional government, but when the government is entirely revolutionized, and all its departments usurped by force, then prudence recommends and necessity enforces obedience to the authority of those who may act as the public functionaries; and in such cases the acts of a *de facto* executive, a *de facto* judiciary, and a *de facto* legislature must be recognized as valid."

1. Contrary Doctrine. — *Burt v. Winona*, etc., R. Co., 31 Minn. 472, 4 Am. & Eng. Corp. Cas. 426. In which case the court, *per* Gilfillan, C. J., said: "It would be a matter of almost intolerable inconvenience, and be productive of many instances of individual hardship and injustice, if third persons whose interests or necessities require them to rely upon the acts of the occupants of public offices should be required to ascertain at their peril the legal right to the offices which such occupants are permitted by the state to occupy. Taking even the narrowest definition of an officer *de facto*, viz., that he is one who is exercising the duties of an officer under color of legal right to the office, the reasons that justify the doctrine apply with equal force to a court or office where the same may be said to exist under color of right; that is, under color of law. That there may be a *de facto* municipal corporation, and consequently *de facto* offices of the same, follows from the rule laid down in *Cooley*, Const. Lim. 254: If a municipal corporation appears 'to be acting under color of law and recognized by the state as such, such a question (that is, of the legal existence of the corporation) should be raised by the state itself by quo warranto or other direct proceedings.'" Mr. Justice Mitchell dissented, saying: "The *de facto* doctrine * * * must have some reasonable limit, unless we are ready to recognize practical revolution and a legislative right to ignore all con-

stitutional barriers." With him Mr. Justice Berry concurred.

In *Com. v. McCombs*, 56 Pa. St. 436, the title of an assistant district attorney was assailed, on appeal from a taxation of costs, on the ground that the act creating the office was unconstitutional. The court refused to consider the objection and said, *per* Strong, J.: "An Act of Assembly, even if it be unconstitutional, is sufficient to give color of title, and an officer acting under it is an officer *de facto*."

In *Adams v. Lindell*, 5 Mo. App. 197, Mr. Justice Hayden, delivering the opinion of the court, set out his reasons for holding that the *de facto* doctrine should be applied to offices as well as to the incumbents thereof.

2. Right to Act — California. — *Satterlee v. San Francisco*, 23 Cal. 314; *Hull v. Superior Ct.*, 63 Cal. 174.

Illinois. — *People v. Lieb*, 85 Ill. 484.

Indiana. — *Leach v. Cassidy*, 23 Ind. 449.

Kansas. — *Brady v. Sweetland*, 13 Kan. 41.

Maine. — *Belfast v. Morrill*, 65 Me. 580.

A seizure by a *de facto* inspector of revenue is valid, and in an action of trespass by such inspector against a person who has taken away goods so seized, it is not necessary that he should prove that his appointment as inspector was approved by the secretary of the treasury, or that he was sworn into office. *Jones v. Gibson*, 1 N. H. 266.

The status of a *de facto* board of education cannot be destroyed by the action of the county superintendent in appointing other persons to take the places of the members of the board, on the supposition that their election was illegal. *Kimball v. Hendee*, 57 N. J. L. 307.

3. Right to Possession of Office and Property Thereof — California. — *Hull v. Superior Ct.*, 63 Cal. 174.

Illinois. — *People v. Lieb*, 85 Ill. 484.

Iowa. — *Desmond v. McCarthy*, 17 Iowa 525.

New York. — *Conover's Case*, 5 Abb. Pr. (N. Y. Supreme Ct.) 73.

Canada. — *Reg. v. Smith*, 4 U. C. Q. B. 322.

In *Runion v. Latimer*, 6 S. Car. 126, a claimant to the office of county treasurer entered the office of the opposing claimant, who was in possession, and took therefrom the "tax duplicate." It was held that the restoration thereof to the claimant in possession could be enforced by mandamus.

In *Thompson v. Holt*, 52 Ala. 491, the court *per* Brickell, C. J., said: "A *prima facie* title to a public office confers a right to exercise its functions and a right to the possession of the insignia and property thereof. On this *prima facie* title the court will compel a delivery of the insignia and property, that the functions and duties of the office may be exercised." This language was quoted with approval in *State v. Johnson*, 30 Fla. 433, and *State v.*

he is ousted in a proper proceeding brought for that purpose.¹

Possession of Money Belonging to Office. — It has been held that a *de facto* officer can recover money belonging to the office which he holds;² but the contrary doctrine has also been held.³

b. RIGHT TO PERFECT TITLE. — A *de facto* officer has the right, at any time before he is actually ousted, to cure the defect in his title, if possible; and upon doing so he becomes a *de jure* officer.⁴

c. RIGHT TO PROTECTION — (1) *Protection from Interference.* — A *de facto* officer is entitled to be protected from forcible interference while exercising the duties of the office he assumes to hold. Thus a person may be indicted for resisting a *de facto* officer who is attempting to make an arrest or to execute process,⁵ or for escaping from the custody of such officer;⁶ and such officer's lack of legal title is no defense to the indictment.⁷

Protection Where Person Interfering Is Killed. — A *de facto* officer who, believing himself to be a *de jure* officer, kills a person who is resisting him while making an arrest, is entitled to the same protection that a *de jure* officer would be entitled to in similar circumstances.⁸

Johnson, 35 Fla. 2. See also *State v. Saxon*, 25 Fla. 792.

Limitation. — A person who has been appointed a justice of the peace, but whose commission is invalid, and who is not in possession of such office, is not entitled to a mandamus to put him in office, though there be no officer *de jure*. *Justices v. Clark*, 1 T. B. Mon. (Ky.) 82.

1. Pendency of Proceedings to Oust. — A *de facto* officer should not be enjoined from exercising the duties and function of his office while an action in the nature of quo warranto to oust him is pending. *State v. Durkee*, 12 Kan. 308; *State v. McIntosh*, 2 Ired. L. (24 N. Car.) 53; *State v. Allen*, 2 Ired. L. (24 N. Car.) 183.

But in *State v. Buckland*, 23 Kan. 259, it was held that a defeated candidate for reelection who refused to give up the office and contested the decision of the canvassers as to the result of the election had no right to exercise the office while such contest was pending.

2. Can Recover Money. — Where taxpayers have voluntarily paid their taxes to a tax collector, he is bound to pay over to a *de facto* town treasurer the sums collected. *Trescott v. Moan*, 50 Me. 347.

The courts will aid a *de facto* school board in obtaining the money which has been set aside for the maintenance of public schools, as the public business must be transacted, and there is no alternative between giving *de facto* officers full control of all things necessary for the transaction thereof and the stoppage of the public business. *School Com'rs v. School Com'rs*, 77 Md. 283.

A *de facto* president of a board of school trustees can maintain an action upon a note payable to him as such officer where he has no personal interest in the money for which the note was given. *Rhodes v. McDonald*, 24 Miss. 418.

3. Contrary Doctrine. — A *de facto* city treasurer cannot compel the county collector to pay over to him money collected for city taxes. *People v. Weber*, 86 Ill. 283.

The fact that a commissioner appointed to lay out and construct a highway has forfeited his office by accepting an incompatible office is available as a defense to an action by him and the other commissioners to compel pay-

ment to them of money raised for the construction of such highway. *People v. Nostrand*, 46 N. Y. 375.

A *de facto* overseer of the poor cannot maintain an action for a penalty for a violation of the excise laws. *Horton v. Parsons*, 37 Hun (N. Y.) 42.

4. Right to Perfect Title. — In *De Turk v. Com.*, 129 Pa. St. 151, it was held that one who had acted as county commissioner while holding the incompatible office of postmaster could defeat quo warranto proceedings instituted to oust him from his office as county commissioner by resigning the office of postmaster.

5. Protection from Interference. — *Andrews v. State*, 78 Ala. 483; *Floyd v. State*, 79 Ala. 39; *Garrett v. State*, 89 Ga. 446; *Bohannon v. State*, 89 Ga. 451; *People v. Hopson*, 1 Den. (N. Y.) 574.

6. Escape. — *Floyd v. State*, 79 Ala. 39.

7. Officer's Lack of Title No Defense. — *Heath v. State*, 36 Ala. 273; *People v. Hopson*, 1 Den. (N. Y.) 574.

8. Protection Where Person Resisting Is Killed. — In *State v. Dierberger*, 90 Mo. 369, a *de facto* deputy constable who killed a man who was resisting him while he was attempting to make an arrest was held to be entitled to protection to the extent that others were bound to respect his official character as if he were an officer *de jure*. The court, *per Black, J.*, said: "It is difficult to see why the defendant may not say that he was an officer *de facto*, and be entitled to protection to the extent that others were bound to respect his official character. It can hardly be said that the state resorts to this proceeding to test the right of the defendant to perform the functions of a deputy constable when there are so many other more appropriate proceedings at hand; but it may rather be said the state here seeks to punish him for doing that which he had no right to do, though an officer he was. The question is by no means free from doubt, but we conclude the defendant should be treated in this case as an officer, and the instructions should proceed upon the theory that he was one. There seems to be no doubt but the defendant believed he was a deputy constable by right, in all respects, and

Recovery of Damages. — But it has been held that a *de facto* officer cannot recover damages in a civil action for an assault on him while attempting to seize property under execution.¹

(2) *Not Protected from Liability for Acts.* — It is generally held that one who attempts to justify an act complained of, on the ground that he was an officer, and that the act was within the powers and duties of his office, must allege and prove that he was such officer *de jure*; that he was such officer *de facto* can afford him no protection.² This is true whether the act was done

the conclusion reached we believe to be in the interest of good order."

1. Cannot Recover Damages. — *People v. Hopson*, 1 Den. (N. Y.) 574. In this case the court, *per* Bronson, C. J., said: "It would probably be a good answer to the action, that he was not a legal officer, but a wrongdoer, who might be resisted."

2. Not Protected from Personal Liability — *Arkansas*. — *Miller v. Callaway*, 32 Ark. 666.

Connecticut. — *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574.

Illinois. — *Schlencker v. Risley*, 4 Ill. 483, 38 Am. Dec. 100; *Case v. Hall*, 21 Ill. 632; *Outhouse v. Allen*, 72 Ill. 529.

Kentucky. — *Rice v. Com.* 3 Bush (Ky.) 14; *Patterson v. Miller*, 2 Metc. (Ky.) 493; *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 224; *Morgan v. Vance*, 4 Bush (Ky.) 323.

Maine. — *Bearce v. Fossett*, 34 Me. 575; *Rounds v. Mansfield*, 38 Me. 580; *Rounds v. Bangor*, 46 Me. 541, 74 Am. Dec. 469; *Pooler v. Reed*, 73 Me. 129; *Grace v. Teague*, 81 Me. 559.

Massachusetts. — *Short v. Symmes*, 150 Mass. 298, 15 Am. St. Rep. 204.

Mississippi. — *Kimball v. Alcorn*, 45 Miss. 151.

New Hampshire. — *Brewster v. Hyde*, 7 N. H. 206; *Cavis v. Robertson*, 9 N. H. 524; *Blake v. Sturtevant*, 12 N. H. 567.

New York. — *People v. Peabody*, 6 Abb. Pr. (N. Y. Supreme Ct.) 228; *New York v. Flagg*, 6 Abb. Pr. (N. Y. Supreme Ct.) 296; *Newman v. Tiernan*, 37 Barb. (N. Y.) 159; *Colton v. Beardsley*, 38 Barb. (N. Y.) 29; *Conover v. Devlin*, 15 How. Pr. (N. Y. Supreme Ct.) 470; *Burditt v. Barry*, 6 Hun (N. Y.) 657; *Green v. Burke*, 23 Wend. (N. Y.) 490.

South Carolina. — *McBee v. Hoke*, 2 Spears L. (S. Car.) 138.

Tennessee. — *Venable v. Curd*, 2 Head (Tenn.) 582; *Shepherd v. Staten*, 5 Heisk. (Tenn.) 79.

Vermont. — *Cummings v. Clark*, 15 Vt. 653; *Courser v. Powers*, 34 Vt. 517.

In *Johnston v. Wilson*, 2 N. H. 202, it was held that a collector of taxes who had neglected to take the oath of office could not justify his acts in distraining for taxes as an officer, where it was provided by statute that such collector could not act until sworn. But the court said: "It seems to be well settled that when the irregularity, whatever it may be, is not punishable at all, or only by a penalty, the acts of the officer are still 'valid in respect to third persons.' * * * and, for aught we perceive, the officer himself may be protected under them."

Conflicting Cases. — In *Londogan v. Hammer*, 30 Iowa 508, it was held that, in an action for

false imprisonment, evidence that the defendant was a *de facto* justice of the peace and that the act complained of was done in the exercise of that office, afforded a sufficient justification; because when one was shown to have been acting as a public officer it was presumed, until the contrary appeared, that he had been duly appointed.

In *Johnson v. Stedman*, 3 Ohio 94, which was an action of trespass for taking and converting goods, the defendant pleaded that he was a constable and took the goods by virtue of an execution placed in his hands. The defendant offered parol evidence, and no other, that he had acted as constable. It was objected that an appointment in writing and the other requisites to make him a legal constable should be produced. The court held that the evidence showed the defendant to be a constable *de facto*, which was sufficient for the purposes of the case, as the real question in dispute was whether the property belonged to the plaintiff or to the execution creditor. The same principle was applied to a tax collector who justified under his office, in *Eldred v. Sexton*, 5 Ohio 216.

In *Foot v. Stiles*, 57 N. Y. 399, it was held that one who had been elected and acted as a commissioner of highways was not liable as a trespasser for his official acts because he had not filed his official bond as required by law. The court said that this was not a case of an officer *de facto*, but of a rightful officer holding by a defeasible title. See also *Barret v. Reed*, 2 Ohio 409.

The case of *Carothers v. Scott*, Tappan (Ohio) 227, has been cited as authority for the position that "when in an action for false imprisonment it appears on the plaintiff's own evidence that the defendant was an acting magistrate and had jurisdiction of the subject and of the person a nonsuit should be ordered, though the authority of the magistrate is not otherwise shown." *Walker & Bates's Ohio Digest*, vol. 1, p. 520. This construction of the case is probably due to a headnote, which is misleading in that it does not show the true ground upon which the court placed its decision. The court, *per* Tappan, President, said: "If this action were attempted to be sustained on the ground of usurpation, or that these defendants were pretending to act, the one as a justice of the peace and the other as a constable, and so committed the trespass complained of, there would be reason and propriety in adhering to the rule requiring them to show their authority; but the ground on which the suit is placed is not that the defendant, Scott, is not a justice, but that, being a justice, duly commissioned and qualified, he was guilty of such an excess of jurisdiction as renders him liable in this action."

by the officer in person or by another person acting under his orders.¹

Limitation. — Although an officer *de facto* may be liable in trespass for his acts, only nominal damages can be assessed where the act in itself was lawful and the officer did not go beyond the duties of the office he assumed to hold.²

(3) *Protection of Person Acting under De Facto Officer.* — The apparent authority of a *de facto* officer is sufficient to protect from all personal liability a person who does, under such authority, an act not unlawful in itself.³

d. OFFICE CONFERS NO PRIVILEGES. — Although a *de facto* officer has certain rights, arising from the public necessity that the office should be exercised by some one, he has no personal privileges, and can claim nothing for himself. The rule is that when a person attempts to enforce a right grounded upon or flowing out of an office which he assumes to hold, he must show a legal right to such office,⁴ and that any act of a *de facto* officer for his own benefit is void.⁵

1. Liability for Acts Done by His Order. — In *Allen v. Archer*, 49 Me. 346, persons who assumed to act as town assessors under an illegal election were held liable, in an action of trespass, for the seizure of property by a collector to whom they had issued a warrant for the collection of taxes assessed by them.

2. Limitation. — In *Cavis v. Robertson*, 9 N. H. 524, it was held that a collector of taxes who had not taken the required oath of office was not within the protection of an act which provided that "no suit shall be maintained against any collector of taxes * * * who shall have taken the oath of office prescribed by law and given bond according to law * * * for any cause whatsoever except such collector's own wrong or illegal conduct;" and such collector, having seized property and sold it for taxes, was held to be liable to the owner in damages. But it was further held that where the tax was legally assessed and the collector did not go beyond the duties of his office, only nominal damages could be recovered, unless the owner of the property showed that he had sustained actual damage by reason of some illegality.

3. Person Acting under Authority of De Facto Officer — *England.* — *Margate Pier Co. v. Hannam*, 3 B. & Ald. 266, 5 E. C. L. 278.

Kentucky. — *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 224.

Massachusetts. — *Com. v. Kirty*, 2 Cush. (Mass.) 577.

New York. — *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451; *Weeks v. Ellis*, 2 Barb. (N. Y.) 320; *Wilcox v. Smith*, 5 Wend. (N. Y.) 231.

Wisconsin. — *Laver v. McGlachlin*, 28 Wis. 364.

A collector of taxes who is sued in trespass for taking certain property can justify on the ground that he acted by virtue of a rate bill made up and certified by a *de facto* prudential committee. *Goodwin v. Perkins*, 39 Vt. 598.

Person Assisting De Facto Officer to Make Arrest or Seizure. — *Soudant v. Wadhams*, 46 Conn. 218; *Schlenker v. Risley*, 4 Ill. 483, 38 Am. Dec. 100; *Weatherford v. State*, 31 Tex. Crim. Rep. 530.

4. De Facto Officer Has No Personal Privileges — *Connecticut.* — *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574.

Illinois. — *People v. Weber*, 89 Ill. 347.

Kentucky. — *Patterson v. Miller*, 2 Metc. (Ky.) 493.

Maine. — *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280.

Mississippi. — *Kimball v. Alcorn*, 45 Miss. 151.

Missouri. — *State v. Dierberger*, 90 Mo. 369; *Turner v. Keller*, 38 Mo. 332.

New York. — *Devlin's Case*, 5 Abb. Pr. (N. Y. C. Pl.) 281; *Colton v. Beardsley*, 38 Barb. (N. Y.) 29; *People v. Hopson*, 1 Den. (N. Y.) 574; *People v. Anthony*, 6 Hun (N. Y.) 142; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730; *Green v. Burke*, 23 Wend. (N. Y.) 490; *People v. Nostrand*, 46 N. Y. 375.

Oregon. — *Territory v. Pyle*, 1 Oregon 149.

Pennsylvania. — *Dillon v. Myers*, Bright. (Pa.) 426; *Neale v. Overseers*, 5 Watts (Pa.) 538.

South Carolina. — *Kottman v. Ayer*, 3 Strobb. L. (S. Car.) 93 (*dictum*).

Vermont. — *Lyndon v. Miller*, 36 Vt. 329.

5. Acts for His Own Benefit Void — *Kentucky.* — *Patterson v. Miller*, 2 Metc. (Ky.) 493; *Hoglan v. Carpenter*, 4 Bush (Ky.) 89.

Maine. — *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280.

Mississippi. — *Rhodes v. McDonald*, 24 Miss. 418.

New York. — *Bentley v. Phelps*, 27 Barb. (N. Y.) 524; *People v. Hopson*, 1 Den. (N. Y.) 574; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730; *Green v. Burke*, 23 Wend. (N. Y.) 490; *People v. Nostrand*, 46 N. Y. 375; *Olmsted v. Dennis*, 77 N. Y. 378.

Pennsylvania. — *Keyser v. M'Kissan*, 2 Rawle (Pa.) 139.

South Dakota. — *Fylpaa v. Brown County*, 6 S. Dak. 634.

Vermont. — *McGregor v. Balch*, 14 Vt. 428, 39 Am. Dec. 231.

In *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, the court, *per Andrews, J.*, said: "In *Cro. Eliz.* 699 the doctrine is tersely stated: 'The act of an officer *de facto*, when it is for his own benefit, is void; because he shall not take advantage of his own want of title, which he must be conscious of; but where it is for the benefit of strangers, or the public, who are presumed to be ignorant of such defect of title, it is good.'"

In *Adams v. Tator*, 42 Hun (N. Y.) 384, the court, *per Landon, J.*, said: "The general rule with respect to *de facto* officers is that the office is so far void as to prevent the officer from asserting it to his own advantage at the

3. Duties. — A *de facto* officer, while in office, can be compelled to perform every official act in behalf of another which the duties of the office require,¹ and he cannot plead his lack of title to avoid so acting.² But a judicial order directed to him as such officer is binding upon him only so long as he continues nominally to fill the office, not after he has abdicated and surrendered possession of the office to the *de jure* officer.³

4. Liabilities — *a. PERSONAL LIABILITY* — (1) *Liability for Money Received.* — A *de facto* officer is accountable for public money which has been collected by him while in the exercise of his office.⁴

Money Lawfully Expended. — A *de facto* officer is not liable to refund public money which he has expended for lawful purposes in the exercise of the office held by him.⁵

(2) *Cannot Escape Liability by Denying Title.* — A person who has acted as a public officer cannot escape civil liability for his acts in that capacity by impeaching his title and attempting to abnegate his office.⁶

(3) *Criminal Liability.* — A *de facto* officer is liable to punishment for misfeasance or malfeasance in office the same as an officer *de jure*.⁷ Therefore, on the trial of an indictment against an officer for official misconduct, it is not

expense or to the injury of another, but is valid so far as to protect third parties from injury; in other words, void as to himself, but valid as to strangers." See also *State v. Dierberger*, 90 Mo. 369.

1. Can Be Compelled to Perform Duties of Office. — *Kelly v. Wimberly*, 61 Miss. 548; *State v. McEntyre*, 3 Ired. L. (25 N. Car.) 171.

A mandamus directing the performance of a duty imposed upon justices of the peace is rightfully directed to one in possession of such office and assuming to perform its duties, whether he be a justice *de jure* or not. *People v. Schiellein*, 95 N. Y. 124.

In *State v. McEntyre*, 3 Ired. L. (25 N. Car.) 171, the court, *per* Ruffin, C. J., said: "A person who undertakes an office and is in office, though he might not have been duly appointed, and therefore may have a defeasible title, * * * is yet, from the possession of its authorities and the enjoyment of its emoluments, bound to perform all the duties, and liable for their omission, in the same manner as if the appointment were strictly legal and his right perfect."

Mr. Bishop, in his work on Criminal Law, criticises the above language as being too broad a statement of the doctrine, and considers that the cases where an officer *de facto* is liable for refusing to act are the exceptions rather than the rule. He says: "Having the right to cease to do wrong—that is, to stop acting in an office to which he has no just title—the mere officer *de facto* cannot as of course be punished for refusing to discharge official duties. Yet it appears that in special circumstances, as where the refusal is to take a particular step constituting a part of a whole which he has taken upon himself to do, his not doing of the part, when he might have declined the whole, will subject him to indictment." 1 Bishop's New Crim. Law, § 464.

2. Cannot Plead Lack of Title to Avoid Acting. — *Kelly v. Wimberly*, 61 Miss. 548; *Chumasero v. Potts*, 2 Mont. 257; *People v. Brown*, 47 Hun (N. Y.) 459.

When Not Liable for Refusal to Act. — In *New York* it is held that a *de facto* highway overseer

is not liable for a penalty for omissions of duty as an officer, where he disavows his authority, and omits to act because he doubts his right to do so. *Bentley v. Phelps*, 27 Barb. (N. Y.) 524. See also *Farman v. Ellington*, 46 Hun (N. Y.) 47, *affirmed* in 124 N. Y. 662; *Olmsted v. Dennis*, 77 N. Y. 378.

3. Abdication. — *People v. Brown*, 47 Hun (N. Y.) 459.

4. Liable for Money Received. — *Lincoln v. Chapin*, 132 Mass. 470.

The irregularity or illegality of a person's appointment to public office does not absolve him from the legal and moral obligation of accounting for public money which has been placed in his hands in consequence of such appointment. *U. S. v. Maurice*, 2 Brock. (U. S.) 96.

Money Which He Could Not Collect. — A *de facto* officer is not accountable for money which should have been paid into the office, but which he failed to collect, on account of the refusal of the persons liable therefor to pay it, on the ground of his lack of authority, and the payment of which he had no power to enforce. *Lincoln v. Chapin*, 132 Mass. 470.

5. Money Lawfully Expended. — *McCracken v. Soucy*, 29 Ill. App. 619.

6. Cannot Escape Liability by Denying Title — *California.* — *Buck v. Eureka*, 109 Cal. 504.

Maine. — *Trescott v. Moan*, 50 Me. 347.

Maryland. — *Billingsley v. State*, 14 Md. 369.

Massachusetts. — *Wendell v. Fleming*, 8 Gray (Mass.) 613.

Mississippi. — *Marshall v. Hamilton*, 41 Miss. 229.

New York. — *Dean v. Gridley*, 10 Wend. (N. Y.) 254; *Hall v. Luther*, 13 Wend. (N. Y.) 491; *People v. Gilbert*, Anth. (N. Y.) 191.

Wisconsin. — *Sprague v. Brown*, 40 Wis. 612.

See also *infra*, this section, *Liability of Sureties*.

7. Criminal Liability. — *Pentecost v. State*, 107 Ala. 81; *State v. Goss*, 69 Me. 22; *Gage v. Payne*, Wright (Ohio) 678; *State v. Bates*, 46 Vt. 387.

necessary for the prosecution to show that he had a legal title to the office which he exercised,¹ and the officer cannot escape by denying that he had such title.²

(4) *Penalties for Usurpation.* — In most of the states the wrongful holding of an office is punishable by either fine or imprisonment, but it has been held that an officer who in good faith continues to hold office, believing himself to be entitled so to hold, after his term has expired, is not punishable under such statutes.³

b. *LIABILITY OF SUPERIOR OFFICER.* — The acts of a *de facto* officer in the discharge of his duties do not create any liability on the part of his superior who invoked his action, though the flaw in his title which makes him a *de facto* officer merely is the informality of his appointment by such superior.⁴

c. *LIABILITY OF SURETIES* — (1) *In General.* — A lack of legal title in one who assumes to act as a public officer does not relieve the sureties on his official bond from any liabilities to which they would be subject were their principal's title a perfect one.⁵

(2) *May Not Deny Principal's Title.* — The sureties of an officer may not, in an action on the bond, escape liability by setting up their principal's lack of

1. *Legal Title Need Not Be Proved.* — *Rex v. Borrett*, 6 C. & P. 124, 25 E. C. L. 312; *People v. Church*, 1 How. Pr. N. S. (N. Y. Ct. Sess.) 366.

2. *Cannot Deny Legal Title* — *Alabama.* — *Diggs v. State*, 49 Ala. 311.

California. — *People v. Bunker*, 70 Cal. 212; *Buck v. Eureka*, 109 Cal. 504.

Iowa. — *State v. Stone*, 40 Iowa 547.

Mississippi. — *Fortenberry v. State*, 56 Miss. 286.

North Carolina. — *State v. Cansler*, 75 N. Car. 442; *State v. Long*, 76 N. Car. 254.

South Carolina. — *State v. Maberry*, 3 Strobb. L. (S. Car.) 144; *State v. Sellers*, 7 Rich. L. (S. Car.) 368.

3. *When Not Liable to Penalties.* — In *Kreidler v. State*, 24 Ohio St. 22, the defendant had been appointed and qualified as a lieutenant of police, and after the expiration of his term continued to hold and exercise his office in good faith, believing that he was entitled to do so until his successor should be qualified. He was prosecuted for such holding under an act providing a punishment for any person who should "take upon himself to exercise or officiate in any office or place of authority, in this state, without being legally authorized." It was held that the case was not within the meaning of the act.

In *State v. Dean*, 49 Kan. 558, it was held that under a statute providing that every school district clerk who should refuse to give up possession of the records, books, and papers of the office to his successor should be fined, a person who had been legally elected clerk of a school district and who held possession of the office after his term had expired, claiming that no successor had been legally elected, could not be convicted and fined for refusing to deliver such records, etc., to one who claimed to have been elected to succeed him.

4. *Liability of Superior.* — *Hamlin v. Dingman*, 5 Lans. (N. Y.) 61.

A city or town is not responsible in damages for the acts of a person who has been elected pound keeper, and assumes to act as such, but whose official bond has not been approved.

Rounds v. Bangor, 46 Me. 541, 74 Am. Dec. 469.

5. *Liability of Sureties.* — *People v. Beach*, 77 Ill. 52; *Case v. State*, 69 Ind. 46; *Ramsey County v. Brisbin*, 17 Minn. 451; *Lyndon v. Miller*, 36 Vt. 329; *State v. Bates*, 36 Vt. 387; *Kent v. Mercer*, 12 U. C. C. P. 30.

The official bond of a person irregularly appointed to office is not void, but may be sustained as a contract to perform the duties belonging to the office. *U. S. v. Maurice*, 2 Brock. (U. S.) 96.

Where a defaulter has been elected sheriff and inducted into the office by the County Court, and has given the bonds required by law, thus becoming sheriff *de facto*, and has collected public taxes, such a consequence as the discharge of his sureties from their voluntary obligations does not in reason or upon principle result from the neglect of the court to perform its duty by excluding him from the office. *Jones v. Scanland*, 6 Humph. (Tenn.) 195, 44 Am. Dec. 300. See also the title BONDS, vol. 4, p. 662.

Void Appointment. — In *Com. v. Teal*, 14 B. Mon. (Ky.) 24, it was held that even though an appointment of a person as constable was absolutely void, yet if he gave bond and incurred liabilities as constable, he and his sureties were liable upon the bond as a common-law bond.

Where Officer Holds Over. — Where a sheriff is re-elected and fails to renew his bond within the time required by law, but continues in office as *de facto* sheriff, the sureties on his original bond are liable for a breach of official duty of which he is guilty. *Dunphy v. Whipple*, 25 Mich. 10.

Where a person who has been appointed district attorney and has given bond for the faithful performance of his duties "during incumbency" continues to hold the office as a *de facto* incumbent after the term for which he was appointed has expired, his sureties are liable for his defalcation while holding as such *de facto* officer. *State v. Wells*, 8 Nev. 105.

Contrary Doctrine. — Where a county treasurer who is re-elected continues to hold his office without giving a new bond as required

legal title to the office he holds,¹ even though the flaw in his title be an irregularity in the bond.²

(3) *Not Liable to De Jure Officer for Fees.* — It has been held that the sureties on the official bond of an officer *de facto* are not liable to the officer *de jure*, upon his recovery of the office, for the fees, salary, or other emoluments which were received by the *de facto* officer while exercising the functions of the office, as the action to recover such fees, etc., is but a personal action for damages against the intruder.³

5. **Right to Compensation as Between De Jure and De Facto Officers** — *a. RIGHTS OF DE JURE OFFICER* — (1) *Entitled to Emoluments of Office.* — In regard to the compensation of public officers, the general rule is that the right to the salary, fees, and other emoluments of an office is incident to the true title, not to the mere occupation and exercise of the office, and that, therefore, a *de jure* officer is entitled to the compensation attached to the office, even though he is prevented from performing the duties thereof.⁴ But it has also been held

by law, the sureties on his original bond are not liable for his misfeasance while so holding as a *de facto* officer. *Wapello County v. Bigham*, 10 Iowa 39. See also *State v. Crooks*, 7 Ohio, pt. ii., 221.

1. **May Not Set Up Principal's Lack of Title** — *Alabama.* — *Williamson v. Woolf*, 37 Ala. 298.

California. — *People v. Jenkins*, 17 Cal. 500.

Illinois. — *Green v. Wardwell*, 17 Ill. 278, 63 Am. Dec. 366; *Shaw v. Havelkluft*, 21 Ill. 127; *Allbee v. People*, 22 Ill. 533.

Kentucky. — *Jones v. Gallatin County*, 78 Ky. 491.

Louisiana. — *Police Jury v. Haw*, 2 La. 41, 20 Am. Dec. 294.

Maine. — *Ford v. Clough*, 8 Me. 334, 23 Am. Dec. 513; *Kellar v. Savage*, 20 Me. 199; *Trescott v. Moan*, 50 Me. 347.

Maryland. — *Billingsley v. State*, 14 Md. 369.

Massachusetts. — *Wendell v. Fleming*, 8 Gray (Mass.) 613.

Mississippi. — *Byrne v. State*, 50 Miss. 688.

New Hampshire. — *Horn v. Whittier*, 6 N. H. 88.

New York. — *Hall v. Luther*, 13 Wend. (N. Y.) 491.

Conflicting Case. — In *McNutt v. Lancaster*, 9 Smed. & M. (Miss.) 570, the surety on the bond of a tax collector was sued for a defalcation by his principal. He set out, as a matter of defense, that the tax collector did not take and subscribe the oath required by law to be taken and subscribed by such officers before they could discharge their official duty. Sharkey, C. J., held that in view of the law of 1822, which declared that if any collector of taxes should presume to execute the duties of his office "before he shall have given bond and taken the oath of office," agreeably to the directions of the act, all his acts and proceedings done under color of office should be absolutely void, this plea constituted a good bar to the action. Mr. Justice Clayton did not consider that the law of 1822 was in force, but held that even if it were, the plea was not a good bar to the action, as the tax collector had enjoyed and exercised his office and was the officer *de facto*; and neither he nor his sureties could be heard to say that the official bond imposed no liability on them.

2. **Irregularity in Bond** — *Alabama.* — *Sprowl v. Lawrence*, 33 Ala. 674.

Arkansas. — *Norris v. State*, 22 Ark. 524.

Mississippi. — *State v. Cooper*, 53 Miss. 615.

Nevada. — *State v. Rhoades*, 6 Nev. 352.

Ohio. — *Kelly v. State*, 25 Ohio St. 567.

Vermont. — *Weston v. Sprague*, 54 Vt. 395.

Virginia. — *Monteith v. Com.*, 15 Gratt. (Va.) 172.

3. **As to Liability to De Jure Officer for Fees.** — *Curry v. Wright*, 86 Tenn. 636.

But under the *Colorado* statutes (Gen. Stat., p. 650, § 142), where a justice of the peace refuses to deliver to his successor the books, etc., belonging to the office, and holds over under a claim that his successor's election is illegal, the sureties on his bond are liable to the *de jure* officer for the fees received by the *de facto* officer. *Morris v. People*, 5 Colo. App. 138.

4. **De Jure Officer Entitled to Compensation** — *California.* — *Dorsey v. Smyth*, 28 Cal. 21; *Stratton v. Oulton*, 28 Cal. 44; *Carroll v. Siebenthaler*, 37 Cal. 193.

Indiana. — *State v. Carr*, 129 Ind. 44, 28 Am. St. Rep. 163.

Iowa. — *McCue v. Wapello County*, 56 Iowa 698, 41 Am. Rep. 134.

New York. — *People v. Tieman*, 30 Barb. (N. Y.) 193, 8 Abb. Pr. (N. Y.) 359; *McManus v. Brooklyn*, (Brooklyn City Ct.) 5 N. Y. Supp. 424; *Hagan v. Brooklyn*, (Brooklyn City Ct.) 5 N. Y. Supp. 425.

Texas. — *Beard v. Decatur*, 64 Tex. 7, 7 Am. & Eng. Corp. Cas. 145.

In *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, the court, *per* Andrews, J., said: "The doctrine that the right to the emoluments of an office follows the true title has been repeatedly declared in this state. * * * Dolan v. New York, 68 N. Y. 274; McVeany v. New York, 80 N. Y. 185, 36 Am. Rep. 600. And these decisions are enforced by the cases which hold that in an action by an officer to recover fees, his title may be put in issue, and that an action therefor cannot be maintained by an officer *de facto* only. *Bronson, J.*, in *People v. Hopson*, 1 Den. (N. Y.) 579, and cases cited; *Riddle v. Bedford County*, 7 S. & R. (Pa.) 392."

A *de jure* city officer who has been illegally kept out of his office and prevented from performing the duties thereof may recover the salary from the city, where the same has not been paid to the *de facto* officer who performed

that a mere offer to perform the duties of the office is not sufficient to entitle the *de jure* officer to recover the salary thereof; that to give him such right he must both obtain and exercise the office.¹

(2) *When Right Matures.* — As to the time when a *de jure* officer should demand his salary, it has been held that he cannot maintain an action therefor while the office is held by a *de facto* incumbent, because a judgment in such case would determine the right to the office in an action to which the *de facto* incumbent was not a party.² But it has been held also that the fact that an office is held by a *de facto* incumbent does not defer the time when the *de jure*

the duties. *Comstock v. Grand Rapids*, 40 Mich. 397.

One who has been declared by a decree of court to have been legally elected to the office of magistrate, and is accordingly commissioned for five years from a certain date, is entitled to the compensation of the office from that date although he was prevented from taking possession of the office at that time. *Philadelphia v. Rink*, (Pa. 1886) 2 Cent. Rep. 289.

The Theory upon which a *de jure* officer is allowed to recover the compensation belonging to an office for a time when he did not perform its duties is that he may treat the services rendered by the *de facto* officer as having been rendered for him, and recover upon that assumption. *Dolan v. New York*, 68 N. Y. 274.

Extent of Recovery. — In an action by a *de jure* city officer against the city for his salary while he was wrongfully out of his office the city cannot recoup and have deducted from his salary the amount he has earned by his personal labor during such period. *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280.

No Distinction Between Fees and Salary. — That there is no difference in principle as to the right of an officer *de jure*, but who has not performed the duties of his office, to recover fees and to receive a salary, is considered in the cases of *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299, and *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600. In the case last cited the court said: "The learned counsel for the appellant, in the case in hand, sought to distinguish between cases where the compensation was by fixed fees for the specific service rendered and where it was by an annual salary payable at recurring periods. We are not able to perceive such a distinction as will affect the applicability of the cases cited." The court then examined the cases theretofore decided and cited, and held that the rule was the same whether the compensation to the officer was by salary or fees, and declared that "the difference would be only that that by salary was a fixed and certain sum, and that by fees uncertain." And see *Beard v. Decatur*, 64 Tex. 7, 7 Am. & Eng. Corp. Cas. 145.

1. Doctrine that Actual Services Must Be Rendered. — *Farrell v. Bridgeport*, 45 Conn. 191; *Deane v. Greene County*, 66 How. Pr. (N. Y. Supreme Ct.) 461.

In *Jump v. Spence*, 28 Md. 1, one who in an election contest was declared to have been elected to an office which had been exercised by his opponent under the decision of the election officers was held to be not entitled to the salary of the office which accrued before the decision in favor of his right and his qualifica-

tion and assumption of the office under such decision.

In *Wayne County v. Benoit*, 20 Mich. 176, it was held that a *de jure* county officer could not enforce a claim against the county for the salary and emoluments of the office for a time during which he was kept out by a *de facto* officer. In delivering the opinion of the majority of the court Campbell, C. J., said: "The laws assume that the laborer is worthy of his hire, and the person who is required to be recognized, for the time being, as the legal incumbent for the purposes of doing the work should be recognized for the purpose of remuneration also, so far as those are concerned with whom he deals officially, and who have no personal interest in the contest for the office." But from this view Cooley, J., dissented, and after examining the cases cited to support the majority opinion, said: "The general language employed in these cases, that the right to fees grows out of the rendition of the service, is, on all logical rules, to be understood with reference to the particular facts then before the court, and cannot be applied universally, as claimed by the defense, without coming in conflict with the decision of this court in *Stadler v. Detroit*, 13 Mich. 347. We there held that a municipal corporation which had excluded a salaried officer from the performance of his duties was bound to pay him the salary. We are still, I believe, satisfied with this decision."

In *Smith v. New York*, 37 N. Y. 518, it was held that no claim could be brought for salary or perquisites against a municipal corporation, covering any period when the claimant was not actually in office; and this was put upon the ground that these are the reward of express or implied services, and therefore cannot belong to one who could not lawfully perform these services, although wrongfully hindered from occupying a position in which he might render them. And in *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600, the court said, by Folger, J., "It is * * * to be deducted from the cases in this state that, as a general principle, the rendition of official service must precede a right to demand and recover the compensation given by law to the officer," though under the special circumstances of the case the principle stated was not applied. The latter case is cited in *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, as authority for the position that "the right to the salary of an office is not necessarily dependent upon the actual rendition of service by the claimant."

2. When Right Matures. — *Selby v. Portland*, 14 Oregon 243, 58 Am. Rep. 307.

officer should demand the payment of his salary until such *de facto* officer is ousted.¹

(3) *Right to Recover from De Facto Officer.* — One who has been wrongfully kept out of an office to which he was entitled can, after obtaining judgment of ouster against the *de facto* officer, recover from him the emoluments of the office which he received while unlawfully holding.²

1. In *Carroll v. Siebenthaler*, 37 Cal. 193, the plaintiff, who had obtained judgment of ouster against another person, who usurped an office to which the plaintiff was entitled, sought to recover the salary of such office for thirty-two months past. The salary of the office was payable monthly, and a statute of the state provided that all claims against a county must be presented within one year after such claim became due. It was held that the plaintiff, having made no previous demand for payment of the salary to him, could only recover the salary for the twelve months immediately preceding the time when his action was brought.

2. *May Recover Emoluments from De Facto Officer — California.* — *Stoddard v. Williams*, 65 Cal. 472.

Indiana. — *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299.

Louisiana. — *Sigur v. Crenshaw*, 10 La. Ann. 297.

Missouri. — *Hunter v. Chandler*, 45 Mo. 452.

New York. — *Platt v. Stout*, 14 Abb. Pr. (N. Y. Supreme Ct.) 178.

Ireland. — *Crosbie v. Hurley*, 1 Al. & Nap. 431.

In *Kreitz v. Behrensmeyer*, 149 Ill. 496, the court, *per* Phillips, J., said: "It is conceded that no statute exists in this state declaring the right of a *de jure* officer to recover from a *de facto* officer the salary paid such *de facto* officer who has discharged the duties of the office under a wrongful or a mistaken purpose. There is no legislation on that subject in this state. The right of recovery, if it exists, depends, therefore, on the principles of the common law. * * * By chapter 28 of Starr & Curtis's Statutes of Illinois the common law of England is declared in force in this state. By reference to the decisions of the common-law courts of England the common law of that country is to be found. An examination of the decisions of the courts of that country shows a uniform declaration of the principle that a *de jure* officer has a right of action to recover against an officer *de facto*, by reason of the intrusion of the latter into the office and his receipt of the emoluments thereof. Among others the following opinions of English courts may be referred to as sustaining this right of recovery: *Vaux v. Jefferen*, 2 Dyer 114*b*; *Arris v. Stukely*, 2 Mod. 260; *Lee v. Drake*, 2 Salk. 468; *Webb's Case*, 8 Coke 45*b*. * * * On the basis of a sound public policy the principle commends itself, for the reason that one would be less liable to usurp or wrongfully retain a public office, and defeat the will of the people or the appointing power, if no benefit, but a loss, would result from such wrongful retention or usurpation of an office. * * * We do not desire to enter on a discussion of the question as to whether it is a hardship on Kreitz or his estate that he should be held to

receive no compensation for his services, for however great that hardship may be, the rule of law has been long settled in this state that the *de jure* officer may recover the fees or salary paid to a *de facto* officer. The rule is in accord with a sound public policy. Its tendency is that there would be less danger or frequency of usurpation or intrusion into an office. Its tendency is to cause greater caution in and purify elections, as one with such danger attendant on illegal voting would abstain from encouraging it. Its tendency is to cause a careful investigation into the right to an office, where a notice of contest is served and petition filed. Public interest is in accord with private right when it is held that one lawfully elected to an office, and deprived of the office by another, may recover the salary or fees attendant on the office. The rule is not changed by reason of one holding a certificate of election and entering in good faith, under a mistaken belief of right. However much the good faith of one entering, the right exists somewhere, and if the right existed in another, he is an intruder in the office and enters at his peril. As was said in *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52: 'After the vote was canvassed by the clerk and justice of the peace, appellant promptly gave appellee notice that he would contest the election, and specifically pointed out the grounds. Being thus apprised of the grounds upon which appellant based his claim, the sources of information were open to him to learn the facts, and to have acted upon them. Failing to learn them, or, having done so, not heeding them, he has no reason to complain if he has to respond to the wrong perpetrated on another. He has intruded into appellant's office without right and has received the profits of the office, and, like the person entering into the land of another with a defective title, he must answer for the profits.'"

In *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, the court, in discussing the question whether an action could be maintained by a person dispossessed of an office, against the intruder, to recover the emoluments of the office received by him, said, *per* Andrews, J.: "In the case of *Dolan v. New York*, 68 N. Y. 276, it was assumed that such an action could be maintained, and authorities were cited to maintain the proposition. The determination of this question was not, perhaps, essential to sustain the judgment in that case. But we think the doctrine is well founded in reason and authority. The plaintiff, being the officer *de jure*, was entitled to earn the salary. It is true that he did not render the service for which the salary is the compensation. But he was ready and willing to render it, and was prevented by the conjoint acts of the mayor and the defendant. * * * The provisions of the Revised Statutes to

But a Clear Title Must Be Shown in order to support such a recovery.¹

Salary. — Where the emoluments received by the *de facto* officer consist of the salary of the office, the *de jure* officer can recover the whole of such salary without any deduction for the value of the *de facto* officer's services or for what the *de jure* officer earned in other ways while excluded.²

Fees. — Where the emoluments consist of fees, it has been held that the measure of the *de jure* officer's recovery is the amount of such fees, less the necessary expenses of earning them.³ But the *de facto* officer can retain no

which reference has been made [2 N. Y. Rev. Stat. 282, §§ 31, 34], allowing the recovery of damages by the officer *de jure* against an intruder, proceed upon the assumption that the former may recover of the latter what he has lost by the usurpation. The revisers, in their notes upon this subject, 5 Edm. Stat., p. 774, say that it was intended to enlarge the scope of the remedy by information, so as 'to provide for the recovery of the fees received by the defendant.' The exclusion of a *de jure* officer from his office is a legal wrong committed by the intruder. In a legal view it is immaterial that the defendant may have acted in good faith, or that he supposed he had the better title. A good motive is not an adequate answer to a claim for indemnity for a violated right. There is a great preponderance of authority in support of the doctrine that the *de jure* officer can recover against an intruder the damages resulting from the intrusion, and that, as a general rule, the salary annexed to the office and received by the defendant measures the loss. *Dolan v. New York*, 68 N. Y. 274; *Lawlor v. Alton*, 8 Ir. R. C. L. 160; *Glascock v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Douglass v. State*, 31 Ind. 429; *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *Dorsey v. Smyth*, 28 Cal. 21; *Sigur v. Crenshaw*, 10 La. Ann. 297; *U. S. v. Addison*, 6 Wall. (U. S.) 291."

Damages. — Where the suit is brought for damages for the intrusion, the measure of damages is the salary or other emoluments received by the intruder, and which the *de jure* officer would otherwise have received. *Rule v. Tait*, 38 Kan. 765; *Wayne County v. Benoit*, 20 Mich. 176; *People v. Nolan*, 101 N. Y. 539; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730; *Dolan v. New York*, 68 N. Y. 274.

In *Lawlor v. Alton*, 8 Ir. R. C. L. 160, it was held that a legally elected surgeon to an infirmary, who had been kept out of his office by an intruder, could recover damages from the intruder for such exclusion; but that, as he had not actually discharged the duties of the office, though he had offered and was ready to do so, he was not entitled to recover, as money had and received, the salary which the intruder had received under the grand jury presentment.

Gratuities. — In *Boyter v. Dodsworth*, 6 T. R. 681, it was held that the lawful sexton of a church could not recover from one who had intruded into the office gratuities received for showing the church, though he might recover regular fees received for performing the duties of the office.

Statutory Provisions. — In *Arkansas* it is provided that where a "usurper has received fees

and emoluments arising from the office or franchise, he shall be liable therefor to the person entitled thereto, who may claim the same in the action brought to deprive him of the office or franchise, or in a separate action." Sand. & Hill's Dig. *Arkansas Stat.* (1884), § 7371.

And in several other states one who is declared to be entitled to an office is given by statute a right to recover damages from a person who has kept him out of office. *Dakota Code Civ. Pro.* (1885), § 540; *Vorhies's Rev. Laws Louisiana* (1884), § 2602; *Howell's Anno. Stat. Michigan* (1882), § 8643; *Montana Code Civ. Pro.* (1887) 415; *Gen. Stat. Nevada* (1885) 324; *Hill's Anno. Laws Oregon* (1892), § 362.

Case Denying Right to Recover Salary. — In *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353, the court held, by a vote of seven to five, that in the absence of statutory enactment giving such a right, a *de jure* officer who had obtained judgment in favor of his right to the office could not recover from a *de facto* officer who had held the office in good faith the salary received by such *de facto* officer. There being no such statute in *New Jersey*, it was held that there could be no such recovery.

1. Must Show Clear Title. — *Richards v. McMillin*, 36 Neb. 352; *McMillin v. Richards*, 45 Neb. 786.

2. Entire Salary Recoverable. — *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 131.

3. De Facto Officer Entitled to Expenses of Earning Fees. — *In re Havird*, 2 Idaho 652.

In *Chowning v. Boger*, (Tex. 1885) 9 Am. & Eng. Corp. Cas. 91, it was held that a *de jure* sheriff was entitled to recover from a *de facto* sheriff the fees and emoluments of the office received by him. But it was also held that, as the *de facto* sheriff had been acting in apparent right, having been legally appointed, and had not been guilty of any fraud, he should be allowed to deduct his reasonable expenses incurred in earning such fees. The court said that if he had intruded into the office without pretense of legal right, a different rule would have been applied.

A person who has acted as jailer under color of title, though constitutionally ineligible to the office, is entitled to the amount allowed him by the Circuit Court for feeding prisoners, as against the person legally entitled to the office. *Atchison v. Lucas*, 83 Ky. 451.

Profits. — Where a person has exercised the duties of an office, and it is judicially determined that the office does not belong to him, the *de jure* officer may recover from him the profits of the office which he received. *Arris v. Stukely*, 2 Mod. 260. And in case of an office where the compensation depends upon fees, the profits of the office consist of the fees

portion of such fees as compensation for his own labor.¹

Good Faith of De Facto Officer. — The right of a *de jure* officer to recover, from one who has kept him out of his office, the emoluments received by such intruder, is not affected by the fact that such intruder acted in good faith, and was in possession only while a contest over the title to the office was pending,² or that the intruder was put in possession under a judgment that he was the lawful officer, upon the reversal of which judgment he immediately surrendered the office.³

b. RIGHTS OF DE FACTO OFFICER — (1) *As to Emoluments of Office.* — It is generally held that a mere *de facto* officer cannot recover any of the compensation attached to the office,⁴ because he cannot make the necessary showing that he has a legal title.⁵ But this doctrine is opposed by a considerable number of cases in which a *de facto* officer has been held entitled to compensation.⁶

and perquisites received, less the necessary expenses of earning them. *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52; *Kreitz v. Behrensmeyer*, 149 Ill. 496, *affirming* 52 Ill. App. 291; *Bier v. Gorrell*, 30 W. Va. 95.

Case Holding the Contrary. — In *Douglass v. State*, 31 Ind. 429, it was held that a *de jure* officer was entitled to recover from one who had wrongfully kept him out of office the gross emoluments received by the latter without any allowance to him for the necessary expenses of the office.

1. De Facto Officer Can Retain Nothing for His Services. — *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Douglass v. State*, 31 Ind. 429; *Wenner v. Smith*, 4 Utah 238.

2. Possession Pending Contest. — *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52; *Petit v. Rousseau*, 15 La. Ann. 239. See also *State v. Holmes*, 43 La. Ann. 1185.

3. Possession under Judgment. — *Kessel v. Zeiser*, 102 N. Y. 114, 55 Am. Rep. 769.

Limitation. — Where an officer was ousted by legal proceedings, and pending an appeal the person who had obtained the office resigned and another person was appointed to fill the vacancy, and upon a reversal of the judgment of ouster such appointee promptly delivered the office to the officer, the appointee was held not liable to the *de jure* officer for the fees which he had received while holding the office. *Nichols v. Branham*, 84 Va. 923.

4. De Facto Officer Cannot Recover Compensation — *United States*. — *Romero v. U. S.*, 24 Ct. of Cl. 331. But see *Shelley v. U. S.*, 19 Ct. of Cl. 653, *infra*, this note.

California. — *Burke v. Edgar*, 67 Cal. 182.

Connecticut. — *Samis v. King*, 40 Conn. 298.

Iowa. — *McCue v. Wapello County*, 56 Iowa 698, 41 Am. Rep. 134.

Massachusetts. — *Dolliver v. Parks*, 136 Mass. 499.

Mississippi. — *Christian v. Gibbs*, 53 Miss. 314.

Nevada. — *Meagher v. Storey County*, 5 Nev. 244.

New Jersey. — *Meehan v. Chosen Freeholders*, 46 N. J. L. 276, 50 Am. Rep. 421. But see *Erwin v. Jersey City*, 60 N. J. L. 141, *infra*, this note.

New York. — *People v. Hopson*, 1 Den. (N. Y.) 574; *Dolan v. New York*, 68 N. Y. 274; *People v. Tieman*, 30 Barb. (N. Y.) 193. But see *Deane v. Greene County*, 66 How. Pr. (N. Y. Supreme Ct.) 461, *infra*, this note.

Pennsylvania. — *Jones v. Easton*, 4 Pa. Dist. Rep. 509; *Com. v. Slifer*, 25 Pa. St. 23, 64 Am. Dec. 680; *Philadelphia v. Given*, 60 Pa. St. 136.

In *People v. Tieman*, 30 Barb. (N. Y.) 193, 8 Abb. Pr. (N. Y.) 359, the court, *per* W. F. Allen, J., said: "Possession under color of right may well serve as a shield for defense, but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office."

In a case where the charter of a city provided for the appointment of a single person as city attorney, and two persons acted in that capacity, it was held that neither of them could maintain an action for the salary of the office. *Jersey City v. Erwin*, 59 N. J. L. 282.

Good Faith of a *de facto* officer, and his honest belief that he is entitled to the office he exercises, do not give him any rights in regard to compensation. *People v. Potter*, 63 Cal. 127; *Comstock v. Grand Rapids*, 40 Mich. 397.

Acquiescence in a person's acting as an officer, and the fact that his title was never questioned while he was in office, do not confer upon him any right to compensation, if he was in fact ineligible to the office. *Matthews v. Copiah County*, 53 Miss. 715, 24 Am. Rep. 715.

5. Must Have Legal Title. — A person who seeks to recover the salary or emoluments of an office held by him must show that he is a lawful officer.

Connecticut. — *Samis v. King*, 40 Conn. 298.

Illinois. — *Home Ins. Co. v. Tierney*, 47 Ill. App. 600.

Minnesota. — *Yorks v. St. Paul*, 62 Minn. 250.

New York. — *New York v. Flagg*, 6 Abb. Pr. (N. Y. Supreme Ct.) 296.

Pennsylvania. — *Dillon v. Myers*, Bright. (Pa.) 426.

South Carolina. — *Allen v. McNeil*, 1 Mill (S. Car.) 459; *Kottman v. Ayer*, 3 Strobb. L. (S. Car.) 93 (*dictum*).

6. Doctrine that De Facto Officer Is Entitled to Compensation. — In *England*, where the council of a borough removed a town clerk who had been elected to hold during good behavior, but who had not made the declaration required by law, it was held that as having been an officer *de facto* he was entitled to compensation. *Reg. v. Cambridge*, 12 Ad. & El. 702, 40 E. C. L. 166.

A *de facto* clerk in the prerogative office of Canterbury was held entitled to receive the

(2) *Rights Pending Contest of Title.* — It has been held that during the pendency of a contest over the title to an office the payment of the salary to either claimant may be enjoined;¹ and in several states payment during such time is forbidden by statute.² But it has also been held that, during such time, the *de facto* officer is entitled to receive the amounts necessary to meet the expenses of carrying on the business of the office.³

(3) *Recovery by Government of Salary Paid.* — It has been held that the national government cannot recover, as money paid under a mistake of law, the salary which has been paid to a *de facto* officer;⁴ but in several of the states it is provided by statute that a person wrongfully exercising an office shall forfeit to the state all emoluments received.⁵

c. PROTECTION AFFORDED BY PAYMENT TO DE FACTO OFFICER —

(1) *General Rule.* — The general rule is that a state, county, or municipality which, before judgment of ouster against a *de facto* officer, has paid him the salary of the office due at the time of payment is protected against any liability

stated fees and to retain them without account. *Seymour v. Bennet*, 2 Atk. 482.

United States. — Under the statute providing for the payment of members of Congress, a *de facto* member is lawfully entitled to receive the salary attached to his seat, whether he be a member *de jure* or not. *Shelley v. U. S.*, 19 Ct. of Cl. 653.

In *Arizona* it is held that where there is no *de jure* officer, a *de facto* state officer may recover from the state the salary of the office for the time during which he performed its duties, *Behan v. Prison Com'rs*, (Arizona 1892) 31 Pac. Rep. 521; even though such salary has already been paid to another person who is not the officer either *de jure* or *de facto*, *Adams v. Insane Asylum*, (Arizona 1895) 40 Pac. Rep. 185.

In *Georgia* a *de facto* city marshal was allowed to recover from the city the salary of the office for the time he actually served, but no longer. *Miller v. Seney*, 81 Ga. 489.

In *Idaho* it is held that the right to compensation is incident to the rendition of services, and that a *de facto* county officer has against the county the right to the compensation provided for the office he exercises. *Gorman v. Boise County*, 1 Idaho 655.

In *Missouri* a *de facto* officer while in possession of the office can recover the fees and salary incident thereto. *State v. Draper*, 48 Mo. 213; *State v. Clark*, 52 Mo. 508; *State v. John*, 81 Mo. 13; *Dickerson v. Butler*, 27 Mo. App. 9.

But one who has acted as a *de facto* officer but has yielded the office to another cannot recover for his official services, as he has not, at the time of the bringing suit, such a *prima facie* title as is necessary to support a recovery. *Dickerson v. Butler*, 27 Mo. App. 9.

In *New Jersey* one who becomes a public officer *de facto*, without dishonesty or fraud on his part, and who renders the services required of such public officer, may recover the compensation provided by law for such services during the period of their rendition. *Erwin v. Jersey City*, 60 N. J. L. 141.

New York. — In *Deane v. Greene County*, 66 How. Pr. (N. Y. Supreme Ct.) 461, the court held that a person who had acted as coroner of a county under a decision in favor of his right to do so, but who had afterwards been ousted

on quo warranto, was entitled to receive payment for his services as such officer. The decision was placed upon the ground that the *de jure* officer could not recover directly from the county the emoluments of the office for the time when he performed no services, and that the county should not be exempted from payment for lawful services of which it had the full benefit.

1. Payment of Salary May Be Enjoined Pending Contest of Title. — *New York v. Flagg*, 6 Abb. Pr. (N. Y. Supreme Ct.) 296.

A *de facto* officer may be enjoined from receiving the fees of the office during the pendency of a suit to determine the title thereto. *George v. Tucker*, 27 La. Ann. 67.

As to payment of salaries pending contest of title, see the title PUBLIC OFFICERS.

Contrary Doctrine. — A district judge who holds his office under a certificate of election from the secretary of state is entitled to receive the salary of the office though a suit contesting the validity of his election is pending. *Henderson v. Glynn*, 2 Colo. App. 303.

2. Statutory Provisions. — See *Arizona Rev. Stat.* (1887), § 3065; *California Polit. Code* (1887), § 936; *Idaho Rev. Stat.* (1887), § 380.

3. Necessary Expenses. — A *de facto* officer whose title is being litigated is entitled to receive the necessary expenses incident to the exercise of the office, though it is provided by law that during the pendency of such a suit no warrant shall be issued to him for the salary of the office. *In re Havird*, 2 Idaho 652.

4. Government Cannot Recover Salary Paid. — *Badeau v. U. S.*, 130 U. S. 439.

5. In Arkansas it is provided that where a usurper has received fees and emoluments arising from the office or franchise, the same may be recovered by the state and paid into the public treasury, if no one is entitled to the fees or franchise. *Sand. & Hill's Dig. Arkansas Stat.* (1894), § 7371.

In *Massachusetts* it is provided that any officer who accepts or holds another office which is declared incompatible by the Constitution shall forfeit and pay into the treasury of the commonwealth any and all compensation received by him from any and all offices during the time in which he has so violated the law. *Pub. Stat. Mass.* (1882), c. 21, § 9.

to the *de jure* officer for such salary,¹ especially where the latter has slept upon his rights until after services have been performed by, and the salary has been

1. **Effect of Payment to De Facto Officer** — *Arizona*. — Shaw *v.* Pima County, (Arizona 1888) 18 Pac. Rep. 273.

Colorado. — Henderson *v.* Glynn, 2 Colo. App. 306.

Louisiana. — Michel *v.* New Orleans, 32 La. Ann. 1094.

Michigan. — Wayne County *v.* Benoit 20 Mich. 176.

Minnesota. — Parker *v.* Dakota County, 4 Minn. 59.

Mississippi. — McAfee *v.* Russell, 29 Miss. 84.

Missouri. — State *v.* Clark, 52 Mo. 508.

Nebraska. — State *v.* Milne, 36 Neb. 301, 38 Am. St. Rep. 724.

New Jersey. — McDonald *v.* Newark, 58 N. J. L. 12.

New York. — Dolan *v.* New York, 68 N. Y. 274; McVeany *v.* New York, 80 N. Y. 185, 36 Am. Rep. 600; Terhune *v.* New York, 88 N. Y. 247; Demarest *v.* New York, 147 N. Y. 203; McManus *v.* Brooklyn, (Brooklyn City Ct.) 5 N. Y. Supp. 424; Hagan *v.* Brooklyn, (Brooklyn City Ct.) 5 N. Y. Supp. 425. *Contra*, People *v.* Brennan, 30 How. Pr. (N. Y. Supreme Ct.) 417.

In Gorman *v.* Boise County, 1 Idaho 655, the principle stated in the text was upheld on the ground that, as against the county, a *de facto* county officer was entitled to the compensation provided for the office he exercised.

The case of People *v.* Tieman, 30 Barb. (N. Y.) 193, concerning which there has been considerable misunderstanding, was an action by a *de facto* officer to recover the salary of the office held by him. The court held that he could not recover; but it was not decided that if the salary had been paid to him such payment would not have afforded a valid defense against a claim by the *de jure* officer for the same salary. If the proper construction is placed upon this decision there is nothing in it inconsistent with the New York cases which directly support the proposition in the text.

Contrary Doctrine. — In Dorsey *v.* Smyth, 28 Cal. 21, it was held that a *de jure* officer could not be deprived of his salary or of the right to recover the same against the county by another person's usurpation of the office and the wrongful payment of the salary to such person, though the payment was made by the direction of a court in a proceeding to which the *de jure* officer was not a party. See also Carroll *v.* Siebenthaler, 37 Cal. 193.

Judge Cooley gives his support to the doctrine of the *California* cases. In a dissenting opinion in the case of Wayne County *v.* Benoit, 20 Mich. 192, he says, referring to the case of Dorsey *v.* Smyth, 28 Cal. 21: "This decision appears to me to be sustainable on the soundest reasons of public policy. A wrong is done to society and to public order in every instance in which the usurpation of a public office takes place; and the rules of law ought to be such as to give the greatest possible discouragement to such a proceeding. The county authorities, in a case like this, ought

not to be told that they may countenance the intrusion with impunity, and deliver over to a usurper the emoluments of an office to which he has neither a legal nor a moral claim. Such a rule encourages usurpations, and tends to lower the standard of public morality. Public policy requires that municipal officers should be allowed to sanction or recognize the intrusion only so far as may be necessary to give the public the full benefit of protection which the rule regarding the acts of officers *de facto* was designed to afford."

In State *v.* Carr, 129 Ind. 44, 28 Am. St. Rep. 163, the relator sought to compel the defendant as state auditor to issue his warrant for salary alleged to be due the relator as chief of the Indiana bureau of statistics. The relator had been duly appointed to the office and had qualified and discharged the duties thereof, but another person, who was not entitled to the office, had also discharged the duties; and to the latter person the salary of the office had been paid. It was held that such payment afforded no defense against the claim of the relator. In this case payment was made to the *de facto* officer with full knowledge by the disbursing officer of the invalidity of his title.

In Andrews *v.* Portland, 79 Me. 484, 10 Am. St. Rep. 280, the court held that a city marshal might recover from the city his salary for the time he was kept out of office by a wrongful removal, afterwards set aside on certiorari, though the salary for that time had been paid to the *de facto* incumbent. Libbey, J., in delivering the opinion, recognized that the rule was otherwise in New York and some other states, but said: "Our court is uncommitted, and we have come to the conclusion which seems to us best supported by reason and sound legal principles."

In Memphis *v.* Woodward, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750, it was held that a *de jure* city physician could recover from the city the entire salary of the office, though he had never performed its duties, and the salary had been paid to a *de facto* incumbent. In that case the *de facto* officer, who was the predecessor in office of the *de jure* officer, had obtained an injunction restraining any interference with his possession of the office, which injunction was afterwards dissolved because erroneously granted; but the office was discontinued before the dissolution of the injunction. The court sustained its decision on the ground that the city could have successfully resisted the *de facto* officer's claim, and that the injunction did not require payment of the salary to him; and also intimated that there was a distinction between cases where fees of an office had been paid to a *de facto* incumbent and the case then before the court.

In Kendall *v.* Raybould, 13 Utah 226, it was held that payment of the salary of an office to a *de facto* officer afforded no protection against the claim of the *de jure* officer for such salary, where at the time of payment proceedings instituted by the *de jure* officer to oust the incumbent were pending.

paid to, a *de facto* incumbent.¹

(2) *Notice of Contest of Title*. — The general rule applies even where the municipality had notice at the time of making such payment that the title to the office was contested.²

(3) *Insolvency of De Facto Officer*. — The fact that the officer to whom the salary was paid is insolvent does not prevent the application of the rule.³

(4) *Payment After De Facto Officer Has Gone Out of Office*. — Payment to the *de facto* officer after he has gone out of office affords no protection against the claim of the *de jure* officer, whether or not the salary so paid has already accrued at the time of payment.⁴

(5) *Payment to Usurper*. — Payment to a mere intruder who is without color of right to the office can afford no protection against the claim of the *de jure* officer.⁵

6. Validity of Acts — a. GENERAL RULE. — The general rule is that the acts of a *de facto* public officer are valid so far as they concern the public or

1. Laches of De Jure Officer. — *Chandler v. Hughes County*, (S. Dak. 1896) 67 N. W. Rep. 946.

2. Notice of Contest. — *Saline County v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171; *Scott v. Crump*, 106 Mich. 288; *Fuller v. Roberts County*, (S. Dak. 1896) 68 N. W. Rep. 308.

Payment of the salary of an office to one who holds the office under a judgment that he is entitled thereto is a defense against a claim for such salary by another person who is declared to be entitled to the office by an appellate court which reverses the former judgment. *People v. Brennan*, 1 Abb. Pr. N. S. (N. Y. Supreme Ct.) 184.

In *Dolan v. New York*, 68 N. Y. 274, *Andrews, J.*, said: "If fiscal officers, upon whom the duty is imposed to pay official salaries, are only justified in paying them to the officer *de jure*, they must act at the peril of being held accountable in case it turns out that the *de facto* officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making payment, to go behind the commission and investigate and ascertain the real right and title. This, in many cases, as we have said, would be impracticable. Disbursing officers, charged with the payment of salaries, have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer *de jure*, without inquiring whether another has the better right. Public policy accords with this view. Public offices are created in the interest and for the benefit of the public; such, at least, is the theory upon which statutes creating them are enacted and justified. Public and individual rights are, to a great extent, protected and enforced through official agencies, and the state and individual citizens are interested in having official functions regularly and continuously discharged. The services of persons clothed with an official character are constantly needed. They are called upon to execute the process of the courts and to perform a great variety of acts affecting the public and individuals. It is important that the public offices should be filled, and that

at all times persons may be found ready and competent to exercise official powers and duties. If, on a controversy arising as to the right of an officer in possession, and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the *de facto* officer, except at the peril of paying it a second time if the title of the contestant should subsequently be established, it is easy to see that the public service would be greatly embarrassed and its efficiency impaired. Disbursing officers would not pay the salary until the contest was determined, and this, in many cases, would interfere with the discharge of official functions."

3. Insolvency of De Facto Officer. — *Saline County v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171.

4. Payment After Judgment of Ouster. — *People v. Brennan*, 30 How. Pr. (N. Y.) 424; *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600; *Fylpaa v. Brown County*, 6 S. Dak. 634.

One who has been judicially recognized as the lawful incumbent of an office is entitled to recover from the city all such emoluments of the office as are due and remain unpaid for any part of the term of office which was decreed in his favor. *Michel v. New Orleans*, 32 La. Ann. 1094.

In *Wayne County v. Benoit*, 20 Mich. 176, *Christianity, J.*, said that a *de jure* officer had no claim against a county for salary paid to a *de facto* incumbent of the office, unless such salary was paid after judgment of ouster against such *de facto* officer.

Payment After Abolition of Office. — In *Williams v. Clayton*, 6 Utah 86, the legislature had appropriated money to pay the salary of an office, after such office had been abolished. The auditor issued a warrant for the payment of such salary to one who he claimed had been the officer *de facto* for a certain time. In subsequent mandamus proceedings by the *de jure* officer to compel the drawing of the warrant to him for the salary for such time it was held that the payment to the alleged *de facto* officer afforded no protection against payment to the *de jure* officer.

5. Payment to Usurper. — *Warden v. Bayfield County*, 87 Wis. 181.

third persons who have an interest in the things done, and that such acts cannot be collaterally attacked.¹

1. **Acts of De Facto Officer Valid** — *England*. — *Rex v. Slythe*, 6 B. & C. 240, 13 E. C. L. 156, 9 D. & R. 226; *Milward v. Thatcher*, 2 T. R. 87.

Canada. — *Crookshank v. Macfarlane*, 7 New Bruns. 544; *Pontiac County v. Ross*, 17 Can. Sup. Ct. Rep. 406; *O'Neil v. Atty.-Gen.*, 26 Can. Sup. Ct. Rep. 122.

United States. — *Hussey v. Smith*, 99 U. S. 20; *Northwestern Mut. L. Ins. Co. v. Seaman*, 80 Fed. Rep. 357; *Gonzales v. Ross*, 120 U. S. 605; *McDowell v. U. S.*, 159 U. S. 596; *Nofire v. U. S.*, 164 U. S. 657.

Alabama. — *Cook v. State*, 91 Ala. 53; *Lockhart v. Troy*, 48 Ala. 579; *Lee v. State*, 49 Ala. 43; *Thrower v. State*, 52 Ala. 22; *Thorington v. Gould*, 59 Ala. 461; *Masterson v. Matthews*, 60 Ala. 260; *Joseph v. Cawthorn*, 74 Ala. 411; *Walker v. State*, 107 Ala. 5.

Arizona. — *Jeffords v. Hine*, (Arizona 1886) 11 Pac. Rep. 351.

Arkansas. — *Miller v. Callaway*, 32 Ark. 666; *Carter v. State*, 43 Ark. 132; *Murphy v. Shepard*, 52 Ark. 356; *Barton v. Lattourette*, 55 Ark. 81.

California. — *Satterlee v. San Francisco*, 23 Cal. 314; *People v. Sassovich*, 29 Cal. 480; *Woodward v. Fruitvale Sanitary Dist.*, 99 Cal. 554; *Buck v. Eureka*, 109 Cal. 504.

Colorado. — *Darrow v. People*, 8 Colo. 417; *Morris v. People*, 5 Colo. App. 138.

Connecticut. — *Smith v. State*, 19 Conn. 493; *Trinity College v. Hartford*, 32 Conn. 452.

Florida. — *Kissimmee City v. Cannon*, 26 Fla. 3.

Georgia. — *Crawford v. Howard*, 9 Ga. 314; *Pool v. Perdue*, 44 Ga. 454; *Waller v. Perkins*, 52 Ga. 233; *Gunn v. Tackett*, 67 Ga. 725; *Smith v. Meador*, 74 Ga. 416.

Illinois. — *Barlow v. Standford*, 82 Ill. 298; *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61; *Samuels v. Drainage Com'rs*, 125 Ill. 536; *People v. Ammons*, 10 Ill. 105; *People v. Bangs*, 24 Ill. 184; *Sullivan v. State*, 66 Ill. 75; *Trumbo v. People*, 75 Ill. 561; *People v. Beach*, 77 Ill. 52; *People v. Weber*, 86 Ill. 283; *Leach v. People*, 122 Ill. 420; *School Directors v. National School Furnishing Co.*, 53 Ill. App. 254.

Indiana. — *Milford School Town v. Zeigler*, 1 Ind. App. 138; *Parker v. State*, 133 Ind. 178; *Creighton v. Piper*, 14 Ind. 182; *Mowray v. State*, 88 Ind. 324; *Steinback v. State*, 38 Ind. 489; *Case v. State*, 69 Ind. 46; *Baker v. Wambaugh*, 99 Ind. 312; *Davidson v. State*, 135 Ind. 254.

Iowa. — *State v. Powell*, (Iowa 1897) 70 N. W. Rep. 592; *Gourley v. Hankins*, 2 Iowa 75; *Peirce v. Wear*, 41 Iowa 378; *Burke v. Cutler*, 78 Iowa 299.

Kansas. — *Gilleland v. Schuyler*, 9 Kan. 569; *Riley v. Garfield Tp.*, (Kan. 1897) 49 Pac. Rep. 85; *Hale v. Bischoff*, 53 Kan. 301; *Morton v. Lee*, 28 Kan. 286.

Kentucky. — *Rice v. Com.*, 3 Bush (Ky.) 14; *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 401; *Stokes v. Kirkpatrick*, 1 Metc. (Ky.) 143; *Patterson v. Miller*, 2 Metc. (Ky.) 493; *Hoglan v. Carpenter*, 4 Bush (Ky.) 89; *Justices v. Clark*, 1 T. B. Mon. (Ky.) 82.

Louisiana. — *Citizens Bank v. Bry*, 3 La. Ann. 630.

Maine. — *Hutchings v. Van Bokkelen*, 34 Me. 126; *Hooper v. Goodwin*, 48 Me. 79; *Cushing v. Frankfort*, 57 Me. 541; *Pooler v. Reed*, 73 Me. 129; *Belfast v. Morrill*, 65 Me. 580; *Abbott v. Chase*, 75 Me. 83; *Johnson v. McGinly*, 76 Me. 432; *Whiting v. Ellsworth*, 85 Me. 301.

Maryland. — *Koontz v. Hancock*, 64 Md. 134.

Massachusetts. — *Coolidge v. Brigham*, 1 Allen (Mass.) 333; *Sudbury v. Heard*, 103 Mass. 543; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374; *Atty.-Gen. v. Crocker*, 138 Mass. 214.

Michigan. — *People v. Gobles*, 67 Mich. 475; *Zabel v. Harshman*, 68 Mich. 273; *Wayne County v. Benoit*, 20 Mich. 176; *Donough v. Dewey*, 82 Mich. 309; *Carlisle v. Saginaw*, 64 Mich. 134; *Auditor Gen. v. Menominee County*, 89 Mich. 552.

Minnesota. — *Parker v. Dakota County*, 4 Minn. 59; *McCormick v. Fitch*, 14 Minn. 252; *Ramsey County v. Brisbin*, 17 Minn. 451; *Carli v. Rhener*, 27 Minn. 292; *State v. McMartin*, 42 Minn. 30.

Mississippi. — *Rhodes v. McDonald*, 24 Miss. 418; *Kimball v. Alcorn*, 45 Miss. 151; *Vicksburg v. Lombard*, 51 Miss. 111; *Christian v. Gibbs*, 53 Miss. 314; *Alabama, etc., R. Co. v. Bolding*, 69 Miss. 255, 30 Am. St. Rep. 541.

Missouri. — *Conway v. St. Louis*, 9 Mo. App. 488; *State v. Dierberger*, 90 Mo. 369; *State v. Miller*, 111 Mo. 542; *Perkins v. Fielding*, 119 Mo. 149.

Montana. — *State v. Cook*, 17 Mont. 529.

Nebraska. — *Magneau v. Fremont*, 30 Neb. 843, 27 Am. St. Rep. 436.

Nevada. — *Mallett v. Uncle Sam Gold, etc.*, Min. Co., 1 Nev. 188, 90 Am. Dec. 484; *Sawyer v. Dooley*, 21 Nev. 390.

New Hampshire. — *Atty.-Gen. v. Marston*, 66 N. H. 485; *Londonderry v. Chester*, 2 N. H. 268, 9 Am. Dec. 61; *Lisbon v. Bow*, 10 N. H. 167; *Jones v. French*, 18 N. H. 190; *Merrill v. Palmer*, 13 N. H. 184; *State v. Winkley*, 14 N. H. 480; *Jewell v. Gilbert*, 64 N. H. 13, 10 Am. St. Rep. 357.

New Jersey. — *Erwin v. Jersey City*, 60 N. J. L. 141; *Harvey v. Philbrick*, 49 N. J. L. 374; *State v. Anderson*, 1 N. J. L. 366, 1 Am. Dec. 207; *Hoagland v. Culvert*, 20 N. J. L. 387; *State v. Meyers*, 29 N. J. L. 392; *State v. Tolan*, 33 N. J. L. 195.

New York. — *Devlin's Case*, 5 Abb. Pr. (N. Y. C. Pl.) 281; *Conover's Case*, 5 Abb. Pr. (N. Y. Supreme Ct.) 73; *Bentley v. Phelps*, 27 Barb. (N. Y.) 524; *People v. Tieman*, 30 Barb. (N. Y.) 193, 8 Abb. Pr. (N. Y.) 359; *Colton v. Beardsley*, 38 Barb. (N. Y.) 29; *Morris v. People*, 3 Den. (N. Y.) 381; *People v. Covert*, 1 Hill (N. Y.) 674; *People v. Anthony*, 6 Hun (N. Y.) 142; *Burditt v. Barry*, 6 Hun (N. Y.) 657; *People v. Orleans County Court*, 28 Hun (N. Y.) 14; *Morrison v. Sayre*, 40 Hun (N. Y.) 465; *People v. McDowell*, 70 Hun (N. Y.) 1; *People v. Collins*, 7 Johns. (N. Y.) 549; *M'Instry v. Tanner*, 9 Johns. (N. Y.) 135; *Hamlin v. Dingman*, 5 Lans. (N. Y.) 61; *Bartlett v. Sayer*, (Supreme Ct.) 34 N. Y. St. Rep. 325, 58 Hun (N. Y.) 608; *Dolan v. New York*,

b. ILLUSTRATIONS. — The rule just stated has been applied to make valid the acts of *de facto* officers in regard to the passage of laws,¹ ordinances,²

68 N. Y. 274; *Lambert v. People*, 76 N. Y. 220, 32 Am. Rep. 293; *Olmstead v. Dennis*, 77 N. Y. 378; *Wilcox v. Smith*, 5 Wend. (N. Y.) 231; *People v. White*, 24 Wend. (N. Y.) 520.

North Carolina. — *Burke v. Elliott*, 4 Ired. L. (26 N. Car.) 355; *Burton v. Patton*, 2 Jones L. (47 N. Car.) 124, 62 Am. Dec. 194; *State v. Turner*, 119 N. Car. 841; *Hughes v. Long*, 119 N. Car. 52; *Threadgill v. Carolina Cent. R. Co.*, 73 N. Car. 178; *State v. Speaks*, 95 N. Car. 689.

Ohio. — *State v. Constable*, 7 Ohio, pt. 1, 7; *Scovill v. Cleveland*, 1 Ohio St. 126; *Molitor v. State*, 6 Ohio Cir. Ct. Rep. 263; *Kirker v. Cincinnati*, 48 Ohio St. 507.

Oregon. — *Territory v. Pyle*, 1 Oregon 149; *Hamlin v. Kassafer*, 15 Oregon 456, 3 Am. St. Rep. 176.

Pennsylvania. — *Riddle v. Bedford County*, 7 S. & R. (Pa.) 386; *Thompson v. Ewing*, 1 Brews. (Pa.) 67; *Com. v. Waller*, (Pa. C. Pl.) 28 W. N. C. (Pa.) 252, 8 Lanc. L. Rev. 276, 48 Leg. Int. (Pa.) 312, 10 Pa. Co. Ct. Rep. 111.

South Carolina. — *McBee v. Hoke*, 2 Spears L. (S. Car.) 138; *State v. Hill*, 2 Spears L. (S. Car.) 150; *Ex p. Norris*, 8 S. Car. 408; *Cromer v. Boineest*, 27 S. Car. 436.

South Dakota. — *Merchants' Nat. Bank v. McKinney*, 2 S. Dak. 106; *Fylpaa v. Brown County*, 6 S. Dak. 634.

Tennessee. — *Bates v. Dyer*, 9 Humph. (Tenn.) 162; *Galbraith v. McFarland*, 3 Coldw. (Tenn.) 267, 91 Am. Dec. 281; *Ward v. State*, 2 Coldw. (Tenn.) 605; *Kelley v. Story*, 6 Heisk. (Tenn.) 202; *Maley v. Tipton*, 2 Head (Tenn.) 403; *Pearce v. Hawkins*, 2 Swan (Tenn.) 87.

Texas. — *Aulanier v. Governor*, 1 Tex. 653.

Utah. — See *Utah Comp. Laws* (1888), § 4394.

Vermont. — *Spaulding v. Vincent*, 24 Vt. 501; *Lyndon v. Miller*, 36 Vt. 329; *State v. Bates*, 36 Vt. 387; *Powers's Estate*, 65 Vt. 399; *Brush v. Cook*, *Brayton*, (Vt.) 89.

Virginia. — *Maddox v. Ewell*, 2 Va. Cas. 59; *McCraw v. Williams*, 33 Gratt. (Va.) 510; *Roche v. Jones*, 87 Va. 484.

Washington. — *State v. Fountain*, 14 Wash. 236.

Wisconsin. — *Chicago, etc., R. Co. v. Langlade County*, 56 Wis. 614; *Yorty v. Paine*, 62 Wis. 154.

Reason for the Rule. — In *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574, the court, *per Storrs, J.*, said: "The principle established * * * in regard to the proceedings of officers *de facto*, acting under color of title, is one founded in policy and convenience, is most salutary in its operation, and is, indeed, necessary for the protection of the rights of individuals and the security of the public peace. The rights of no person claiming a title or interest under or through the proceedings of officers having an apparent authority to act would be safe, if he were obliged to examine the legality of the title of such officer up to its original source, and the title or interest of such person were held to be invalidated by some accidental defect or flaw in the appointment, election, or qualifications of such officer, or in the rights of those from whom his appointment or election emanated; nor could the supremacy of the laws be main-

tained, or their execution enforced, if the acts of officers having a colorable but not a legal title were to be deemed invalid. The remarks of Abbott, C. J., in the case of *Margate Pier Co. v. Hannam*, 3 B. & Ald. 266, 5 E. C. L. 278, present this subject in a strong light. He says that if the act of the justice issuing a warrant be invalid on the ground of the objection there made, all persons who should act in the execution of the warrant would act without any authority; a constable who arrests and a jailor who receives a felon would each be a trespasser; resistance to them would be lawful; everything done by either of them would be unlawful; and a constable or person aiding him might, in some possible instance, become amenable even to a charge of murder, for acting under an authority which they reasonably considered themselves bound to obey, and of the invalidity whereof they were wholly ignorant. The acts of a mere usurper of an office, without any color of title, are undoubtedly wholly void, both as to individuals and the public. But where there is a color of lawful title the doings of an officer, as it respects third persons and the public, must be respected until he is ousted on a quo warranto, which is the appropriate proceeding to try the validity of a title to an office, and in which it would be necessary for him to show a complete title in all respects."

Exceptions to General Rule — Statutes. — In *Ferris v. Smith*, 24 Vt. 27, the acts of a person assuming to be a deputy sheriff were held invalid where he had not recorded his deputation and the certificate of his oath of office. The decision was based upon a statute providing that until this was done the official acts of such officer should not be valid; and the court recognized the common-law rule sustaining the acts of *de facto* officers.

In *State v. Perkins*, 24 N. J. L. 409, the court, *per Elmer, J.*, said: "The general rule is that the acts of officers *de facto* in which other parties or the public have an interest are valid. The contrary rule, which has been applied in this state to the cases of surveyors of the highways, rests on the peculiar phraseology of the statute prescribing their oaths."

The statute now in force in *New Jersey* in respect to acts of surveyors of the highways provides that no proceedings or return of surveyors of the highways shall be reversed, set aside, or held to be insufficient by reason of any defect in the official oath of any surveyor of the highways, or of his neglect or omission to take, subscribe, or file such oath, unless objection shall be made in respect to such oath or the absence thereof at the time of the appointment of such surveyor. Gen. Stat. New Jersey (1896), p. 2824, § 97.

1. **An Act of Legislature** is not void because the governor who approved it was such *de facto* merely, and it never received the approval of the *de jure* governor. *State v. Williams*, 5 Wis. 308.

Laws passed by the votes of *de facto* members of the legislature are valid. *State v. Smith*, 44 Ohio St. 348.

2. **Ordinances and Other Measures** adopted by a *de facto* city council, or in the adoption of which

and municipal regulations.¹

Judicial Proceedings are not invalidated because had before *de facto* officers;² and the acts of such officers in regard to the selection of juries are valid.³

A Service of Process, Notice, or Other Paper by a *de facto* officer is valid,⁴ as is also

a *de facto* member of council participated, are valid.

Iowa. — *Cochran v. McCleary*, 22 Iowa 75.
Kentucky. — *Pence v. Frankfort*, (Ky. 1897) 41 S. W. Rep. 1011.

Missouri. — *Perkins v. Fielding*, 119 Mo. 149, citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 96-103.

Nebraska. — *Magneau v. Fremont*, 30 Neb. 843, 27 Am. St. Rep. 436; *State v. Gray*, 23 Neb. 365.

New Jersey. — *State v. Tolan*, 33 N. J. L. 195.

Ohio. — *Schovile v. Cleveland*, 1 Ohio St. 126. See the title ORDINANCES.

1. **Municipal Regulations.** — A *de facto* board of health officers may make valid regulations for the health of the public. *Bedford v. Rice*, 58 N. H. 446. See the title MUNICIPAL CORPORATIONS.

2. **Civil Proceedings of De Facto Judge.** — The judgments, decrees, and orders of a *de facto* judge are valid.

United States. — *Ball v. U. S.*, 140 U. S. 118.

Alabama. — *Masterson v. Matthews*, 60 Ala. 260.

Arkansas. — *Rives v. Pettit*, 4 Ark. 582; *Keith v. State*, 49 Ark. 439.

California. — *Merced Bank v. Rosenthal*, 99 Cal. 39.

Kansas. — *Hunter v. Ferguson*, 13 Kan. 462; *Higby v. Ayres*, 14 Kan. 331.

Kentucky. — *Lexington, etc., Turnpike Road Co. v. McMurtry*, 6 B. Mon. (Ky.) 214.

Louisiana. — *Guilbeau v. Cormier*, 32 La. Ann. 930.

Maine. — *Woodside v. Wagg*, 71 Me. 207.

Mississippi. — *Cooper v. Moore*, 44 Miss. 386.

Missouri. — *State v. Miller*, 111 Mo. 542.

Ohio. — *Le Grange v. Ward*, 11 Ohio 257.

South Carolina. — *Taylor v. Skrine*, 2 Treadw. (S. Car.) 696; *Cromer v. Boinest*, 27 S. Car. 436.

Tennessee. — *Venable v. Curd*, 2 Head (Tenn.) 582; *Calloway v. Sturm*, 1 Heisk. (Tenn.) 764.

Virginia. — *McCraw v. Williams*, 33 Gratt. (Va.) 510.

See the title JUDGMENTS AND DECREES.

Surrogate. — Letters of administration granted by a *de facto* surrogate are valid. *Crookshank v. Macfarlane*, 7 New Bruns. 544.

Justice of the Peace. — A judgment rendered by a *de facto* justice of the peace is valid.

Georgia. — *Hinton v. Lindsay*, 20 Ga. 746.

Missouri. — *Fleming v. Mulhall*, 9 Mo. App. 71.

New York. — *Greenleaf v. Low*, 4 Den. (N. Y.) 170; *Read v. Buffalo*, 3 Keyes (N. Y.) 447.

Vermont. — *Fancher v. Stearns*, 61 Vt. 616.

Wisconsin. — *Tolle v. Stone*, 1 Pin. (Wis.) 230.

Alderman. — The judicial act of a *de facto* alderman, holding and exercising the office, not under the mere color of right, but possessing a commission on its face constitutional and legal, can only be examined in a proceeding in which he is a party and in which he can

be heard. *Cornish v. Young*, 1 Ashm. (Pa.) 153.

Master in Chancery. — The proceedings of a person who is acting and is recognized as a master in chancery will be sustained, whether or not his appointment is valid. *People v. Williams*, 55 Ill. 178.

In Criminal Cases. — One who is tried and sentenced to imprisonment by a *de facto* judge is not denied the equal protection of the laws, or deprived of his liberty without due process of law, in violation of the United States Constitution. *In re Manning*, 139 U. S. 504, affirming 76 Wis. 365. See the title CONSTITUTIONAL LAW, vol. 6, p. 882.

But a trial and conviction before and sentence by a *de facto* judge are valid. *Milward v. Thatcher*, 2 T. R. 87; *State v. Brown*, 12 Minn. 538; *Ostrander v. People*, 29 Hun (N. Y.) 513; *In re Burke*, 76 Wis. 357; *In re Manning*, 76 Wis. 365.

And such judgment cannot be questioned in habeas corpus proceedings. *Ex p. Strang*, 21 Ohio St. 610. See the title HABEAS CORPUS.

The same rules apply to criminal proceedings before a *de facto* justice of the peace, *Ex p. Johnson*, 15 Neb. 512; *People v. Terry*, 103 N. Y. 1; magistrate, *Parks. Petitioner*, 3 Mont. 426; or police justice, *Coyle v. Sherwood*, 1 Hun (N. Y.) 272.

3. **Selection of Grand Jury.** — A writ of habeas corpus will not lie in favor of one convicted of murder because the grand jury by whom he was indicted were selected by a judge who was acting as such under an appointment from the regular judge, who was disabled by sickness, and such acting judge had not then been commissioned by the governor. *State v. Fenderson*, 28 La. Ann. 82. See also *Thrower v. State*, 52 Ala. 22; and see the title GRAND JURY.

Petit Jury. — A conviction of a crime is valid though the venire for drawing the jurors was issued by a *de facto* jury commissioner, *State v. McJunkin*, 7 S. Car. 21; or though the jury were drawn by a *de facto* officer, *People v. Roberts*, 6 Cal. 214; *Mapes v. People*, 69 Ill. 523; *Carpenter v. People*, 64 N. Y. 483; *Dolan v. People*, 64 N. Y. 485; or were sworn by a *de facto* deputy clerk of court, *Mobley v. State*, 46 Miss. 501. See the title JURY AND JURY TRIAL.

4. **Service** — *Alabama*. — *Garner v. Clay*, 1 Stew. (Ala.) 182; *Flournoy v. Clements*, 7 Ala. 535.

Connecticut. — *State v. Brennan's Liquors*, 25 Conn. 278.

Illinois. — *Barlow v. Standford*, 82 Ill. 298.

Iowa. — *Stickney v. Stickney*, 77 Iowa 699.

Louisiana. — *Gradnigo v. Moore*, 10 La. Ann. 670; *Irving v. Edrington*, 41 La. Ann. 671.

Maine. — *Bliss v. Day*, 68 Me. 201.

Massachusetts. — *Elliott v. Willis*, 1 Allen (Mass.) 461; *Fowler v. Bebee*, 9 Mass. 231, 6 Am. Dec. 62; *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335.

New York. — *Snyder v. Schram*, 59 How. Pr. (Montgomery County Ct.) 404.

Vermont. — *State v. Clark*, 44 Vt. 636.

a seizure or sale made by such officer.¹

The Validity of Taxes is not impaired by the fact that the officers by whom they were assessed or levied were *de facto* officers merely;² and a tax sale by a *de facto* officer conveys good title.³

An Election called or conducted by *de facto* officers is valid.⁴

1. **Seizures and Judicial Sales** — *Arkansas*. — Youngblood v. Cunningham, 38 Ark. 571.

California. — *Shores v. Scott River Water Co.*, 17 Cal. 626.

Massachusetts. — Doty v. Gorham, 5 Pick. (Mass.) 487, 16 Am. Dec. 417; Nason v. Dillingham, 15 Mass. 170; Bucknam v. Ruggles, 15 Mass. 180, 8 Am. Dec. 98.

Missouri. — Powers v. Braley, 41 Mo. App. 556.

New Hampshire. — Jones v. Gibson, 1 N. H. 266; Moore v. Graves, 3 N. H. 408.

North Carolina. — Swindell v. Warden, 7 Jones L. (52 N. Car.) 575.

See the titles ATTACHMENT, vol. 3, p. 181; EXECUTIONS; JUDICIAL SALES.

2. **Taxes** — *England*. — Scadding v. Lorant, 3 H. L. Cas. 418, 13 Q. B. 706, 66 E. C. L. 706.

United States. — Gibb v. Washington, 1 McAll. (U. S.) 430.

Arkansas. — Moore v. Turner, 43 Ark. 243; Equalization Board v. Land Owners, 51 Ark. 516. See also Scott v. Watkins, 22 Ark. 556; Barton v. Lattourette, 55 Ark. 81.

Illinois. — Guyer v. Andrews, 11 Ill. 494.

Maryland. — Koontz v. Hancock, 64 Md. 134.

Massachusetts. — Williams v. School Dist. No. 1, 21 Pick. (Mass.) 75.

Mississippi. — Ray v. Murdock, 36 Miss. 692.

New Hampshire. — Tucker v. Aiken, 7 N. H. 131. But see *infra*, this note, *In New Hampshire*.

New Jersey. — State v. Perkins, 24 N. J. L. 409; Bloomfield Tp. v. Pierson, 47 N. J. L. 247.

New York. — Dows v. Irvington, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 162.

Pennsylvania. — Parker v. Luffborough, 10 S. & R. (Pa.) 249.

Tennessee. — McLean v. State, 8 Heisk. (Tenn.) 22.

Wisconsin. — Dean v. Gleason, 16 Wis. 1.

See the title TAXATION.

In an action against a school district to recover back a tax which had been paid to a *de facto* collector of the town, it was held that it was not open to the plaintiff to object that the officer had not been duly elected and sworn. Williams v. School Dist. No. 1, 21 Pick. (Mass.) 75.

In Koontz v. Hancock, 64 Md. 134, the court, *per* Robinson, J., said: "As taxes are levied for the support of the government, the reasons of public policy on which the principle is founded apply with even greater force in regard to the acts of officers whose duty it is to levy and collect such taxes."

The case of Merriitt v. Portchester, 71 N. Y. 309, 27 Am. Rep. 47, in which it was held that "commissioners of estimate and assessment" appointed under the charter of a village, to apportion the expenses of a local improvement, were not even officers *de facto*, where in place of taking the oath required by the charter,

"faithfully and fully to discharge the duties," they each took an oath to perform the duties to the best of his ability, and an assessment levied by them was void, is in effect *overruled* by Matter of Kendall, 85 N. Y. 302, in which case the court, *per* Earl, J., said: "It would be a monstrous proposition to hold that the action of town assessors or of trustees of villages, who, under the general village act, perform the duties of assessors, was void because they had neglected to take any official oath. It is no answer to the validity of the action of these commissioners as *de facto* officers that their action could result in taking private property for assessments which might be consequent upon their action. So a sheriff or constable may seize private property, and a judge may render a judgment, which may result in taking or imposing burdens upon property. And yet the action of such officers could not for that reason be assailed because they had failed to take the proper official oath of office, and hence were merely *de facto* officers." See the title TAXATION.

In New Hampshire it was held that a tax was not valid where the assessors who made the appraisal of property therefor had not complied with a statutory provision that such officers should, before entering upon their duties, take and subscribe an oath to make a just and true appraisal of all ratable estate, according to their best judgment. Pike v. Hanson, 9 N. H. 491.

It was also held that in order to render a sale of land for taxes valid, it must appear that the collector of taxes who sold the land took the oath of office prescribed by law. Cardigan v. Page, 6 N. H. 182.

3. **Tax Sale**. — Twombly v. Kimbrough, 24 Ark. 459; Watkins v. Inge, 24 Kan. 612; Adams v. Jackson, 2 Aik. (Vt.) 145. See also McClain's Anno. Code Iowa (1888), § 1389; Horner's Indiana Stat. (1896), § 1080; Comp. Stat. Nebraska (1897), § 448. And see the titles TAX SALES; TAX TITLES.

A tax sale based on a return of taxes as delinquent by a *de facto* tax collector is valid, whether or not he was in strict law entitled to the tax roll. Stockie v. Silsbee, 41 Mich. 615. But see the preceding note, *In New Hampshire*.

4. **Elections** — *Alabama*. — Butler v. Walker, 98 Ala. 358, 39 Am. St. Rep. 61.

Florida. — State v. County Canvassers, 17 Fla. 9.

Massachusetts. — Com. v. Sullivan, 165 Mass. 183.

Minnesota. — Quinn v. Markoe, 37 Minn. 439.

Montana. — Wells v. Taylor, 5 Mont. 202.

New York. — People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451.

North Carolina. — Wilson v. Peterson, 69 N. Car. 113.

Texas. — State v. Hoff, (Tex. Civ. App. 1895) 29 S. W. Rep. 672; State v. Goowin, 69 Tex. 55. See the title ELECTIONS.

An Affidavit, Deposition, or Acknowledgment before a *de facto* officer has the same force as though there were no flaw in the officer's title.¹

A Contract made by a *de facto* officer binds the public corporation for which he assumes to act,² as does also an evidence of indebtedness issued by him.³

A Bond or Recognizance Taken or approved by a *de facto* officer is binding upon the person by whom it is given.⁴

c. WHEN THE RULE DOES NOT APPLY -- **Exceeding Powers of Office.** — The rule that the acts of a *de facto* officer are valid applies, of course, to such acts only as are within the powers and duties of the office he claims to exercise.⁵

Injury to Innocent Persons. — The object of the rule being to prevent damage to persons who confide in one whom they reasonably believe to be an officer, it will not be applied where its effect would be only to work injury to such persons.⁶

Notice of Defects in Title. — The rule will not be applied to uphold the acts of a mere usurper without color of title,⁷ nor of a claimant to office whose title has

1. **Affidavit.** — *Kaufman v. Stone*, 25 Ark. 336; *Tower v. Welker*, 93 Mich. 332; *Parker v. Baker*, 8 Paige (N. Y.) 428.

Deposition. — *Keeney v. Leas*, 14 Iowa 464. See the title DEPOSITIONS.

Acknowledgment — *Georgia*. — *Smith v. Meador*, 74 Ga. 416.

Illinois. — *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61; *Woodruff v. McHarry*, 56 Ill. 218.

Maine. — *Brown v. Lunt*, 37 Me. 423.

Missouri. — *Wilson v. Kimmel*, 109 Mo. 260.

New Hampshire. — *Prescott v. Hayes*, 42 N. H. 56.

Pennsylvania. — *Adam v. Mengel*, (Pa. 1887) 8 Atl. Rep. 606.

Texas. — *Thompson v. Johnson*, 84 Tex. 548, citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.), title DE FACTO OFFICERS.

See the title ACKNOWLEDGMENTS, vol. 1, p. 495.

Probate of Deeds. — *Cocke v. Halsey*, 16 Pet. (U. S.) 71; *Gillian v. Reddick*, 4 Ired. L. (26 N. Car.) 368; *Farmers, etc., Bank v. Chester*, 6 Humph. (Tenn.) 458, 44 Am. Dec. 318. See the title DEEDS, *post*.

A Relinquishment of Inheritance executed before a magistrate who had neglected to take the oath of office, upon his reappointment as such, was held to be valid in *Kottman v. Ayer*, 3 Strobb. L. (S. Car.) 92. In that case Mr. Justice Evans, delivering the opinion of the court, said: "There would be no security in our titles to property if at any time afterwards they could be called in question because the judge before whom renunciations of dower or inheritance had been taken, the magistrate before whom probate had been made, the register who had recorded them, or the ordinary who had made orders of sale, had omitted to take the oaths of office, to give a bond, or to do some other act required of him as a guaranty for the faithful performance of the duties of his office."

2. **Contracts.** — *De Grave v. Monmouth*, 4 C. & P. 111, 19 E. C. L. 300; *Morrison v. Sayre*, 40 Hun (N. Y.) 465; *O'Neil v. Battie*, 61 Hun (N. Y.) 622, 40 N. Y. St. Rep. 65; *Atty.-Gen. v. Megin*, 63 N. H. 378, 9 Am. & Eng. Corp. Cas. 68; *Case v. Wresler*, 4 Ohio St. 561; *Neale v. Overseers*, 5 Watts (Pa.) 538.

3. **Warrants.** — *Pierce v. Edington*, 38 Ark.

150; *Kimball v. Hendee*, 57 N. J. L. 307; *Merchants Nat. Bank v. McKinney*, 2 S. Dak. 106.

Bonds. — *Ralls County v. Douglass*, 105 U. S. 728; *National L. Ins. Co. v. Board of Education*, 62 Fed. Rep. 778.

Debentures. — *Pontiac County v. Ross*, 17 Can. Sup. Ct. Rep. 406.

Certificate of Indebtedness. — *Woolsey v. Rondout*, 2 Keyes (N. Y.) 603. See the title MUNICIPAL SECURITIES.

4. **Bond Taken or Approved by De Facto Officer** — *Alabama*. — *Estis v. Prince*, 47 Ala. 269.

Illinois. — *Pritchett v. People*, 6 Ill. 525.

Kentucky. — *Wilson v. King*, 3 Litt. (Ky.) 457.

Louisiana. — *State v. Gilbert*, 10 La. Ann. 524.

New Hampshire. — *Horn v. Whittier*, 6 N. H. 88.

Recognizance. — *Rheinart v. State*, 14 Kan. 318; *Sturgeon v. Com.*, (Pa. 1888) 14 Atl. Rep. 41, 22 W. N. C. (Pa.) 146.

5. **Acts Must Be Within Powers of Office.** — *Bailey v. Fisher*, 38 Iowa 229.

6. **Injury to Innocent Persons.** — In *Green v. Burke*, 23 Wend. (N. Y.) 490, an execution was placed in the hands of a constable who was ineligible for his office on account of his minority. He levied, but becoming convinced that he had committed a trespass, he was too prudent to go any farther. He returned the process to the justice and gave up the property to the defendant. The latter offered to pay him the money, but he would not take it. It was held that such levy did not discharge the debt and deprive the execution creditor of his remedy. See also *Com. v. Fowler*, 10 Mass. 290.

7. **Usurper.** — *Cronin v. Stoddard*, 97 N. Y. 271; *Thompson v. Ewing*, 1 Brews. (Pa.) 67.

In *Dabney v. Hudson*, 68 Miss. 292, 24 Am. St. Rep. 276, the court, *per* Cooper, J., said: "It has also been sometimes suggested, even by the most distinguished judges, that the validity of the act of one claiming to be an officer cannot be inquired into in a collateral controversy between third persons, because, the officer not being a party to the proceeding, it would be unjust to him to permit his title to be put in issue and decided." *Parsons, C. J.*, in *Fowler v. Bebee*, 9 Mass. 231, 6 Am. Dec. 62; *Ruffin, C. J.*, in *Burke v. Elliott*, 4 Ired. L. (26 N. Car.) 355. But it is clear that the rule rests upon no foundation, for if it did the

been challenged from the outset.¹ Nor will it be applied to protect a person who knew that the officer whose action he invoked or submitted to was not a legal officer,² or who could have acquired such knowledge with reasonable diligence.³

Private Individual. — The rule does not apply to sustain the acts of a private individual called in by an officer to perform a single duty, as such person does not take rank as a public officer.⁴

Perjury. — Although there is much conflict upon the question, the weight of authority seems to be opposed to the contention that perjury may be predicated on an oath administered by a *de facto* officer.⁵

title of a mere usurper could not be controverted, for he would not be a party to the suit, and his right differs in degree and not in kind from that of one having no right but a mere color of right to an office. The true and only foundation of the rule is that it is essential for the protection of those who must have official business transacted, and who have neither the time nor the opportunity to investigate the title of the incumbent. Finding the office filled by one performing its duties and recognized by the public as the true officer, those having occasion for his services may trust to the facts being as the appearances indicate them to be, and in so doing will be protected. But the law affords this protection because to refuse it would be to mislead to their injury persons who in good faith and upon reasonable grounds believe the person professing to be an officer to be such in fact. If he is a mere intruder, acting without color of right and without recognition by the public, no one should believe him to be an officer and deal with him as such, for no one can reasonably believe a fact to exist for which he has no reasonable grounds."

1. Title Challenged at Outset. — *Williams v. Boynton*, 147 N. Y. 426.

2. Knowledge that Officer Not a Legal One. — *Rouleau v. St. Lambert*, 10 Quebec L. R. Super. Ct. 85, citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 96, 101, 108. *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *Genesee Tp. Independent School Dist v. McDonald*, 98 Pa. St. 444; *Herring v. Lee*, 22 W. Va. 661.

The *de facto* doctrine does not apply to validate a contract made by an officer whose office afterwards ceased to exist, to the extent of enabling the contractor to recover for work done after the office had been notoriously abolished, together with the territorial division of the state for which such office had existed, and after he had been notified to stop work. *Conway v. St. Louis*, 9 Mo. App. 488.

In *State v. Perkins*, 139 Mo. 106, the court, per Sherwood, J., said: "The foundation stone of this whole doctrine of a *de facto* officer, as gathered from all the authorities, seems to be that of preventing the public or third persons from being deceived to their hurt by relying in good faith upon the genuineness and validity of acts done by a pseudo officer. However much color of authority may clothe the person who assumes to perform the functions of an office and discharge its duties, yet, if the public or third persons are not deceived thereby, if they know the true state of the case, the reason which gives origin or existence to the rule which validates the act of an officer *de facto* ceases; and with it cease also all of its

ordinary validating incidents and consequences."

3. Reasonable Diligence. — In *U. S. v. Alexander*, 46 Fed. Rep. 728, the court refused to uphold an order made by a judge after his successor had qualified. Beatty, J., delivering the opinion of the court, said: "There is also another reason why this order should not be sustained. It was made when it was well known by all, including the judge who made it, that another judge had been appointed whose qualification and assumption of the duties of the office it was reasonable to anticipate might occur any day. By a little care and inquiry it could easily have been learned just when this would happen, and thus avoid unnecessary conflict, and especially might this have been done as there was no such emergency as demanded hasty action. Judicial officers, of all others, should observe the greatest care in the exercise of the important power delegated to them. In view of all the circumstances, I think the order was improvidently made. To hold it valid would be a precedent justifying a practice which courts should discourage rather than sustain. Courts have sustained the acts of *de facto* officers only as a matter of necessity, to avoid serious damage to those not at fault; but the encouragement of a careless practice on this subject would result in far greater injury than benefit. Rather is it better that it be understood that the acts and orders of those without the legal right to exercise official trust must pass the ordeal of the closest scrutiny, and be ratified only so far as justified by public policy and necessity."

4. Private Individual. — In *Vaccari v. Maxwell*, 3 Blatchf. (U. S.) 368, it was held that the acts of a merchant who was called in by the collector of a port to act as a "merchant appraiser" in estimating the value of merchandise, and who acted as such without taking the oath prescribed by law, could not be sustained as the acts of a *de facto* officer, but were irregular and void.

5. Oath Administered by De Facto Officer — Perjury. — The English courts support the view that perjury cannot be assigned on an oath administered by an officer *de facto*. *Rex v. Verelst*, 3 Campb. 432. See also *Reg. v. Newton*, 1 C. & K. 469, 47 E. C. L. 469; *Reg. v. Roberts*, 14 Cox C. C. 101.

In *Biggerstaff v. Com.*, 11 Bush (Ky.) 172, the court said: "The rule founded upon public policy which requires the acts of *de facto* officers to be treated for many purposes as valid and binding does not apply when an oath administered by such an officer is made the foundation of a prosecution for perjury."

And in *State v. Hayward*, 1 Nott & M. (S.

d. APPOINTMENT BY DE FACTO OFFICER. — The question whether an officer *de facto* can confer upon another, by appointing the latter to an office within his gift, a better title than the appointing officer has, is one upon which the authorities are in conflict. The *English* rule appears to be that where an officer is ousted by quo warranto, those who were appointed by him when he was the officer *de facto* are concluded by the judgment as privies to the defendant, and lose their places.¹ And some cases in the *United States* uphold the

Car.) 546, it was held that a magistrate who took the oaths of qualification before one of the associate judges was not duly qualified, and that a person could not be tried for perjury on an oath taken before such a magistrate, and if on such oath the defendant was convicted, a new trial would be granted.

In *Walker v. State*, 107 Ala. 5, it was held that an oath administered by a *de facto* deputy clerk could not be assigned as perjury.

And in *Muir v. State*, 8 Blackf. (Ind.) 154, it was adjudged that the defendant might show that the person who administered the oath alleged to be false had no authority to administer it.

In *Staight v. State*, 39 Ohio St. 496, it was held that where application for a marriage license is made to a deputy clerk of the Probate Court, who is holding without a new appointment during a second term of the judge appointing him, and such deputy administers an oath to the applicant and examines him as to the right of the parties to such license, a prosecution for perjury cannot be maintained against such applicant, based on such testimony, for the reason that the oath was not administered by lawful authority.

This case, however, is referred to in *State v. Gardner*, 54 Ohio St. 25, in the concurring opinion of Spear, J., in the following language: "The position of deputy clerk is not, in the constitutional sense, an office. At common law the officer and his deputy filled but a single office. By statute the probate judge is *ex officio* clerk of his own court; the deputy is appointed by him, and can be neither appointed nor removed by any one else, and the acts of the deputy are the acts of the principal. *Warwick v. State*, 25 Ohio St. 21. Petit, the one acting as deputy when the oath was administered to Staight, had received no appointment under the judge's second term, and had taken no oath. Even had there been an office to fill, he lacked color of office, and in no respect could be regarded an officer *de facto*. It would appear that the case has no important bearing upon the present contention."

In *Lambert v. People*, 76 N. Y. 220, 32 Am. Rep. 293, where it appeared impossible that the notary who administered the oath should be a *de jure* notary, and further that proof that he was even a *de facto* officer was defective, it was held that perjury could not be assigned. Conflicting opinions were delivered concerning the main question.

On the other hand, in *Howard v. Sexton*, 1 Den. (N. Y.) 440, Bronson, C. J., said by way of illustration: "If parties should go to a trial before a judge or a justice of the peace who had not taken the oath of office, I think a witness who should swear false on such trial could not escape the pains of perjury."

And in *People v. Cook*, 8 N. Y. 67, 59 Am.

Dec. 451, it was held that a challenged voter swearing falsely before a *de facto* board of inspectors is as much liable to punishment under the statute as if the oath had been administered by inspectors *de jure*.

In *State v. Hascall*, 6 N. H. 352, it was decided to be sufficient, *prima facie*, on an indictment for perjury, to show that the person by whom the oath was administered was an acting magistrate, and that the evidence of the individual himself was receivable for that purpose.

In *Morrell v. People*, 32 Ill. 499, it was held that proof that the person before whom the oath was taken habitually acted in the capacity of a particular officer is perhaps only *prima facie* evidence of the fact, but until rebutted it is sufficient without producing his appointment or commission.

In *Keator v. People*, 32 Mich. 484, it was held that evidence that the oath was administered in open court by one who was acting as deputy clerk is sufficient proof of his official character, and in a collateral proceeding it is enough that he was shown to be an officer *de facto*.

In *People v. Albertson*, 8 How. Pr. (Greene County Ct.) 363, it was held that perjury could not be assigned of testimony given before a justice of the peace who was acting without color of title.

1. Appointment by De Facto Officer — English Rule. — *Throop on Public Officers*, § 655. *Citing Rex v. Lisle*, Andr. 163, 2 Stra. 1090; *Rex v. York*, 5 T. R. 66; *Rex v. Grimes*, 5 Burr. 2599; *Rex v. Hebden*, Andr. 389.

In *People v. Murray*, 73 N. Y. 535, Earl, J., reviewed the English cases on this subject in the following language: "In *Rex v. Lisle*, Andr. 163, quo warranto was brought against the defendant for acting as Burgess of the town of Christ Church. He had been elected one of the burgesses by Goldwire, claiming to act as mayor of the town, at the time when a writ of quo warranto was pending against Goldwire in which it was afterwards determined that he was not the mayor. As Goldwire was neither *de jure* nor *de facto* mayor, it was held that the office of Burgess could not be derived from him. It was said: 'In the present case it seems very extraordinary that one called to account by the crown for acting as Burgess should set up a title derived to him from a pretended mayor whose right was litigating, at the suit of the crown, at the very time when the other was elected. If such an one hath so great a power against the crown, there will be no difference between a rightful mayor and an intruder. It was said by Lee, C. J., and Page, justice, that as there was so recent a prosecution against Goldwire, and as the present prosecution is by the crown, the issue must be construed as has been mentioned, viz., whether

doctrine that a *de facto* officer cannot confer upon his appointee any better title than he himself has.¹ But the weight of American authority is in favor of the position that the appointee of a *de facto* officer has good title to his office, even after such *de facto* officer has been ousted.²

III. REMOVAL OF DE FACTO OFFICERS—1. Title Cannot Be Collaterally Attacked

—*a. GENERAL RULE.*—It is the general rule that the title of a *de facto* officer, whether a public officer or an officer of a private corporation, cannot be collaterally attacked in an action to which he is not a party,³ nor in an action to

Goldwire was a lawful mayor or not.' And in such a case it might well be held that the adjudication against Goldwire should be binding upon Lisle deriving title from him. In *Rex v. Hebden*, Andr. 389, there was a writ of quo warranto against Hebden for acting as one of the bailiffs of the corporation of Scarborough, and he pleaded a nomination by A and B, two bailiffs of the same corporation. Upon the issue taken of their being bailiffs, a judgment of ouster in a quo warranto against them was held admissible and conclusive against Hebden, unless shown to have been collusive. The decision was based upon the ground that Hebden held under and derived his right from A and B. In *Rex v. Grimes*, 5 Burr. 2599, there was an information in the nature of a quo warranto against Grimes to show by what authority he claimed to be one of the chief burgesses of the borough of Yarmouth, in the Isle of Wight. It appeared, among other things, that John Leigh presided as mayor at the election of the defendant as chief Burgess and took part in such election, and it was held that a judgment given against Leigh on an information against him for usurping the office of mayor was evidence against Grimes, who claimed title, in part at least, from and under him. In *Rex v. York*, 5 T. R. 66, all that was decided pertinent to this case is that a judgment of ouster against one corporator is conclusive evidence against another who derives title under him. Kenyon, C. J., said: 'If you derive title to a corporate office through A, and the prosecutor show a judgment of ouster against A, it is conclusive against you, unless you can impeach the judgment as obtained *per fraudem*.'"

1. *Concurring American Cases.*—*Jersey City v. Erwin*, 59 N. J. L. 282; *People v. Anthony*, 6 Hun (N. Y.) 142.

In *New York v. Flagg*, 6 Abb. Pr. (N. Y. Supreme Ct.) 296, the court, *per* Sutherland, J., said, speaking of an officer *de facto*: "Without right himself he cannot confer any on others. His appointment of deputies or subordinates, as to himself and them, would be as void as any other colorable official act. It might make them severally officers *de facto* as to third persons, but could give them no better or greater right to institute, as such, any affirmative action or proceeding than he himself had or has as an officer *de facto*."

2. *American Rule.*—*Brady v. Howe*, 50 Miss. 607; *Norfleet v. Staton*, 73 N. Car. 546; *State v. Alling*, 12 Ohio 16; *State v. Jacobs*, 17 Ohio 143.

In *People v. Stevens*, 5 Hill (N. Y.) 616, Bronson, J., expressed the opinion that one who was appointed clerk of the common council of a city by the vote of a *de facto* alderman

would be entitled to hold the office, though the alderman should afterwards be ousted on quo warranto. The case was decided, however, on other grounds.

3. *Title Cannot Be Collaterally Attacked—Public Officer—England.*—*Reg. v. Chester*, 34 Eng. L. & Eq. 59.

United States.—*Gibb v. Washington*, 1 McAll. (U. S.) 430; *Peyton v. Brent*, 3 Cranch (C. C.) 424.

Alabama.—*Thompson v. State*, 21 Ala. 48; *Heath v. State*, 36 Ala. 273; *Lee v. State*, 49 Ala. 43; *Thrower v. State*, 52 Ala. 22; *Masters v. Matthews*, 60 Ala. 260; *Joseph v. Cawthorn*, 74 Ala. 411; *Eaton v. Harris*, 42 Ala. 491; *Ex p. Strobach*, 49 Ala. 443; *Reynolds v. McWilliams*, 49 Ala. 552.

Arizona.—*Jeffords v. Hine*, (Arizona 1886) 11 Pac. Rep. 351.

Arkansas.—*Twombly v. Kimbrough*, 24 Ark. 459; *Kaufman v. Stone*, 25 Ark. 336; *Keith v. State*, 49 Ark. 439.

California.—*People v. Sassovich*, 29 Cal. 480; *Hull v. Superior Ct.*, 63 Cal. 174.

Colorado.—*Pueblo County v. Gould*, 6 Colo. App. 44.

Connecticut.—*Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574; *Douglass v. Wickwire*, 19 Conn. 489; *State v. Brennan's Liquors*, 25 Conn. 278.

Florida.—*Rushing v. Thompson*, 20 Fla. 583; *Kissimmee City v. Cannon*, 26 Fla. 3.

Georgia.—*Hinton v. Lindsay*, 20 Ga. 746; *Pool v. Perdue*, 44 Ga. 454.

Idaho.—*Gorman v. Boise County*, 1 Idaho 655.

Illinois.—*Pritchett v. People*, 6 Ill. 525; *People v. Matteson*, 17 Ill. 167; *Lewistown v. Proctor*, 23 Ill. 533; *Metz v. Anderson*, 23 Ill. 463, 76 Am. Dec. 704; *Burgess v. Davis*, 37 Ill. App. 353, *affirmed* in 138 Ill. 578; *Kuhle v. People*, 65 Ill. App. 378; *Trumbo v. People*, 75 Ill. 561; *Law v. People*, 87 Ill. 385.

Indiana.—*Milford School Town v. Zeigler*, 1 Ind. App. 138; *Osborne v. State*, 128 Ind. 129.

Iowa.—*Cochran v. McCleary*, 22 Iowa 75.

Kansas.—*State v. Nield*, 4 Kan. App. 626.

Louisiana.—*Schwartz v. Thirty-two Flatboats*, 14 La. Ann. 240; *State v. Lewis*, 22 La. Ann. 33; *Monroe v. Hoffman*, 29 La. Ann. 651; *State v. O'Grady*, 31 La. Ann. 378; *Guilbeau v. Cormier*, 32 La. Ann. 930; *State v. Books*, 39 La. Ann. 817.

Massachusetts.—*Fitchburg R. Co. v. Grand Junction R., etc., Co.*, 1 Allen (Mass.) 552; *Coolidge v. Brigham*, 1 Allen (Mass.) 333; *Doty v. Gorham*, 5 Pick. (Mass.) 487, 16 Am. Dec. 417; *Fowler v. Bebee*, 9 Mass. 231, 6 Am. Dec. 62; *Buckman v. Ruggles*, 15 Mass. 180,

which he is a party, where he has no personal interest in such action, but is merely prosecuting or defending the same in his official capacity.¹ Nor can

8 Am. Dec. 98; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374.

Michigan. — *Boehme v. Monroe*, 106 Mich. 401; *Carleton v. People*, 10 Mich. 250; *Facey v. Fuller*, 13 Mich. 527; *Ballou v. O'Brien*, 20 Mich. 304; *Mead v. Ingham County*, 36 Mich. 416; *Stockle v. Silsbee*, 41 Mich. 615; *Moiles v. Watson*, 60 Mich. 415; *Donough v. Dewey*, 82 Mich. 309; *Frey v. Michie*, 68 Mich. 323; *Carlisle v. Saginaw*, 84 Mich. 134; *Tower v. Welker*, 93 Mich. 332; *Atty.-Gen. v. Parsell*, 99 Mich. 381.

Mississippi. — *Cooper v. Moore*, 44 Miss. 386.

Montana. — *Carland v. Custer County*, 5 Mont. 579; *State v. Cook*, 17 Mont. 529.

Nevada. — *Sawyer v. Dooley*, 21 Nev. 390.

New Hampshire. — *Morse v. Calley*, 5 N. H. 222; *Merrill v. Palmer*, 13 N. H. 184; *Bean v. Thompson*, 19 N. H. 290, 49 Am. Dec. 154; *Baker v. Shephard*, 24 N. H. 212; *State v. Barnard*, (N. H. 1892) 29 Atl. Rep. 410; *State v. Butman*, 42 N. H. 490; *Bedford v. Rice*, 58 N. H. 446; *Northumberland v. Cobleigh*, 59 N. H. 250; *Jewell v. Gilbert*, 64 N. H. 13, 10 Am. St. Rep. 357.

New Jersey. — *Richman v. Adams*, 59 N. J. L. 289; *State v. Toian*, 33 N. J. L. 195.

New York. — *Devlin's Case*, 5 Abb. Pr. (N. Y. C. Pl.) 281; *Conover's Case*, 5 Abb. Pr. (N. Y. Supreme Ct.) 73; *Morris v. People*, 3 Den. (N. Y.) 381; *Greenleaf v. Low*, 4 Den. (N. Y.) 170; *New York v. Tucker*, 1 Daly (N. Y.) 107; *People v. Stevens*, 5 Hill (N. Y.) 616; *Crosier v. Cornell Steamboat Co.*, 27 Hun (N. Y.) 215; *People v. Orleans County Ct.*, 28 Hun (N. Y.) 14; *People v. New York*, 3 Johns. Cas. (N. Y.) 79; *Parker v. Baker*, 8 Paige (N. Y.) 428; *Palmer v. Foley*, 36 N. Y. Super. Ct. 14; *People v. Bartlett*, 6 Wend. (N. Y.) 422; *People v. Lane*, 55 N. Y. 217; *Lambert v. People*, 76 N. Y. 220, 32 Am. Rep. 293; *People v. New York*, etc., *Bridge*, (Supreme Ct.) 7 N. Y. Supp. 806.

North Carolina. — *Culver v. Eggers*, 63 N. Car. 630.

Pennsylvania. — *Adam v. Mengel*, (Pa. 1887) 8 Atl. Rep. 606; *McKim v. Somers*, 1 P. & W. (Pa.) 297.

Tennessee. — *Blackburn v. State*, 3 Head (Tenn.) 690; *Calloway v. Sturn*, 1 Heisk. (Tenn.) 764.

Texas. — *Dane v. State*, (Tex. Crim. App. 1896) 35 S. W. Rep. 661; *Aulanier v. Governor*, 1 Tex. 653.

Vermont. — *Fancher v. Stearns*, 61 Vt. 616; *McGregor v. Balch*, 14 Vt. 428, 39 Am. Dec. 231.

Washington. — *Bullene v. Garrison*, 1 Wash. Ter. 587.

Wisconsin. — *Lask v. U. S.*, 1 Pin. (Wis.) 77; *Baker v. State*, 69 Wis. 32; *State v. Bartlett*, 35 Wis. 287; *Chicago, etc., R. Co. v. Langlade County*, 56 Wis. 614.

A court will not pass upon the validity of the election of a *de facto* mayor in a collateral proceeding to which he is not a party, unless perhaps in a case of gross and manifest fraud. *Rex v. Godwin*, 1 Doug. 397.

Officers of Corporations — *Michigan*. — *Druse v. Wheeler*, 22 Mich. 439; *Johns v. People*, 25 Mich. 499.

New Hampshire. — *Nashua F. Ins. Co. v. Moore*, 55 N. H. 48.

New York. — *People v. Hills*, 1 Lans. (N. Y.) 202; *In re Santa Eulalia Silver Min. Co.*, (Supreme Ct.) 4 N. Y. Supp. 174.

Ohio. — *First Presb. Soc. v. Smithers*, 12 Ohio St. 248; *Ehrman v. Union Cent. L. Ins. Co.*, 35 Ohio St. 324; *Raymond v. Spring Grove, etc.*, R. Co., 21 Cinc. Wkly. L. Bull. 103.

Wisconsin. — *Sauerhering v. Iron Ridge, etc.*, R. Co., 25 Wis. 447.

Appeal from Judgment. — The title of a *de facto* judicial officer cannot be questioned on appeal from a judgment rendered by him. *Gumberts v. Adams Express Co.*, 28 Ind. 181; *Nashville v. Thompson*, 12 Lea (Tenn.) 344; *Tolle v. Stone*, 1 Pin. (Wis.) 230. See also *Com. v. Taber*, 123 Mass. 253. Or in certiorari to proceedings before him. *People v. Gobles*, 67 Mich. 475; *M'Instry v. Tanner*, 9 Johns. (N. Y.) 135. But in *Ipsley v. Turk*, 2 Mod. 194, it was held that in a writ of error upon a judgment in an inferior court it might be pleaded that the mayor, who was a judge of such court, had not received the sacrament, pursuant to stat. 13 Charles II., c. 1; for, under the statute, his acts in such case were void.

For a fuller treatment of this subject, and further authorities, see the title APPEALS, 2 ENCYC. OF PL. AND PR. 458.

An Injunction will not be issued at the suit of a taxpayer to restrain payment of the salary of an officer to a *de facto* incumbent thereof, as that would involve a decision upon the officer's title. *Burgess v. Davis*, 138 Ill. 578, affirming 37 Ill. App. 353.

Mandamus will not lie to compel the installation of a person who claims an office, when there is a *de facto* incumbent in possession. *People v. School Trustees*, 42 Ill. App. 60; *Fort v. Howell*, 58 N. J. L. 541. For a full treatment see the title MANDAMUS.

A Person Summoned to Testify before a *de facto* grand jury cannot raise the question of its competency to act. *Ex p. Haymond*, 91 Cal. 545.

1. Formal Party to Action — *California*. — *Hull v. Superior Ct.*, 63 Cal. 176.

Florida. — *State v. Gleason*, 12 Fla. 226.

Indiana. — *Creighton v. Piper*, 14 Ind. 182.

Missouri. — *State v. John*, 81 Mo. 13; *Buis v. Cooper*, 63 Mo. App. 196, 1 Mo. App. Rep. 746.

Nevada. — *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478.

New York. — *Dows v. Irvington*, 13 Abb. N. Cas. (N. Y. Supreme Ct.) 162; *People v. Schiellein*, 95 N. Y. 124.

Vermont. — *Taylor v. Nichols*, 29 Vt. 104.

Contrary Doctrine — In *Mississippi* the High Court of Errors and Appeals declared the appointment of a levee commissioner void, in a proceeding brought by him in his official capacity. *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169. The court, *per* Chief Justice Smith, said: "This court * * * went farther, and inquired into the validity of the appointment of officers where their acts, performed *colore officii*, were brought in question in a collateral proceeding. *Thomas v. State*, 5 How. (Miss.) 20; *Smith v. Halfacre*, 6 How.

such an officer's title be questioned in any other collateral way.¹

b. LIMITATIONS — (1) *Inquiry as to Whether De Facto Officer or Usurper.* — Although the question of strict title to an office cannot be investigated in a collateral proceeding, the court will make such inquiry into the title of a person who has acted as an officer as to determine whether he is a *de facto* officer or a mere intruder.²

(2) *Inquiry as to Existence of Office.* — It has been held that where the acts of an officer come into question collaterally, the court may consider, at the instance of the party affected by such acts, the question whether or not any such legal office exists as that which the officer assumes to exercise.³

(3) *When Title Is in Issue.* — A person who attempts to escape liability for his acts by setting up that the acts complained of were done in the exercise of an office held by him puts his title to such office directly in issue.⁴ And the same is true where a person in possession of an office attempts to recover the salary or other emoluments incident thereto.⁵

(Miss.) 582; *Houston v. Royston*, 7 How. (Miss.) 543. In the case of *Smith v. Halfacre*, 6 How. (Miss.) 582, the right to a seat upon the Circuit Court bench was decided upon a plea in abatement, in an ordinary suit, setting out the grounds upon which the title of the judge *de facto* was contested. In a case recently decided, the case of *Sam v. State*, 31 Miss. 480, the validity of an executive appointment of a circuit judge was examined upon a plea in abatement to an indictment found by a grand jury, and passed upon. These cases must be held as settling the principle of this court that where a law, an appointment to office, or any other act made absolutely void by the Constitution, or by legislative enactment, whenever it comes, even incidentally, in question, may be so declared."

1. Collateral Attack Otherwise than in Actions. — In *U. S. v. Harsha*, 56 Fed. Rep. 953, it was held that the comptroller of the treasury could not refuse to audit the accounts of a clerk of the Circuit Court and to allow him the sums due for his services, on the ground that he held an incompatible office. The court said: "It would be strange indeed if his right could be determined, as upon a quo warranto, on the auditing of his account in the treasury department."

Where one who has been appointed and commissioned as an officer presents himself before the proper officer to take the oath of office, such officer cannot refuse to administer the oath on the ground that the appointee is a minor, and incapable of holding office. *People v. Dean*, 3 Wend. (N. Y.) 438.

2. De Facto Officer or Usurper. — *U. S. v. Alexander*, 46 Fed. Rep. 728; *First Presb. Soc. v. Smithers*, 12 Ohio St. 248; *In re Boyle*, 9 Wis. 264.

In *U. S. v. Alexander*, 46 Fed. Rep. 728, the court, *per Beatty, J.*, said that the proposition that in an action to set aside an order by a judge the court could not look beyond the act of the officer and investigate the title to the office, "unconditionally accepted, would make valid the unauthorized proceedings of a mere intruder into an office; of any one who might assume, without the semblance of authority, to act, and thus leave us remediless against usurpation and the grossest injustice. While the question of strict title to an office can be

inquired into and determined only by direct proceeding, and while courts will not, in a collateral proceeding, make such investigation, they may and will make such inquiry as will establish the line between the mere intruder into an office and one holding it under some color of title, some semblance of right — between him without any authority whatever and the *de facto* officer."

3. Existence of Office May Be Collaterally Inquired Into. — *People v. Toal*, 85 Cal. 333; *Lambert v. People*, 76 N. Y. 220, 32 Am. Rep. 293; *Sturgeon v. Com.*, (Pa. 1888) 14 Atl. Rep. 41, 22 W. N. C. (Pa.) 146; *Moore v. State*, 5 Sneed (Tenn.) 510.

4. Attempt to Justify under Office. — *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574; *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 224; *Patterson v. Miller*, 2 Metc. (Ky.) 493; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *Shepherd v. Staten*, 5 Heisk. (Tenn.) 79.

Exception. — The validity of the appointment of a constable to his office cannot be tried in an action of trespass in which he justifies under his office, where he was appointed to fill a vacancy by the officers who had lawful authority to determine that such vacancy existed and to make an appointment to fill the same, and where the appointee would have been liable to a penalty had he refused to serve. *Wood v. Peake*, 8 Johns. (N. Y.) 69.

5. Attempt to Secure Benefits — *Illinois.* — *People v. Weber*, 86 Ill. 283.

Massachusetts. — *Phelon v. Granville*, 140 Mass. 386.

New Jersey. — *Meehan v. Chosen Freeholders*, 46 N. J. L. 276, 50 Am. Rep. 421.

New York. — *Curtin v. Barton*, 139 N. Y. 505.

Pennsylvania. — *Riddle v. Bedford County*, 7 S. & R. (Pa.) 386.

See also *Kimball v. Alcorn*, 45 Miss. 151.

Contrary Decisions. — In *mandamus* by a *de facto* officer to compel payment of his salary, an alleged want of title to the office and irregularity of the incumbency cannot be set up as a defense. *Henderson v. Glynn*, 2 Colo. App. 303.

The title of a *de facto* assistant district attorney cannot be assailed on appeal from a taxation of costs to him on an indictment. *Com. v. McCombs*, 56 Pa. St. 436.

Reynolds v. McWilliams, 49 Ala. 552, was an

(4) *Action Against De Facto Officer for Fees.* — It has been held that the title to an office may be tried in an action by a claimant thereof against an intruder to recover the fees received by him.¹

2. *Direct Proceeding Against Officer.* — The proper proceeding to try the title to a public office is by an information in the nature of *quo warranto* against the person in possession,² or by the statutory proceeding for the purpose, in states where such is provided.³ The title cannot be tried in any other manner, though the proceeding be directly against the officer.⁴

application for a mandamus compelling the state auditor to audit the accounts of the petitioner for feeding prisoners and conveying convicts to the penitentiary. The answer denied that the petitioner was the lawful sheriff, alleging that no vacancy existed in the office when he was appointed. It was held that such a question could not be raised, and a mandamus was properly awarded. The court, *per Saffold, J.*, said: "Before the auditor can be required to audit the proper charges of a sheriff, and to issue his warrant therefor on the state treasury, he must be informed by some evidence that the person making the application is the sheriff. He must be satisfied that he is not a mere pretender to the office or a usurper intruding himself into it without color of right. If he knows that the claimant, though elected or appointed by competent authority, has failed to comply with indispensable prerequisites to entering upon the duties, such as giving bond, or taking an oath, or is holding over after the expiration of his term without any provision by law, he may refuse to recognize his right, and the court will not compel him to do so. *Rounds v. Bangor*, 46 Me. 541, 74 Am. Dec. 469; *People v. Tieman*, 30 Barb. (N. Y.) 193; *Riddle v. Bedford County*, 7 S. & R. (Pa.) 386. The reason of this is that the claimant has never perfected his right to the office, or it has ceased, within his knowledge. He is a wrongdoer, and the law will do nothing to encourage him, apart from the protection due to third persons and the public generally. But when the appointment or election is made under competent authority, and all necessary prerequisites have been complied with, if the claimant is in the discharge of the duties of his office for the term for which he was elected or appointed, he cannot be interfered with except by a direct proceeding to set aside or annul his claim. This is partly in his interest, because he ought not to be held responsible for errors committed, without fault on his part, by the appointing power. * * * The appellant does not deny the validity of the acts of officers *de facto* when they concern the public or third persons. But he contends that where the act is for the benefit of the officer, a different rule prevails. It is so stated in *Flournoy v. Clements*, 7 Ala. 535, 'because he shall not take advantage of his own want of title, of which he cannot be ignorant.' This is the principle supported in *Rounds v. Bangor*, 46 Me. 541; *People v. Tieman*, 30 Barb. (N. Y.) 193, and other cases *supra*. The rule is a just one when the incumbent knows he is not entitled to the office, and is acting wantonly or recklessly. But in all other cases his rights towards the public and third persons ought to be the same as theirs towards him.

He is the lawful incumbent, except in a direct proceeding to oust him. Even the *de jure* officer cannot question his right, in a suit to recover the emoluments of the office. If he cannot defend in all cases where he can be defended against, saving his wanton usurpation, or holding over contrary to law, he is exposed to needless peril, to the demoralization of the people, who are thus taught to assail the authority of all officers, speculating upon the chances of escaping punishment. His accountability to the state and to the rightful claimant are generally sufficient to suppress the individual assertion of any very doubtful right to the office. The auditor occupies the relation of third person to the sheriff. If he may question the validity of his incumbency, in respect to auditing his claims against the state, and test the matter by suit, so may each suitor in court who may owe him fees, the judgment in every case being no bar to a suit between the sheriff and other parties on a like issue. Even a *de jure* sheriff would fail before such repeated assaults."

1. *Action Against Intruder for Fees.* — *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Wenner v. Smith*, 4 Utah 238.

In *Lightly v. Clouston*, 1 Taunt. 112, *Heath, J.*, said: "So long back as the time of Charles II. it was held that the title to an office, under an adverse possession, might be tried in an action for the fees of the office had and received." In *Wayne County v. Benoit*, 20 Mich. 176, *Cooley, J.*, quoted this language, in his dissenting opinion, adding that Judge Heath was supposed to refer to *Howard v. Wood*, 2 Lev. 245. *Contra*, *Hunter v. Chandler*, 45 Mo. 452.

2. *Quo Warranto Is Proper Proceeding.* — *French v. Cowan*, 79 Me. 426; *People v. Stevens*, 5 Hill (N. Y.) 616; *People v. Kings County*, 89 Hun (N. Y.) 38; *Campbell v. Com.*, 96 Pa. St. 344.

For a Full Treatment of this subject, see the titles PUBLIC OFFICERS; QUO WARRANTO.

As to Removal of Officers of Corporations, see the title AMOTION, vol. 2, p. 310.

3. *Statutory Proceeding.* — *State v. Callahan*, 4 N. Dak. 481.

4. *An Injunction will not be granted to restrain a de facto officer from exercising his office.* *Burke v. Leland*, 51 Minn. 355; *Hagner v. Heyberger*, 7 W. & S. (Pa.) 104, 42 Am. Dec. 220. For a full treatment of this subject, see the title INJUNCTION.

Mandamus—Replevin. — The title to an office cannot be determined in mandamus or replevin proceedings against a *de facto* incumbent to obtain possession of the books, papers, and other property of the office. *Desmond v. McCarthy*, 17 Iowa 525; *Conklin v. Cunningham*, 7 N.

3. When De Facto Officers Will Not Be Removed. — As a matter of public policy the courts may refuse to remove *de facto* officers of a municipality, on quo warranto, where there are no *de jure* officers claiming such offices, and such removal would cause a suspension of the functions of the corporation.¹

DE FACTO ROAD. — By a road *de facto* is meant a road actually used by the public.²

DE FAIRE ECHELLE. (See generally the title MARINE INSURANCE.) — A clause inserted in French marine policies, which is equivalent to a license to touch and trade at intermediate ports.³

DE HOMINE REPLEGIANDO. (See generally the titles HABEAS CORPUS; REPLEVIN.) — The writ *de homine replegiando* lies to replevy a man out of prison, or out of the custody of a private person (in the same manner that chattels taken on distress may at common law be replevied), upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him.⁴

DE INJURIA. (See ENCYC. OF PLEADING AND PRACTICE, title REPLICATION.) — These were the formal words of traverse, used in replications in actions of trespass, and more compendiously called the traverse *de injuria*.

DE JURE. — See the titles DE FACTO CORPORATIONS; DE FACTO OFFICERS; and see DE FACTO, and the references there given.

DE LUNATICO INQUIRENDO. (See also the title INSANITY.) — *De lunatico inquirendo* is a writ directed to the sheriff, directing him to inquire, by means of a jury, whether the party charged is a lunatic. It is also the name of a commission issued in case of alleged lunacy to inquire whether the party be a lunatic or not.

DE MEDIETATE LINGUÆ. (See also the title JURY AND JURY TRIAL.) — A term applied in *England* to a jury one-half of which consisted of denizens or natives, and the other half of aliens.

Mex. 445. For a full treatment, see the titles MANDAMUS; REPLEVIN.

A Writ of Prohibition will not lie for the purpose of trying the title of a *de facto* officer. *State v. McMartin*, 42 Minn. 30. For a full treatment, see the title PROHIBITION.

1. When De Facto Officers Will Not Be Removed. — *State v. Hoff*, 88 Tex. 297.

2. *Locke v. First Div. St. Paul, etc., R. Co.*,

15 Minn. 350. See generally the title HIGHWAYS.

3. *American Ins. Co. v. Griswold*, 14 Wend. (N. Y.) 399, 491.

4. 3 Bl. Com. 129; 4 Minor's Inst. 431.

De Homine Replegiando. — The writ *de homine replegiando* lies in favor of a person unlawfully imprisoned. *Hutchings v. Van Bokkelen*, 34 Me. 130; *Richardson v. Richardson*, 32 Me. 560.

DE MINIMIS NON CURAT LEX.

BY WALTER CARRINGTON.

I. DEFINITION, 828.

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CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the titles *ACCRETION*, vol. 1, p. 476; *DAMAGES*, *ante*; *DAY*, *ante*; *EXECUTIONS*; *INTERPRETATION AND CONSTRUCTION*; *TAXATION*; *TAX SALES*; *TIME (COMPUTATION OF)*.

I. DEFINITION. — *De minimis non curat lex*, or, as frequently abbreviated, *de minimis*, is a well-known maxim, and means "the law does not notice (or care for) very small or trifling matters."¹

II. SPECIFIC APPLICATIONS — **1. Fractions of a Day.** — The general rule is that in the legal computation of time there are no fractions of a day, and the day on which an event happens or an act is done must be entirely included or excluded. But this legal fiction will not be allowed to prevail where it would occasion manifest injustice.²

2. Payments. — In making payments, fractions of less value than the smallest current coin are not regarded.³

3. Tax Proceedings. — The general rule is that upon a question of excessive taxation the maxim in question does not apply.⁴

1. 2 Bouv. L. Dict. 176.

2. This Subject Is Discussed under the title *DAY*, *ante*, p. 737.

3. In Making Payments Fractions Not Regarded. — *Boyden v. Moore*, 5 Mass. 365. In this case the defendant had brought into court what she supposed to be justly due on the action and costs up to the time. Upon the trial it appeared that she had brought in too little by forty-one cents. It was held not to be a proper case to which to apply the maxim, but the court said: "That the law will not regard trifles is, when properly applied, a correct maxim. But to this point it is not applicable. In calculating interest there may, and probably must, arise fractions not to be expressed in the legal money of account; these fractions are trifles, and may be rejected. In making payments it is sometimes not possible, from the value and divisions of the current coin, to make the exact sum; if the payment be made as nearly as it can conveniently be made, the fractional part of a small coin may be neg-

lected; it is a trifle. But the present case is not one of these trifles."

4. Excess Vitiates a Tax Sale — *California*. — *Bucknall v. Story*, 36 Cal. 67; *Treadwell v. Patterson*, 51 Cal. 637; *Harper v. Rowe*, 53 Cal. 233; *Axtell v. Gerlach*, 67 Cal. 483; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485; *Knox v. Higby*, 76 Cal. 264; *Doland v. Mooney*, 79 Cal. 137. Compare *O'Grady v. Barnhisel*, 23 Cal. 287.

Dakota. — *Bode v. New England Invest. Co.*, 6 Dakota 499.

Kansas. — *Genthner v. Lewis*, 24 Kan. 309.

Kentucky. — *Smith v. Ryan*, 88 Ky. 636.

Michigan. — *Case v. Dean*, 16 Mich. 12; *Silsbee v. Stockle*, 44 Mich. 561; *Burroughs v. Goff*, 64 Mich. 464; *Hammontree v. Lott*, 40 Mich. 190. Compare *Drennan v. Beierlein*, 49 Mich. 272.

New Hampshire. — *Wells v. Burbank*, 17 N. H. 393.

Texas. — *Lufkin v. Galveston*, 73 Tex. 340.

Wisconsin. — *Barden v. Columbia County*,

4. Levies of Land on Execution. — While, in a number of cases, it has been held that a levy of land on execution is invalid if more land is seized and set off than is sufficient to satisfy the execution,¹ yet it has been held that if the excess is no greater than one of the least of the current coins, the maxim will apply;² and some cases have held that even a greater

33 Wis. 445, 14 Am. Rep. 762; *Baker v. Columbia County*, 39 Wis. 447; *Milledge v. Coleman*, 47 Wis. 184.

Compare *Havard v. Day*, 62 Miss. 748.

In *Axtell v. Gerlach*, 67 Cal. 483, it was held that a tax sale for one dollar in excess of the amount authorized by law is void.

In *Treadwell v. Patterson*, 51 Cal. 637, it was held that the sale is void unless the excess is less than the smallest fractional coin authorized by law.

But it has been held that a tax sale is not invalid because of a slight mistake made by the collector in computing the amount of taxes and costs by which the property was sold for five and one-half cents more than the amount actually due, particularly when it is not made to appear that the owner of the land suffered any injury by the mistake. *O'Grady v. Barnhisel*, 23 Cal. 287.

In *Colman v. Shattuck*, 62 N. Y. 350, where the officer returned four cents too much, the mistake was held not to invalidate the sale.

Tax Levy. — In *Workman v. Worcester*, 118 Mass. 168, under a statute empowering the city counsel of Worcester to lay, make, and maintain drains and sewers in that city, the mayor and aldermen ordered the sum of four hundred and fifty thousand dollars assessed upon the persons whose estates were benefited by such drains and sewers. The amount actually assessed was four hundred and fifty thousand and one dollars. The court held that the excess was immaterial, and said: "The excess of a single dollar in the amount actually assessed over the four hundred and fifty thousand dollars previously determined by the mayor and aldermen as the amount to be assessed is too trifling a variation to affect the validity of the assessment. A case can hardly be imagined which would more imperatively call for the application of the maxim *de minimis non curat lex*."

In *Thatcher v. People*, 79 Ill. 597, it was held that if a small excess over the amount of tax levied is extended by the clerk by a mistake, and is equally distributed on each tract of land, amounting to no more than about one and one-half cents per tract, it could not be held substantially to affect the justice of the tax and defeat its collection. Said the court: "*De minimis non curat lex*. It would be unheard of to hold such a trifle to be substantially unjust and requiring the defeat of the collection of the revenue of the state, counties, schools, and other municipalities."

Where the amount of tax required to be raised in a town was six thousand six hundred and fifty-four dollars and fifty-six cents, and the treasurer's warrant as made out was for six thousand six hundred and sixty-three dollars and seventeen cents, the difference was held to be too trifling to be regarded in deciding upon the legality of a warrant in a collateral proceeding. *Kelley v. Corson*, 8 Wis. 182.

In *Case v. Dean*, 16 Mich. 12, it was held that any addition perceptibly increasing an individual tax avoids it.

And in *Huse v. Merriam*, 2 Me. 375, the court went so far as to hold that if, in the assessment of a tax, the assessors exceed the sum limited by law, though the excess be only eighty-seven cents, the whole is void. The court, in delivering its opinion, said: "The maxim is so vague in itself as to form a very uncertain ground of proceeding or judging, and it may be almost as difficult to apply it as a rule in pecuniary concerns as to the interest which a witness has in the event of a cause, and in such a case it cannot apply. Any interest excludes him."

1. A Levy of Land on Execution Invalid if Excessive. — *Boyd v. Page*, 30 Me. 460; *Thayer v. Mayo*, 34 Me. 139; *Glidden v. Chase*, 35 Me. 90, 56 Am. Dec. 690; *Pickett v. Breckenridge*, 22 Pick. (Mass.) 297, 33 Am. Dec. 745; *Chenery v. Stevens*, 97 Mass. 77; *Skinner v. McDaniel*, 5 Vt. 544. See also *Grosvenor v. Chesley*, 48 Me. 369.

Illustrations. — In *Glidden v. Chase*, 35 Me. 90, 56 Am. Dec. 690, it was held that a levy of land on execution greater in value by the sum of fourteen cents, according to the appraisement, than the officer was authorized by his precept to take, was invalid. *Howard, J.*, in delivering the opinion, said: "It is not assumed that a creditor can legally take more land from his debtor, by levy, than may be sufficient, at the appraisement, to satisfy his execution and all fees and charges of levy, but it is contended that the excess was so small in the levy of the demandant that it may be regarded as a trifle which cannot affect the validity of the proceedings. *De minimis non curat lex*, is a sound maxim of the common law when properly applied, but it furnishes no positive rule of duty. It had its origin in necessity, and was not intended to excuse negligence or justify wrong in any form."

Where land appraised at fifty dollars and eighty-three cents was set off in satisfaction of an execution amounting to forty-seven dollars and eighty-three cents only, the levy was held to be invalid. The court said: "The surplus value of the land, it is true, is inconsiderable, but not so trifling as to come within the maxim *de minimis non curat lex*, a maxim which can rarely be admitted in the administration of justice." *Pickett v. Breckenridge*, 22 Pick. (Mass.) 297, 33 Am. Dec. 745.

2. But Not if the Excess Is Trifling. — *Dwinel v. Soper*, 32 Me. 119, 52 Am. Dec. 643. In this case it was held that in levying an execution upon real estate, the taking of land to an amount greater by one cent and three mills than the creditor is entitled to will not vacate the levy, the case coming within the rule *de minimis non curat lex*. The court said: "An amount which cannot be paid in any legally current coin of the country must, of

excess will not invalidate the levy.¹

5. **Contracts — Variance.** — This maxim may be applied to those cases which hold that where the contract proved and the contract declared upon are substantially, though not literally, the same, there is no variance.²

6. **Accretion.** — It has been held that the right of riparian proprietors to alluvium, where the gain is by small imperceptible degrees, had its origin in the maxim *de minimis non curat lex*.³

7. **Actions for Trifling Injuries.** — The maxim is applicable to certain injuries which are so small and of so little consideration in the law that no action will lie for them.⁴ But it is never applied to a personal injury or to the positive and wrongful invasion of another's property. In such cases an action will lie even though no actual pecuniary damage be shown.⁵

course, be disregarded. A literal application of the maxim would authorize the court to disregard also, in the estimate of value, one of the least of the current coins."

1. **What Excess Held Not to Invalidate Levy.** — Where two executions were levied on land, one for the sum of seventy-nine dollars and thirty-nine cents, the other for thirty-eight dollars and thirty-four cents; and on the former land to the amount of seventy-nine dollars and forty-nine cents, and on the latter to the amount of thirty-eight dollars and fifty-one cents, was set off; it was held that such levies were valid, the excess being within the maxim. *Huntington v. Winchell*, 8 Conn. 45, 20 Am. Dec. 84.

Where the appraised value of land set off on execution was one hundred and thirty-four dollars and forty-four cents, and the amount of the execution and officers' fees was one hundred and thirty-four dollars and thirty cents, it was held that the case was within the maxim, and the levy was not, therefore, rendered void. *Spencer v. Champion*, 9 Conn. 536.

2. **Where Contracts Are Substantially Similar There Is No Variance.** — Dissenting opinion of Littleale, J., in *Whitcher v. Hall*, 5 B. & C. 269, 11 E. C. L. 224, citing *Hands v. Burton*, 9 East 349, and *Barbe v. Parker*, 1 H. Bl. 283.

3. **Maxim Applied to Accretions.** — 2 Black. Com. 262; Pollock, C. B., in *New River Co. v. Land Tax Com'rs*, 2 H. & N. 138.

But on this question the opinions are not unanimous. *Atty.-Gen. v. Chambers*, 4 De G. & J. 55, *per* Lord Chelmsford, citing *Baron Alderson* and *Lord Abinger* in *Matter of Hull*, etc., R. Co., 5 M. & W. 327. See the title ACCRETION, vol. 1, p. 476.

4. **An Action Will Not Lie for Trifling Injuries.** — *Broom's Legal Maxims*, 142 *et seq.* *Ashby v. White*, *per* Powys, J., *Ld. Raym.* 938, 1 Smith L. Cas. 273; *Young v. Spencer*, 10 B. & C. 145, 21 E. C. L. 47; *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478; *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75.

No action lies for a waste but to the value of a penny, for *de minimis non curat lex*, and if the jury find the waste but to the value of a penny, the plaintiff shall not have judgment. 22 Vin. Abr., tit. Waste, (N.)

Actions for Injuries to Incorporeal Rights. — Says Chancellor Kent in his *Commentaries*, vol. 3, p. 439: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in

the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. * * * Streams of water are intended for the use and comfort of man, and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned [without causing material injury or annoyance to his neighbor below him]; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land a stream passes is that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish or affect, the application of the water by the proprietors above or below on the stream." See also *Embrey v. Owen*, 6 Exch. 363; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189.

"The same law will be found to be applicable to the corresponding rights to air and light. These also are bestowed by Providence for the common benefit of man; and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes, without its in some degree impairing the natural purity of the air; he cannot erect a building, or plant a tree, near the house of another, without in some degree diminishing the quantity of light he enjoys; but such small interruptions give no right of action; for they are necessary incidents to the common enjoyment by all." *Embrey v. Owen*, 6 Exch. 353.

5. **When the Maxim Does Not Apply.** — *Lord Holt* in *Ashby v. White*, *Ld. Raym.* 938, 1 Smith's L. Cas. 264, on appeal 1 Bro. P. C. 45; *Williams v. Mostyn*, 4 M. & W. 144; *Story*,

8. New Trial Where the Amount in Dispute Is Small. — The court will not, in general, grant a new trial or reverse a decree where the value of the amount in

J., in *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 189; *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75.

In the great case of *Ashby v. White*, 1 Bro. P. C. 45, the House of Lords, reversing the King's Bench, held that to hinder a burgess from voting for a member of the House of Commons is a good ground of action. In the lower court Powys, J., said: "If this refusal of the plaintiff's vote be an injury, it is of so small and little consideration in the law that no action will lie for it; it is one of those things [to] which the maxim *de minimis non curat lex*" applies. But Lord Holt, in his dissenting opinion, said: "Every man that is to give his vote on the election of members to serve in Parliament has a several and a particular right in his private capacity as a citizen or burgess. And surely it cannot be said that this is so inconsiderable a right as to apply that maxim to it, *de minimis non curat lex*. * * * If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy, for want of right and want of remedy are reciprocal. * * * Every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his rights. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage, for it is an invasion of his property. * * * A man * * * shall have an action against any one who enters and invades his franchise, though he lose nothing by it."

In *Seneca Road Co. v. Auburn, etc., R. Co.*, 5 Hill (N. Y.) 170, an incorporated company acting under a charter from the state had constructed a turnpike. Subsequently a railroad corporation built their road across the turnpike without making or tendering any compensation therefor. It was held that as this was a wrongful invasion of the property of the turnpike company, the maxim did not apply, and consequently that recovery might be had regardless of the amount of damage actually sustained. The court, by Cowen, J., said: "This maxim is never applied to the positive and wrongful invasion of another's property. To warrant an action in such case, says a learned writer, 'some temporal damage, be it more or less, must actually have resulted or must be likely to ensue. The degree is wholly immaterial; nor does the law, upon every occasion, require distinct proof that an inconvenience has been sustained. For example, if the hand of A touch the person of B, who shall declare that pain has or has not ensued?

The only mode to render B secure is to infer that an inconvenience has actually resulted.' Hamm, N. P. 39 Am. ed. (1823). 'Where a new market is erected near an ancient one, the owner of the ancient market may have an action; and yet perhaps the cattle that would have come to the old market might not have been sold, and so no toll would have been gained, and consequently there would have been no real damage; but there is a possibility of damage.' 2 Ld. Raym. 948. * * * The owner of a horse might be benefited by a skillful rider taking the horse from the pasture and using him, yet the law would give damages, and, under circumstances, very serious damages, for such an act. The owner of a franchise, as well as of other property, has a right to exclude all persons from doing anything by which it may possibly be injured. The rule is necessary for the general protection of property, and a greater evil could scarcely befall a country than the rule being frittered away or relaxed in the least, under the idea that though an exclusive right be violated, the injury is trifling, or indeed nothing at all."

In *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75, an officer who had attached certain hay and grain made use of a pitchfork belonging to the debtor in removing the same, and when he had completed the removal, left it where he found it, and it was received by the debtor and was in no way injured. It was held that the officer was not liable in trespass for such use of the pitchfork. But the court said: "It is true that, by the theory of the law, whenever an invasion of a right is established, though no actual damage be shown, the law infers a damage to the owner of the property and gives nominal damages. This goes upon the ground either that some damage is the probable result of the defendant's act, or that his act would have effect to injure the other's right, and would be evidence in future in favor of the wrongdoer. This last applies more particularly to unlawful entries upon real property, and to disturbance of incorporeal rights when the unlawful act might have an effect upon the right of the party and be evidence in favor of the wrongdoer, if his right ever came in question. In these cases an action may be supported though there be no actual damage done, because otherwise the party might lose his right. So, too, whenever any one wantonly invades another's rights for the purpose of injury an action will lie, though no actual damage be done; the law presumes damage on account of the unlawful intent. But it is believed that no case can be found where damages have been given for a trespass to personal property when no unlawful intent, or disturbance of a right or possession, is shown, and when not only all probable but all possible damage is expressly disproved. * * * Mr. Broom, in his recent work on *Legal Maxims*, lays down the law in the following language: 'Farther, there are some injuries of so small and little consideration in the law that no action will lie for them; for instance, in respect to the payment of tithes, the principle which

dispute to which the plaintiff would be fairly entitled is too inconsiderable to merit a second examination.¹

DE NOVO. — Anew; a second time.²

DE PARTITIONE. — See the title PARTITION.

DE VENTRE INSPICIENDO. (See also INFANTS; PREGNANCY; UNBORN CHILDREN.) — A common-law writ, issued at the instance of the heir presumptive, and directed to the sheriff, commanding him that he cause examination to be made whether a woman therein named is with child or not, and if with child, then about what time it will be born, and to certify the same. It is granted in a case when a widow, whose husband had lands in fee simple, marries again soon after her husband's death, and declares herself pregnant by her first husband, and, under that pretext, withholds the lands from the next heir.³

may be extracted from the cases appears to be that for small quantities of corn, involuntarily left in the process of raking, tithe shall not be payable, unless there be any particular fraud, or intention to deprive the parson of his full right.' If any farther authority is deemed necessary in support of the ruling of the County Court on this point, we have only to refer to that ancient and well-established maxim, *de minimis non curat lex*, which seems peculiarly applicable in this case, and would alone have been ample authority upon this part of the case; for we fully agree with Mr. Sedgwick that the law should hold out no inducement to useless or vindictive litigation. Sedgwick on Damages 62."

1. New Trial Refused When Matter in Dispute Is Inconsiderable. — Broom's Legal Maxims, 156; Burton v. Thompson, 2 Burr. 665; Lee v. Evans, 12 C. B. N. S. 368, 104 E. C. L. 368; Farewell v. Chaffey, 1 Burr. 54; Marsh v. Bower, 2 W. Bl. 851; Wilson v. Rastall, 4 T. R. 758; Macrow v. Hull, 1 Burr. 11; Mostyn v. Coles, 7 H. & N. 872; Fisher v. Haggerty, 36 Ill. 128; McNutt v. Dicks, 42 Ill. 498; Boyden v. Moore, 5 Mass. 371; Brewer v. Tyringham, 12 Pick. (Mass.) 547; Feeter v. Whipple, 8 Johns. (N. Y.) 369.

Omission to Assess Nominal Damages Is No Ground for a New Trial. — The omission to assess nominal damages when substantial justice has been done, or where there is a mere naked technical right to recover, is no cause for a new trial. Willson v. McEvoy, 25 Cal. 169; Bustamante v. Stewart, 55 Cal. 115; Jennings v. Loring, 5 Ind. 250; Tillotson v. Miller, 5 Blackf. (Ind.) 381.

In *McConihe v. New York, etc., R. Co.*, 20 N. Y. 495, 75 Am. Dec. 420, it was found that the defendant had violated its contract, but no specific damages were proved, and a verdict was rendered subject to the opinion of the court. Upon this verdict the court rendered a judgment for the defendant. It was held that this judgment ought to have been affirmed, for though it ought to have been for the plaintiff for nominal damages, yet it was a proper case for the application of the maxim that the law does not regard trifles.

Cases Where the Maxim Was Held Not to Apply. — In *Merrill v. Hurlburt*, 63 Cal. 494, the evidence showed that the value of the property replevied did not exceed three hundred and sixty dollars, but the court found the value at

three hundred and seventy-five dollars. It was held that considering the amount involved the judgment ought not to be affirmed on the maxim *de minimis non curat lex*.

In *Badgley v. Heald*, 9 Ill. 64, a judgment was rendered for forty-six cents in excess of the plaintiff's claim. The court held that the excess was not so small that the maxim would apply.

2. Trial De Novo. — In *Lewis v. Baca*, 5 N. Mex. 289, it is said: "A trial *de novo*, as we take it, means a trial anew in the appellate tribunal, according to the usual or prescribed mode of procedure in other cases involving similar questions, whether of law or fact."

In *Paul v. Armstrong*, 1 Nev. 96, the court says. "The statute says that, upon an appeal, the case shall be tried *de novo* in the appellate court. That is, as I understand it, in the same manner, with the same effect, and upon the same issues tried in the court below."

3. 1 Bl. Com. 456.

Pretended or Alleged Pregnancy. — The uncertainty in point of fact, of the precise period of gestation, gives occasion to a proceeding at common law, when a widow is suspected to feign herself with child in order to produce a supposititious heir to the estate. In this case at common law, the heir, or other person interested immediately or contingently, may have a writ *de ventre inspiciendo*, to examine whether she be with child or not; and if she be, to keep her under proper restraint till delivered; which is also entirely conformable to the practice of the civil law; but if the widow be proved not pregnant, the presumptive heir or successor to the estate shall be admitted to the inheritance, though liable to lose it again on the birth of a child within the legal period. The writ *de ventre inspiciendo*, which is said to be of common right, and not in the discretion of the court, directs the sheriff or sergeant to summon a jury of twelve men, and as many women, by whom the female is to be examined (*tractari per ubera et ventrem*), in the presence of the men, the exigency of the case dispensing at once with common decency and respectful deference to the sex. If this mandate were strictly observed, according to its terms, it would be, as Mr. Hargreave justly observes, an intolerable grievance. It seems, however, that the courts have, sometimes at least, winked at the men's withdrawing themselves

DEAD. — Deprived or destitute of life.¹

DEAD BLOCKS. — See note 2.

during the search. It appears from some of the reports that it was so managed in Willoughbie's Case, Cro. Eliz. 566; although, according to Croke, the writ was literally complied with. At all events, for more than a century past, the courts have been accustomed to make a previous order that the writ should issue unless by a designated time, and from time to time afterwards, the female shall submit to a satisfactory examination by women of skill, who may report her condition to the court; and thus the actual employment of the writ seems to have been avoided. 1 Minor's Inst. 409, citing Reg. Brev. Orig. 227 a; 1 Th. Co. Lit. 143, 144, and note (7); Vin. Abr., *Ventre Inscipiendo* (A); Willoughbie's Case, Cro. Eliz. 566; Theaker's Case, Cro. Jac. 685; *Ex p.* Aiscough, 2 P. Wms. 591; *Ex p.* Wallop, 4 Bro. C. C. 90.

There is yet another instance at common law which occasions an examination as to a woman's alleged pregnancy. When capitally convicted a woman might plead her pregnancy. The judge directed that a jury of twelve matrons should inquire into the fact; and if she was found to be pregnant execution was stayed until she was delivered. 4 Bl. Com. 394. In *State v. Arden*, 1 Bay. (S. Car.) 489, the jury found the prisoner not pregnant. The plea was held inadmissible in *Holeman v. State*, 13 Ark. 105, where the prisoner had been sentenced to the penitentiary for a year. In *Spooner's Case*, Chandler's Cr. Tr. (Mass.) 55, an application was made for respite on the ground of the pregnancy of the condemned. A jury of matrons was empaneled, and a verdict of not pregnant returned. This verdict was shown to be incorrect by an examination of the prisoner's body after her execution. For an interesting account of such an examination see 9 Cent. L. J. 94.

1. Webster's Dict.

Dead Animals. — An ordinance which makes it the duty of an inspector to cause the immediate removal of "all putrid and unsound beef, pork, fish, hides, or skins, all *dead* animals, and every putrid, offensive, unsound, unwholesome substance found in any street or other place in the city, * * * so as most effectually to secure the public health," does not justify the removal from a railroad car of hogs that have suffocated on the passage. The owner of such hogs may in case of such removal recover damages from the inspector. The court said: "A *dead* hog is not *per se* a nuisance, even though it died of suffocation, and is not necessarily dangerous to public health. The owner may still put it to a useful and innocent purpose. This ordinance, so far as it relates to '*dead* animals,' cannot be literally construed, because, if it should be, a city inspector might with impunity remove *dead* animals provided for food. The connection in which the terms are used, and the object of the ordinance, render it quite manifest that only such *dead* animals were meant as were nuisances or dangerous or deleterious to public health." *Underwood v. Green*, 42 N. Y. 140. See generally the titles **BOARDS OF**

HEALTH, vol. 4, p. 596; **MUNICIPAL CORPORATIONS**; **NUISANCES**.

Dead Weight. — Under the provisions of the Louisiana Act of Feb. 5, 1842, reviving the charters of the banks of the city of New Orleans, only the debts due to those institutions at the time of the passage of that act can be considered as forming a part of their *dead weight*. Debts subsequently contracted, though between the date of the passage of the act, and its promulgation, or acceptance by the banks, are not included in the *dead weight*. *City Bank v. Barbarin*, 6 Rob. (La.) 289.

Dead Weight — Charter Party. — See the title **CONTRACTS OF AFFREIGHTMENT AND CHARTER PARTIES**, vol. 7, p. 276. And see *Cunningham v. Dunn*, 3 C. P. Div. 443.

Dead Stock. (See also **LIVE STOCK**; **STOCK**.) — The testator bequeathed all his live and *dead* stock, household furniture and effects, to trustees. It was held that by this bequest the emblements or crops growing at the time of the testator's death passed. *Rudge v. Winnall*, 12 Beav. 357; *Blake v. Gibbs*, 5 Russ. 13, note. See also the titles **CROPS**, *ante*; **WILLS**.

Live and Dead Stock. — Where a testator bequeathed "his furniture, and stock of carriages and horses, and other live and *dead* stock," the latter phrase, taken together with "carriages and horses," was held to be antithetical to "furniture," and to refer only to out-of-door stock; *Arden, M. R.*, saying: "I do not mean to say what 'live and *dead* stock' might mean if it stood independent of everything else; but upon the whole of this will taken together I cannot by any fair inference deduce that the testator did intend under the words 'live and *dead* stock,' as they stand here, his books and wine." *Porter v. Tournay*, 3 Ves. Jr. 311.

2. Coupling Cars. (See also the title **COUPLING CARS**, vol. 7, p. 1046.) — The plaintiff, employed as brakeman by the defendant, had his hand crushed between the *dead blocks* while coupling cars. The court said: "The accident which resulted in the injury was the immediate result of the plaintiff's own act in putting his hand awkwardly between the *dead blocks*. These *blocks* are, as their name indicates, dangerous. They are to be avoided in all couplings, and are upon all cars. They are not in a line with nor in close proximity to the drawheads, but they are on each side and above the drawheads, and while they are dangerous in themselves, they are necessary to preserve the life of the brakeman by protecting his body from the cars, and they are a necessary precaution against danger. They are open, obvious, and notorious, and all brakemen understand, doubtless, that they must keep their hands from between them, for if they were to touch ever so gently the touch would crush all that came between. The plaintiff distinctly admits that he knew the situation of these *dead blocks*; that their situation, use, and the danger surrounding them were known to him, is clearly proved." *Norfolk, etc., R. Co. v. Cottrell*, 83 Va. 522.

DEAD BODY.

BY WALTER CARRINGTON.

I. RIGHT AND DUTY TO BODY, 834.

1. *Right of Property or Possession*, 834.
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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ACCIDENT INSURANCE, vol. 1, p. 324; *CEMETERIES*, vol. 5, p. 781; *CORONERS*, vol. 7, p. 598; *DEBTS OF DECEDENTS*, *post*; *EXECUTORS AND ADMINISTRATORS*; *LARCENY*; *MUNICIPAL CORPORATIONS*; *POLICE POWER*.

I. RIGHT AND DUTY TO BODY — 1. Right of Property or Possession — a. IN GENERAL. — While a dead body is not property in the strict sense of the common law,¹ yet the right to bury a corpse and preserve its remains is a legal

1. At Common Law a Dead Body Is Not Property. — 3 Coke's Inst. 203; 2 Black. Com. 429.

England. — Foster v. Dodd, 8 B. & S. 842; Reg. v. Sharpe, Dears. & B. C. C. 160; Williams v. Williams, 20 Ch. Div. 659.

Indiana. — Renihan v. Wright, 125 Ind. 536, 21 Am. St. Rep. 249.

Massachusetts. — Meagher v. Driscoll, 99 Mass. 284, 96 Am. Dec. 759.

Minnesota. — Larson v. Chase, 47 Minn. 307, 28 Am. St. Rep. 370.

New York. — Matter of Widening Beekman St., 4 Bradf. (N. Y.) 503; Snyder v. Snyder, 60 How. Pr. (N. Y. Supreme Ct.) 368; Foley v. Phelps, 1 N. Y. App. Div. 551.

Pennsylvania. — Fox v. Gordon, 16 Phila. (Pa.) 185.

Rhode Island. — Pierce v. Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667.

South Carolina. — Griffith v. Charlotte, etc., R. Co., 23 S. Car. App. 55, 55 Am. Rep. 1, 24 Am. L. Reg. N. S. 586.

No Civil Action for Injury to Dead Body. — At common law an heir could not bring a civil action against such as indecently at least, if

not impiously, violated and disturbed the remains of his ancestors when dead and buried. 2 Black. Com. 429; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759.

Owner of Soil Could Sue for Trespass. — The person, indeed, who had the freehold of the soil could bring an action of trespass against such as dug and disturbed it. Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Foley v. Phelps, 1 N. Y. App. Div. 551; Fox v. Gordon, 16 Phila. (Pa.) 185.

Only Remedy Was by Indictment. — The only common-law remedy for the wrongful removal of a dead body, independent of ecclesiastical authority, was by indictment. Reg. v. Sharpe, Dears. & B. C. C. 160, 40 Eng. L. & Eq. 581; Pierce v. Swan Point Cemetery, 10 R. I. 237, note, 14 Am. Rep. 667.

A Dead Body Is Not Merchandise. — In an *Ohio* case, reported in 6 Am. L. Rev. 182, the court held that a human corpse was not itself so far property that it could be made an article of merchandise. The court would not, in the absence of a statute permitting such a transaction, enforce a contract for the sale of a dead

right which the courts will recognize and protect.¹ And any violation of it will give rise to an action for damages.²

Not Subject to Ecclesiastical Cognizance. — In *England*, questions relating to the burial and preservation of dead bodies were under the jurisdiction of the ecclesiastical courts.³ But in the *United States*, neither a corpse nor its burial is legally subject in any way to ecclesiastical cognizance, nor to sacerdotal power of any kind.⁴

human body. To permit such a contract to be made would be to outrage decency, humanity, and public policy.

In Indiana Dead Bodies Are Property. — But in *Indiana* it has been held that the bodies of the dead belong to the surviving relations in the order of inheritance, as property, and that they have the right to dispose of them as such within restrictions analogous to those by which the disposition of other property may be regulated. *Bogert v. Indianapolis*, 13 Ind. 138; *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249.

But as they cannot be permitted to create a nuisance by them, they may be required, where population is dense, to bury them at a certain depth, or outside of where the population is dense or likely to become so, and within a reasonable time after death. *Bogert v. Indianapolis*, 13 Ind. 135.

1. Right of Burial Is a Legal Right. — *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249; *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370; *Ohio* case reported in 6 Am. L. Rev. 182; *Matter of Widening Beekman St.*, 4 Bradf. (N. Y.) 503; *Foley v. Phelps*, 1 N. Y. App. Div. 551; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667.

"When we speak of the right and obligation to select the place and direct the manner of the burial of a relative or friend, we do not speak of a right of property, but of rights and duties recognized by the laws and usages of society, as growing out of the natural relations of human beings to each other and the divine and human laws which bind society together." *Thayer, P. J.*, in *Fox v. Gordon*, 16 Phila. (Pa.) 185.

2. Party Injured May Sue for Damages. — *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370; *Foley v. Phelps*, 1 N. Y. App. Div. 551.

Illustrations. — In an *Ohio* case reported in 6 Am. L. Rev. 182, the defendants, a body of physicians, obtained permission to dissect a part of a body, promising to give the body burial after the dissection. They broke this agreement, putting timbers and straw into a box, and sending this as the body to a cemetery for interment, previously holding funeral services over the rubbish. The fraud was discovered, and the body found in the dissecting room. The action was brought by the husband of the deceased, averring damages for laceration of feelings. The court held that he was entitled to recover, and used these strong words: "The old English decisions referred to by defendant only establish that a body is not property. They do not show that there may not be rights attached to a dead body, rights to care for it, watch over it, and bury it, which the law will protect. Even if they did hold that no such rights existed, in this age and in this country the court would feel it its duty to disregard them."

It has been held that an action will lie by a widow to recover damages for the mutilation of her deceased husband's remains. *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370; *Foley v. Phelps*, 1 N. Y. App. Div. 551.

Measure of Damages. — Where the rights of one legally entitled to the custody of a dead body are violated by a mutilation of the body, or otherwise, the party injured may in an action for damages recover for the mental suffering caused by the injury. *Bessemer Land, etc., Co. v. Jenkins*, 111 Ala. 135; *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249; *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370; *Hale v. Bonner*, 82 Tex. 33, 27 Am. St. Rep. 850.

Thus a widow may recover for the mental suffering caused by the mutilation of her husband's remains, although no actual pecuniary damage is shown. *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370.

And so, in a suit by a husband and wife against an undertaker for neglect of the body of their daughter left in his care, it was held that recovery might be had for the mental anguish of the plaintiffs caused by such neglect. *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249.

When an Action Will Not Lie. — A medical examiner who is required to make a *post mortem* on the direction of the coroner is not responsible to the relatives of the deceased where he does not disfigure the body more than necessary. *Young v. College of Physicians, etc.*, 81 Md. 358.

Where the ordinances of a city require a physician's certificate of the cause of death before burial of the body, and the circumstances of death in a certain case are such as to render a *post mortem* of the body necessary to enable the attending physician to certify the true cause of death, an action for damages will not lie in favor of the heirs of the deceased, either against a physician who has made the examination in a proper manner, or against the undertakers having charge of the body for permitting the examination to be made. *Cook v. Walley*, 1 Colo. App. 163.

3. In England Ecclesiastical Courts Had Jurisdiction. — *Foster v. Dodd*, 8 B. & S. 842; *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370; *In re Donn*, (Supreme Ct.) 14 N. Y. Supp. 189; *Pierce v. Swan Point Cemetery*, 10 R. I. 237, 14 Am. Rep. 667.

4. No Ecclesiastical Authority in the United States. — *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249; *Matter of Widening Beekman St.*, 4 Bradf. (N. Y.) 503; *In re Donn*, (Supreme Ct.) 14 N. Y. Supp. 189.

Upon the questions who has the right to the custody of a dead body for the purpose of burial, and what remedies such person has to protect that right, the English common-law authorities are not very helpful or particularly

6. BEFORE BURIAL. — As a general rule, the right of burial and the right to select the place of burial rest, in the absence of any testamentary direction on the part of the deceased,¹ in the next of kin.² But in the case of a deceased wife the right is in the husband rather than in her next of kin.³ And although the decisions are not entirely free from incongruity, it is now well settled that a widow is entitled to control the burial of her deceased husband as against his next of kin.⁴

To Be Decided on Equitable Grounds. — But, no matter in whom the right rests, it is in the nature of a sacred trust for the benefit of all who may, from family ties or friendship, have an interest in the remains, and in case of a contention the court should assume an equitable jurisdiction over the subject, somewhat in analogy to the care and custody of infants, and make such disposition as

in point, for the reason that, from a very early date in that country, the ecclesiastical courts assumed exclusive jurisdiction of such matters. It is easy to see, therefore, why the common law, in its early stages, refused to recognize the idea of property in a corpse, and treated it as belonging to no one, unless it was the church. The repudiation of the ecclesiastical law and of ecclesiastical courts by the American colonies left the temporal courts the sole protector of the dead and of the living in their dead. Inclined to follow the precedents of the English common law, these courts were at first slow to realize the changed condition of things, and the consequent necessity that they should take cognizance of these matters and administer remedies as in other analogous cases. This has been accomplished by a process of gradual development, and all courts now concur in holding that the right to the possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the deceased by domestic ties, and that this is a right which the law will recognize and protect. *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370.

"The dogma of the English ecclesiastical law, that a child has no such claim, no such exclusive power, no peculiar interest in the dead body of its parent, is so utterly inconsistent with every enlightened perception of personal right, so inexpressibly repulsive to every proper moral sense, that its adoption would be an eternal disgrace to American jurisprudence. The establishment of a right so sacred and precious ought not to need any judicial precedent. Our courts of justice should place it at once where it should fundamentally rest forever on the deepest and most unerring instincts of human nature; and hold it to be a self-evident right of humanity, entitled to legal protection, by every consideration of feeling, decency, and Christian duty." *Matter of Widening Beekman St.*, 4 Bradf. (N. Y.) 529.

1. Wishes of Testator Will Prevail. — The expressed wishes of a testator as to the disposition of his remains will prevail over the wishes of the family. *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Matter of Widening Beekman St.*, 4 Bradf. (N. Y.) 503; *In re Donn*, (Supreme Ct.) 14 N. Y. Supp. 189; *Scott v. Riley*, 16 Phila. (Pa.) 106; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667. See also *Lowrie v. Plitt*, 11 Phila. (Pa.) 303.

But in England it has been held that a direc-

tion by will as to the disposition of the testator's body cannot be enforced. *Williams v. Williams*, 20 Ch. Div. 659.

2. Right of Burial Rests in Next of Kin. — *Matter of Widening Beekman St.*, 14 Bradf. (N. Y.) 503; *People v. St. Patrick's Cathedral*, 58 How. Pr. (N. Y. Supreme Ct.) 55; *Rousseau v. Troy*, 49 How. Pr. (N. Y. Supreme Ct.) 492; *In re Donn*, (Supreme Ct.) 14 N. Y. Supp. 189; *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506.

When Next of Kin Is a Minor. — If the next of kin be a minor, then the right devolves upon the next of kin of full age. *People v. St. Patrick's Cathedral*, 58 How. Pr. (N. Y. Supreme Ct.) 55.

3. Husband Controls Rather than Next of Kin. — *Durell v. Hayward*, 9 Gray (Mass.) 248, 69 Am. Dec. 284; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; Ohio case reported in 6 Am. L. Rev. 182; *Fox v. Gordon*, 16 Phila. (Pa.) 185.

The indisputable and paramount right of a husband to dispose of the body of his deceased wife by a decent sepulture in a suitable place carries with it the right of placing over the spot of burial a proper monument or memorial in accordance with the well-known and long-established usage of the community. *Durell v. Hayward*, 9 Gray (Mass.) 248, 69 Am. Dec. 284.

4. Widow Preferred to Next of Kin. — *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370; *Foley v. Phelps*, 1 N. Y. App. Div. 551; *Secor Case*, 10 Alb. L. J. 70; *Scott v. Riley*, 16 Phila. (Pa.) 106; *Fox v. Gordon*, 16 Phila. (Pa.) 185; *Hackett v. Hackett*, 18 R. I. 155.

In *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370, it was held that the right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving wife (if living with her husband at the time of his death), rather than to the next of kin; and the court, in rendering its opinion, said: "This is in accordance not only with common custom and general sentiment, but also, as we think, with reason. The wife is certainly nearer in point of relationship and affection than any other person. She is the constant companion of her husband during life, bound to him by the closest ties of love, and should have the paramount right to render the last sacred services to his remains after death."

seems to be best and right under all the circumstances.¹

Control of Executor. — In *England*, it has been held that an executor has the right to the custody and possession of the body of his decedent until it is properly buried.² But this doctrine has no support in the *United States*.³

c. AFTER BURIAL. — Ordinarily, the right of burial includes the right to change the place of burial.⁴ But the disturbance of the remains of the dead is not encouraged.⁵ And after burial, if all the parties interested have consented thereto, neither husband, wife, nor next of kin will be permitted to remove the remains merely because a quarrel has arisen in the family or among the near relations of the deceased.⁶

1. The Right Is an Equitable Trust. — *Larson v. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370; *Snyder v. Snyder*, 60 How. Pr. (N. Y. Supreme Ct.) 368; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; *Hackett v. Hackett*, 18 R. I. 155.

Illustrations. — *Snyder v. Snyder*, 60 How. Pr. (N. Y. Supreme Ct.) 368, was a contention between the widow of the deceased (who was his second wife), and his only son and heir (being the child of his first marriage), as to the disposition of his remains. It was held that, on equitable grounds, the claim of the son was to be preferred.

"The right to determine the place of sepulture must be exercised with proper observance of what is due to public propriety and to the feelings of relatives, and it may be overruled by other considerations. If, for example, a husband and wife should quarrel and separate, if the family relation should be destroyed, and the wife should return to her parents, and thenceforth become again a member of their family, and live under their protection and support, and die in those circumstances, no chancellor, it is safe to say, would interfere, at the instance of such a husband, to prevent the parents from burying their daughter in such place and manner as they might desire." *Fox v. Gordon*, 16 Phila. (Pa.) 185.

2. Right of Executor. — *Williams v. Williams*, 20 Ch. Div. 659; *Reg. v. Fox*, 2 Q. B. 246, 42 E. C. L. 658.

3. Renihan v. Wright, 125 Ind. 536, 21 Am. St. Rep. 249; *Griffith v. Charlotte, etc., R. Co.*, 23 S. Car. 25, 55 Am. Rep. 1, 24 Am. L. Reg. N. S. 586.

4. Right to Change Place of Burial. — *Matter of Widening Beekman St.*, 4 Bradf. (N. Y.) 503.

Public Use — Indemnity. — If the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably re-interring their remains. *Matter of Widening Beekman St.*, 4 Bradf. (N. Y.) 532. See the title CEMETERIES, vol. 5, p. 781.

5. Choppin v. Dauphin, 48 La. Ann. 1220; *Secor Case*, 10 Alb. L. J. 70; *Lowrie v. Plitt*, 11 Phila. (Pa.) 303.

6. Husband and Next of Kin. — So it has been held that a husband cannot remove the dead body of his wife against the consent of the next of kin. *Fox v. Gordon*, 16 Phila. (Pa.) 185. In this case, the daughter and the wife of the complainant, Fox, both died, and were, with his consent, buried in a burial lot owned by Mr. Gordon, the father of Mrs. Fox. The expenses arising out of the sickness and fune-

erals of both mother and daughter were paid by Mr. Gordon. After the lapse of more than three years, during which he acquiesced in the disposition made of the remains of his wife and daughter, Fox commenced a suit against Mrs. Gordon, his wife's mother (Mr. Gordon having died in the meantime), to compel the removal of the bodies of her daughter and grandchild from the graves in which they were interred. The court refused to order the removal, and said: "His right to fix the spot where the remains of his wife and child should rest has been once exercised, and cannot, after the lapse of three years, be recalled or altered, when its effect would be to harrow up the feelings of others, and to disturb unnecessarily the bodies which should be left to repose in the graves to which they were consigned with the solemnities and religious rites which attend the burial of the dead."

Widow and Next of Kin. — In several cases the widow was not allowed to remove the remains of her deceased husband against the will of the next of kin. *Thompson v. Deeds*, 93 Iowa 228; *Peters v. Peters*, 43 N. J. Eq. 140; *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667.

In *Peters v. Peters*, 43 N. J. Eq. 140, it was held that, as against the father of the deceased, who at his own expense, and by the request and with the consent of the widow, has buried his son's body in his own lot, the widow has no right to remove it, and injunction will issue to prevent her doing so.

In *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667, the widow, after burial, was required, at the suit of the son, to restore the remains of her husband to the burial lot in which they had been interred upon his death, with her consent and the consent of his children, and from which she had removed them without their consent, for the purpose of interment elsewhere.

Next of Kin and Widow. — *E converso*, the next of kin were not allowed to remove remains against the will of the widow. *Secor Case*, 10 Alb. L. J. 70. In this case, after the deceased had been buried by his widow, with the consent of his son, the latter was enjoined from removing the remains for the purpose of interment in a lot of his own.

As Between Next of Kin. — In *Lowrie v. Plitt*, 11 Phila. (Pa.) 303, the court dismissed an application from several next of kin to remove remains against the will of others of the next of kin in the same degree. In this case, the deceased, at her request, and with the concurrence of all her children except one, was

2. Duty of Burial — *a.* **BURIAL OF THE POOR.** — The burial of the dead is an act of necessity, and the common law casts upon the individual under whose roof a poor person dies the duty of carrying the remains, decently covered, to the place of burial. He cannot keep the body unburied, nor do anything which prevents Christian burial. He cannot, therefore, cast it out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living. And for the same reason he cannot carry the body uncovered to the grave.¹

b. **DUTY OF HUSBAND, WIFE, OR PARENT.** — It is the duty of the surviving husband to bury the corpse of his wife,² and of the widow to bury the body

buried in her sister's lot. It was held that one child or his executors could not remove her remains to another place of sepulture. The court said: "The law regards with favor the repose of the dead. When they are inurned in the places selected by them, it must be something more than sentiment or abstract right which will induce us to enforce the claim of the next of kin by the invasion of the burial place of another. In such a case, it may well be questioned whether the right of the next of kin exists at all."

When Children Cannot Remove Their Mother's Remains. — The deceased, a Roman Catholic, was, at her request, buried in the consecrated cemetery of her church, her husband making no objection, though, not being a member of the church, he knew he could not be buried beside her. At his death, eleven years afterwards, he was buried in a different cemetery. It was held that, in view of the wishes of the wife and consent of her husband, their children could not remove her body and place it beside that of the husband. *In re Donn*, (Supreme Ct.) 14 N. Y. Supp. 189.

Consent. — But if the remains have been buried without the free consent of the person having the right to control the burial, a court of equity may permit such person to remove them. *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Hackett v. Hackett*, 18 R. I. 155.

Thus, if a husband has not freely consented to the burial of his wife in a lot on land owned by another person, with the intention or understanding that it should be her final resting-place, a court of equity may permit him, after such burial, to remove her body, coffin, and tombstone to his own land, and restrain the person upon whose land she was first buried from interfering with such removal. *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465.

1. An Act of Necessity. — *Reg. v. Stewart*, 12 Ad. & El. 773, 40 E. C. L. 192; *Gilbert v. Buzzard*, 2 Hagg Cons. Rep. 333; *Kanavan's Case*, 1 Me. 226; *Rappelyea v. Russell*, 1 Daly (N. Y.) 214; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506; *Fox v. Gordon*, 16 Phila. (Pa.) 185.

In England under the Ecclesiastical Law every parishioner had a right to be buried in the parish burying ground. 1 *Burns's Ecclesiastical Law*, 257. See *Pierce v. Swan Point Cemetery*, 10 R. I. 237, 14 Am. Rep. 667.

In *Gilbert v. Buzzard*, Hagg Cons. Rep., 348, Lord Stowell (Sir William Scott) says: "The rule of law which says that a man has a right to be buried in his own churchyard is to be found most certainly in many of our

authoritative text writers, but it is not quite so easy to find the rule which gives him the right of burying a large chest or trunk in company with himself. That is not part of his original and absolute right, nor is it necessarily involved in it. That right, strictly taken, is to be returned to his parent earth for dissolution, and to be carried thither in a decent and inoffensive manner. When these purposes are answered, his rights are perhaps fully satisfied, in the strict sense in which any claim in the nature of an absolute right can be deemed to extend."

2. Husband Obligated to Bury Wife — *California*. — *Matter of Weringer*, 100 Cal. 345.

Colorado. — *Cook v. Walley*, 1 Colo. App. 163. *Massachusetts*. — *Durell v. Hayward*, 9 Gray (Mass.) 248, 69 Am. Dec. 284; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465.

Michigan. — *Galloway v. McPherson*, 67 Mich. 546, 11 Am. St. Rep. 596.

New York. — *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Foley v. Phelps*, 1 N. Y. App. Div. 551.

Ohio. — *McClellan v. Filson*, 44 Ohio St. 184, 58 Am. Rep. 814.

Pennsylvania. — *Waesch's Estate*, 166 Pa. St. 204; *Wheeler's Estate*, 4 Pa. Dist. Rep. 265; *Fox v. Gordon*, 16 Phila. (Pa.) 185.

A husband's duty to give his wife a decent burial includes the placing of some mark of identification over her burial place. Still, if he is poor, and she left a considerable estate, the court might allow a reasonable amount from her estate towards a monument. *Matter of Weringer*, 100 Cal. 345.

Even where the wife provides in her will that her funeral expenses are to be paid out of her own estate, the husband will not be allowed to claim as creditor for such expenses so as to exhaust the estate and deprive other creditors of payment. *Wheeler's Estate*, 4 Pa. Dist. Rep. 265.

Married Woman's Estate Liable for Her Funeral Expenses. — In some states the courts have held that the estate of a married woman is liable for her funeral expenses. Thus in *Rhode Island* the estate of a married woman is liable for her funeral charges and expenses notwithstanding she leaves a husband. *Buxton v. Barrett*, 14 R. I. 40; *Johnson's Petition*, 15 R. I. 438.

And in *Pennsylvania* it has been held that the estate of a deceased wife is liable for her funeral expenses when the husband is insolvent. *Scott's Estate*, 15 Pa. Co. Ct. Rep. 316.

And under the *Ohio* statute an executor may pay the funeral expenses of a married woman from the assets of her estate, although she

of her deceased husband.¹ And a father is bound to provide for the funeral of his child, if he can in any lawful way procure the means of so doing.²

c. **DUTY OF EXECUTOR OR ADMINISTRATOR.** — An executor or administrator must bury his decedent in a manner suitable to the estate he leaves behind him.

For a Full Discussion of this question reference is made to another article in this volume.³

II. CRIMINAL LIABILITY FOR INJURIES TO BODY — 1. Larceny. — Larceny cannot be committed of a dead body.⁴ But it can be of a coffin in which the body is interred,⁵ or of the clothes found upon the body,⁶ or of the shroud.⁷

2. Disinterring or Disturbing Remains — a. **AT COMMON LAW.** — The following acts are indictable at common law as corrupting to the public morals and disturbing to the sensibilities: Disturbing a dead body without proper authority;⁸ indignities offered to human remains by improperly and indecently disinterring them;⁹ digging up the body when buried, or conveying it from the burial ground for sale¹⁰ or for dissection.¹¹

leave surviving her a husband having property. *McClellan v. Filson*, 44 Ohio St. 184, 58 Am. Rep. 814.

In *New York*, if the wife leaves assets sufficient to pay the expenses, the husband has a remedy over against her executors for the amount he is obliged to pay. *Kessler v. Hessen*, 19 Abb. N. Cas. (N. Y. City Ct.) 86; *McCue v. Garvey*, 14 Hun (N. Y.) 562; *Freeman v. Coit*, 27 Hun (N. Y.) 450; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Jackson v. Westerfield*, 61 How. Pr. (N. Y. Supreme Ct.) 399. See the title DEBTS OF DECEDENTS, *post*.

Husband Liable Even After Separation. — The husband is liable for the necessary expense of the decent interment of his wife from whom he has been separated, whether the party incurring such expense be an undertaker or a mere volunteer. *Jenkins v. Tucker*, 1 H. Bl. 90; *Ambrose v. Kerrison*, 10 C. B. 776, 70 E. C. L. 776; *Bradshaw v. Beard*, 12 C. B. N. S. 344, 104 E. C. L. 344; *Seybold v. Morgan*, 43 Ill. App. 39; *Lakin v. Ames*, 10 Cush. (Mass.) 198; *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670.

Thus where the wife died in the husband's absence, and a relative with whom the wife lived up to her death directed the funeral and paid the expenses, the court held that such relative might recover from the husband. *Jenkins v. Tucker*, 1 H. Bl. 90. See the title HUSBAND AND WIFE.

1. Wife Must Bury Husband. — *Cook v. Walley*, 1 Colo. App. 163; *Fox v. Gordon*, 16 Phila. (Pa.) 185.

But in *France's Estate*, 75 Pa. St. 220, it was held that if the widow paid the funeral expenses of her husband, she might recover the amount expended from his estate. See the titles DEBTS OF DECEDENTS, *post*; HUSBAND AND WIFE.

2. Father Must Bury Child. — *Reg. v. Vann*, 8 Eng. L. & Eq. 596. See the title PARENT AND CHILD.

3. See the title DEBTS OF DECEDENTS, *post*.

4. Larceny. — *Stevens's Dig. of Crim. Law*, art. 292; *Haynes's Case*, 2 East P. C. 652; *Fox v. Gordon*, 16 Phila. (Pa.) 185. See the title LARCENY.

5. Coffin. — *State v. Doepke*, 68 Mo. 208, 30 Am. Rep. 785.

And this rule is not changed by the *Missouri* statute. *State v. Doepke*, 68 Mo. 208, 30 Am. Rep. 785.

Attempting to Steal Coffin. — It was a misdemeanor at common law to attempt to steal a coffin, and in *Missouri* such an attempt is a statutory offense. *State v. Doepke*, 68 Mo. 208, 30 Am. Rep. 785.

6. Clothes. — 2 Bl. Com. 429; *Wonson v. Sayward*, 13 Pick. (Mass.) 402, 23 Am. Dec. 691. In this case it was held that the taking of articles of dress from the body of a dead man, drowned and washed ashore, is a felony.

The *Missouri* statute provides a punishment for an attempt to steal any vestment or other article interred with a dead body. *State v. Doepke*, 68 Mo. 208, 30 Am. Rep. 785.

7. Shroud. — *Haynes's Case*, 12 Coke 113.

"If any one, in taking up a dead body, steals the shroud or other apparel, it will be felony, for the property thereof remains in the executor, or whoever was at the charge of the funeral." 2 Bl. Com. 429.

8. Disturbing Dead Body. — *Fox v. Gordon*, 16 Phila. (Pa.) 185; *Reg. v. Sharpe, Dears. & B. C. C.* 160, 40 Eng. L. & Eq. 581; *Craig v. Pittsburgh First Presb. Church*, 88 Pa. St. 52.

Thus in *Reg. v. Sharpe, Dears. & B. C. C.* 160, 40 Eng. L. & Eq. 581, a man was indicted for removing his mother's body from the burial ground of a dissenting church, in order to bury it with his father's, and it was held that, although his motive was good, yet, as he removed it without the consent of the congregation or its officers, the indictment should be sustained. The court said that, under the English law, the only protection of a grave, independent of ecclesiastical authority, was by indictment.

As to the Recovery of Damages for trespassing, see the title CEMETERIES, vol. 5, p. 794.

9. Improperly Disinterring Body. — *Foster v. Dodd*, 8 B. & S. 842.

10. Stealing Body. — *Haynes's Case*, 2 East P. C. 652.

Disinterring It for Sale. — *Reg. v. Giles, Russ. & R.* 367, notes; *Rex v. Duffin, R. & R. C. C.* 365.

11. For Dissection. — *Rex v. Lynn*, 2 T. R. 733; *Com. v. Cooley*, 10 Pick. (Mass.) 37; *Kanavan's Case*, 1 Me. 226.

In *Rex v. Lynn*, 2 T. R. 733, the court said

b. BY STATUTE. — By the statutes of several states, to disinter a human body without lawful authority is an indictable offense.¹

c. ACCESSORIES. — A person, without being actually present at the unlawful disinterment of a dead body, may be found guilty of the offense, if, with the intention of giving assistance, he be near enough to afford it should it be needed.²

3. Cremation. — To burn a dead body instead of burying it is not a misdemeanor, unless it is so done as to amount to a public nuisance.³

4. Other Offenses. — There are some other offenses relating to dead bodies which are indictable as being *contra bonos mores*.⁴

that common decency required that the practice should be put a stop to; that the offense was cognizable in a criminal court as being highly indecent, and *contra bonos mores*, at the bare idea alone of which nature revolted; that the purpose of taking up the body for dissection did not make it less an indictable offense.

1. Disinterring Body a Statutory Offense. — *Tate v. State*, 6 Blackf. (Ind.) 110; *State v. Pugsley*, 75 Iowa 742; *Com. v. Cooley*, 10 Pick. (Mass.) 37; *McNamee v. People*, 31 Mich. 473; *State v. Doepke*, 68 Mo. 208, 30 Am. Rep. 785; *Rhodes v. Brandt*, 21 Hun (N. Y.) 1; *People v. Fitzgerald*, 105 N. Y. 146, 59 Am. Rep. 483, reversing 43 Hun (N. Y.) 35; *Craig v. Pittsburgh First Presb. Church*, 88 Pa. St. 52; *Palmer v. Broder*, 78 Wis. 483.

Under the *Indiana* statutes the disinterment of a corpse is indictable if it is done without either the consent of the deceased given in his lifetime, or of his near relations given subsequently to his death. *State v. McClure*, 4 Blackf. (Ind.) 328; *Tate v. State*, 6 Blackf. (Ind.) 110.

Under the *Iowa* statute it is incumbent on the person charged with disinterring a dead body to show that he had lawful authority to do so. *State v. Schaffer*, 95 Iowa 379.

In *Com. v. Cooley*, 10 Pick. (Mass.) 37, it was held that the *Massachusetts* statute of 1814, c. 175, superseded the common law in relation to the offense of disinterring a dead body.

This statute forbade any person to dig up a human body, "not being authorized by the * * * selectmen of any town in this commonwealth." It was held to be sufficient that the indictment averred that the accused was not authorized by the selectmen of the town where the body had been buried, this being according to the intent of the legislature. *Com. v. Loring*, 8 Pick. (Mass.) 370.

The removal of a dead body is not an offense within the meaning of the *Massachusetts* statute, 1830, c. 57 (Rev. Stat., c. 130, § 19), unless done with the intent to use or dispose of the body for the purpose of dissection. *Com. v. Slack*, 19 Pick. (Mass.) 304.

In *Michigan* it is an indictable offense to dig up or remove any human body from the place where it is interred, and the provisions of the statute are held to include those acts which are done for the purposes of dissection, as well as those done for any other unlawful purpose. *McNamee v. People*, 31 Mich. 473.

Under the *Missouri* statute it is a misdemeanor for any one to receive a dead body, knowing it to have been disinterred contrary to the provision of the statute. *State v. Doepke*, 68 Mo. 208, 30 Am. Rep. 785.

The *New York* statute provides that every person who shall remove a dead body from its place of interment, for the purpose of sale or dissection, or from mere wantonness, shall, upon conviction, be punished by fine or imprisonment, or both.

Where a father, acting under the advice of counsel, caused the body of his child to be exhumed and a portion of the thigh bone to be removed, in order that it might be used in evidence on a trial for malpractice, it was held that the body was not removed from the grave "for the purpose of dissection or from mere wantonness," as these terms were used in the statute, nor had any offense against public decency been committed. *Rhodes v. Brandt*, 21 Hun (N. Y.) 1.

The *New York* and *Wisconsin* statutes do not apply to public examinations made by legally constituted authorities for the purpose of ascertaining whether crime has been committed in producing the death of the person whose body is exhumed, although some of the proceedings of the officer under whose directions the examination was made were irregular. *People v. Fitzgerald*, 105 N. Y. 146, 59 Am. Rep. 483; *Palmer v. Broder*, 78 Wis. 483.

2. Accessories. — *Tate v. State*, 6 Blackf. (Ind.) 110. See the title ACCESSORY, vol. 1, p. 257.

3. Cremation Is Not a Misdemeanor. — *Reg. v. Price*, 12 Q. B. Div. 247. In this case the court said: "To burn a dead body in such a place and such a manner as to annoy persons passing along public roads or other places where they have a right to go, is, beyond all doubt, a nuisance."

If cremation is intended to prevent a coroner's inquisition, it is a misdemeanor. *Roscoe's Crim. Evidence* (8th ed.), 447; *Reg. v. Stephenson*, 13 Q. B. Div. 331.

4. Selling Body for Dissection. — The selling for dissection of the dead body of one executed, when the death sentence did not so direct, is an indictable offense. *Rex v. Cundick*, D. & R. N. P. C. 13.

Exposing Body in Highway. — To leave a dead body exposed in a highway is an indictable nuisance. *Reg. v. Clark*, 15 Cox C. C. 171.

Throwing Body into a River. — Casting a dead body into a river without the rites of Christian sepulture is indictable. *Kanavan's Case*, 1 Me. 226.

Conspiracy to Prevent Burial. — A conspiracy to prevent the burial of a dead body is indictable at common law. *Young's Case*, cited in *Rex v. Lynn*, 2 T. R. 734.

Interrupting Burial Service. — Wilfully interrupting a clergyman in reading the burial ser-

DEAD FREIGHT. (See also **CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES**, vol. 7, p. 726.)—"Dead freight" is the freight which would have been payable for that part of the vessel which was not occupied by merchandise, but ought to have been.¹ It is not freight, but an unliquidated compensation for the loss of freight, recoverable in the absence and place of freight.²

DEAD LETTER LAW.—See **OBSOLETE**; and see the title **STATUTES**.

DEADHEAD. (See also the titles **CARRIERS OF PASSENGERS**, vol. 5, p. 507; **TICKETS AND FARES**.)—See note 3.

DEADLY WEAPONS.—See the title **ASSAULT AND BATTERY**, vol. 2, p. 970; **CARRYING WEAPONS**, vol. 5, p. 736; and see generally the titles **HOMICIDE**; **SELF-DEFENSE**.

vice and interring a corpse is an indictable offense. *Rex v. Cheere*, 4 B. & C. 902, 10 E. C. L. 466.

Preventing Inquest.—It is an indictable offense to prevent a coroner from holding an inquest, as by burying the body, or otherwise, in a case where the coroner has jurisdiction to hold an inquest. *Reg. v. Stephenson*, 13 Q. B. Div. 331; *Reg. v. Price*, 12 Q. B. Div. 247; *Rex v. Sologuard, Andr.* 231; *Rex v. Proby*, 1 Ld. Ken. 250; *Reg. v. Clerk*, 1 Salk. 377.

A coroner has jurisdiction to hold, and is justified in holding, an inquest, if he honestly believes information to be true which has been given to him, and which, if true, would make it his duty to hold such inquest. *Reg. v. Stephenson*, 13 Q. B. Div. 331. See the title **CORONERS**, vol. 7, p. 598.

Arresting Dead Body for Debt.—At common law a jailer who detained a dead body for a debt due by the deceased was liable to prosecution. *Reg. v. Scott*, 2 Q. B. 248, note, 42 E. C. L. 659, note. See also *Reg. v. Fox*, 2 Q. B. 247, 42 E. C. L. 659. And *Lord Ellenborough*, C. J., in *Jones v. Ashburnham*, 4 East 460.

And in *Maine* it is a statutory offense for a civil officer to arrest a dead body by any process in his hands against the party while living. *Kanavan's Case*, 1 Me. 226.

In New York Unauthorized Dissection Is a Misdemeanor.—Under the provision of the Penal Code of New York the unauthorized dissection of human remains is a misdemeanor. *Foley v. Phelps*, 1 N. Y. App. Div. 551.

Father Not Indictable for Not Burying His Child.—A father cannot be indicted for not burying the dead body of his child when he had not the means to do so, even though he refused to borrow money for the purpose. *Reg. v. Vann*, 8 Eng. L. & Eq. 596.

Injury to a Tombstone.—It is a statutory offense in several states to remove or deface a tombstone. *Winters v. State*, 9 Ind. 172; *State v. Wilson*, 94 N. Car. 1015; *Phillips v. State*, 29 Tex. 226. See the title **CEMETERIES**, vol. 5, p. 781.

1. *Gray v. Carr*, L. R. 6 Q. B. 528.

The term *dead freight* denotes an agreed sum to be paid in respect of space not filled according to charter, or damages provided for by a charter, in the event of the freighter not loading a full cargo. 1 *Maude & P.* 389, citing *Birley v. Gladstone*, 3 M. & S. 205; *Phillips v. Rodie*, 15 East 547; *Pearson v. Goschen*, 17 C. B. N. S. 352, 112 E. C. L. 352.

2. *Phillips v. Rodie*, 15 East 547.

3. **Deadheads—Taxation.**—In *Gardner v. Hall*, Phil. L. (61 N. Car.) 22, it was held that a statute imposing a tax upon *deadheads* was valid. The court said: "This action was brought to test the legality of the tax imposed upon *deadheads* by the Act of 1860, c. 31, § 12. The term *deadhead* is applied to persons other than the president, directors, officers, agents, or employees of a railroad company, who are permitted by the company to travel on the road without paying any fare therefor."

DEAF AND DUMB PERSONS.

BY JOSEPH WALKER MAGRATH.

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CROSS-REFERENCES.

As to matters of PROCEDURE, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, *title* ARRAIGNMENT AND PLEA, vol. 2, p. 769; *and the references given under* CRIMINAL PROCEDURE, vol. 5, p. 622.

As to other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: CONTRACTS, vol. 7, p. 88; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368; *CRIMINAL LAW, ante; DEEDS; INTERPRETER; TESTAMENTARY CAPACITY; WITNESSES.*

I. NO PRESUMPTION OF IDIOCY. — In the early history of the law, a person born deaf and dumb was presumed to be an idiot,¹ though such presumption could be overcome by proof of understanding.² The modern doctrine, however, is that no such presumption exists.³

1. Formerly Presumed to Be Idiots. — *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Perrine's Case*, 41 N. J. Eq. 409, 25 Am. L. Reg. N. S. 776; *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441; *Barnett v. Barnett*, 1 Jones Eq. (54 N. Car.) 221; *Christmas v. Mitchell*, 3 Ired. Eq. (38 N. Car.) 535; *State v. Weldon*, 39 S. Car. 318.

Presumption Reasonable as Preventing Fraud. — In *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441, Chancellor Kent said: "Perhaps, after all, the presumption, in the first instance, is, that every such [deaf and dumb] person is incompetent. It is a reasonable presumption, in order to insure protection, and prevent fraud, and is founded on the notorious fact that the want of hearing and speech exceedingly cramps the powers, and limits the range of the mind. The failure of the organs requisite for general intercourse and communion with mankind oppresses the understanding."

Person Deaf and Dumb from Casualty. — A man deaf and dumb from his birth is *non compos mentis*, but not if he becomes so through accident; but a person deaf, dumb, and blind through a casualty is *non compos mentis*. *Yong v. Sant*, 1 Dyer 56a, note.

2. Presumption Might Be Overcome. — *Perrine's Case*, 41 N. J. Eq. 409, 25 Am. L. Reg. N. S. 776, *quoting* from *Hale P. C.* 34; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329.

3. No Presumption of Idiocy in Modern Times. — *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187; *Hebert's Succession*, 33 La. Ann. 1099; *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441; *Barnett v. Barnett*, 1 Jones Eq. (54 N. Car.) 221. See also *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329.

In *State v. Howard*, 118 Mo. 127, the court said: "The presumption that a person deaf and dumb from birth should be deemed an idiot does not seem to obtain in modern practice, at least in the United States."

In *Christmas v. Mitchell*, 3 Ired. Eq. (38 N. Car.) 535, the court, *per* Nash, J., said: "Science and benevolence have together rectified the public mind, as to such persons, and it is no longer, in common understanding, any evidence that an individual is an idiot because deprived from his birth of the power of speech and hearing. No one who has witnessed the wonders worked in modern times in giving instruction to unfortunate persons of this class would, after hearing the testimony in this case, doubt that Leonidas Christmas might have been instructed, not only in the mechanic arts, but that his mind might have been enlightened to receive the high moral obligations of civil life, and the still more profound truths of our holy religion. We are constrained, then, to say that he does not come within the exception contained in the statutes."

II. CIVIL CAPACITY — 1. In Relation to Property and Judicial Proceedings. —

The fact that a person is deaf and dumb does not, unless he is actually deficient in understanding, render him incompetent to hold and manage property,¹ or to prosecute and defend actions in the courts.²

2. In Relation to Deeds and Wills — Deeds. — A deaf and dumb person may execute a deed, which will be valid and binding for all purposes where it is shown that he understood the nature of the instrument he was signing, and assented to it.³

Wills. — The fact that a person is deaf and dumb does not, of itself, affect his testamentary capacity,⁴ though it has been said that the wills of such per-

In *Barnett v. Barnett*, 1 Jones Eq. (54 N. Car.) 221, the court, *per* Nash, C. J., said: "In the earlier history of the law a person who was born deaf and dumb was considered to be an idiot. That period has long passed, and the question as to their legal ability to make a contract is placed on its proper ground — their mental capacity. Modern inventions have restored these unfortunates to their proper stations in society. The domestic relation with all its endearments is open to them, and we find them occupying distinguished stations in almost every department of the arts and sciences."

Presumption as to Person Blind, Deaf and Dumb. — In *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187, the court, *per* Hosmer, C. J., speaking of a deaf and dumb person, said: "If, super-added to the deprivation of the two senses before mentioned, the grantor had been blind, he would be considered in law as incapable of any understanding, being deficient in those inlets which furnish the human mind with ideas." See also *Perrine's Case*, 41 N. J. Eq. 409, 25 Am. L. Reg. N. S. 776; and note to *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441.

1. Capacity to Hold and Manage Property. — In *Dickenson v. Blisset*, 1 Dick. 268, a person born deaf and dumb, and who had attained her majority, applied for possession of her estate, and for assignment to her of her personal property. Lord Chancellor Hardwicke, having put questions to her in writing, to which she gave sensible answers in writing, thereupon granted the application.

When Not Competent to Manage Business. — A person sixty-five years of age, who has been deaf and dumb ever since she was two or three years old; is perfectly ignorant, never having been taught any language whether spoken or by signs; can neither read nor write; is incapable of understanding business of any kind save, perhaps, an ordinary transaction involving no more than a dollar or two; and cannot even receive any communication upon the subject of business, is not capable of managing her own affairs nor of selecting an agent to manage them for her. *Perrine's Case*, 41 N. J. Eq. 409, 25 Am. L. Reg. N. S. 776.

In *Ohio* it has been held that a guardian might be legally appointed by the probate court, for a deaf and dumb person who is found by the court to be incapable of managing his affairs, without submitting the question of his capacity to a jury of any kind. *Shroyer v. Richmond*, 16 Ohio St. 455.

2. Capacity to Prosecute and Defend Actions. — In *In re Biddulph's, etc.*, Trusts, 5 De G. & Sm. 469, it was held that a deaf, dumb, and blind

person might be a petitioner in court without a next friend.

In *Elliott's Case*, Carter's Rep. 53, Bridgman, C. J., and the other judges of the Common Bench admitted a woman born deaf and dumb to levy a fine, after due examination of her. He mentioned also the case of one Hill, who was born deaf and dumb, and who was examined by Judge Warburton, and found intelligent, and admitted to levy a fine.

But in *Ferres v. Ferres*, 2 Eq. Abr. 695, a recovery suffered by a deaf and dumb person, and a settlement to uses, were set aside, though no actual fraud was shown.

3. May Execute a Deed. — *Farmer v. Farmer*, 1 H. L. Cas. 724; *Matter of Harper*, 6 M. & G. 732, 46 E. C. L. 732; *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187; *Barnett v. Barnett*, 1 Jones Eq. (54 N. Car.) 221. See also *Morrison v. Morrison*, 27 Gratt. (Va.) 190; and note to *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441.

What Is Sufficient Mental Capacity. — A deaf-mute who has sufficient understanding to manage all the domestic affairs of a family, and can converse upon ordinary subjects with a person with whom she is familiar, is competent to make a deed of gift of her property. *Barnett v. Barnett*, 1 Jones Eq. (54 N. Car.) 221.

No Comprehension of Difference between Deed and Will. — It is no objection to the validity of the deed of a deaf-mute that he did not understand the difference between a deed and a will, when the only reason of his not understanding was a lack of signs which could convey the distinction to him, and he had directed the conveyance of the land referred to in the deed. *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187.

Guaranty. — In *Vickers v. Bell*, 9 L. T. N. S. 600, an instrument of guaranty executed by a deaf-mute was upheld against his estate, where it appeared that the contents thereof had been fully made known to him by the use of signs with the fingers, and that an alteration in the instrument had been made in accordance with a properly expressed and rational wish of his.

4. Testamentary Capacity. — In *Goods of Geale*, 3 S. & T. 430, 33 L. J. P. 125, 12 W. R. 1027; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329. See also *Goods of Owston*, 2 S. & T. 461, 6 L. T. 368; *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 67; *Moore v. Moore*, 2 Bradf. (N. Y.) 261; *Reynolds v. Reynolds*, 1 Spears L. (S. Car.) 253, 40 Am. Dec. 599.

"By the Civil Law it was generally understood and laid down that a person born deaf and dumb was incapable of making a will, and he was deemed a fit subject for a curator or

sons are regarded with much suspicion.¹

3. Marriage. — The presumption is in favor of the capacity of a deaf mute to enter into a contract of marriage, and of the validity of such a marriage.²

4. As Witnesses. — A deaf and dumb person who understands the nature and sanctity of an oath, is a competent witness, if any person can be found who can communicate to him, by signs, the questions asked, and interpret his answers to the court and jury; or if he can write and read writing, and thus receive questions and give answers.³

guardian. (Inst. 1, 23, 24, and Ferniere, *h, t*; and Inst. 2, 12, 3, and Ferrier and Vinnius, *h, t*)." Brower *v.* Fisher, 4 Johns. Ch. (N. Y.) 441.

In *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 42, Surrogate Bradford said, at page 67: "By the Roman law no person could make a valid will who lacked some of the principal senses — such, for example, as were deaf and dumb or blind. Blackstone lays this down of those born deaf, dumb, and blind, who, he says, 'as they have always wanted the common inlets of understanding, are incapable of having *animum testandi*, and their testaments are therefore void.' (2 Com. 497.) [And] the rule was of necessity qualified by the reason of it, which was a presumed want of capacity. Persons born deaf and dumb could not make wills, on the supposition of insufficient capacity: *Surdus, mutus, testamentum facere non possunt*; but subsequently it was allowed where the defects were not congenital, and there existed sufficient testamentary capacity. (Cod., lib. vi., tit. 22, § 10.)"

1. Wills Regarded with Suspicion. — Goods of Owston, 2 S. & T. 461, 6 L. T. 368. In this case probate was asked of the will of a deaf and dumb person. It appeared that the testator communicated his instructions by signs and motions to an acquaintance, who afterwards prepared in conformity with such instructions a will which was duly executed by the testator. The court required an affidavit from the drawer of the will as to the nature of the signs and motions by which the instructions were communicated to him, and ultimately refused to grant probate on motion.

In *Goods of Geale*, 3 S. & T. 430, 33 L. J. P. 125, 12 W. R. 1027, probate was sought of the will of a person who was deaf, dumb, and illiterate. The court, before granting probate, required evidence on affidavit of the signs by which the testator had signified that he understood and approved of the provisions of the will.

See also *Rollwagen v. Rollwagen*, 63 N. Y. 504.

2. Marriage. — *Harrod v. Harrod*, 1 Kay & J. 4, 18 Jur. 853. In this case it was further held that, if no question of mental capacity was raised, an objection that the deaf-mute did not understand the nature of the contract into which she had been induced to enter was an objection on the ground of fraud.

3. Competent Witnesses — England. — *Ruston's Case*, 1 Leach C. C. 408; *Morrison v. Lennard*, 3 C. & P. 127, 14 E. C. L. 238; *Martin's Case*, Allison's Prac. Crim. Law of Scotland, 486; *Bartholomew v. George*, Kent Sp. Ass. 1851 (MS.), Best's Prin. Ev. 144.

Colorado. — *Ritchey v. People*, 23 Colo. 314. **Connecticut.** — *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90.

Indiana. — *Snyder v. Nations*, 5 Blackf. (Ind.) 295; *Skaggs v. State*, 108 Ind. 53.

Missouri. — *State v. Howard*, 118 Mo. 127, citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 110.

New York. — *People v. McGee*, 1 Den. (N. Y.) 19.

South Carolina. — *State v. Weldon*, 39 S. Car. 318, citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 121.

Texas. — *Kirk v. State*, (Tex. Crim. App. 1896) 37 S. W. Rep. 440.

See also the title WITNESSES.

The difficulty that attends the examination of a deaf-mute is no reason for excluding his testimony. *Ritchey v. People*, 23 Colo. 314. In this case the method of examining the witness was by submitting to him written questions to which he replied in writing, the questions and answers being then read to the jury.

When Not Competent. — A deaf and dumb child who has never been educated in the sign language is not a competent witness, where it is impossible to explain to him the nature of an oath, or even to make him understand questions which are put to him, and he can do nothing more than give an account, by signs, of what he saw; his only communication with the members of his family, one of whom is offered as interpreter, being that in a limited way they understand his gestures and pantomime in reference to his every-day wants and affairs. *Territory v. Duran*, 3 N. Mex. 134.

Interpreter Need Not Be Adept in Sign Language. — It is not necessary that an interpreter for a deaf and dumb witness should be an adept in the deaf and dumb or sign language; it is sufficient that he so far understands the language that he can well and truly interpret the questions that may be propounded to the witness and her answers thereto. *Skaggs v. State*, 108 Ind. 53; *State v. Weldon*, 39 S. Car. 318.

In *Ruston's Case*, 1 Leach C. C. 408, a man deaf and dumb from his birth was offered as a witness. His sister being examined on the *voir dire*, it appeared that she and her brother, for a number of years, had been able to understand each other by means of certain arbitrary signs and motions. She acknowledged that these signs were not significant of letters, syllables, words, or sentences, but were expressive of general propositions and entire conceptions of the mind; and that the subject of their conversation had been generally confined to the domestic concerns and familiar occurrences of life. She believed, however, that her brother had a perfect knowledge of the tenets of Christianity, and was certain that she could communicate to him a true conception of the moral and religious nature of an

Manner of Testifying. — The court may elicit the testimony of such person by whatever means are necessary and best suited to obtain accurate information. The fact that the witness can write does not render it improper for his testimony to be communicated by signs.¹

III. RESPONSIBILITY FOR CRIME. — The fact that a person is deaf and dumb does not of itself relieve him from responsibility for crime, if he has sufficient understanding to distinguish between right and wrong;² but it has been said that the legal presumption is that he has not such understanding.³ A person

oath, and of the temporal dangers of perjury. The witness was admitted, and his sister was sworn to well and truly communicate to him the questions asked, and interpret his answers to the court.

When Witness Dumb — Weight of Evidence. — In *Quinn v. Halbert*, 55 Vt. 223, the plaintiff was allowed to testify against the objection of the defendant. By some infirmity of the vocal organs he was bereft of the power of speech. He could not explain any proposition, but only assent or dissent in answer to a direct question by a nod or shake of the head. It was held that the plaintiff was a legal witness, although dumb and uneducated in the use of signs, but the attention of the jury should have been called to the plaintiff's peculiar disability as affecting the weight of his testimony.

1. Most Accurate Method Should Be Used. — *State v. Howard*, 118 Mo. 127.

In a case where a deaf and dumb person was called as a witness and examined through a sworn interpreter, who put questions to him by signs made with his fingers, saying that he spelled out every word, and the witness answered in the same manner, *Best, C. J.*, observed: "I have been doubting whether, as this lad can write, we ought not to make him write his answers. We are bound to adopt the best mode. I should certainly receive the present mode of interpreting, even in a capital case. But I think when the witness can write, that is a more certain mode." *Morrison v. Lennard*, 3 C. & P. 127, 14 E. C. L. 238.

"But it would be difficult to maintain this as a proposition of law, even supposing it to hold good as a principle of convenience. Neither of these modes of giving evidence is derivative from, or secondary to, the other; besides which, a deaf and dumb witness might be very expert in making and understanding signs, and yet express his thoughts very indifferently in writing. In a much more recent case before Lord Campbell, which was an action for seduction, the seduced party was deaf and dumb, but could write very well, and two letters written by her to the defendant were put in evidence. Her examination in court, however, was chiefly carried on by signs, and occasionally, when these were not understood, by writing. *Bartholomew v. George*, Kent Sp. Ass. 1851 (MS.)." *Best's Prin. of Ev.* 144.

The testimony of a deaf and dumb witness should be received in the sign language, through an interpreter, where it is shown that she is "capable of relating facts correctly in that manner," though she can also "read and write, and communicate her ideas imperfectly by writing." *State v. DeWolf*, 8 Conn. 93, 20 Am. Dec. 90.

More than One Interpreter. — In the examination of a deaf and dumb witness it is not error to appoint more than one interpreter and allow the questions to be interpreted by the first interpreter to the second, who is deaf and dumb, and by the second to the witness, the answers being transmitted to the court by the reverse proceeding. *Skaggs v. State*, 108 Ind. 53.

2. When Responsible for Crime. — *Rex v. Jones*, 1 Leach C. C. 102; *Rex v. Steel*, 1 Leach C. C. 451; *Reg. v. Whitfield*, 3 C. & K. 121; *State v. Draper*, 1 *Houst. Cr. Cas.* (Del.) 291; *Com. v. Hill*, 14 Mass. 207.

If it appears that a man deaf and dumb from his birth has the use of understanding, then he may be tried for a crime, and suffer judgment and execution, though great caution is to be used therein. *Perrine's Case*, 41 N. J. Eq. 409, 25 Am. L. Reg. N. S. 776, quoting *Hale P. C.* 34.

When Malice Not Implied. — Malice will not be implied in the case of a person who is deaf and dumb and has never received any education or religious or moral instruction, and who has a violent temper when excited, where he uses a knife and furiously stabs and kills another who has assaulted him and thrown him and is about to whip him, unless there is evidence sufficient to satisfy the jury that he provoked the assault for the purpose of stabbing such person. *State v. Draper*, 1 *Houst. Cr. Cas.* (Del.) 291.

3. Presumption Against Responsibility. — In *State v. Draper*, 1 *Houst. Cr. Cas.* (Del.) 291, the court, per *Gilpin, C. J.*, charged the jury as follows: "In all cases of alleged crime, the crime alleged having been proved to have been committed by the accused, it is the general rule that he is presumed to have been at the time sane or of sound mind, and to have had a sufficient degree of reason to be criminally responsible for it, until the contrary has been proved to the satisfaction of the jury. But this rule of law does not apply to a deaf and dumb person when charged with the commission of a crime. On the contrary, the legal presumption is then directly reversed; for in such a case it is incumbent upon the prosecution to prove to the satisfaction of the jury that the accused had capacity and reason sufficient to enable him to distinguish between right and wrong as to the act at the time when it was committed by him, and had a knowledge and consciousness that the act he was doing was wrong and criminal, and would subject him to punishment; and this the state was bound to prove in this case in regard to the capacity and reason, knowledge and understanding of the prisoner at the bar, to the satisfaction of the jury, or it would be their duty to acquit him."

so afflicted should not be tried for a crime where it is impossible to communicate to him or make him understand the nature and incidents of a trial.¹

IV. EDUCATION AND CARE OF THE DEAF AND DUMB.—At the present time there are, both in the United States and in Europe, numerous institutions, maintained at the public expense, where the deaf and dumb are cared for and educated in a manner suited to their condition.²

DEAL — DEALER. (See **TRADE — TRADER**; and see the titles **INTOXICATING LIQUORS**; **OCCUPATION, BUSINESS, AND PRIVILEGE TAXES**; **REVENUE LAWS**.)—"To deal" is to traffic, to transact business, to trade.³ A dealer in the popular acceptance of the word is not one who buys to keep, or makes to sell, but one who buys to sell again. He stands intermediately between the producer and the consumer, and depends for his profit, not upon the labor he bestows upon his commodities, but upon the skill and foresight with which he watches the markets.⁴

1. Should Not Be Tried when Unable to Comprehend trial.—*Rex v. Dyson*, R. & R. C. C. 523, 7 C. & P. 305, note, 32 E. C. L. 518, note; *Rex v. Pritchard*, 7 C. & P. 303, 32 E. C. L. 517; *Reg. v. Berry*, 1 Q. B. Div. 447, 34 L. T. 590, 45 L. J. M. C. 123, 13 Cox C. C. 189; *State v. Harris*, 8 Jones L. (53 N. Car.) 136, 78 Am. Dec. 272.

In *Rex v. Dyson*, R. & R. C. C. 523, 7 C. & P. 305, note, 32 E. C. L. 518, note, a person indicted for murder stood mute, and was found by the jury to be mute by the visitation of God, having always been deaf and dumb. Parke, B., directed a plea of not guilty to be recorded for her, and the jury was sworn to try whether she was sane or not. Witnesses were examined, and their testimony showed her incapable at that time of understanding the mode of trial or of conducting her defense. One of the witnesses, who had testified that he had instructed her in the dumb alphabet, but that she was not so far advanced as to put words together, swore that though she was then incapable of understanding the nature of the proceedings against her, he had no doubt but that with time and pains she might be taught to do so by the means used by instructors of the deaf and dumb. The court in charging the jury told them that if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings, they ought to find her not sane. The jury found her not sane, and the court ordered her to be kept in strict custody under 39 & 40 George III., c. 94, § 2, until his majesty's pleasure should be known.

2. Institutions for the Deaf and Dumb.—*Barnett v. Barnett*, 1 Jones Eq. (54 N. Car.) 221. And see the statutes of the various states.

In *Nebraska* institutions for the deaf and dumb, in which they are instructed in such branches of learning as are suited to their condition, are considered as asylums, and in the same class with poorhouses and insane asylums, rather than as educational institutions. See *State v. Bacon*, 6 Neb. 286.

3. *Vernon v. Manhattan Co.*, 17 Wend. (N. Y.) 526.

4. *Norris v. Com.*, 27 Pa. St. 495; *Com. v. Brinton*, 3 Pa. Dist. Rep. 783.

Retail Dealer.—See **RETAIL**.

Wholesale Dealer.—See **WHOLESALE**.

In *Allen v. Sharp*, 2 Exch. 352, 17 L. J. Exch. 212, it was said by Alderson, B.: "I take it that the strict definition of *dealing* is distributing. A *dealer* is one who distributes."

Societies and Clubs.—As to whether the sale by a society, of intoxicating liquors to its members, constitutes the society a *dealer*, see the title **INTOXICATING LIQUORS**.

Before Sale.—Under an act requiring dealers in foreign wines to take out licenses before laying in their stocks, one begins to be a *dealer* from the time he buys with the intention of selling again, although he has yet sold nothing. *Rex v. Excise Com'rs*, 2 T. R. 381.

Taxation—Single Transaction.—An indictment under the act to license and tax merchants, charging that "defendant did sell, retail, and deliver six yards of cloth, without first obtaining a license," was bad, the law being directed against those who "*deal* in the selling of goods, wares, and merchandise, at any store, stand," etc. The court held that the indictment must pursue the words of the statute, and said: "Does this indictment charge this offense? It charges that Martin 'did sell, retail, and deliver' six yards of cloth. These are not the words of the statute, nor are they even the equivalent of the words of the statute, and even equivalent words would not be sufficient. The statute did not intend that every man who sold a single article should be deemed a merchant. Had that been the intention, the language of the statute would have been: 'Every person who shall sell goods, wares, or merchandise shall be deemed a merchant.' The language of the statute is very different. It is that every person who shall deal in the selling of goods, wares, or merchandise, etc., shall be deemed a merchant. To *deal* in the selling of a thing is to traffic, to trade in the selling of it, to make a business of it. A single act of selling, then, will not constitute a person a merchant; he must *deal* in the business to be one." *State v. Martin*, 5 Mo. 363.

Single Transaction—United States Revenue Laws.—In *Goodwin v. Clark*, 65 Me. 280, it was held that a single sale of all the merchandise which a person had on hand, by one who was going out of the business, did not constitute the seller a *dealer* within the mean-

ing of the United States revenue laws. See generally the title REVENUE LAWS.

In *Graham v. State*, 71 Miss. 208, it was held that a pawnbroker who took a pistol in pawn for repayment of a loan, and upon failure of such repayment sold it, was not a *dealer* within the statute providing that dealers in pistols should pay a privilege tax of one hundred dollars.

Intoxicating Liquors — Single Transaction. (See the title INTOXICATING LIQUORS.) — In *Overall v. Bezeau*, 37 Mich. 506, it was held that a single sale in gross of a stock of liquors, without a license as a wholesale liquor *dealer*, was not within the statute requiring wholesale *dealers* to pay a tax to the state. The court said: "Plaintiff owned a quantity of liquors, and he sold them in gross; he had certain property, and he sold it in one lot. This did not make him a *dealer*; a *dealer* is one who makes successive sales as a business. But this plaintiff, by the sale he made, was indicating as distinctly as possible his intention not to be a *dealer*, either by wholesale or retail. The court, we think, committed no error in excluding the showing."

In construing the sections of the Revised Statutes of the United States on the subject (§§ 3242 *et seq.*), a plurality of instances is held necessary to constitute the offense; but it is to be borne in mind that the only purpose of the tax laid upon dealers in liquors or other commodities is the raising of revenue, while the states issue licenses generally as a measure of police regulation. *U. S. v. Jackson*, 1 Hughes (U. S.) 531; *U. S. v. Feigelsstock*, 14 Blatchf. (U. S.) 321. In the former case it was held that a few instances of selling liquor in small quantity by one having no bar-room and none of the usual appliances of *liquor-dealers*, and with no intention apparent of defrauding the national revenue, is not sufficient to convict one of carrying on the business of a *liquor-dealer* without a license. The offense under the United States statutes, it is to be observed, is the "carrying on the business of a *dealer*." How many sales and what preparation and appointments of a bar-room are necessary in each case to amount to this, are for the jury. *U. S. v. Jackson*, 1 Hughes (U. S.) 531.

But in *State v. Chandler*, 15 Vt. 425, it was held that the penalty for *dealing* in the selling of foreign or domestic distilled spirits might be incurred by a single act of selling without a license. The court said: "The first section of the chapter defines the act that is unlawful if done without a license; and that is, 'to sell any foreign or domestic distilled spirituous liquors.' This being the act that is forbidden to be done, of course for the doing of this the penalty is incurred. It is not any succession of acts of a similar character that constitutes the offense. The fourteenth section defines who are retailers; and by '*dealing* in the selling,' the same is meant as in the first section, by the expression 'to sell.' But there is another view of the case, still more decisive. The twenty-sixth section of the same chapter provides that 'if any person shall be guilty of more than one distinct offense prohibited in either of the three preceding sections, he may be prosecuted and subjected to the penalties for all such distinct offenses at the same time.'

There would be a difficulty in understanding when a distinct offense had been committed, or how many had been committed, if it required any number or succession of acts of selling to constitute a distinct offense. The result, therefore, must be that the offense is manifest by the proof of a single act of selling." See also *State v. Bugbee*, 22 Vt. 32; *State v. Clark*, 23 Vt. 293.

Dealings — Single Transaction — Partnership — Notice of Dissolution. (See also PARTNERSHIP.) — It is the rule of law that one who has *dealings* with a firm is entitled to notice of its dissolution. In *Jansen v. Grimshaw*, 26 Ill. App. 292, it was contended that by *dealing* was not meant a single transaction. The court said: "Appellant does not controvert this proposition of law, but insists that appellee is not within the rule, one transaction such as here disclosed not being such *dealings* as to make actual notice essential. The transaction was a loan of money to be used in the business of the firm. How many or how frequent interviews may have occurred before the loan was made, or how often it was the subject of discussion afterwards, does not appear. The record shows merely the giving of the note when the money was furnished, and the payment of the interest for one year. We understand that the *dealings* referred to in the rule above stated need not be confined to any particular sort of transaction, but may include any transaction within the ordinary scope of the business of the firm, in the course of which one who *deals* with the firm is induced to act on the faith and belief, well founded, that certain individuals compose the firm and are bound by the contracts made in the firm name within the scope of its ordinary business. One who so deals has the right to expect the firm will not be dissolved by the retirement of a solvent member without notice to him. We think the appellee may insist upon the application of the rule in this case. The transaction here disclosed brings the parties within the letter and spirit of the rule."

Partnership — Notice of Dissolution. — In *Vernon v. Manhattan Co.*, 22 Wend. (N. Y.) 183, it is said in reference to this rule: "The word *dealing* is merely used as a general term to convey the idea that the person who is entitled to actual notice of the dissolution must be one who has had business relations with the firm, by which a credit is raised upon the faith of the copartnership. See also *Rose v. Coffield*, 53 Md. 26.

Partnership — Statutes of Limitations. (See generally the title LIMITATIONS OF ACTIONS.) — A statute of limitations provided that the statute should not commence to run between the parties until there had been a cessation of the partnership *dealings*. In construing this statute the court, in *Sandy v. Randall*, 20 W. Va. 247, said: "If we determine what is meant by the term *dealings*, there will be no difficulty in applying the limitation to the facts in any case. If it means the active operations of the partnership carried on before the dissolution, the word is very badly chosen, because, if that was intended, the word 'dissolution' would have been much more appropriate and left no room for doubt. Such a construction can hardly be deemed reasonable; for many part-

nerships, involving numerous transactions scattered over many states, and some of them, perhaps, in litigation with other parties requiring a long time to reach a final result, could not, by the exercise of the greatest possible diligence, be gotten in a condition within four years for a final adjustment between the parties themselves. In such cases the suit would be barred before the cause of action properly accrued. This was certainly not the intention of the legislature. But the proper construction of this statute is not now an open question. The courts of Virginia, in construing a statute identical with this, have decided that the word *dealings* embraces any act done after the dissolution of the partnership in winding it up; such as the collection or payment of debts due to or by the firm. *Foster v. Rison*, 17 Gratt. (Va.) 321."

In *Foster v. Rison*, 17 Gratt. (Va.) 334, it is said: "But what acts are comprehended in the word *dealings*, in the meaning of the code, may be a question of some doubt. Is the word confined to the active operations of the partnership during its continuance, or does it embrace also any act done after its dissolution in winding it up: such as the collection or payment of outstanding debts due to or by the firm, and even good debts due to the firm, outstanding when the suit is brought? I think the word should be construed in the latter and extended sense."

Principal Occupation. — As to whether, in order to be a *dealer* in a particular commodity, a person must be principally occupied in the buying and selling of that commodity, the authorities differ. On the one hand, one was held to be a *dealer* in spirituous, etc., liquors, though he engaged in the general merchandise business, and sold whiskey rather to accommodate his regular customers than to derive profit and as a minor part of his business. *Koopman v. State*, 61 Ala. 70; *Weil v. State*, 52 Ala. 19. On the other hand, a general dry-goods merchant, who had tobacco in small quantities, and by way of variety sold it by the plug, was held not a "*dealer* in tobacco." The court said: "The common-sense interpretation of the words '*dealer* in tobacco,' as here used, must mean that it is the business of the party, his usual occupation, employment, vocation." When a party is indicted, however, for selling without a license under these circumstances, his good faith must be considered, *i. e.*, whether he used the dry-goods business as a cover for his dealing in tobacco. *Carter v. State*, 44 Ala. 29.

Banks and Banking. (See generally the title BANKS AND BANKING, vol. 3, p. 787.) — A statute provided that a bank should not *deal* in goods, wares, and merchandise in any manner whatever. It was held that this meant that the bank should not buy and sell goods, wares, and merchandise for the purpose of gain in the ordinary business of a merchant or trader, or engage in the business of a broker or commission merchant; but a contract by which the bank lent a large sum of money, taking bills of exchange for payment thereof and receiving at the same time, as one of the conditions of the loan, a quantity of cotton, with authority to ship it to a foreign port and sell for the account and at the risk and expense of

the owner, and to credit his bill with the amount of the net proceeds, adding the difference of exchange between the state and the place where the cotton was sold, was held not to be a *dealing* in goods, wares, or merchandise within the prohibition. *Bates v. State Bank*, 2 Ala. 451.

Same — Deal or Trade Distinguished from Purchase. — The charter of the United States Bank provided that the corporation should not directly or indirectly *deal* or trade in anything except bills of exchange or gold or silver bullion, etc. It was held that this did not prohibit the bank from purchasing a bill or note. The court said: "The expressions are general, that the corporation shall not directly or indirectly deal or trade in anything except bills of exchange or gold or silver bullion. From these expressions, therefore, to impute an intention in Congress not to allow the corporation to purchase anything but bills of exchange or gold or silver bullion would be subjecting that legislature to the strange inconsistency of having created a bank with a capital of thirty-five millions of dollars, and yet not given to it the capacity of commencing its banking operations. * * * But it may be asked, for what purpose can the expressions '*deal* or trade' have been employed? We answer: Not to restrict the bank in its right to purchase, but to denote what things may or may not be both bought and sold by the bank." *U. S. Bank v. Norton*, 3 A. K. Marsh. (Ky.) 426.

A prohibition against *dealing* in certain articles does not prohibit the purchase of such articles. *Fleckner v. U. S. Bank*, 8 Wheat. (U. S.) 338.

Taxation — Manufactory. — A *Pennsylvania* statute imposed a tax upon all *dealers* in American goods, wares, and merchandise, except mechanics who should keep a store or warehouse at their own shop or manufactory for the purpose of vending their own manufactures exclusively. It was held that parties who manufactured locomotives, and sold them only at their own shop or manufactory, were not liable. The court said: "The plaintiffs in error are not *dealers*. A *dealer*, in the popular and therefore in the statutory sense of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again. He stands intermediately between the producer and the consumer, and depends for his profit, not upon the labor he bestows on his commodities, but upon the skill and foresight with which he watches the markets. A man who makes locomotives is a mechanic. If he is not, I know not why we should give that appellation to one who makes wagons or wheelbarrows." *Norris v. Com.*, 27 Pa. St. 495.

In *Com. v. Pottsville Iron, etc., Co.*, 157 Pa. St. 500, it was held that a manufacturing corporation might sell its own products at its factory, or send them to a commission merchant to sell, without being liable to the mercantile license tax; but if the company kept a store or warehouse where it sold goods manufactured by others as well as those made by itself, it was liable to assessment as a *dealer*. See also *Com. v. National Oil Co.*, 157 Pa. St. 516; *Com. v. Savage F. Brick Co.*, 157 Pa. St. 512. See *infra*, *Taylor v. Vincent*, 12 Lea (Tenn.) 285.

DEALERS' TALK. — See the titles IMPLIED WARRANTY; VENDOR AND PURCHASER; FRAUD AND MISREPRESENTATION.

Same — Plumber. — Within the *Pennsylvania* statute taxing *dealers* in goods, wares, and merchandise, it was held that a plumber who bought the necessary plumbing materials from other *dealers*, and charged a percentage on the cost of the materials, in addition to his charge for work, but had no place of business but his shop, and did not do business as a buyer or seller, was not a *dealer*. *Com. v. Gormly*, 173 Pa. St. 586.

Same — Miller. — In *Berks County v. Bertolet*, 13 Pa. St. 524, it was held that a miller was a *dealer* in merchandise because he sold flour, and that he was not a mechanic, and that at any rate he was not within the section because he did not sell his flour at home. The court said: "A *dealer* is one who trades, buys or sells. If so, Bertolet is a dealer, for, according to the case stated, he both buys and sells; he buys the grain, and when manufactured sells the flour. It is true he does not buy the flour, but he buys the materials of which it is composed, and this brings him within the spirit of the act; he is a *dealer* to all intents and purposes." This case is distinguished in *Norris v. Com.*, 27 Pa. St. 495, *supra*. But compare *Com. v. Campbell*, 33 Pa. St. 386, *infra*.

Same — Tanner. — A tanner who sent his goods to Philadelphia for sale was held not a *dealer*. The court said: "But he also sends leather to Philadelphia, and sells it there, though without keeping a store there; and according to the decision in *Berks County v. Bertolet*, 13 Pa. St. 522, this makes him taxable as a seller of merchandise. In that decision we think that the law was misunderstood; for it confounds the distinction between *dealers* and manufacturers, which is clearly marked in the law. *Dealers* are the middlemen between the manufacturer or the producer and the consumer; and they are made taxable under all the laws we have referred to. Manufacturers were made taxable, as sellers of merchandise, by the Act of 1846, if they keep a store, away from their manufactory, for the sale of their goods. The mode in which the defendant sells his leather does not bring him within the act, and therefore he is not taxable by the mercantile appraisers." *Com. v. Campbell*, 33 Pa. St. 386.

Same — Butcher. — One who slaughters and cuts up animals and sells the meat as food is not a *dealer* within the meaning of a statute requiring *dealers* who buy and sell goods, etc., to take out a license. *State v. Yearby*, 82 N. Car. 561, 33 Am. Rep. 694.

One who is engaged in the business of butchering lambs, calves, and sheep, and of dressing poultry, at his slaughter-house on his farm, and shipping the same to commission men and retailers in Philadelphia, but who does not sell at retail in his neighborhood, and has no store or warehouse apart from his place of butchering, is not liable to assessment for a mercantile state tax as a *dealer*. *Com. v. Brinton*, 3 Pa. Dist. Rep. 783.

Distinguished from Manufacturer. — A manufacturer of liquors made of the produce of *Tennessee*, who sells the same in unbroken

packages at his place of business, is not liable for the tax on *dealers*. The court said: "We have carefully considered the question, and our conclusion is that a manufacturer who sells articles manufactured by him, the articles being the product of the growth of the state, is not a *dealer* in such articles; that a manufacturer of whiskey or other spirituous liquors, who sells from his place of manufacture in unbroken packages, or as a manufacturer, is not a wholesale *dealer* in whiskey under our revenue laws." *Taylor v. Vincent*, 12 Lea (Tenn.) 285. See *supra*, the *Pennsylvania* cases under *Taxation — Manufactory*.

A Physician who keeps on hand intoxicating liquors for the purpose of sale and profit is a *dealer* within the meaning of an act prescribing a penalty for selling such liquors to minors. *State v. McBrayer*, 98 N. Car. 619.

Agency. — In *State v. Dow*, 21 Vt. 487, it is said: "In order to constitute one a *dealer*, so as to subject him to the penalty imposed by the statute of 1846, it is not necessary that he should actually do the business in person, or even that it should be done in his presence or by his express command. A merchant who keeps liquors in his store for sale, and clerks to deal it out in common with other commodities kept for sale, is equally as liable for sales made by such clerks, as if made by him in person; it is a *dealing* by him."

The defendant was engaged in procuring liquor for any one who would patronize him. He testified that if any one wished to employ his services to procure, for instance, a bottle of beer, he required him to pay down ten cents, and when the beer was delivered to pay a further sum of fifteen cents, as remuneration for his trouble. The evidence, however, failed to show that the defendant bought specific quantities of beer or liquor to correspond with special orders given to him. It was held that he was a *dealer* within the revenue laws. The court said: "The word *dealer* is not confined to one who sells his own property only. If one opens out a place of business for the purpose of furnishing to all who may patronize him liquors, malt or spirituous, in quantities less than five gallons, he is engaged in the business of a retail liquor *dealer*, irrespective of the question of the manner or mode in which he acquires or procures the liquors from the manufacturers. The fact that he procures from the manufacturer or wholesaler the liquor in quantities, and disposes of the same for a profit to any one who may call upon him, certainly makes him a *dealer*. If the evidence had fully sustained the claim of defendant — which it did not — that he never procured any liquor from the manufacturer until he had secured orders for the same from customers, it would not change the rule, for it would still be true that, relying upon these orders for small quantities, he procured beer by the case from the manufacturer, and delivered it to his customers, charging them a round profit upon each bottle." *U. S. v. Allen*, 38 Fed. Rep. 738.

Same — Commission-Merchants. — The term "wholesale *dealers*" in the *United States* Internal Revenue Act of 1864, as amended July

DEAR.—See note 1.

DEATH.—See the titles ACCIDENT INSURANCE, vol. 1, p. 284; CIVIL DEATH, vol. 6, p. 64; LIFE INSURANCE; DEATH BY WRONGFUL ACT, *infra*. As to capital punishment, see the titles PUNISHMENT; SENTENCE; WARRANTS. As to such phrases as “death by his own hand,” “death by the hands of justice,” etc., see the titles ACCIDENT INSURANCE, vol. 1, p. 284; LIFE INSURANCE; SUICIDE. As to the presumption of death, see the titles BIGAMY, vol. 4, p. 34; DIVORCE; LIMITATIONS OF ACTION; SURVIVORSHIP IN COMMON DISASTER. As to the effect of death on actions, see ENCYC. OF PLEADING AND PRACTICE, titles ABATEMENT, vol. 1, p. 1; DEATH, vol. 5, p. 783. As to pedigree, see the title PEDIGREE.

13, 1866, includes commission merchants. *Slack v. Tucker*, 23 Wall. (U. S.) 321.

Set-off—Dealings Together.—In *Pate v. Gray, Hempst.* (U. S.) 155, it was held that the expressions “mutual debts,” “*dealing together*,” and “indebted to each other,” convey the same meaning in statutes of set-off. See generally the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

Dealer in Futures. (See the titles BROKERS, vol. 4, p. 959; OPTIONS; STOCK; STOCK EXCHANGE.)—In the Memphis Brokerage Assoc. *v. Cullen*, 11 Lea (Tenn.) 75, it was held that a person who received orders to buy or sell in New York or elsewhere, and produce for delivery at a future time, and who executed these orders through correspondents, he having no pecuniary interest in the transaction, was a *dealer* in futures, and as such liable to a tax upon such *dealer*. See also *Kent v. Miltenberger*, 13 Mo. App. 512.

Dealing in Grain.—In *Irwin v. Williar*, 110 U. S. 506, it is said: “*Dealing* in grain is not a technical phrase from which a court can properly infer as matter of law authority to bind the firm in every case irrespective of its circumstances; and if, by usage, it has acquired a fixed and definite meaning, as a word of art in trade, that is matter of fact to be established by proof and found by a jury. It may mean one thing at Brazil in Indiana, another at Baltimore. It may not be the same when standing alone, with what it is in connection with a flouring-mill in a small interior town. It may mean *dealing* in grain on hand for present delivery for cash or on credit, or it may mean, also, *dealing* in futures by means of contracts of sale or purchase for purposes of speculating upon the course of the market.”

Dealers in Second-hand Goods.—An ordinance of a city which required *dealers* in second-hand goods to procure a license, declared that “any person who keeps a store, office, or place of business, for the purchase or sale of second-hand clothing, or garments of any kind, or second-hand goods, wares, or merchandise, is hereby declared to be a *dealer* in second-hand goods.” It was held that booksellers, *dealing* in such stock as is usually kept in a retail bookstore, who buy and sell, in connection with their own business, and as incidental thereto, second-hand books, are not “*dealers* in second-hand goods,” within the meaning of the ordinance. *Eastman v. Chicago*, 79 Ill. 178.

Transient or Itinerant Dealer. (See the title HAWKERS AND PEDDLERS.)—A transient or itinerant *dealer* is one who travels from place

to place, while engaged in his business of selling. *Shiff v. State*, 84 Ala. 454.

Benevolent Association.—A benevolent association which sold to its members tickets entitling the holder, at a picnic of the association, to a glass of beer or other refreshment, was held to be a *dealer* within the United States revenue laws, which define a *dealer* in malt liquors as one who sells or offers for sale in less quantities than five gallons at one time, where he does not *deal* in spirituous liquors. *U. S. v. Giller*, 54 Fed. Rep. 656. See generally the titles INTOXICATING LIQUORS; SOCIETIES AND CLUBS.

Trading—Bankruptcy.—In *Exp. Herbert*, 2 Ves. & B. 399, the lord chancellor said that, according to Mr. Cooke (Cooke’s Bankrupt Law 43, 6th ed.), “*dealer* and chapman” had been held a sufficient description of trading; and, though the practice of issuing commissions upon affidavits as loose as this was so inconsistent and dangerous as perhaps to require correction by some general order, the general statement of the commission, that the bankrupt got his living by buying and selling, was sufficient to support it.

1. Wills. (See generally the title WILLS.)—A devise by a husband to his “*dear wife*,” not mentioning her name, applies exclusively to the individual who answers the description at the date of the will, and not to an after-taken wife. *Johnson v. Johnson*, 1 Tenn. Ch. 621. The court said: “The original intent of the testator, every one will concede at once, was to give the property devised to his then existing wife. The words ‘my *dear wife*’ point to a person then existing, the qualifying adjective necessarily implying affection for an individual; such affection being, of course, inconceivable of a person not then occupying the designated relation.”

A testator had a wife who survived him, but before his death he went through the ceremony of marriage with a woman whose Christian name was Caroline, and who continued to reside with him to the time of his death. It was held, that under a devise made shortly before his death to “my *dear wife* Caroline,” Caroline took, though the whole description was not applicable to her. *Doe v. Rouse*, 5 C. B. 422, 57 E. C. L. 422. In that case it was said: “The testator could hardly have meant to refer to the latter [his lawful wife] when he speaks of his *dear wife*, seeing that he had repudiated her, and contracted an engagement of some sort with another woman. There is an old maxim that *veritas nominis tollit errorem demonstrationis*.”

DEATH BY WRONGFUL ACT.

BY H. DENT MINOR.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 5, p. 848.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *AGENCY*, vol. 1, p. 930; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368; *CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *DAMAGES*, ante, p. 537; *DEBTS OF DECEDENTS*, *post*; *EXECUTORS AND ADMINISTRATORS*; *EXEMPLARY DAMAGES*; *FELLOW-SERVANTS*; *LIMITATION OF ACTIONS*; *MASTER AND SERVANT*; *MORTALITY TABLES*; *MUNICIPAL CORPORATIONS*; *NEGLIGENCE*; *PRIVATE INTERNATIONAL LAW*.

I. SCOPE OF THE TITLE. — This article does not undertake to discuss questions of negligence or contributory negligence, nor questions arising in actions for wrongful death which apply equally to all actions for personal injury. The discussion is limited to matters peculiar to actions arising under the statutes authorizing a recovery for wrongful death.¹

II. THE RIGHT OF ACTION IN ABSENCE OF STATUTE — 1. General Rule — No Action. — Under the common law, in pursuance of the maxim *actio personalis moritur cum persona*,² no right of action existed in favor of the heirs, distribu-

1. For a discussion of the general law relating to actions for personal injuries, see *COMPARATIVE NEGLIGENCE*, vol. 6, p. 360; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368; *FELLOW-SERVANTS*; *MASTER AND SERVANT*; *NEGLIGENCE*; *RAILROADS*; *RECEIVERS*; *SHIPS AND SHIPPING*; and other titles referred to in the table of cross-references at the beginning of this title.

2. See the title *DEATH*, 5 *ENCYC. OF PLEADING AND PRACTICE* 783, and cross-references there given. See also the title *DEBTS OF DECEDENTS*, *post*.

Actio Personalis Moritur Cum Persona. — The applicability of this maxim in cases where the plaintiff claims an action for damages resulting

from the death of a servant, parent, or child, though often assumed, is probably incorrect. This is clearly explained by Taschereau, J., in his judgment in *Monaghan v. Horn*, 7 Can. Sup. Ct. Rep. 441. He says: "What action dies with the person? Clearly the action of one who dies. Well, the one who died never had an action for being killed. The action that, according to the maxim, died with the deceased is the action he, the deceased, had for the injuries, if any, he suffered in his lifetime. But the present plaintiff's action is not at all for injuries and damages caused to her deceased son, but purely and simply for injuries and damages caused to herself, the plaintiff. - These injuries and damages she

tees, or personal representatives of a deceased person, for damages for his wrongful death. The right of action which the injured person had abated with his death and did not survive; and no right of action existed in favor of those surviving him, because the civil right was merged in the criminal act.¹

complaints of and claims in the present action did obviously not exist when her son was living; her right to the present action had not accrued, and could not accrue when and as long as he lived. How, then, can it be contended that her right of action died with him? How could her action die before it came to existence, before it originated, before the fact that created it happened? It is plain that, when the death is immediate, the maxim cannot apply, because the deceased never had an action against the person who wrongfully caused his death. * * * *Actio personalis moritur cum persona* applies only to the party who had the action, to the party who would have been plaintiff if he had lived. It does not apply to the deceased wrongdoer, against whom the action would have been taken. In other words, it is the *actio personalis*, the action for injuries to the person itself, not the *actio in personam*, that dies with the person." See also the judgment of Bramwell, B., in *Osborn v. Gillett*, L. R. 8 Exch. 88, and the opinion of Hunt, J., in *Green v. Hudson River R. Co.*, 2 Keyes (N. Y.) 294, 2 Abb. App. Dec. (N. Y.) 277.

1. **The Common-law Doctrine** — *England*. — *Higgins v. Butcher*, Yel. 89; *Baker v. Bolton*, 1 Campb. 493; *Osborn v. Gillett*, L. R. 8 Exch. 88.

Canada. — *Monaghan v. Horn*, 7 Can. Sup. Ct. Rep. 409.

United States. — *New Orleans v. Abbagnato*, 62 Fed. Rep. 240, 23 U. S. App. 533; *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754. See also the title ADMIRALTY JURISDICTION, vol. I, p. 658.

Alabama. — *Kahl v. Memphis*, etc., R. Co., 95 Ala. 337.

California. — *Kramer v. San Francisco Market St. R. Co.*, 25 Cal. 434.

Colorado. — See *Kelley v. Union Pac. R. Co.*, 16 Colo. 455; *Hindry v. Holt*, (Colo. 1897) 51 Pac. Rep. 1002.

Connecticut. — *Connecticut Mut. L. Ins. Co. v. New York*, etc., R. Co., 25 Conn. 265, 65 Am. Dec. 571. Compare *Cross v. Guthery*, 2 Root (Conn.) 90, 1 Am. Dec. 61.

Georgia. — *Allen v. Atlanta St. R. Co.*, 54 Ga. 503; *Georgia R., etc., Co. v. Wynn*, 42 Ga. 333; *Western, etc., R. Co. v. Strong*, 52 Ga. 461; *Womack v. Central R., etc., Co.*, 80 Ga. 132; *Shields v. Yonge*, 15 Ga. 349.

Illinois. — *Chicago, etc., R. Co. v. Schroeder*, 18 Ill. App. 328; *Maney v. Chicago, etc., R. Co.*, 49 Ill. App. 105; *Peoria M. & F. Ins. Co. v. Frost*, 37 Ill. 333.

Indiana. — *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Stewart v. Terre Haute, etc., R. Co.*, 103 Ind. 44; *Indianapolis, etc., R. Co. v. Keely*, 23 Ind. 133; *Jeffersonville R. Co. v. Swayne*, 26 Ind. 484.

Iowa. — See *Connors v. Burlington, etc., R. Co.*, 71 Iowa 490, 60 Am. Rep. 814.

Kansas. — *Eureka v. Merrifield*, 53 Kan. 794.

Kentucky. — *Eden v. Lexington, etc., R. Co.*, 14 B. Mon. (Ky.) 165; *Winnegar v. Central Pass. R. Co.*, 85 Ky. 547, 34 Am. & Eng. R.

Cas. 462; *Wise v. Covington, etc., St. R. Co.*, 91 Ky. 537.

Louisiana. — *Hubgh v. New Orleans, etc., R. Co.*, 6 La. Ann. 495, 54 Am. Dec. 565; *Herman v. New Orleans, etc., Co.*, 11 La. Ann. 5; *Van Amburg v. Vicksburg, etc., R. Co.*, 37 La. Ann. 650, 55 Am. Rep. 517.

Maine. — *Lyons v. Woodward*, 49 Me. 29; *State v. Grand Trunk R. Co.*, 58 Me. 176, 4 Am. Rep. 258.

Massachusetts. — *Carey v. Berkshire R. Co.*, 1 Cush. (Mass.) 475, 48 Am. Dec. 616; *Kearney v. Boston, etc., R. Corp.*, 9 Cush. (Mass.) 108; *Palfrey v. Portland, etc., R. Co.*, 4 Allen (Mass.) 55; *Shaw v. Boston, etc., R. Corp.*, 8 Gray (Mass.) 45; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85; *Holland v. Lynn, etc., R. Co.*, 144 Mass. 425, 30 Am. & Eng. R. Cas. 648; *Gunn v. Cambridge R. Co.*, 144 Mass. 430, note, 30 Am. & Eng. R. Cas. 652; *Moran v. Hollings*, 125 Mass. 93.

Michigan. — *Hyatt v. Adams*, 16 Mich. 180.

Mississippi. — *Amos v. Mobile, etc., R. Co.*, 63 Miss. 511.

New Hampshire. — *Corliss v. Worcester, etc., R. Co.*, 63 N. H. 404, 21 Am. & Eng. R. Cas. 208; *Wyatt v. Williams*, 43 N. H. 102; *State v. Manchester, etc., R. Co.*, 52 N. H. 528.

New Jersey. — *Grosso v. Delaware, etc., R. Co.*, 50 N. J. L. 317.

New York. — *Lucas v. New York Cent. R. Co.*, 21 Barb. (N. Y.) 245; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Green v. Hudson River R. Co.*, 2 Keyes (N. Y.) 294, *disapproving Ford v. Monroe*, 20 Wend. (N. Y.) 210. But see *Ford v. Monroe*, 20 Wend. (N. Y.) 210.

Ohio. — *Worley v. Cincinnati, etc., R. Co.*, 1 Handy (Ohio) 481; *Campbell v. Rogers*, 2 Handy (Ohio) 110; *Woodard v. Michigan Southern, etc., R. Co.*, 10 Ohio St. 121.

Pennsylvania. — *Pennsylvania R. Co. v. Adams*, 55 Pa. St. 499.

Tennessee. — *Louisville, etc., R. Co. v. Burke*, 6 Coldw. (Tenn.) 45.

Texas. — *Gulf, etc., R. Co. v. Beall*, (Tex. 1897) 42 S. W. Rep. 1054.

Utah. — *Thomas v. Union Pac. R. Co.*, 1 Utah 233.

Vermont. — *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

In *The Garland*, 5 Fed. Rep. 925, the court, *per Brown, J.*, said: "In such case the liability of the defendant ceases with the life of the person injured. This rule has remained undisturbed by a single well-considered opinion, except that of *Sullivan v. Union Pac. R. Co.*, 3 Dill. (U. S.) 334, for over seventy years, and although it seems to be based upon technical grounds, and does not commend itself to one's sense of natural justice, it is too firmly established to be shaken by judicial opinion." In *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, it was observed that "it is impossible to speak of it as a proposition open to question." But see the judgment of Bramwell, B., in *Osborn v. Gillett*, L. R. 8 Exch. 93, and an interesting article by Mr. F. T. Fox, Jr., in 12 Cent. L. J.

Contract in Consideration of Forbearance to Sue for Damages from Death.—The rule is enforced to the extent that no action will lie on a promise by a railroad company, made to a widow whose husband had been killed on its road, to pay her a certain sum in consideration of her forbearance to sue.¹

2. Extent and Scope of This Rule—*a. DEATH NOT INSTANTANEOUS*—**LOSS OF SERVICES.**—When the death of the party does not result instantaneously, an action may be brought, after his death, by the person entitled to his services, for damages caused by a loss of such services between the time the injury occurred and the death of the injured party, together with all incidental expenses incurred for medical attention and the like.²

b. ACTION FOUNDED ON BREACH OF CONTRACTUAL DUTY—**Recovery in Contract by Employer.**—Where the breach of a contractual duty owing from a third person to an employer results in the death of an employee, it has been held that a cause of action arises in favor of the employer against such third person for the damages resulting from the latter's wrongful act.³

464, 13 Cent. L. J. 100. See also *Monaghan v. Horn*, 7 Can. Sup. Ct. Rep. 409, judgments of *Fournier and Taschereau, JJ.*; *Sullivan v. Union Pac. R. Co.*, 3 Dill. (U. S.) 334. The last case can no longer be considered as law, and when a second time before the court was disposed of in accordance with the prevailing authority as stated in the text. *Sullivan v. Union Pac. R. Co.*, 1 McCrary (U. S.) 301. 2 Fed. Rep. 447.

The rule has been frequently criticised as being technical and without the support of sound principle. See *Holmes v. Oregon*, etc., R. Co., 5 Fed. Rep. 78, 6 Sawy. (U. S.) 262; *The Garland*, 5 Fed. Rep. 926; *Maney v. Chicago*, etc., R. Co., 49 Ill. App. 105.

Civil and Foreign Laws.—Interesting discussions of the state of the civil law and the French law as to permitting a recovery for the death of a person may be found in *The Harrisburg*, 119 U. S. 109; *Hubgh v. New Orleans*, etc., R. Co., 6 La. Ann. 495, 54 Am. Dec. 565; *Herman v. New Orleans*, etc., Co., 11 La. Ann. 5; *Monaghan v. Horn*, 7 Can. Sup. Ct. Rep. 409; *Canadian Pac. R. Co. v. Robinson*, 14 Can. Sup. Ct. Rep. 105.

The Scotch law takes cognizance of the loss and sufferings of the family of a person killed and gives a right of action therefor under certain circumstances, the compensation being known as "assythment." *Bell's Principles Laws of Scotland* (7th ed.), § 2029; *Weems v. Mathieson*, 4 Macq. H. L. Cas. 215; 1 *Hodges on Railways* 613.

1. Express Promise to Pay for Death—No Action Lies.—*Palfrey v. Portland*, etc., R. Co., 4 Allen (Mass.) 55. The court, by Metcalf, J., said: "The demurrer admits that the defendants, in consideration of the matter alleged in the declaration and the plaintiff's forbearance to sue them, promised to pay her, etc. But it is a very ancient rule of law that a promise to pay money in consideration of forbearance to sue, when there is no legal cause of action, is without consideration and void. *Toley's Case*, 2 Leon. 105; *Hammon v. Roll*, March. 202; *Chitty on Contr.* (7th Am. ed.) 35."

2. Party Entitled to Services May Recover.—*Cooley on Torts*, p. 262; *Covington St. R. Co. v. Packer*, 9 Bush (Ky.) 455, 15 Am. Rep. 725; *Hyatt v. Adams*, 16 Mich. 180; *Sullivan v. Union Pac. R. Co.*, 3 Dill (U. S.) 334. See also *Womack v. Central R.*, etc., Co., 80 Ga. 132.

In *Natchez*, etc., R. Co. *v. Cook*, 63 Miss 38, a minor, while in the discharge of his duties as an employee of the defendant company, was injured through the negligence of the company, and died, three days later, from the effect of such injuries. It was held that his mother, his only surviving parent, was entitled, under the common law (her son not having been emancipated), to recover of the defendant company damages for the loss of his services from the time the injuries were received up to the time of his death and for any incidental expenses incurred by her during that time for medical attention to and care and nursing of him.

Medical and Funeral Expenses.—Under the rule of the text, it seems that the husband may maintain an action for the value of medical services and the amount of the funeral expenses incurred in consequence of his wife's wrongful death. So, also, a parent may recover for similar expenses for the death of his child. But nothing can be recovered for the loss of life. *Eden v. Lexington*, etc., R. Co., 14 B. Mon. (Ky.) 165.

When Damages Are Nominal—No Recovery.—In *Allen v. Atlanta St. R. Co.*, 54 Ga. 503, the action was to recover damages for the killing, by the defendant company, of the plaintiff's son, who was only two years old when killed. Recovery was denied on the ground that the suit could be maintained only for the loss of present services, and not for services which would have been rendered in future, and that the services of a child two years old could not be of any value. See *Little Rock*, etc., R. Co. *v. Barker*, 33 Ark. 350, 34 Am. Rep. 44.

The same rule applies when the time between the injury and the death of the injured party is so short as to render the services during that time worth too little to be taken notice of by the law. See *Tully v. Fitchburg R. Co.*, 134 Mass. 499; *Gulf*, etc., R. Co. *v. Beall*, (Tex. 1897) 42 S. W. Rep. 1054. Compare *Ford v. Monroe*, 20 Wend. (N. Y.) 210.

3. Recovery by Employer for Breach of Contract Duty.—*Hoosier Stone Co. v. Louisville*, etc., R. Co., 131 Ind. 575. In this case the facts were that the defendant had agreed to furnish the plaintiff with suitable cars at its quarry for the transportation of stone. Owing to defective appliances, one of the cars furnished became unmanageable, and one of the plain-

Action by Representative for Damage to Estate. — It has been held that where a person dies as a result of an injury caused by a breach of a contractual duty on the part of the person inflicting the injury, the personal representative of the decedent may recover, in an action for breach of contract, the damages to the decedent's personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business.¹ Other cases admitting a right of recovery in such cases are not so clear as to the extent or measure of damages recoverable.²

c. SUCH RIGHTS NOT AFFECTED BY STATUTE. — A right of action for damages existing at common law in favor of a personal representative³ or a parent⁴ to recover for losses between the time of an injury and the resulting

tiff's employees was killed. The personal representative of the employee thereupon sued the plaintiff and recovered damages. The plaintiff then brought this action against the defendant, setting out the facts and alleging a breach of the defendant's contract duty in furnishing suitable cars, and sought to recover the damages sustained by the plaintiff as a result of the death of its employee and the judgment recovered against it. It was held that the complaint alleged a valid cause of action. The court, by Elliott, C. J., said: "As the duty violated was one owing directly to the appellant [the plaintiff], there was an actionable wrong, and the right of action was in the party to whom the duty was owing. * * * It is doubtful whether the appellant can successfully assert that it has a right to be reimbursed for the damages recovered by the administrator of the estate, but, granting that it has no such right, the question of whether there may be a recovery for the injury resulting to the appellant from the breach of duty directly owing to it is unaffected. The appellant may have a right of action for a negligent breach by the appellee, although it may not be entitled to all the damages claimed."

1. Action by Representative — Damages to Estate Before Death. — *Bradshaw v. Lancashire, etc.*, R. Co., L. R. 10 C. P. 189. In this case the court proceeded upon the ground that the cause of action was the breach of a contract made with the testator during his lifetime (in this case a contract of carriage between the testator and the defendant), whereby, in his lifetime, his estate was injured by his having to pay medical and other expenses, and injury to his business, the direct and immediate consequence of the accident. It was contended that, inasmuch as the remedy for the personal injury died with the person, the damages to the estate, being consequential on the personal injury, died also. But the court held otherwise, *Grove, J.*, saying: "The two sorts of damage are separable. The one is pecuniary loss to the estate immediately and naturally arising out of the accident; the other is personal to the party injured, and as such dies with the person. I do not see that there is any valid distinction between this case and that of *Potter v. Metropolitan R. Co.*, 30 L. T. N. S. 765." In the case thus cited and relied on, it was held that a widow was entitled to recover damages to her husband's estate caused by medical attendance on herself, necessitated by an accident in which both husband and wife were injured.

Dicta supporting the principle established in *Bradshaw v. Lancashire, etc.*, R. Co., L. R. 10 C. P. 189, are to be found in the earlier cases of *Knights v. Quarles*, 2 B. & B. 102, 4 Moo. 532; *Alton v. Midland R. Co.*, 34 L. J. C. P. 292, 12 L. T. 703.

In *Leggott v. Great Northern R. Co.*, 1 Q. B. Div. 599, the correctness of the decision in *Bradshaw v. Lancashire, etc.*, R. Co., L. R. 10 C. P. 189, was questioned, although the ruling of that case was followed as binding upon the court. In the still later case of *Pulling v. Great Eastern R. Co.*, 9 Q. B. Div. 110, the *Bradshaw* case, however, was apparently approved, although it was held that the representative of a deceased person is not entitled to recover in an action of tort for injuries to the estate of the decedent received during his lifetime, as a result of an injury inflicted upon him in consequence of which he died.

2. Recovery in Contract for Injuries Resulting in Death. — In *Winnegar v. Central Pass. R. Co.*, 85 Ky. 547, it was held that an action against a passenger carrier in the nature of an action on the case for the injuries resulting from a breach of the carrier's contract to transport the passenger safely survives to the personal representative, and the fact that the death of the person injured resulted from the injuries received does not affect the right of recovery, the action being for the injuries, and not for the death. See also *Kelley v. Union Pac. R. Co.*, 16 Colo. 455.

Where a young child, who was a passenger for a valuable consideration upon an ocean steamship, was poisoned during the voyage by carelessness on the part of the officers of the vessel and died on board, it was held that his personal representative was entitled to maintain an action against the steamship, the court, by *Blatchford, J.*, saying: "I think that the libel is one for breach of contract, and that the cause of action survived to the administrator and may be sued for *in rem*, in like manner as if the deceased had sustained an injury short of death through the negligence of those in charge of the vessel, and in breach of the contract of carriage." The *Steamship City of Brussels*, 6 Ben. (U. S.) 370.

3. *Bradshaw v. Lancashire, etc.*, R. Co., L. R. 10 C. P. 189.

4. *Davis v. St. Louis, etc.*, R. Co., 53 Ark. 117, 44 Am. & Eng. R. Cas. 690.

Common-law Action Bars Statutory Action, and Vice Versa. — It has been held, however, that an action for loss of services before death bars an action under the statute, and *vice versa*. *Louisville, etc.*, R. Co. *v. McElwain*, 98 Ky.

death of the person injured is not taken away by a statute giving a right of action for death by wrongful act.¹

III. RIGHT OF ACTION GIVEN BY STATUTE — 1. Generally. — The unsatisfactory state of the common law with respect to the right to recover for death due to negligence or wrongful act led to the passage of statutes giving a right of recovery in such cases. The earliest of these statutes was the *English* act of 1846, 9 & 10 Vict., c. 93, commonly known as Lord Campbell's Act. This enactment has served as the model for much of the subsequent legislation on this subject. It began by declaring that "no action at common law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person; and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him." It then conferred a right of action on the personal representative for the benefit of the wife, husband, parent, and child of the deceased. This statute does not merely remove the operation of the maxim *actio personalis moritur cum persona*, but gives a new cause of action.² In all of the *United States*, statutes of like purpose and containing provisions more or less similar have been enacted. There are, however, numerous minor differences. In some, the right of action is vested directly in the widow, next of kin, or other beneficiaries; in some, as under Lord Campbell's Act, in the personal representative of the deceased.³ Again, some of the statutes merely provide for the survival of the cause of action which the deceased would have had if he had been alive, while others create a new substantive cause of action.⁴ It would not be in accordance with the plan of this work, nor would it be other than misleading, to insert in this place an outline of all the state statutes on this subject. In every case the practitioner will examine his own statutes, and where the provisions of the statutes of another state are in question he will not be satisfied until he has examined the official acts at large and traced the amendments to date. But although the general enactments are not here given, particular statutory provisions are given in connection with decisions construing them with some fulness under the various subdivisions of this title.

2. Two Classes of Statutes. — The statutes are divisible into two classes. In some jurisdictions the provisions embrace both.

a. SURVIVAL STATUTES. — In some of the states the statute provides merely for a survival of the right of action which the deceased had. In such cases the damages recoverable are confined to the loss sustained and the pain and suffering endured by the deceased; the loss to his relatives cannot be considered.⁵

700. See also *infra*, this title, *Defenses to the Action — Former Recovery — As a Bar to Action*.

1. But it has been declared that this right of action is taken away where the statute clearly contemplates that the right of action given by it shall be exclusive, or when it provides for the recovery of all damages in one action. See *Graham v. Hannibal*, etc., R.Co., 28 Fed. Rep. 744.

2. *Seward v. The Vera Cruz*, L. R. 10 App. 59.

3. See *infra*, this title, *Parties and Beneficiaries — Who Entitled to Right of Action*.

4. See *infra*, this section, *Two Classes of Statutes*.

5. See *infra*, this title, *Measure of Damages — Distinction Between Survival Actions and Others*.

Survival Statutes — Colorado. — Rev. Stat. (1868), p. 682, § 154 (Mills's Annot. Stat. 1891, § 4810), provides that "all actions at law whatsoever, save and except actions on the case for slander or libel, or trespass for injuries done to the person, * * * shall survive to and

against executors and administrators." Under this provision an action which, at common law, would have been an action of trespass on the case does not survive to or against the personal representative. *Munal v. Brown*, 70 Fed. Rep. 967.

Indiana. — Under Rev. Stat., § 266, the father has a right of action for the wrongful death of his child. Section 282 provides that actions for personal injuries die with the party entitled thereto, "except in cases in which an action is given for an injury causing death," etc. Section 283 provides that all other causes of action shall survive to the personal representative of the deceased. Under these provisions the right of action in favor of a father for the death of his child survives. *Pennsylvania Co. v. Davis*, 4 Ind. App. 51.

Kansas. — *Atchison*, etc., R. Co. v. *Rowe*, 56 Kan. 411.

New Hampshire. — The New Hampshire statute (Laws of N. H. 1879, c. 35) authorizes the recovery of damages only for the injury

Statutes Creating Right of Action Are Not Necessarily Survival Statutes. — The statutes creating a right of action in certain beneficiaries for the wrongful death of a relative are not necessarily survival statutes. Unless the statute provides specifically that an action for personal injuries shall survive, the common-law rule that such actions died with the death of the person injured remains in full force although another and a distinct right of action for the wrongful death is conferred.¹

b. **STATUTES CREATING A NEW CAUSE OF ACTION.** — Lord Campbell's Act and the statutes of most of the states create in favor of certain beneficiaries surviving the deceased an entirely new cause of action, distinct from and independent of any right of action the deceased may have had during his lifetime or would have had if he had survived the injury.² In actions under this class of statutes the inquiry is as to the extent of the damages sustained by the beneficiaries in consequence of the wrongful death, and the loss to the deceased or his pain and suffering are not to be considered. It is not material in such actions whether the deceased survived the injury for any appreciable length of time, the right of action not being dependent upon the extent of any right the deceased had or might have had.

3. Constitutionality of Statutes — *a.* **GENERALLY.** — Statutes giving a right of action for damages resulting from death by wrongful act are usually regarded as free from constitutional objections. Objections to them with respect to their general policy have rarely been made, and never sustained, although particular statutes have been declared unconstitutional on account of special features.³

resulting in death, and not for the injury sustained by the decedent's surviving relatives in consequence of the death, and is a survival statute merely. *Clark v. Manchester*, 62 N. H. 577; *Jewett v. Keene*, 62 N. H. 701.

Ohio. — *Ohio, etc., Coal Co. v. Smith*, 53 Ohio St. 313.

1. In *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 61 Am. & Eng. R. Cas. 605, which was an action begun by a party injured by the defendant company's negligence, the defendant had a verdict and judgment in the trial court. The plaintiff sued out a writ of error to the Federal Supreme Court, and, pending the hearing on this writ, the plaintiff died and his personal representative sought to revive the suit in his name as administrator. The action was under the *West Virginia* statute which provides for a right of action for a wrongful death, but contains nothing with reference to the survival of actions for personal injuries. On motion by the defendant to dismiss the writ of error because it was abated by the death of the plaintiff it was held that the motion should be sustained; that the right of action which the deceased had did not survive under the statute. *Citing Cunningham v. Sayre*, 21 W. Va. 440; *Curry v. Mannington*, 23 W. Va. 14.

2. **Lord Campbell's Act.** — *Pym v. Great Northern R. Co.*, 4 B. & S. 396, 116 E. C. L. 396, 10 Jur. N. S. 199, 11 W. R. 922, *affirming* 2 B. & S. 759, 110 E. C. L. 759, 8 Jur. N. S. 819.

California. — The action given by the statute is a new one, and not merely a transfer to the personal representative of the right the deceased had or would have had if he had lived. *Munro v. Pacific Coast Dredging, etc., Co.*, 84 Cal. 515, 18 Am. St. Rep. 248.

Minnesota. — The statute (Gen. Stat. Minn., c. 77, § 2) creates a new cause of action, and is not a survival statute. The damages are

therefore limited to the pecuniary loss sustained by the beneficiaries named in the statute. *Hutchins v. St. Paul, etc., R. Co.*, 44 Minn. 5.

3. **Constitutionality—Alabama.** — Section 2899 of the Alabama Code of 1876, giving a parent a right of action for the death of his child when such death was caused by the wrongful act of a corporation, was declared unconstitutional as discriminating against corporations. *Smith v. Louisville, etc., R. Co.*, 75 Ala. 449, 21 Am. & Eng. R. Cas. 157. And see *infra*, this section, *When Statute Amounts to Class Legislation*.

Georgia. — *South-Western R. Co. v. Paulk*, 24 Ga. 356 (Act of 1850 upheld); *Georgia R. Co. v. Pittman*, 73 Ga. 325, 26 Am. & Eng. R. Cas. 474 (Act of 1878).

The fact that a statute allowing a recovery for the death of an injured person provides that in such actions such expenses as the deceased would have incurred had he lived should not be deducted from the value of the life of the deceased does not render the statute unconstitutional as special legislation. Nor does a provision in the statute defining the phrase "full value of the life of the deceased" render the statute objectionable as usurping judicial functions. Such a provision merely prescribes the measure of damages. *Clay v. Central R., etc., Co.*, 84 Ga. 345, 42 Am. & Eng. R. Cas. 76.

Kentucky. — *Schoolcraft v. Louisville, etc., R. Co.*, 92 Ky. 233, 48 Am. & Eng. R. Cas. 1.

Section 241 of the new constitution is not invalid as depriving any person of his property without due process of law, although the recovery may be for the benefit of a person having no claim on the deceased for support. *Owensboro, etc., R. Co. v. Barclay*, (Ky. 1897) 43 S. W. Rep. 177.

Missouri. — *Carroll v. Missouri Pac. R. Co.*,

b. WHEN STATUTE AMOUNTS TO CLASS LEGISLATION.—Where the statute confers a right of action against corporations only, it seems to be objectionable as violating that part of the Fourteenth Amendment which provides that no state shall deny to any "person" the equal protection of its laws.¹ But the authorities are not in harmony as to the extent to which such a right of action may be limited to certain classes of persons. Where the distinction against a particular class is founded upon reason and justice and in the fair exercise of the state's police power, without any arbitrary or unjust discrimination, it seems that it will be upheld.²

c. STATUTE ATTEMPTING TO EXCLUDE FEDERAL JURISDICTION.—A statute creating a right of action for a death by wrongful act which attempts to exclude the federal courts from jurisdiction over such actions is void in so far as it attempts to prevent such jurisdiction.³

IV. WHEN THE ACTION WILL LIE — 1. Generally.—The plaintiff in an action for injuries resulting in death is practically in the same position as a plaintiff in an action for personal injuries sustained by himself, and must affirmatively show some wrongful act on the part of the defendant which was the proximate cause of the result complained of. The statutes creating a right of action for injuries resulting in death in no way alter the general rules of law with regard to actions *ex delicto*. These general rules are discussed elsewhere.⁴

88 Mo. 239, 57 Am. Rep. 382, 26 Am. & Eng. R. Cas. 268.

The recent amendment to the Missouri statute authorizing the enforcement in Missouri of a right of action for an injury inflicted in another state, from which death ensued, provided the laws of the latter state gave a right of action, but providing that a person appointed by a Missouri court must sue, is invalid in so far as it seeks to authorize the bringing of the action by a person not authorized to bring it by the laws of the state where the injury occurred. *Wilson v. Tootle*, 55 Fed. Rep. 211.

Texas.—The statute of Feb. 2, 1860, giving a right of action for compensatory damages against any railroad or steamboat company to certain surviving relatives of a person killed through the negligence of such a company, was not abrogated by the Constitution of 1869, § 30, which provided that "every person, corporation, or company, that may commit a homicide, through wilful act or omission, shall be responsible in exemplary damages to the surviving husband, widow," etc. *Gohen v. Texas Pac. R. Co.*, 2 Woods (U. S.) 346; *Houston, etc., R. Co. v. Moore*, 49 Tex. 31, 30 Am. Rep. 98.

1. Statute Held Unconstitutional as Unjustly Discriminating Against Corporations.—The *Alabama* Constitution, art. XIV., § 12, provided that "all corporations shall have the right to sue, and shall be subject to be sued in all courts, in like cases as natural persons." The Code of 1876, § 2899, gave the parent a right of action for the death of a child when caused by the wrongful act of a corporation. It was held that the statute was unconstitutional and void as unjustly discriminating against corporations. *Smith v. Louisville, etc., R. Co.*, 75 Ala. 449, 21 Am. & Eng. R. Cas. 157. See the same principle upheld in South, etc., *Alabama R. Co. v. Morris*, 65 Ala. 193; *San Mateo County v. Southern Pac. R. Co.*, 8 Sawy. (U. S.) 238, 8 Am. & Eng. R. Cas. 1; *Gordon v. Winchester Bldg., etc., Assoc.*, 12 Bush (Ky.)

110, 23 Am. Rep. 713; *Chicago, etc., R. Co. v. Moss*, 60 Miss. 641, 20 Am. & Eng. R. Cas. 555.

2. Statute Upheld.—The *Kentucky* statute (Gen. Stat. Ky., c. 57, § 1) gave a right of action to the personal representative of one not in the employment of a railroad company who should lose his life through the negligence or carelessness of the operators of such railroad. It was contended that this statute was unconstitutional in that it violated the provision of the Fourteenth Amendment requiring that no state should deny to any person within its jurisdiction the equal protection of its laws, and that it also violated the provision of the state constitution which guaranteed equal rights to all persons. The objections to the statute in this connection were, *first*, that it authorized an action against railroads alone, instead of against all persons; and, *second*, that it gave a right of action as against a railroad to all persons except those in its employ. The court held that as to the second ground the defendant railroad company could not complain, the unconstitutionality, if any, being in its favor. As to the first ground, the court held the objection not maintainable. *Schoolcraft v. Louisville, etc., R. Co.*, 92 Ky. 233, 48 Am. & Eng. R. Cas. 1. See also *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 33 Am. & Eng. R. Cas. 390; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 38 Am. & Eng. R. Cas. 267.

3. Exclusion of Federal Jurisdiction Invalid.—The *Wisconsin* statute (Rev. Stat., § 4255) provided, as a condition to the right of action then conferred, that the action should be brought in some court established by the constitution or laws of Wisconsin. It was held that this condition was a nullity in so far as it attempted to prevent jurisdiction by the federal courts of such actions. *Bigelow v. Nickerson*, 70 Fed. Rep. 113, 34 U. S. App. 261. See also *Chicago, etc., R. Co. v. Whitton*, 13 Wall. (U. S.) 270, *per Field*, J.

4. See table of cross-references at the beginning of this title.

2. Deceased Must Have Been Entitled to Sue Had He Lived. — Whether the statute is merely a survival statute or creates an entirely new right of action, it is always essential, in order for a plaintiff to recover, to show that the death occurred under such circumstances as that the deceased, had he lived, would have been entitled to sue. Some wrongful act or omission amounting to negligence on the part of the defendant must be shown, and the deceased must have been free from contributory negligence.¹

3. Death Must Have Been Proximate Consequence of Wrongful Act. — In all cases the plaintiff must show affirmatively that the wrongful act of the defendant was the proximate cause of the death complained of.² And this is a question

1. Essential that Deceased if Alive Would Have Right of Action. — The statutes, following the principle of Lord Campbell's Act, all, with perhaps one or two exceptions, provide that a right of action for a wrongful death exists only in cases where the deceased himself might have maintained the action had he survived.

An action for a homicide must be based upon the violation by the defendant of some duty or obligation he was under to the deceased, and the test must always be: Would the deceased have had a right of action had he lived? Therefore, the wife of an employee who was killed by an accident the risk of which he had assumed by his contract of employment cannot maintain an action to recover for his death. *Western, etc., R. Co. v. Strong*, 52 Ga. 461, 8 Am. Ry. Rep. 13.

All Defenses Which Could Have Been Asserted Against Deceased Available. — Unless the statute clearly provides otherwise, it confers on the beneficiary no higher or better right than the deceased would have had except as to the measure of damages, and every defense available as against an action by the deceased may be asserted as against the beneficiary. *Haigh v. Royal Mail Steam Packet Co.*, 5 Asp. M. C. 189, 4 Ry. & C. T. Cas. XV., 52 L. J. Q. B. 640, 48 J. P. 230, affirming 52 L. J. Q. B. 395, 48 L. T. 267, 5 Asp. M. C. 47; *Armstrong v. South-Eastern R. Co.*, 11 Jur. 758; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Evansville, etc., R. Co. v. Lowdermilk*, 15 Ind. 120; *Texas, etc., R. Co. v. Berry*, 67 Tex. 238, 31 Am. & Eng. R. Cas. 147.

2. For a general discussion of the subject of proximate and remote cause see the title NEGLIGENCE. See also the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 381.

Causal Connection — Illustrations. — In the absence of proof as to how the injury occurred, there can be no recovery. *Newell v. Rahn*, 64 Ill. App. 249. See *Wiese v. Remme*, 140 Mo. 289.

The deceased was injured in a railroad accident, and the injury brought on insanity. About eight months after the accident, in a fit of insanity, he committed suicide. It was held that the accident was merely a remote cause of the death, and that his personal representative could maintain no action under the *Virginia* statute. *Scheffer v. Washington City, etc., R. Co.*, 105 U. S. 249, 8 Am. & Eng. R. Cas. 59.

Where the defendant strikes a blow which knocks the deceased down, and, in falling, the latter's head comes in contact with the pavement, causing his death, the blow by the de-

fendant must be considered the proximate cause of the death. *Mitchell v. Cody*, 6 Misc. Rep. (N. Y. Super. Ct.) 307.

In *Wagner v. Woolsey*, 1 Heisk. (Tenn.) 235, it was alleged that the deceased was driven from his home by the defendants, that he afterwards enlisted in the federal army, was captured and detained as a prisoner of war, and died in prison. It was held that while the deceased, had he lived, might have maintained an action against the defendants for their wrongful conduct in driving him from his home, still his subsequent death after so many other causes had intervened was too remote from the alleged cause to warrant a recovery by his personal representative under the statute.

The plaintiff's action was based on the claim that the deceased had lost his life in a collision between two of the defendant's vessels, on one of which he was a passenger. The only proof was that one witness testified to having seen the dead body at S. (the point for which the deceased was bound) two days after the collision. It was held that it was error, under such facts, to allow the jury to find for the plaintiff, there being no proof that the death was caused by the alleged collision. *Providence, etc., Steamship Co. v. Clare*, 127 U. S. 45.

When Any One of Several Causes May Have Produced the Result. — In *Looram v. Third Ave. R. Co.*, 57 N. Y. Super. Ct. 165, the proof was that the deceased died of peritonitis. It appeared from the testimony of the experts that this might be caused in any one of seven different ways. The jury having found for the plaintiff, it was held that the verdict should not be disturbed, although there was no proof but that several causes not attributable to the defendant's negligence existed in the case. See also *Weber v. Third Ave. R. Co.*, 12 N. Y. App. Div. 512.

Proprietor of Ocean Bathing Resort — Death of Bather. — In *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563, it appeared that the defendant was a company which maintained a bathing place, letting out bathing privileges to the public for hire. It was notified of the disappearance of a bather sufficiently soon after he had been seen to warrant the inference that it might have found and rescued him if immediate efforts had been made. The company had no agent to watch the bathers or to rescue them in case of danger, and in this instance made no efforts to search for the missing bather. It was held that the case should have been submitted to the jury, and it was error to direct a verdict for the defendant.

for the jury when there is any evidence to sustain the plaintiff's contention.¹

"Injury Resulting in Death." — The use in the statutes of the phrase "injury resulting in death" is for the purpose of expressing the common-law rule of proximate cause. It does not change the rule that the defendant cannot be held responsible unless it is made to appear that his wrongful act was the proximate cause of the death.²

Wrongful Act Operating Concurrently with Disease Germs. — In *Randall v. New Orleans, etc.*, R. Co., 45 La. Ann. 778, the plaintiff's claim was that the deceased had been wrongfully expelled from the defendant company's train at night, in freezing weather, at a station where he had to wait several hours before he could get a train returning home; and that in consequence of the cold and exposure he took a cold from which he died. The expert testimony was that the deceased died of typhoid fever, a germ disease; that the exposure could not have brought on this disease unless the deceased was afflicted with it when he commenced his journey. It was held that the expulsion could not be said to be the proximate cause of the death.

Death Caused by Disease Communicated Through a Horse Sold by Defendant. — The case of *State v. Fox*, 79 Md. 514, 47 Am. St. Rep. 424, was an action for a wrongful death alleged to have been caused by a disease contracted from a horse sold by the defendant to the deceased. It was held that an allegation that the disease could "easily be communicated to human beings" did not sufficiently charge that it was contracted by the deceased as a natural and probable consequence of contact therewith.

Mortal Wound — Death Hastened by Poison. — In *Thompson v. Louisville, etc.*, R. Co., 91 Ala. 496, an employee was injured, fatally, according to the testimony of physicians. Afterwards, by mistake, a large quantity of poison was given him, from the effects of which he died. It was held that the injury "resulted" in death within the meaning of the statute, and that a recovery could be had.

Refusal of Deceased to Submit to an Operation. — The mere fact that the deceased rejected his physician's advice and refused to allow an amputation of his injured limb will not affect the right of his representative to recover where it appears that the physician believed that such amputation would merely improve his chances of recovery. The refusal, under such circumstances, would not amount to an efficient intervening cause. *Sullivan v. Tioga R. Co.*, 112 N. Y. 643.

Surgical Operation Necessitated by Injury the Immediate Cause of Death. — The deceased was a strong and healthy man when injured; he was removed to a hospital, where he died five months later. The injury necessitated the performance of a serious operation, and the testimony of the physicians was that he died from the shock of the operation. It was held that the death resulted from the injury caused by the defendant. *Rettig v. Fifth Ave. Transp. Co.*, 6 Misc. Rep. (N. Y. Super. Ct.) 328.

1. Proximate Cause Generally for Jury. — See the title NEGLIGENCE. *East St. Louis Connecting R. Co. v. Dwyer*, 41 Ill. App. 522; *Purcell v. Lauer*, 14 N. Y. App. Div. 33, 4 N.

Y. Ann. Cas. 129; *Taft v. Brooklyn Heights R. Co.*, 14 N. Y. Misc. Rep. (Brooklyn City Ct.) 390; *Lyons v. Second Ave. R. Co.*, 89 Hun (N. Y.) 374, 2 N. Y. Ann. Cas. 402.

In *Sorenson v. Northern Pac. R. Co.*, 36 Fed. Rep. 166, the proof was that immediately after the injury complained of the decedent's health began to fail, and he died a year later. Two or three years prior to the injury the decedent had been injured by the fall of a derrick, but he had recovered from this and was a strong and hearty man before the last accident. The expert testimony as to the cause of his death was conflicting. It was held that a finding of the jury that the last accident caused his death should not be disturbed.

How Cause of Death to Be Proved. — The cause of the death need not necessarily be proved by eyewitnesses, but may be shown by evidence of the surrounding circumstances and of the physical facts. Thus where the deceased was found dead in the street under an electric light wire which was hanging too low and was un-insulated, and the testimony of physicians showed that his physical organs were in a normal condition when a post-mortem examination was made, and that he could not have died from any disease, it was held that the jury was warranted in finding that the death resulted from his coming into contact with an uninsulated wire, particularly where there were burns on his arm apparently caused by a "live" electric wire. *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658. See also *Ray v. Poplar Bluff*, 70 Mo. App. 252.

2. Injury Resulting in Death. — Where the proof shows that the deceased was injured in the accident, and that from that time until his death he could not walk or speak, a finding that the death resulted from the injury is justified. *Chicago, etc., R. Co. v. Beatty*, 13 Ind. App. 604.

Evidence — Post-mortem Examination. — In determining whether the death complained of resulted from the injury inflicted by the defendants, the results of a post-mortem examination of the decedent's body are competent evidence. *McClellan v. Fort Wayne, etc., R. Co.*, 105 Mich. 101.

Death Caused by Injury. — Where the statute gives a right of action for a death caused by the wrongful act of another, it is error, in an action against a physician for malpractice to charge that the plaintiff is entitled to recover if the defendant's negligence "contributed" to the death. *Chase v. Nelson*, 39 Ill. App. 53.

When Contributory Negligence Is Alleged. — In *Kuhn v. Delaware, etc., R. Co.*, 92 Hun (N. Y.) 74, it was held that the trial court was right in charging the jury that if there was negligence on the part of the deceased which contributed to cause the death, and but for which the death would not have occurred, "then it could not be said that his death was the result

4. Wrongful Act Does Not Embrace Omission. — On the principle that statutes of this class, being in derogation of the common law, must be strictly construed, it has been held in *Rhode Island* that an action will not lie for a death resulting from the mere passive neglect or omission of duty on the part of the defendant where the statute authorizes an action for a death resulting from "the wrongful act" of any person or corporation.¹

5. What Is Wilful Neglect. — Under a *Kentucky* statute which gave a right of action for death due to "wilful neglect," the question of the existence of wilful neglect depends upon the facts of each particular case. The proof must show such conduct on the part of the defendant or his agents as amounts to a wilful, deliberate killing, or indicates a reckless disregard of the rights of others.² Under the present *Kentucky* statute giving a right of action for death resulting from an injury inflicted by negligent or wrongful act,³ an action for death due to "wilful neglect" cannot be maintained.⁴

6. Felonious and Intentional Killing. — Many of the statutes expressly provide that it is immaterial whether the killing was felonious or not.⁵

In the Absence of Express Statutory Provision, it seems that the action may be maintained whether the killing was felonious or not.⁶

of the accident, but was the result of his own negligence. But if death would have occurred in any event, whether he was careless or not, then I do not think the defendant is relieved."

Under the Kansas Statute (Civ. Code, § 422), which is a survival statute purely, an action for personal injuries survives to the personal representative, whether the death results from the injury inflicted by the defendant or from other causes. *Martin v. Missouri Pac. R. Co.*, (Kan. 1897) 49 Pac. Rep. 605.

1. Passive Neglect or Omission Not "Wrongful Act." — *Myette v. Gross*, 18 R. I. 729.

Where the cause of the death was the negligent omission of the defendant to shore up the roof of his mine, no action lies under the *Rhode Island* statute providing for a recovery when the death is caused "by the wrongful act" of a person, etc. *Myette v. Gross*, 18 R. I. 729, citing *Bradbury v. Furlong*, 13 R. I. 15, 43 Am. Rep. 1.

Most of the statutes specifically provide that the action may be maintained when the death is due to "the wrongful act or omission" or "the wrongful act, neglect, or default" of the defendant. See the various statutes.

2. Kentucky Statute — Wilful Neglect. — *Louisville, etc., R. Co. v. Coniff* (Ky. 1894) 27 S. W. Rep. 865.

For cases illustrating circumstances under which a finding of wilful neglect was held to be justified, see *Louisville, etc., R. Co. v. Hurst*, (Ky. 1892) 20 S. W. Rep. 817; *Louisville, etc., R. Co. v. Potts*, 92 Ky. 30. See also *Shelby v. Cincinnati, etc., R. Co.*, 85 Ky. 224; *Hammill v. Louisville, etc., R. Co.*, 93 Ky. 343.

Cases wherein the facts were held not sufficient to establish wilful neglect are: *Derby v. Kentucky Cent. R. Co.*, (Ky. 1887) 4 S. W. Rep. 303; *Rogers v. Hughes*, 87 Ky. 185; *Reinder v. Blick, etc., Coal Co.*, (Ky. 1890) 13 S. W. Rep. 719; *Filbin v. Chesapeake, etc., R. Co.*, 91 Ky. 444; *O'Bannon v. Louisville, etc., R. Co.*, (Ky. 1888) 6 S. W. Rep. 434. See also *Simmons v. Louisville, etc., R. Co.*, (Ky. 1892) 18 S. W. Rep. 1024.

3. Ky. Stat. (Barb. & Carr. 1894), c. 1, § 6, p. 172.

4. Clark v. Louisville, etc., R. Co., (Ky. 1897) 39 S. W. Rep. 840.

5. See the statutes.

6. Immaterial Whether Killing Was Felonious or Not. — The right of action is not confined to cases where the wrongful act causing the death amounted to a crime. *Donaldson v. Mississippi, etc., R. Co.*, 18 Iowa 280, 87 Am. Dec. 391; *Central R. Co. v. Roach*, 70 Ga. 434; *Vawter v. Hultz*, 112 Mo. 633. See also *McDonald v. Eagle, etc., Mfg. Co.*, 68 Ga. 839.

And the action may be maintained although the killing was felonious. *Wise v. Teerpenning*, 2 Edm. Sel. Cas. (N. Y. Supreme Ct.) 112; *Sawtell v. Western, etc., R. Co.*, 61 Ga. 567; *Gray v. McDonald*, 104 Mo. 303. See also *Wallace v. Stevens*, 74 Tex. 559; *Stephens v. Wallace*, 10 Tex. Civ. App. 44.

In *Burnham v. Stone*, 101 Cal. 164, the defendant officer, in attempting to execute a writ of restitution, killed the deceased while the latter was resisting the execution of the writ. The description in the writ was by reference to certain buildings, but there was an error in that part of the description relating to the government subdivisions. It was held that the description by buildings justified the officer in executing the writ as to the land on which they were situated, and he was therefore not a trespasser, and could not be held liable as such for the death occurring in consequence of his execution of the writ. See also *Garcia v. Sanders*, (Tex. Civ. App. 1896) 35 S. W. Rep. 52, reversed in 90 Tex. 103.

But in Colorado it seems that the statute providing that all actions, except a certain excepted class, shall survive to and against the personal representative, does not include actions for felonious killing. See *Munal v. Brown*, 70 Fed. Rep. 967.

And in Kentucky also this is true. The *Kentucky* statutes "have enlarged the common-law rule by making railroad companies and other corporations liable when death ensues to one by reason of the wilful neglect of the agents or servants of the corporation; and when the party killed is not in the employ of the corporation an action may be maintained for a less degree of neglect than either gross

The Prior Conviction of the Wrongdoer is not essential to a maintenance of the action except where the statute expressly so provides.¹

Intentional Killing. — Such being the doctrine with regard to felonious deaths, the fact that a death is intentionally inflicted does not, of course, take the killing out of the operation of the statutes or relieve from liability the person to whom the death is due, unless the killing is done in self-defense or the person is otherwise free from blame.²

7. Death Instantaneous³ — a. AS EXCLUDING CAUSE OF ACTION. — Whether or not the fact that death was instantaneous is material as to a plaintiff's right to recover, must depend wholly on the nature of the right of action created by the statute. Where, as in some jurisdictions, the action is for the benefit of the estate of the deceased, purely, and is brought by the personal representative, the right of action is only such as the deceased had in his lifetime; and it has been held that if the injury and death are simultaneous nothing can be recovered, but this course of decision has not been followed under all the statutes.⁴

or wilful neglect." Under this it is held that where the deceased died from an injury wilfully and intentionally inflicted, he can maintain no action. The statutes of the state expressly say that no right of action for personal injury, etc., shall cease or die with the person injured, except actions for assault and battery, etc. *Winnegar v. Central Pass. R. Co.*, 85 Ky. 547, 34 Am. & Eng. R. Cas. 463. See also *Spring v. Glenn*, 12 Bush (Ky.) 172; *Morgan v. Thompson*, 82 Ky. 383.

In *Winnegar v. Central Pass. R. Co.*, 85 Ky. 547, the deceased was a passenger on a street railway, and his death was caused by the driver's wilfully assaulting him and throwing him from the car.

But an action may be maintained under Gen. Stat. Ky. (1894), c. 1, § 6, which gives a right of action to the widow or minor child of a person killed by the malicious use of firearms. Under this statute only the widow or minor child of the deceased can sue. The broad provision of § 241 of the constitution (1891), providing for an action by the personal representative where the death is caused by the "negligence or wrongful act" of the defendant, does not embrace a case of felonious killing. *McClure v. Alexander*, (Ky. 1894) 24 S. W. Rep. 619.

Defendant Liable Though Killing Was Only Manslaughter. — The fact that the defendant killed the deceased under such justifying circumstances as would reduce his crime to manslaughter in the criminal courts will not relieve him from liability. *McClurg v. Ingleheart*, (Ky. 1895) 33 S. W. Rep. 80.

1. Prior Conviction. — *Wise v. Teerpenning*, 2 Edm. Sel. Cas. (N. Y. Supreme Ct.) 112.

Under the *Georgia* Code the widow of a passenger killed on a railroad must either prosecute for the felony as prescribed in § 2970, or make it appear that there is a good excuse for her failure to do so. The fact of her nonresidence, her poverty, and her ignorance of who the real criminal is will not suffice for an excuse. A homicide resulting from a collision of trains is *prima facie* felonious within the statute. *Sawtell v. Western*, etc., R. Co., 61 Ga. 567.

The failure to allege a prosecution in the declaration is an error which may be cured by

amendment. *Weekes v. Cottingham*, 58 Ga. 559.

See generally the title MERGER.

2. *Nichols v. Winfrey*, 79 Mo. 544, 90 Mo. 403; *Wallace v. Stevens*, 74 Tex. 559; *Stephens v. Wallace*, 10 Tex. Civ. App. 44.

3. See *supra*, this title, *The Right of Action in Absence of Statute — Death Not Instantaneous*.

As to how far the fact that the death was instantaneous affects the measure of damages recoverable, see *infra*, this title, *Elements to Be Considered in Estimating Damages — Death Practically Instantaneous*.

4. Action for Benefit of Estate Brought by Representative — Iowa. — See *Kellow v. Central Iowa R. Co.*, 68 Iowa 470, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858, where it was said that in such actions the test is whether the deceased lived after the injury, and not the length of time he lived thereafter.

The rule is otherwise now, by virtue of a later statute. See the next paragraph *infra*.

Massachusetts. — Mass. Stat. of 1842, c. 81, § 1, contemplated the deceased as having been entitled to an action for the injury, and either to have brought an action and subsequently died, or, being entitled to it, to have died before exercising his right. Under such a statute, no recovery could be had where the death was instantaneous. *Kearney v. Boston*, etc., R. Corp., 9 Cush. (Mass.) 108. See also *Bancroft v. Boston*, etc., R. Corp., 11 Allen (Mass.) 34; *Moran v. Hollings*, 125 Mass. 93; *Corcoran v. Boston*, etc., R. Co., 133 Mass. 507, 12 Am. & Eng. R. Cas. 226; *Riley v. Connecticut River R. Co.*, 135 Mass. 292, 15 Am. & Eng. R. Cas. 181; *Nourse v. Packard*, 138 Mass. 307; *Mulchahey v. Washburn Car Wheel Co.*, 145 Mass. 281, 1 Am. St. Rep. 453; and *infra*, this section and subdivision, *What Amounts to Instantaneous Death*.

The former rule has been abrogated to the extent that a recovery may be had in certain cases of instantaneous death of an employee, provided notice, as required by the statute, is given to the employer. Mass. Stat. 1887, c. 270, § 3; 1888, c. 155, § 1.

The notice required may be given by some one in the decedent's behalf within thirty days after the occurrence, or by the executor or administrator within thirty days after his ap-

And This Fact Has Been Held Not Material where, as is the case in most of the states, the right of action is not based upon any right the deceased might have been entitled to had he lived, but is given to surviving relatives to compensate them for the pecuniary injury they may have sustained by reason of the wrongful death.¹

pointment. *Daly v. New Jersey Steel, etc., Co.*, 155 Mass. 1. Or it may be given by the widow of the deceased. *Gustafsen v. Washburn, etc., Mfg. Co.*, 153 Mass. 468. See also *Hodnett v. Boston, etc., R. Co.*, 156 Mass. 86, as to what is a proper compliance with the statute as to notice.

An action under Stat. of 1887, c. 270, § 3, as amended by Stat. of 1888, c. 155, § 1, for the instantaneous death of an employee, brought by the widow, is supported by a notice in the form required by the statute, given by the administrator of the decedent's estate within thirty days after his appointment. *Jones v. Boston, etc., R. Co.*, 157 Mass. 51; *Dickerman v. Old Colony R. Co.*, (Mass. 1892) 31 N. E. Rep. 728, 157 Mass. 52, note.

Mississippi. — The case of *Illinois Cent. R. Co. v. Pendergrass*, 69 Miss. 425, was not an action by a relative of the deceased under Code of 1880, § 1510 (copied after Lord Campbell's Act), but was an action by a personal representative under § 2070, which provided that the executor or administrator might commence and prosecute any action "which the testator or intestate might have commenced and prosecuted." It was held that the latter section of the code conferred no right of action on the executor or administrator for the wrongful death of the deceased where the death was simultaneous with the injury. See also *Vicksburg, etc., R. Co. v. Phillips*, 64 Miss. 603.

New Jersey. — A husband cannot maintain an action for the loss of his wife's services where it appears that she was killed instantly. *Grosso v. Delaware, etc., R. Co.*, 50 N. J. L. 317. See also *Lucas v. New York Cent. R. Co.*, 21 Barb. (N. Y.) 245.

South Carolina. — Under S. Car. Gen. Stat., §§ 2183-2186, a right of action for a wrongful death is given to the personal representative for the benefit of certain dependent kindred of the deceased. This right of action, although it exists only in cases where the deceased could have maintained an action had he lived, is not affected by the fact that the death was instantaneous. *Reed v. Northeastern R. Co.*, 37 S. Car. 42, following *Price v. Richmond, etc., R. Co.*, 33 S. Car. 562.

South Dakota. — The right of action by surviving relatives of the deceased to recover such damages as they have sustained in consequence of the death is not affected by the fact that the death was instantaneous, though such a fact bars any action by the personal representative, his right of action being confined to the damages suffered by the deceased. *Belding v. Black Hills, etc., R. Co.*, 3 S. Dak. 369, 52 Am. & Eng. R. Cas. 624.

Tennessee. — It was originally held that the fact that the death was instantaneous would bar any recovery at all under the then existing statutes (T. & S. Code, 2291-2293). *Louisville, etc., R. Co. v. Burke*, 6 Coldw. (Tenn.) 45. But this case was afterwards expressly overruled on this point, and a contrary doctrine

established. *Nashville, etc., R. Co. v. Prince*, 2 Heisk. (Tenn.) 580; *East Tennessee, etc., R. Co. v. Mitchell*, 11 Heisk. (Tenn.) 400; *Fowlkes v. Nashville, etc., R. Co.*, 9 Heisk. (Tenn.) 829, 5 Baxt. (Tenn.) 663.

A still later decision, however, has established the rule that the damages recoverable under §§ 2291-2293 of T. & S. Code (§§ 3130, 3131, 3133 of M. & V. Code) are merely such damages as the deceased himself sustained — such damages as would have been recoverable by him in an action brought at the time of his death. *Nashville, etc., R. Co. v. Smith*, 9 Lea (Tenn.) 474; *Chicago, etc., R. Co. v. Pounds*, 11 Lea (Tenn.) 129.

These latter cases did not involve cases of instantaneous death, but it would seem to be a necessary consequence of their holding, that nothing more than nominal damages could be recovered where the death was instantaneous.

Under the present statute, which enlarges the measure of damages (M. & V. Code, § 3134), the question as to the death having been immediate is immaterial, except as affecting the measure of damages.

Texas. — The action for actual damage to the parents and other relatives of the deceased, under Sayles Tex. Civ. Stat., arts. 2899-2900, may be maintained although the death was instantaneous. *International, etc., R. Co. v. Kindred*, 57 Tex. 491, 11 Am. & Eng. R. Cas. 649. See also *March v. Walker*, 48 Tex. 372.

The Character of Action Conferred by the Statute Must Be Considered. — In *Illinois Cent. R. Co. v. Pendergrass*, 69 Miss. 425, the court, by Woods, J., said: "The confusion in the minds of some text-writers has arisen from failure to remember that the seeming diversity of opinion in courts of last resort has arisen out of language employed in construing variant and dissimilar statutes on this same general subject of the survival of actions to personal representatives."

1. Fact of Instantaneous Death Not Affecting Right of Action — *England.* — See *Pym v. Great Northern R. Co.*, 4 B. & S. 396, 116 E. C. L. 396, 10 Jur. N. S. 199, 11 W. R. 922.

Connecticut. — *Murphy v. New York, etc., R. Co.*, 30 Conn. 184.

Iowa. — Under the later Iowa statutes the fact that the death was instantaneous is not material. *Worden v. Humeston, etc., R. Co.*, 72 Iowa 203; *Connors v. Burlington, etc., R. Co.*, 71 Iowa 490, 60 Am. Rep. 814.

The rule was otherwise prior to the later statutes. See *Kellow v. Central Iowa R. Co.*, 68 Iowa 470, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858, and the last paragraph *supra*.

The statute (Iowa Code of 1873, §§ 2525-2527. Code of 1888, §§ 3730-3732) expressly provides that all causes of action shall survive, and not be affected by the death of the party entitled thereto, and that the right to the civil remedy for a wrongful death shall not be merged in the public offense, but may be enforced independently. As these provisions destroy the

b. EXCLUDES RECOVERY FOR PAIN AND SUFFERING. — Without regard to the character of the statute or to its special provisions with reference to damages for the pain and suffering of the deceased, manifestly there can be no recovery on this element of damage when the death was instantaneous.¹

c. WHAT AMOUNTS TO INSTANTANEOUS DEATH. — The death is to be regarded as instantaneous unless there was an appreciable length of time between the moment of the injury and the moment of death.² It seems that it is not material whether the deceased was conscious during the intervening time or not, though there must be actual life during such time.³

V. DEFENSES TO THE ACTION — 1. In General. — The defenses to actions for injuries resulting in death are largely the same as in actions for personal

grounds upon which the common-law rule rested, they abrogate that rule entirely. And since it is only by virtue of the common-law rule that recovery was denied in any case, the fact that the death was instantaneous is not material. *Connors v. Burlington, etc., R. Co.*, 71 Iowa 490, 60 Am. Rep. 814.

Massachusetts. — Under the Employers' Liability Act, a right of action exists, by special provision, where the deceased died "instantly or without conscious suffering." *Maier v. Boston, etc., R. Co.*, 158 Mass. 36. See the last paragraph *supra*.

Nevada. — Under Nev. Comp. Laws, p. 39, § 115, providing for a recovery for injuries resulting in death, the fact that the death was instantaneous is not material. *Roach v. Consolidated Imperial Min. Co.*, 7 Sawy. (U. S.) 224.

New Hampshire. — See *Clark v. Manchester*, 62 N. H. 577.

New York. — Under the Act of 1847, a recovery could be had although the death was instantaneous. *Brown v. Buffalo, etc., R. Co.*, 22 N. Y. 191.

1. See *infra*, this title, *Elements to Be Considered in Estimating Damages — Physical and Mental Suffering of Deceased*.

2. **When Death Instantaneous.** — *Iowa.* — The test is not how long the injured party lived after his injury was received, but whether he lived at all. *Kellow v. Central Iowa R. Co.*, 68 Iowa 470, 21 Am. & Eng. R. Cas. 485, 56 Am. Rep. 858.

Massachusetts. — If the evidence is conflicting, the question as to whether the deceased survived his injuries for an appreciable length of time is for the jury. *Tully v. Fitchburg R. Co.*, 134 Mass. 499, 14 Am. & Eng. R. Cas. 682.

In an action under Mass. Stat. of 1887, c. 270, for the killing of a brakeman, who apparently, no one having seen the accident, was killed by reason of his head coming in contact with an overhead bridge while he was riding on the top of a high refrigerator car attached to the rear end of the caboose of a freight train, the facts that the speed of the train was about twenty miles an hour at the time; that the lesions on his head were sufficient to produce instant death; that the men in the caboose, though very near him, heard no outcry; and that the defendant's workmen on another train, who picked up the dead body, were not called as witnesses, justify the inference that the deceased died instantly or without conscious suffering. *Maier v. Boston, etc., R. Co.*, 158 Mass. 36.

Where the deceased was killed by falling a distance of forty feet, and death occurred instantly upon his striking the ground, such death is simultaneous with the injury, the length of time occupied in falling not being appreciable. *Moran v. Hollings*, 125 Mass. 93. Compare *Bancroft v. Boston, etc., R. Corp.*, 11 Allen (Mass.) 34, where it was held that the death was not instantaneous, although the injured man lived only fifteen minutes and was unconscious during that time.

Under Massachusetts Employers' Liability Act (Pub. Stat. 1887, c. 270, § 3; Stat. 1888, c. 155), notice must be given to the employer within thirty days when the death is instantaneous, otherwise there can be no recovery. A notice leaving to conjecture the question as to whether the employee, who was injured at a certain time, regained consciousness before his death on the same day, is not a sufficient compliance with the statute. *Hodnett v. Boston, etc., R. Co.*, 156 Mass. 86.

Mississippi. — The deceased, somewhat intoxicated, was last seen alive walking on the defendant's railroad track, in the town of C., about twelve o'clock at night. Shortly afterwards a train passed, running at the rate of forty miles an hour, and after that another train running slowly. The next morning his mutilated remains were found scattered along the track about ninety yards, showing that he had been struck by a swiftly moving train. The defendant's employees knew nothing of the occurrence at the time. In an action by the personal representative under Code of 1880, §§ 2078, 2079, it was held that the plaintiff could not recover, since the jury could not possibly be warranted in finding that the deceased had survived the injury for any appreciable space of time. *Illinois Cent. R. Co. v. Pendergrass*, 69 Miss. 425.

3. **Must Be Actual Life.** — Something more than a mere spasmodic twitching of the muscles of the body, which is consistent with the extinction of life, must be shown. *Haring v. New York, etc., R. Co.*, 13 Barb. (N. Y.) 9.

When the deceased, a passenger, lived only fifteen minutes after he was injured, and was unconscious during that entire time, it was held that death was not instantaneous. *Bancroft v. Boston, etc., R. Corp.*, 11 Allen (Mass.) 34.

"The accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind, on the part of the sufferer." *Hollenbeck v. Berkshire R. Co.*, 9 Cush. (Mass.) 481.

injuries, and are fully discussed in other articles.¹ The present discussion is confined to certain applications of general doctrines in actions for death due to wrongful acts.

2. Fellow-servant Doctrine Not Abrogated. — Although the statutes employ the comprehensive phrase that when the death of a person is caused by the wrongful act of "any person" the action may be maintained, it is uniformly held that the term "any person" does not include a fellow-servant, and the defense arising from the doctrine of fellow-servants is available when it can be made out.²

3. Contributory Negligence. — The broad language of the statutes is not to be construed as giving a right of action for substantial damages in every case where a death results from the wrongful act of a defendant. The defense of contributory negligence is always available to the defendant if there is proof to support it.³ Many of the statutes specifically provide that the action may be maintained only in cases where the death occurred under such circumstances as would have entitled the deceased to sue had death not ensued.⁴

But Where the Killing Was Wilful or Felonious, the defense of contributory negli-

1. See the titles CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368; FELLOW-SERVANTS; MASTER AND SERVANT; RELEASE AND DISCHARGE.

2. **Negligence of Fellow-servants a Defense.** — *Miller v. Missouri Pac. R. Co.*, 109 Mo. 350, 32 Am. St. Rep. 673; *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113; *Proctor v. Hannibal, etc., R. Co.*, 64 Mo. 112, 9 Am. Ry. Rep. 440, *overruling Schultz v. Pacific R. Co.*, 36 Mo. 13; *Lutz v. Atlantic, etc., R. Co.*, 6 N. Mex. 496, 53 Am. & Eng. R. Cas. 478. Compare *Philo v. Illinois Cent. R. Co.*, 33 Iowa 47, where it is held that, under Acts of 9th Gen. Assembly, c. 169, § 7, making railroad companies liable "to any person sustaining such damage," etc., the personal representative of an employee who was killed in consequence of the negligence or mismanagement of other employees of the company could maintain the action.

Massachusetts — Employers' Liability Act. — Under the act creating a right of action generally for a wrongful death (Mass. Pub. Stat., c. 112, § 212; Acts of 1883, c. 243), a personal representative cannot maintain an action for the death of an employee resulting from the negligence of a fellow-servant, for the reason that the deceased, had he survived, could not have maintained an action. Under the later statute, the Employers' Liability Act, a right of action is allowed in such cases, with some qualifications, but the right is given to the widow of the deceased or his dependent next of kin. It is held that, reading the two statutes together, it is plain that the legislature intended to remove the defense existing under the fellow-servant rule only in cases where the widow or next of kin sued, and that the defense was available still as against an action by the personal representative. *Clark v. New York, etc., R. Co.*, 160 Mass. 39.

3. **Defense of Contributory Negligence Available.** — *Alabama, etc., R. Co. v. Burgess*, (Ala. 1897) 22 So. Rep. 913 (action under Ala. Civ. Code, § 2588); *Baltimore, etc., R. Co. v. Pletz*, 61 Ill. App. 161; *Kauffman v. Cleveland, etc., R. Co.*, 144 Ind. 456; *Chandler v. New York, etc., R. Co.*, 159 Mass. 589. See also the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 444.

Circumstantial Evidence. — The fact that the deceased was not guilty of any contributory negligence may be proved by circumstantial evidence. *Fejdowski v. Delaware, etc., Canal Co.*, 12 N. Y. App. Div. 589.

When Question Need Not Be Submitted to Jury. — Where the only evidence given in the case shows that the deceased was guilty of contributory negligence, the mere fact that all the witnesses were adverse and were employees of the defendant company does not warrant the trial court in submitting the question to the jury to determine the weight of the evidence. *Bunt v. Sierra Butte Gold Min. Co.*, 138 U. S. 483, *affirming* 24 Fed. Rep. 847.

Collision of Vessels — Mutual Fault. — Where the statute limits the right of action to cases where the deceased might have recovered had he lived, no action will lie against a tug for the death of one of the crew caused by a collision due partly to the negligence of the tug's officers and partly to that of the officers of the colliding ship. The only remedy is against the latter vessel for one-half the damages. *The Job T. Wilson*, 84 Fed. Rep. 204.

In Kentucky the statute originally provided that a recovery might be had in any case for a death caused by wilful neglect, and the rule was that contributory negligence was no defense to an action based on such neglect. *Ky. Gen. Stat.*, c. 57, §§ 1-3.

The later statute (*Ky. Stat.*, § 6), passed in pursuance of § 241 of the constitution, provides for a recovery in cases of death caused by the "negligence or wrongful act" of a defendant. Under this there is no special right of action for "wilful neglect" as allowed by the former statutes, and a plaintiff cannot recover in a case where the deceased was guilty of contributory negligence by alleging "wilful neglect." *Clark v. Louisville, etc., R. Co.* (Ky. 1897) 39 S. W. Rep. 840.

The constitution of 1891 (§ 241) did not deprive the defendant of the defense of contributory negligence. *Passamaneck v. Louisville R. Co.*, 98 Ky. 195.

4. See *supra*, this title, *When the Action Will Lie — Deceased Must Have Been Entitled to Sue Had He Lived*. See also the statutes.

gence of the deceased cannot be set up. The general doctrine of contributory negligence has no application to such a case.¹

When Self-defense is the defense relied on by the defendant in a civil action for a wrongful killing, the defense does not depend upon the belief of the jury as to whether the defendant was in danger; the inquiry must be whether the defendant had reasonable grounds to believe and did believe that he was in danger from which he could protect himself only by taking the life of his opponent.²

Imputable Negligence. — Some authorities hold that where the death of a child of tender years has resulted from a wrongful or negligent act, and suit is brought to recover damages for the death, contributory negligence on the part of the parent or other person who is to benefit by the recovery is a bar to the action.³ Other cases hold that such negligence constitutes no bar, at least where the action is for the benefit of the decedent's estate.⁴

Where There Are Several Beneficiaries, some of whom are chargeable with contributory negligence, it has been held that, under a statute which requires the jury to assess the damages for the beneficiaries distributively, the right of action of

1. Contributory Negligence No Defense when Homicide Intentional. — *Kain v. Larkin*, 56 Hun (N. Y.) 79. See also *Louisville, etc., R. Co. v. Markee*, 103 Ala. 160.

Contributory negligence on the part of the deceased in not avoiding the conflict is no defense to an action for his wrongful death, since the rule of contributory negligence cannot apply in such a case, the right of self-defense being absolute. *Gray v. McDonald*, 104 Mo. 308. See also *McClurg v. Ingleheart*, (Ky. 1895) 33 S. W. Rep. 80.

2. Self-defense. — *McClurg v. Ingleheart*, (Ky. 1895) 33 S. W. Rep. 80; *Nichols v. Winfrey*, 79 Mo. 544, 90 Mo. 403; *Stephens v. Wallace*, 10 Tex. Civ. App. 44; *Wallace v. Stevens*, 74 Tex. 559. See also the title SELF-DEFENSE.

Evidence in such a case offered by the defendant to prove his reputation as a peaceable, honorable, and law-abiding man, is not competent. *Vawter v. Hultz*, 112 Mo. 633. See also *Lexington, etc., Min. Co. v. Huffman*, (Ky. 1895) 32 S. W. Rep. 611.

The Burden of Proof to show the killing wrongful is upon the plaintiff. *Nichols v. Winfrey*, 79 Mo. 544.

3. Injury to Young Child — Negligence of Beneficiary Bars Action. — *Chicago City R. Co. v. Wilcox*, 138 Ill. 370, *affirming* 33 Ill. App. 450; *Pekin v. McMahon*, 154 Ill. 153; *Chicago, etc., R. Co. v. Logue*, 158 Ill. 621; *Baltimore, etc., R. Co. v. Pletz*, 61 Ill. App. 161; *Westerfield v. Lewis*, 43 La. Ann. 63; *Wolf v. Lake Erie, etc., R. Co.*, 55 Ohio St. 517. See also the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 449.

In *Baltimore, etc., R. Co. v. Pletz*, 61 Ill. App. 161, the court said: "However the doctrine [of imputable negligence] may be criticised as inequitable when the infant is the plaintiff, no such objection can be urged when the administrator sues for the benefit mainly of those whose negligence was the proximate cause of the injury and the loss of life."

In *Wolf v. Lake Erie, etc., R. Co.*, 55 Ohio St. 517, it was held that, as a parent could not recover in his own name for an injury to, or the death of, his child where the parent's own negligence had contributed to the injury or death, there could be no recovery in an action by the personal representative of a deceased

infant for the benefit of a parent, where the latter was guilty of contributory negligence. The intervention in the action of the personal representative, who was a mere trustee, was held immaterial.

Acquiescence of Parent in Dangerous Employment. — In an action for the death of a minor killed in the defendant's employ, the death being due to the defendant's failure to give him proper instructions, there can be no recovery by the parents of the deceased if they consented to his being employed as he was, with knowledge of the fact that he had not sufficient knowledge and judgment to understand the dangers of his employment, and had not acquired such knowledge from any source since his employment. But the statement of the father that he did not have the defendant discharge his son, because he was afraid it would discourage him and cause him to go with some other railroad, is competent on the issue as to the father's acquiescence in the employment. *Missouri, etc., R. Co. v. Evans*, (Tex. Civ. App. 1897) 41 S. W. Rep. 80.

4. Negligence of Beneficiary No Bar. — *Wymore v. Mahaska County*, 78 Iowa 396, 16 Am. St. Rep. 449; *Norfolk, etc., R. Co. v. Groseclose*, 88 Va. 267, 29 Am. St. Rep. 718, where the court said: "When the facts are such that the child could have recovered had his injuries not been fatal, his administrator may recover, without regard to the negligence or presence of the parent at the time the injuries were received, and although the estate is inherited by the parent."

In *Wolf v. Lake Erie, etc., R. Co.*, 55 Ohio St. 533, these cases are distinguished from those asserting the doctrine that the parent's negligence is a bar, on the ground that, according to the statutes under which they were decided, the damages arising from the wrongful death survived and became a part of the estate of the deceased, and were inherited from the estate by the named beneficiaries as heirs. "The contributory negligence of such heirs," it was said, "does not constitute a defense to an action brought by an administrator for the recovery of such damages, because the damages are part of the estate, and the estate is cast upon the heirs by operation of law."

the innocent beneficiaries is not barred;¹ and where the damages are assessed in a lump sum, and the right of all must stand or fall together, a recovery may be had, though some are guilty of contributory negligence.²

4. Accord and Satisfaction — *a. BY ONE BENEFICIARY* — **Effect and Validity of.** — One of several beneficiaries cannot compromise the right of action against a defendant and thereby bind the other beneficiaries, at least unless the party making the compromise has the right of action expressly vested in him.³

Compromise by Beneficiaries Without Consent of Personal Representative. — When the right of action is vested solely in the personal representative, although for the express use and benefit of the widow and children or others, he alone has the power to compromise the suit, and a compromise and settlement made by the defendant with the beneficiaries alone will be no bar to an action by him.⁴

b. BY WIDOW OF DECEASED. — The widow of the deceased has been held to have the right to compromise when the right of action was vested in her, although it was expressly provided in the statute that the recovery should be for the benefit of herself and the children of the deceased.⁵

1. Several Beneficiaries — Some Negligent. — *Wolf v. Lake Erie, etc., R. Co., 55 Ohio St. 517.* The court in this case laid down the rule for assessing damages in such cases as follows: "It, therefore, seems clear that, in arriving at the total amount of damages to be awarded under the statute as amended, the jury should consider the pecuniary injury to each separate beneficiary (not found guilty of contributory negligence), but return a verdict for a gross sum which should be distributed among the beneficiaries not found guilty of contributory negligence. As to beneficiaries found guilty of contributory negligence, no damages should be awarded on their account."

2. Cleveland, etc., R. Co. v. Crawford, 24 Ohio St. 631, 15 Am. Rep. 633, as explained in *Wolf v. Lake Erie, etc., R. Co., 55 Ohio St. 534.*

3. Compromise Not Allowed. — The validity of the compromise seems to depend upon whether it is made by the party in whose name the action is brought. Thus in *Indiana* it is held that under the statute authorizing an action for the death of a person to be brought by his administrator, the damages to inure to the exclusive benefit of the widow and children of the deceased, the widow cannot compromise the cause of action and release the damages so as to preclude a suit by the administrator, even though it is shown that there were no children. *Yelton v. Evansville, etc., R. Co., 134 Ind. 414, 54 Am. & Eng. R. Cas. 69.* See also *Dowell v. Burlington, etc., R. Co., 62 Iowa 629, 15 Am. & Eng. R. Cas. 153* (action commenced by administrator; widow held to have no right to compromise it).

The *Tennessee* statute provides that the action may be commenced by the widow, or by the children if there be no widow, or by the personal representative. *M. & V. Code (Tenn.) 3130-3132.* Under this, the widow has the first right to sue, and if she exercises it she may compromise the action at any time. See note 5, *infra*. But when she does not sue, and the administrator then brings the action, she has no power to compromise the suit brought by the administrator. "It was his suit, and, being so, he alone had the right to control it." *Knoxville, etc., R. Co. v. Acuff, 92 Tenn. 28, 54 Am. & Eng. R. Cas. 75, note.* See *Webb v. East Tennessee, etc., R. Co., 88 Tenn. 119,*

42 Am. & Eng. R. Cas. 44; Lewis v. Brooks, 6 Verg. (Tenn.) 180.

Effect of Compromise as to Necessary Parties to Action. — When there are several persons entitled to the right of action, and one or more of them compromise with the defendant, those who have compromised their claim need not be joined as parties to an action by the others. *Houston, etc., R. Co. v. Bradley, 45 Tex. 171.*

4. Yelton v. Evansville, etc., R. Co., 134 Ind. 414. Compare *Stuebing v. Marshall, 10 Daly (N. Y.) 406, 2 Civ. Pro. Rep. (N. Y.) 77.*

5. Widow Allowed to Compromise Although Children Are Entitled to Benefit of the Recovery. — The *Mississippi* statute (Code of 1880, § 1510) gave the widow the right to sue for the wrongful death of her husband, but provided that the damages so recovered should, if the deceased left children, be distributed as the personal property of the husband. It was held that the widow alone had the right of action, and even after judgment and pending an appeal might accept less than the judgment and discharge the defendant, and that the children would be bound by her action. *Natchez Cotton Mills Co. v. Mullins, 67 Miss. 672.*

In *Southern Pac. Co. v. Tomlinson, (Arizona 1893) 33 Pac. Rep. 710,* decided under Rev. Stat. of Ariz. (1887), §§ 2145-2155, which provide that the action may be brought for the benefit of the husband, wife, children, and parents of the deceased, by any one of them for the benefit of all, and that the recovery should be apportioned among them by the jury, it was held that the party bringing the suit might enter a remittitur as to the damages apportioned to the other beneficiaries, although the effect was to reduce the recovery in favor of such persons to nominal damages. But this ruling was reversed on appeal, the Supreme Court of the United States holding that the error in allowing the remittitur was one of which the defendant had a right to complain. *Southern Pac. Co. v. Tomlinson, 163 U. S. 369.*

The Tennessee Statute (Act of 1871, c. 78, § 1, amending T. & S. Code, § 2291) fixed the right of action in the "widow, and in case there is no widow, [in] his children or personal representative for the benefit of his widow or next of kin." In *Greenlee v. East Tennessee, etc., R. Co., 5 Lea (Tenn.) 418, 4 Am. & Eng. R.*

c. BY EXECUTOR OR ADMINISTRATOR. — The executor may compromise the right of action where it is vested in him although it is in him only for the benefit of others.¹

5. Release — By Decedent. — When the right of action given by the statute is merely such as the deceased would have had if he had survived the injury, a release properly executed by him in his lifetime is a complete defense to an action by his personal representative or others to recover damages for his death.² The same rule is true where the statute is not a survival statute, but creates a new and distinct cause of action in favor of certain beneficiaries, if it provides that the right of action shall exist only in cases where the deceased himself might have maintained the action had he lived.³

Cas. 351, the widow, after suit had been commenced by her, compromised the case. The motion to dismiss the suit, in pursuance of the compromise with the widow, was resisted by the children of the deceased. It was held that while the children were entitled to the benefit of the recovery, the widow alone, in the first instance, had the right to sue; that she might sue or not, at her option, and that if she failed to sue within the statutory period limiting such actions, the rights of the children would be barred; and therefore she had the right to make the compromise.

The widow has the same right to compromise the whole matter before suit brought, to receive the entire amount settled upon, and to give a complete and valid discharge to the defendant. *Holder v. Nashville, etc., R. Co.*, 92 Tenn. 141, 36 Am. St. Rep. 77, 54 Am. & Eng. R. Cas. 73, *note*.

So, also, when the suit is originally brought by the administrator, but is revived in the name of the wife, she may dismiss it without the consent of her children or their guardian. *Stephens v. Nashville, etc., R. Co.*, 10 Lea (Tenn.) 448, 11 Am. & Eng. R. Cas. 671. See also *Knoxville, etc., R. Co. v. Acuff*, 92 Tenn. 26, 54 Am. & Eng. R. Cas. 75, *note*; *Webb v. East Tennessee, etc., R. Co.*, 88 Tenn. 119, 42 Am. & Eng. R. Cas. 44.

1. **Executor May Compromise.** — *Hartigan v. Southern Pac. Co.*, 86 Cal. 142.

The *Rhode Island* statute vests the right of action for a wrongful death in the executor of the deceased, for the benefit of the husband, widow, children, or next of kin. It was held that a receipt given by the executor to the person causing the death in compromise of the right of action, reciting "in full settlement of all claims and demands which I, as executrix, * * * may have against" the defendant, would be a bar to any action against the defendant. *Parker v. Providence, etc., Steamboat Co.*, 17 R. I. 376, 33 Am. St. Rep. 869, *citing and approving* *Stephens v. Nashville, etc., R. Co.*, 10 Lea (Tenn.) 448, and other cases cited in the preceding note; *Chadbourn v. Chadbourn*, 9 Allen (Mass.) 173; *Meeker v. Vanderveer*, 15 N. J. L. 392; *Rogers v. Hand*, 39 N. J. Eq. 270. Compare *Markel v. Spittler*, 28 Ind. 488.

2. **When the Statute Is Merely a Survival Statute.** — In some of the states the statute merely abolishes the common-law rule that an action for personal injuries dies with the person injured. In such cases the personal representative of the deceased has exactly the

same right of action which his deceased had, and nothing more. See *Hurst v. Detroit City R. Co.*, 84 Mich. 539, 48 Am. & Eng. R. Cas. 16, *note* (statute conferring two separate and distinct rights of action).

The *Pennsylvania* Act of April 15, 1851 (2 Brightly's Purdon's Dig. (12th ed.), p. 1603, §§ 2, 3), providing that a right of action for personal injuries should not abate with the death of the person injured, but should survive to his personal representative, and that, in the event of the decedent's failure to sue in his lifetime, his widow or personal representative might sue, and the Act of April 26, 1855 (2 Brightly's Purdon's Dig. (12th ed.), p. 1603, § 4), extending this right of action to parents and children of the deceased, does not give the widow an independent cause of action which the deceased could not, in his lifetime, release or compromise; and therefore a release or compromise properly entered into by him will bar an action by her. *Hill v. Pennsylvania R. Co.*, 178 Pa. St. 223.

3. **When Right of Action Is Different but Depends on Right of Deceased to Have Sued.** — *Sykora v. Case Threshing Mach. Co.*, 59 Minn. 130; *Dibble v. New York, etc., R. Co.*, 25 Barb. (N. Y.) 183, *criticised in* *Schlichting v. Wintgen*, 25 Hun (N. Y.) 626; *Price v. Richmond, etc., R. Co.*, 33 S. Car. 556, 48 Am. & Eng. R. Cas. 15, *note*. See also *Hecht v. Ohio, etc., R. Co.*, 132 Ind. 507. Compare *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 44 Am. St. Rep. 335, 59 Am. & Eng. R. Cas. 120; *Illinois Cent. R. Co. v. Cozby*, 69 Ill. App. 256.

Where a passenger who was injured by the negligence of a railroad company accepts, in his lifetime, a sum of money in satisfaction of all claims, his subsequent death from such injuries does not create a new cause of action upon which his widow can maintain suit. *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 555, 16 W. R. 1040, 18 L. T. 82.

When Statute Inflicts a Penalty. — Under the *Massachusetts* statute, which inflicts a penalty not less than a fixed sum nor greater than the maximum limit fixed upon a person or corporation wrongfully causing a death, the damages are in the nature of "a penalty given to the widow and children and next of kin, instead of to the commonwealth, and as such the intestate could not release the defendant from liability for it." A stipulation in a free pass releasing the defendant company from liability was therefore held to be no bar to an action by the widow and children of the deceased under the statute. *Doyle v. Fitchburg R. Co.*, 162 Mass.

A Release Made by the Deceased in Advance of the Injury and in consideration of insurance effected on his life by his employer for the benefit of his wife will not relieve the employer from liability to an action by the personal representative of the deceased for the benefit of the widow.¹ But if the widow accepts the proceeds of such insurance and, upon doing so, executes a full and absolute release of the employer from all liability, she is estopped thereafter from prosecuting an action for the death of her husband for her own benefit, though she may still maintain the action for the benefit of her child.²

A Release Executed by a Party Having No Authority to make it in no way affects the right of action given by the statute to certain beneficiaries.³

6. Former Recovery.—The rule varies in the different states as to whether a recovery by one of several beneficiaries will bar an action by the others, the variance being partly due to the provisions of the statutes.

a. AS A BAR TO ACTION—**Identity of Right of Action, etc.**—When the statute, either in express terms or by clear implication, provides for only one action, a recovery by one beneficiary will be a bar to any recovery by the others.⁴

66, 44 Am. St. Rep. 335, 59 Am. & Eng. R. Cas. 120, *citing* Com. v. Vermont, etc., R. Co., 108 Mass. 12, 11 Am. Rep. 301; Com. v. Boston, etc., R. Corp., 134 Mass. 211; Littlejohn v. Fitchburg R. Co., 148 Mass. 478, 37 Am. & Eng. R. Cas. 54.

1. Maney v. Chicago, etc., R. Co., 49 Ill. App. 105; Chicago, etc., R. Co. v. Wymore, 40 Neb. 645.

2. Chicago, etc., R. Co. v. Wymore, 40 Neb. 645.

In Baltimore, etc., R. Co. v. McCamey, 12 Ohio Cir. Ct. Rep. 543, 1 Ohio Cir. Dec. 631, the deceased, who was a railroad man, was a member of an employees' relief association, and upon his death the benefits arising from his contract were paid to his widow, who thereupon executed a release to the railroad company. It was held that this release would not bar an action by the personal representative, under Ohio Rev. Stat., § 6135, against the railroad company for the wrongful death, such action being for the benefit of the widow and children of the deceased. Whether or not the widow was entitled, under such circumstances, to share in the recovery, was held to be a question for the decision of the probate court on the distribution of the damages.

3. Unauthorized Release.—In Stuber v. McEntee, 142 N. Y. 200, *reversing* 61 N. Y. Super. Ct. 338, the defendant paid to K., a brother-in-law of the decedent, \$400, which the latter accepted in full satisfaction of all claims. The father of the deceased having subsequently obtained letters of administration and brought an action to recover for the death, it was held that the payment to K. in no way estopped the father from suing, it appearing that K. had no authority whatever to execute any release which would bind the next of kin. See also Tennessee Coal, etc., Co. v. Herndon, 100 Ala. 451.

Release by One Beneficiary.—A release given by the husband of the deceased is no defense to an action against the wrongdoer brought by the representative of deceased. South, etc., Alabama R. Co. v. Sullivan, 59 Ala. 272.

Where the statute gives a right of action for the wrongful killing of a minor child for the benefit of the father alone, a release by the father is a bar to an action brought by the per-

sonal representative of the deceased. Stuebing v. Marshall, 10 Daly (N. Y.) 406, 2 Civ. Pro. Rep. (N. Y.) 77.

4. California.—The statute provides that the action may be brought by the heirs of the deceased or by his personal representatives. But only one action is allowed, and a former recovery by an executor or administrator may be pleaded in bar of an action subsequently brought by the heirs. Hartigan v. Southern Pac. Co., 86 Cal. 142; Munro v. Pacific Coast Dredging, etc., Co., 84 Cal. 515, 18 Am. St. Rep. 245.

Indiana.—See Hecht v. Ohio, etc., R. Co., 132 Ind. 507.

Kentucky.—A common-law recovery for the mental and bodily suffering of the deceased caused by the same acts of negligence which ultimately caused his death (his death occurring some time after the injury) will bar an action under the statute by the widow, heir, or personal representative of the deceased to recover for his wrongful killing. And the converse of this proposition is true. Conner v. Paul, 12 Bush (Ky.) 144. See also Hansford v. Payne, 11 Bush (Ky.) 380; Hackett v. Louisville, etc., R. Co., 95 Ky. 236.

The plaintiff, an administrator, at the request of the widow, brought an action under Gen. Stat. Ky., c. 57, § 3, to recover for the wrongful death of her husband. After this suit was begun, the widow commenced a suit in her own name. It was held that, there being no children, the widow was the sole beneficiary and was entitled to maintain her action. But as both actions were for her benefit, only one could be maintained, and the defendant could plead the pendency of either action in bar of the other, as it might elect. Henderson v. Kentucky Cent. R. Co., 86 Ky. 389.

A recovery by the personal representative of a deceased wife, under Gen. Stat. Ky., c. 57, § 1, is a bar to an action by the husband to recover for the loss of his wife's services and society during the period between the injury and the death. Louisville, etc., R. Co. v. McElwain, 98 Ky. 700.

Missouri.—A recovery under Rev. Stat. Mo., § 2123, by the parents of the deceased (a minor child), will bar a common-law action by them to recover for the loss of his services before

Whether the other beneficiaries may maintain an action to compel a distribution of the amount recovered by the beneficiary who sued, is a question.

Recovery by Deceased Before Death. — A recovery by the deceased in his lifetime based on the wrongful act of the defendant operates as a release by him,¹ and is a bar to any subsequent action by his survivors for his death resulting from the injury.²

Former Recoveries Held No Bar — Causes of Action Distinguished. — A former action brought by the deceased during his lifetime will not operate as a bar to an action by the statutory beneficiaries after his death, where the statute is not merely a survival statute and recognizes two causes of action.³ Nor, in some jurisdictions, will a recovery by one beneficiary for certain elements of damage bar an action by another beneficiary based on other and different elements of damage.⁴ And under the *Texas* statute it seems that a recovery by one of

death. *Graham v. Hannibal, etc.*, R. Co., 28 Fed. Rep. 744. Compare *Davis v. St. Louis, etc.*, R. Co., 53 Ark. 117, 44 Am. & Eng. R. Cas. 690.

New York. — In an action by a father, as administrator, brought under Laws of 1847, c. 450, Laws of 1849, c. 256, to recover for the death of his infant son, where the recovery is for his exclusive benefit, he may sue for and recover his entire damages, including the loss of his son's services during minority, in one action. But such a recovery will be a bar to another action brought by the father, as such, even assuming that he had such an action as the latter independently of the statute. *McGovern v. New York Cent., etc.*, R. Co., 67 N. Y. 417, 15 Am. Ry. Rep. 110.

Oregon. — Section 34 of Hill's Oregon Code gives the parent a right of action for "injury or death of a child." Section 371 gives the personal representative of one who has been killed by the wrongful act of another a right of action against the wrongdoers. It was held, by a divided court, affirming the judgment of the trial court, that a recovery by the personal representative, deceased being an adult, was a bar to an action by the father, although the deceased had continued to render services to his father after his maturity just as he had done before. *Putman v. Southern Pac. Co.*, 21 Oregon 230.

South Carolina. — The statutory provision that the remedy given by Gen. Stat. S. Car., § 2183, "shall not apply to any case where the person injured has, for such injury, brought action which has proceeded to trial and final judgment before his or her death," is not an exception to the previous sections, nor does it imply that an action in behalf of the widow and children will be defeated only by judgment already had in an action brought by the deceased; but was intended only to prevent a double remedy for the same wrongful act in any possible case. *Price v. Richmond, etc.*, R. Co., 33 S. Car. 556.

Vermont. — One provision of the statute (Rev. Laws, § 2134) is that in case a party to an action for personal injuries dies pending the action, it may be prosecuted by or against his personal representative. Another provision (§§ 2138-39) is that where the death of any person is caused by the wrongful act of another, the wrongdoer shall be liable to an action to be brought by the personal representative and for the benefit of the widow and

next of kin. The plaintiff in an action for personal injuries died while his action was pending, and the suit was revived in the name of his administrator. It was held that a judgment recovered in such action by the administrator was a bar to another action by him under sections 2138-39 for the benefit of the widow and next of kin of deceased. *Legg v. Britton*, 64 Vt. 652.

1. See *supra*, this section, *Defenses to the Action — Release*.

2. **Recovery by Deceased — Survivor's Action Barred.** — The rule of the text is true although the right of action for a wrongful death as provided by the statute creating it belongs exclusively to the widow and children, and although the measure of damages is entirely different from that in an action by the deceased. *Hecht v. Ohio, etc.*, R. Co., 132 Ind. 507.

But it seems that the rule is not true where the statute recognizes two distinct causes of action for the same injury, one for the benefit of the decedent's estate and another for the benefit of relatives. See the next paragraph.

3. **Action by Deceased Begun in His Lifetime Not a Bar to Suit by Beneficiaries.** — *Schlichting v. Wintgen*, 25 Hun (N. Y.) 626, *criticising* *Dibble v. New York, etc.*, R. Co., 25 Barb. (N. Y.) 183; *International, etc.*, R. Co. *v. Kuehn*, 70 Tex. 582, 35 Am. & Eng. R. Cas. 421 (suit pending at time of death).

Arkansas Statute — Pendency of Another Action. — An action brought under the Act of 1838 (Mansf. Ark. Dig., § 5332) for the benefit of the decedent's estate is no bar to an action by the personal representative for the benefit of his widow and children under the Act of 1883 (Mansf. Ark. Dig., § 5225). Both actions may proceed *pari passu*. *Davis v. St. Louis, etc.*, R. Co., 53 Ark. 117, 44 Am. & Eng. R. Cas. 690.

An action brought by a party not entitled to sue is no bar to an action by a proper party. Therefore, where, under Code Ala., § 2590, only the personal representatives may sue, the pendency of an action by the mother of the deceased cannot be pleaded in bar of the action by the personal representative. *Tennessee Coal, etc., Co. v. Herndon*, 100 Ala. 451.

4. **Former Recovery Based on One Element of Damage Only.** — In a suit under the *Illinois* statute by a father for the wrongful killing of his child, the fact that, before the child's death, there had been a recovery for medical attendance and similar expenses, and for loss

several beneficiaries will not bar an action by any of the others.¹

6. RECOVERY IN ONE STATE AS A BAR TO ACTION IN ANOTHER. — The action being maintainable in any state, owing to the transitory nature of the cause of action, a recovery in any state will operate as a bar to an action in another state based on the same injury.²

7. Death of Party Entitled to Right of Action. — Under the common-law rule, the statutory right of action for an injury causing the death of a person abates with the death of the beneficiary entitled under the statute to bring the action. The statutory action, being *ex delicto*, comes within the rule *actio personalis moritur cum persona*.³

Statute Provisions for Right Surviving Beneficiary. — But in many of the states provision has been made, by statute, for the survival of this right of action, either to the heirs and personal representative of the beneficiary, or to other relatives or next of kin of the person for whose death the action existed.⁴

of services before death, does not affect the damages recoverable in the second action. *Barley v. Chicago, etc., R. Co.*, 4 Biss. (U. S.) 430.

The deceased was injured through the negligence of the defendant company to such an extent that he was never afterwards able to attend to business. His widow, as administratrix, brought suit to recover damages for his death, for the benefit of herself and children, and recovered a judgment, which was paid. Afterwards, she, as administratrix, brought a suit to recover for expenses incurred by deceased before his death and in consequence of the injuries. It was held, under the *English* statute, that the recovery in the former action was no bar to the latter action. *Leggott v. Great Northern R. Co.*, 1 Q. B. Div. 599, 35 L. T. 334.

Georgia — Action by Father for Son's Services No Bar to Action by Mother to recover for the loss of her son's life. The father's right of action is one existing independently of the statute, and his recovery is confined to the value of his son's services between the time of injury and the death. The mother's right of action is for the loss of her son's life and the consequent loss of an expected pecuniary benefit. *Augusta R. Co. v. Glover*, 92 Ga. 132, 58 Am. & Eng. R. Cas. 269.

Massachusetts. — The right of action given to the personal representative by Pub. Stat., c. 52, § 17, to sue for damages for the loss of his intestate's life, such suit to be for the benefit of the widow and children of deceased, is separate and distinct from the right of action which the personal representative has to sue for the damages sustained by deceased in his lifetime and for the loss to his estate by his death, and the two actions may proceed at the same time. *Bowes v. Boston*, 155 Mass. 344.

Washington. — Section 8 of the Code of 1881 provides for an action by the heirs or personal representatives. Section 9 provides for an action by the father for the death of his minor child. It is held that since a recovery under section 9 is limited to the loss of the services of the child during minority, a recovery by the personal representative under section 8 is no bar to an action by the father under section 9. *Hedrick v. Ilwaco R., etc., Co.*, 4 Wash. 400, 54 Am. & Eng. R. Cas. 45.

Ireland. — A recovery for wrongfully causing the death of a person is not a bar to a sub-

sequent suit by the administrator to recover damages for the loss to the decedent's estate caused by his death. *Barnett v. Lucas*, 6 Ir. R. C. L. 247, affirming 5 Ir. R. C. L. 140.

England. — The administrator may bring two suits: one to recover damages for the wrongful death and another for the benefit of decedent's estate. The two actions are separate and distinct, and are not brought in the same right. The defendant may, in the second suit, contest an issue which was decided against him in the first suit. *Leggott v. Great Northern R. Co.*, 1 Q. B. Div. 599, 35 L. T. 334, 24 W. R. 784.

1. Under Texas Statute. — A Posthumous Child is not precluded from recovering damages for the death of his father by a suit brought by his mother and another beneficiary which resulted in a recovery in their favor. *Nelson v. Galveston, etc., R. Co.*, 78 Tex. 621, 22 Am. St. Rep. 81, 48 Am. & Eng. R. Cas. 8.

2. Morris v. Chicago, etc., R. Co., 65 Iowa 727, 19 Am. & Eng. R. Cas. 180; *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 54 Am. & Eng. R. Cas. 82, distinguishing *Aspden v. Nixon*, 4 How. (U. S.) 476. See *infra*, this title, *Jurisdiction — Nature of the Action*.

3. See the title DEATH, 5 ENCYC. OF PL. AND PR., 807, 810. See also the title DEBTS OF DECEDENTS, *post*.

4. Statutes Providing for Survivorship. — See Rev. Stat. Indiana (1881), § 282; *Pennsylvania Co. v. Davis*, 4 Ind. App. 51.

Wife's Right of Action for Husband's Death — Connecticut. — A husband and wife were both fatally injured in the same accident, but the husband died before his wife. They left no children. It was held that under the Connecticut statute the right to recover damages for the husband's death vested absolutely in his wife, and upon her death went to her personal representative and heirs, and not to those of the husband. *Waldo v. Goodsell*, 33 Conn. 432.

Death of Parent — Georgia. — The right of action by a parent for the death of his child does not survive. *Frazier v. Georgia R. etc., Co.*, (Ga. 1897) 28 S. E. Rep. 662.

New York — Continuance by Administrator D. B. N. — An action brought by an administrator to recover for the death of his intestate due to wrongful act may, upon the death of the administrator, be continued by the administrator *de bonis non*. *Mundi v. Glokner*, 24 N. Y. App. Div. 110, reversing 20 Misc. Rep. (N. Y.) 63.

Death Pending Action of One of Several Beneficiaries. — Where one of the several beneficiaries named in the statute dies pending or prior to the action, the right of those remaining is not affected, but the fact of such death may be shown on the question of the measure of damages recoverable.¹

8. **Death of Wrongdoer.** — The rule of the common law that the right of action for a tort dies with the death of the tortfeasor still prevails² except where the statute expressly provides that it may be revived against his personal representative.³ Statutes providing for such a revivor are to be strictly construed.⁴

VI. LIMITATION OF THE ACTION — 1. Generally. — The statutes creating the right of action in this class of cases provide, almost invariably, in express terms, within what time the action shall be brought.⁵

North Carolina — State University the Beneficiary. — Under the North Carolina statute, if there be no next of kin of the deceased who are entitled to recover under the statute of distributions, the recovery goes to the State University. *Warner v. Western North Carolina R. Co.*, 94 N. Car. 250, 25 Am. & Eng. R. Cas. 432.

In Tennessee — No Survival of Action. — Where the widow of the deceased dies pending an action brought by her to recover for the wrongful killing of her husband by the defendant, under M. & V. Code Tenn. (1884), §§ 3130-3132, which provides that the decedent's right of action for personal injuries shall survive for the benefit of his widow and next of kin, and that the widow may bring the action in her own name, her administrator cannot bring such action in his own name. *Loague v. Memphis, etc., R. Co.*, 91 Tenn. 458, 52 Am. & Eng. R. Cas. 635, citing *Flatley v. Memphis, etc., R. Co.*, 9 Heisk. (Tenn.) 230; *Greenlee v. East Tennessee, etc., R. Co.*, 5 Lea (Tenn.) 418, 4 Am. & Eng. R. Cas. 351.

"No right of action will be inferred; no remedy will be given in favor of any persons except those distinctly contemplated as beneficiaries." *Caldwell, J.*, in *East Tennessee, etc., R. Co. v. Lilly*, 90 Tenn. 566, 49 Am. & Eng. R. Cas. 495.

The death of the widow pending an action brought in the name of the personal representative for her benefit will abate the action. *Louisville, etc., R. Co. v. Bean*, 94 Tenn. 388.

Death of Plaintiff Pending a Writ of Error. — In such a case the suit must be dismissed. *Martin v. Baltimore, etc., R. Co.*, 151 U. S. 673, 61 Am. & Eng. R. Cas. 605.

1. **When One of Several Beneficiaries Dies.** — Under the *Missouri* statute (1889), § 4425, where both parents bring an action for the death of their minor son and one of them dies pending the action, the entire right of action survives to the other. *Tobin v. Missouri Pac. R. Co.*, (Mo. 1891) 18 S. W. Rep. 996; *Senn v. Southern R. Co.*, 124 Mo. 621.

In *Taylor v. Western Pac. R. Co.*, 45 Cal. 323, which was an action brought under the *California* Act of April 26, 1862, § 3, it was held that where the action is for the death of a husband and parent who leaves a widow and children surviving him, the damages should be sufficient to cover the loss sustained by both the widow and the children. But if the widow die pending the action, then the damages that would have gone to her are to be ignored en-

tirely and evidence relating thereto should be excluded.

2. See the title *DEATH*, 5 ENCYC. OF PL. AND PR., 827, 829.

3. **Abates the Action.** — The contention that an action brought by a widow for the death of her husband ought to be an exception to the common-law rule because the action is not for a wrong to the party killed, but one to herself, and therefore ought not to abate upon the death of the wrongdoer, has nothing to support it. *Moe v. Smiley*, 125 Pa. St. 136, 23 W. N. C. (Pa.) 461.

Dissolution of Corporation. — The dissolution of a corporation does not abate an action against it for wrongfully causing a death. The right of action survives and may be prosecuted against the receiver or trustee. *People v. Troy Steel, etc., Co.*, 82 Hun (N. Y.) 303, 24 Civ. Pro. Rep. (N. Y.) 201. See also *Hepworth v. Union Ferry Co.*, 62 Hun (N. Y.) 257, 22 Civ. Pro. Rep. (N. Y.) 407, note.

4. **Statute Providing for Revivor to Be Strictly Construed.** — The Rev. Stat. of *Texas* (1895), arts. 3021-3026, providing for an action for a death caused by wrongful act, provide that in the event of the death of the wrongdoer after suit brought, the suit may be revived and prosecuted to judgment against his personal representative. Under this it is held that where the wrongdoer dies before suit is brought, the action abates, there being no provision for its prosecution in such a case. *Johnson v. Farmer*, 89 Tex. 610.

Under the Rev. Stat. of *Colorado* (1868), § 154, p. 682, providing that "all actions at law whatsoever, save and except actions on the case for slander or libel, or trespass for injuries to the person, * * * shall survive" to and against the personal representative, an action for personal injuries which, under the common law, would be an action of trespass on the case, does not survive against the personal representative. *Munal v. Brown*, 70 Fed. Rep. 967.

5. **Time Within Which Action Must Be Brought — Alabama.** — An action by an administrator against a railroad company for the death of an employee is not governed by Code of 1886, § 2589, which provides that actions for negligent injuries resulting in death shall be brought within two years after the death, but by section 2619, subd. 6, the general provision, which limits the right of action "for any injury to the person or rights of another, not arising from contract," to one year after cause of action

2. The Statute Absolute. — It seems that provisions in the statutes authorizing actions for wrongful death which limit the time within which the actions shall be brought are not properly statutes of limitation as that term is generally used. They are qualifications restricting the rights granted by the statutes, and must be strictly complied with. As the statutes confer a new right of action, no explanations as to why the suit was not brought within the specified time will avail unless the statutes themselves provide a saving clause.¹

3. Effect of Minority of Parties Plaintiff. — The minority of the parties plaintiff does not, therefore, interfere with the running of the statute.² It seems

accrued. *O'Kief v. Memphis, etc., R. Co.*, 99 Ala. 524.

Georgia. — An action by a father for the wrongful killing of his minor son, who was capable of rendering service, is an action for injury to property, and may be brought within four years. *Frazier v. Georgia R., etc., Co.*, (Ga. 1897) 28 S. E. Rep. 662.

Kentucky. — The action must be brought within one year from the qualification of the administrator. *Fleming v. Ernst*, 2 Bush (Ky.) 123, holding that the Act of Feb. 17, 1866, Myers's Supp., p. 724, did not apply to such actions.

New York. — When the action is brought under the Act of 1847, c. 450, as amended by Acts of 1849, c. 256, and Acts of 1870, c. 78, it must be brought within two years from the time of the death. *Bonnell v. Jewett*, 24 Hun (N. Y.) 524.

Under the constitution of 1895, art. 1, § 18, such actions are subject to no statutory limitations. This provision does not, it seems, affect suits on rights of action which accrued prior to the adoption of the constitution. *O'Reilly v. Utah, etc., Stage Co.*, 87 Hun (N. Y.) 406. *Contra*, however, in *Isola v. Weber*, 13 Misc. Rep. (N. Y. C. Pl.) 97. See also *Burns v. Houston, etc., R. Co.*, 15 Misc. Rep. (N. Y. Super Ct.) 19; title DEATH BY WRONGFUL ACT, 5 ENCYC. OF PL. AND PR., 883, note.

North Carolina. — Under N. Car. Code, § 1498, the action must be brought within one year after the death of the party injured. *Taylor v. Cranberry Iron, etc., Co.*, 94 N. Car. 525.

An action brought more than a year after the death is barred, although brought within a month after the appointment of an administrator, and although the statute requires the action to be brought by the personal representative. *Best v. Kinston*, 106 N. Car. 205.

Ohio. — The limitation is two years from the death of the person injured. *Pittsburg, etc., R. Co. v. Hine*, 25 Ohio St. 629, 10 Am. Ry. Rep. 157.

1. Taylor v. Cranberry Iron, etc., Co., 94 N. Car. 525; *Best v. Kinston*, 106 N. Car. 205; *George v. Chicago, etc., R. Co.*, 51 Wis. 603.

Under the *Ohio* "Act requiring compensation" for causing death by wrongful act, neglect, or default (S. & C. 1139, 1140), which gave a right of action provided such action should be commenced within two years after the death of such deceased person, the proviso is a condition qualifying the right of action, and not a mere limitation on the remedy, and the amendment and repeal of the section containing the proviso during the existence of the right of action, and the omission of the proviso in the section as amended, did not have the

effect of extending the time within which the action should have been brought. *Pittsburg, etc., R. Co. v. Hine*, 25 Ohio St. 629, 10 Am. Ry. Rep. 157.

2. Deceased a Minor — Rule Not Changed — Iowa. — In *Murphy v. Chicago, etc., R. Co.*, 80 Iowa 26, 44 Am. & Eng. R. Cas. 697, note, which was an action for damages for the death of a minor, the defendant demurred to the declaration on the ground that the action was not brought within the statutory period. The Code of Iowa (1888), § 2529, provides that actions founded on injuries to the person may be brought within two years "after their causes accrue, and not afterwards, except when otherwise specially declared." Section 2535 provides that the time limited for such actions "shall, in favor of minors * * * be extended so that they shall have one year from and after the termination of such disability within which to commence said actions." The plaintiff contended that as the deceased was a minor he did not become vested with a complete right of action before his death; that the statute did not begin to run until there was a person who had the legal capacity to sue and be sued; that the imperfect right of action survived to his estate and was perfected by the qualification of his administrator, and that section 2535 extended the limitation of section 2529. It was held that the right of action accrued to the administrator at the time of the minor's death, and that the limitation in section 2529 ran unaffected by section 2535. See also *Bledsoe v. Stokes*, 1 Baxt. (Tenn.) 312. Compare *Paschal v. Owen*, 77 Tex. 583.

Under the Kentucky Act (Ky. Gen. Stat., c. 57, § 3), an action by an heir of the deceased is barred after one year, although such heir was an infant, if there was either a widow or personal representative of the deceased who might have sued. The saving of the statute in behalf of the infant applies only where there is no other person in being qualified to sue. *Louisville, etc. R. Co. v. Sanders*, 86 Ky. 259.

Mississippi. — The saving clause in favor of infants contained in the Code of 1892, § 2746, in the chapter on limitation of actions, does not apply in an action for wrongful death. The action must be brought within one year after the death, as provided in the statute creating the right of action, without regard to the plaintiff's minority or the fact that he had no guardian. *Foster v. Yazoo, etc., R. Co.*, 72 Miss. 886.

Pennsylvania. — *Lanning v. Pennsylvania Electric Light Co.*, 31 W. N. C. (Pa.) 251.

Tennessee. — In an action under the original Tennessee statute, which provided that the right of action for personal injuries should not

that this rule is true although there may be a provision in the general law relating to the limitation of actions, to the effect that the statute of limitations shall not run against minors until their majority.

4. General and Special Statutes Conflicting. — The *Canadian* statutes provide one limitation for such actions when the injury results from the wrongful act of a railway company, and another for cases where the injury results from any other cause. The rule, as announced by the cases, seems to be that the general limitation (the longer one) will govern.¹

5. When Statute Begins to Run. — The question as to when the statute begins to run must depend largely upon its provisions. Ordinarily, the statute begins to run from the time the death occurred, and not from the time of the injury,² nor from the time of the qualification of the personal representative,³ although the statute may vest the right of action in such repre-

abate on the death of the person injured, but should "pass to his personal representative for the benefit of his widow and next of kin," the plaintiff's replication to a plea of the statute of limitations was that the children left by the deceased were under age, and that the statute did not run against an action for their benefit. But it was held that the personal representative alone had the right to sue, and the minority of the children left by the deceased was of no importance. *Bledsoe v. Stokes*, 1 Baxt. (Tenn.) 312; *Flatley v. Memphis, etc., R. Co.*, 9 Heisk. (Tenn.) 233.

Wisconsin. — The action must be brought within two years after the death of the injured person. *George v. Chicago, etc., R. Co.*, 51 Wis. 603.

1. Canadian Statutes. — C. S. C., c. 66, § 83 (42 Vict., c. 9, § 27), limits the time to six months when the action is for an injury resulting in death "sustained by reason of the railway." This act is a part of the special railway legislation. The general statute, R. S. O., c. 135 (Lord Campbell's Act), provides a limitation of twelve months. It appeared that the plaintiff's father was killed on Feb. 10, 1891, by a fall from a bridge which was a part of a highway which crossed over the defendant company's road, and which the company had allowed to be out of repair. The action was begun on Nov. 14, 1891, more than six months after the death occurred, no letters of administration having been taken out. It was held that this was not a case of an injury "sustained by reason of the railway," and that the six months' limitation in the railway act did not apply. The court further held that the provisions of Lord Campbell's Act are not affected by the special railway legislation, and that, in any view of the case, this action was brought in time. *Zimmer v. Grand Trunk R. Co.*, 19 Ont. App. 693. But see *Conger v. Grand Trunk R. Co.*, 13 Ont. Rep. 160.

The right of action given by Civ. Code of Lower Can., § 1056, is for the wrongful death, and is not affected by the fact that at the time the deceased died his right of action had become barred. *Robinson v. Canadian Pac. R. Co.*, (1892) App. 481.

2. From Time Death Occurs. — *Nestelle v. Northern Pac. R. Co.*, 56 Fed. Rep. 261. See also *Smith v. Metropolitan St. R. Co.*, 15 Misc. Rep. (N. Y. C. Pl.) 158. Compare *Barnes v. Brooklyn*, 22 N. Y. App. Div. 520; *Fowlkes v. Nashville, etc., R. Co.*, 9 Heisk. (Tenn.) 829.

The *Indiana* statute provides that the personal representative of the deceased may maintain an action against the wrongdoer if the deceased "might have maintained an action had he lived," for the same act or omission. The action must be commenced within two years. It was held that this meant two years from the death of the party killed. *Louisville, etc. R. Co. v. Clarke*, 152 U. S. 230, citing *Hanna v. Jeffersonville R. Co.*, 32 Ind. 113, in which latter case the reasons for this view are well discussed.

The Original Kentucky Statute providing for actions for wrongful death was passed in 1854, and required the action to be brought "within one year from the time of such death." In the compilation of the statutes the entire Act of 1854, with the exception of the limitation section, was put in c. 57, Gen. Stat. The section relating to the limitation was put in the chapter on limitation of actions (c. 71, art. 3), and changed so as to read that this action, with others, should be brought within one year "after the cause of action accrued." It is held that this change in phraseology does not change the meaning, and that the statute still begins to run from the date of the death, and not from the date of the qualification of the personal representative. *Carden v. Louisville, etc., R. Co.*, (Ky. 1897) 39 S. W. Rep. 1027, (Ky. 1896) 37 S. W. Rep. 839.

3. Time Between Death and Qualification of Personal Representative Counted. — *Rugland v. Anderson*, 30 Minn. 386; *Greene v. New York Cent., etc., R. Co.*, 48 N. Y. Super. Ct. 333; 2 Civ. Pro. Rep. (N. Y.) 427 (Act of Sept. 1, 1880, held to have repealed provision in 3 N. Y. Rev. Stat. 773, § 9); *Fowlkes v. Nashville, etc., R. Co.*, 9 Heisk. (Tenn.) 829, 5 Baxt. (Tenn.) 663.

In this last case the court held that the limitation of one year began to run from the time of the injury, and not from the time of the death, and therefore the time between the death of the injured party and the qualification of his representative was not to be excluded. *Citing Angell on Lim.*, § 56. But the court, by McFarland, J., went on to say: "It is different if the cause of action does not accrue until after the death; then, in general, the statute does not begin to run until the appointment of a representative." *Citing Angell on Lim.*, c. 7; *Thurman v. Shelton*, 10 Yerg. (Tenn.) 383.

Death Instantaneous — Fact Not Material. — In

sentative. These rules, however, are generally based upon the specific requirements of the statute, and where any other construction is admissible it seems that the latter rule will not prevail and the statute will be construed as beginning to run only after the qualification of the personal representative, where he is the party who is authorized to bring the action. The general rule that the statute of limitations does not run while there is no person qualified to institute the suit would require this rule.¹

6. Where Decedent's Right of Action Barred.—Where the statute follows Lord Campbell's Act, the right of action conferred is for the wrongful death and is based thereon, and the fact that the decedent's right of action for the personal injury had become barred will not affect the right of action conferred by the statute on his survivors, unless there is some provision in the statute requiring the contrary.²

7. Amendments to Declaration—To What Extent Barred.³—Whether an amendment to the declaration can be allowed after the expiration of the statutory period within which the action must be brought, depends upon the extent to which the amendment changes the character of the action. The declaration may be so amended as to state the cause of action in a different way if it states no new cause of action.⁴ So also it may be amended so as to

Fowlkes v. Nashville, etc., R. Co., 9 Heisk. (Tenn.) 833, 5 Baxt. (Tenn.) 663, it was urged by the plaintiffs in support of their contention that the statute began to run only after the qualification of the personal representative, that the death was instantaneous, and therefore no right of action accrued to the party in his lifetime, and there was never any person qualified to sue until the representative became so. But it was held that under T. & S. Code, §§ 2291-93, there is no distinction between cases where the death is instantaneous and where it is not. In either case, the limitation is the same—one year from the time of injury. *Criticising* as unsound, *Whitford v. Panama R. Co.*, 23 N. Y. 465.

The Reason of the Rule of the Text is well stated in the opinion of the court in *Hanna v. Jeffersonville R. Co.*, 32 Ind. 113, where it is said: "The statute was intended mainly to be operative against carriers of passengers, and in a very large measure against corporations whose business is exclusively performed by hired servants who are being constantly changed, and within whose knowledge the facts of such cases would generally rest, or who must be depended on for such information as would lead to a discovery of the facts and the witnesses to establish them. The reasons for requiring the suit to be brought within some short period after the occurrence were, therefore, very forcible and must have been perceived." Otherwise, "a door would be opened wide for injustice and wrong." *Quoted in Louisville, etc., R. Co. v. Clarke*, 152 U. S. 230.

1. Statute Suspended While There Is No Person Who Can Sue.—See *Thurman v. Shelton*, 10 Yerg. (Tenn.) 383; *Fowlkes v. Nashville, etc., R. Co.*, 9 Heisk. (Tenn.) 833, 5 Baxt. (Tenn.) 663. See also *Fleming v. Ernst*, 2 Bush (Ky.) 128.

Under the *Connecticut* statute (1853) which gives a right of action to the personal representative and requires the action to be brought "within one year after the cause of action shall have arisen," the limitation begins to run only after the qualification of the repre-

sentative. *Andrews v. Hartford, etc., R. Co.*, 34 Conn. 57.

2. Robinson v. Canadian Pac. R. Co., (1892) App. 481, *reversing* 19 Can. Sup. Ct. Rep. 292. On the original trial of this case, reported in 5 Montreal L. R. Super. Ct. 225, the principle stated in the text was upheld and the holding was *affirmed* in 6 Montreal L. R. Q. B. 118. On appeal to the Supreme Court of Canada, the case was reversed. But on the final appeal the holding of the two lower courts was approved and the rule of the Supreme Court declared wrong.

The rule of the text is impliedly sustained by the authorities cited *supra*, this section, *When Statute Begins to Run*, which hold that it begins to run from the time of the death and not from the time of the injury.

The rule announced in the text is, however, open to serious question. Most of the statutes specifically provide that the action may be maintained only in cases where the deceased himself might have maintained it had he lived. And it is plausibly urged that since the deceased had no right of action at the time of his death, his personal representative or others cannot maintain an action. See the reasoning in *Canadian Pac. R. Co. v. Robinson*, 19 Can. Sup. Ct. Rep. 292, 54 Am. & Eng. R. Cas. 49. See also *Fowlkes v. Nashville, etc., R. Co.*, 9 Heisk. (Tenn.) 830, 5 Baxt. (Tenn.) 663.

3. The General Subject of Amendment of Pleadings, including the question as to how such amendments are affected by the statute of limitations, is discussed at length in the titles AMENDMENTS, 1 ENCYC. OF PL. AND PR., pp. 621 *et seq.*; DEATH BY WRONGFUL ACT, 5 ENCYC. OF PL. AND PR., p. 848 *et seq.* Only a few later cases are noted here.

4. Restating Cause of Action.—See the title DEATH BY WRONGFUL ACT, 5 ENCYC. OF PL. AND PR., p. 848.

The original complaint charged that the death of the deceased was caused by the defective condition of the roadbed. The amended complaint charged that it was due to the defective condition of the roadbed and

show the existence of the beneficiaries named in the statute,¹ or so as to add new parties to the suit.² Where there is a misnomer of the defendant the mistake may be corrected if it appears that the real defendant was in fact served with process and appeared in the case.³ These amendments may be made after the expiration of the statutory period of limitation.⁴

8. Common-law Limitation of a Year and a Day after Injury. — The ancient rule of the common law, applicable to cases of murder, appeal of death, etc., that there was no liability where the deceased did not die within a year and a day after the injury, cannot be applied, by mere analogy, to actions under the statute for an injury causing death. Unless the statutory limitation commences expressly at the time of the injury, the action for the wrongful death may be brought without regard to the length of time between the injury and the death.⁵

VII. JURISDICTION — NATURE OF THE ACTION — 1. General Rule — Action Transitory. — Subject to the qualification that the laws of the state where the injury occurred must permit such an action, and that the law of the forum must be substantially similar,⁶ the general rule is that an action for wrongfully

a coupling pin. It was held that no new cause of action was stated upon which the statute of limitations would act as a bar. *Texas, etc., R. Co. v. Cox*, 145 U. S. 593.

In an action by a personal representative against a railway company for causing the death of the intestate, the plaintiff, more than two years after the injury, by leave of court amended his declaration by adding a new count, which, however, was a mere restatement of the cause of action set up in the original counts. The defendant pleaded the two years' statute of limitations to the new count, and on demurrer the trial court sustained the plea. It was held that this was error. *Blanchard v. Lake Shore, etc., R. Co.*, 126 Ill. 416, *affirming* 27 Ill. App. 22.

Alleging Death to Have Occurred in Different Place. — In an action by a personal representative for the death of his intestate, who was a brakeman, the suit was commenced April 15, 1876. At the September term, 1877, there was a verdict and judgment for the plaintiff. A new trial was granted, it having developed at the trial that the killing took place in the state of Alabama. An amended declaration was then filed, averring the venue in Alabama and setting out the Alabama statute. To this amended declaration the defendant pleaded the one year statute of limitations. It was held that the amendment neither changed the cause of action nor the parties to the suit; nor did it deprive the defendant of any defense it had to the original suit; and that the amendment therefore related back to the issuance of the original summons, which had been issued within the one year. The fact that the amended declaration had an additional averment that the death was caused "by the employment by the defendant, without proper care, of unskilful agents," did not change the cause of action, but merely stated the additional means by which the wrongful act was accomplished. *Nashville, etc., R. Co. v. Foster*, 10 Lea (Tenn.) 351, 11 Am. & Eng. R. Cas. 180. *Citing* *Nance v. Thompson*, 1 Sneed (Tenn.) 321. *Explaining* *Flatley v. Memphis, etc., R. Co.*, 9 Heisk. (Tenn.) 230.

1. Alleging Existence of Statutory Beneficiaries.

— See the title DEATH BY WRONGFUL ACT, 5 ENCYC. OF PL. AND PR., p. 881.

2. See the title DEATH BY WRONGFUL ACT, 5 ENCYC. OF PL. AND PR., p. 880. *Compare*, however, *East Line, etc., R. Co. v. Culbertson*, 72 Tex. 375, 13 Am. St. Rep. 805, 38 Am. & Eng. R. Cas. 225. In this case one of the beneficiaries failed to join in the suit. It was held that he could not be joined after the lapse of the statutory period, but that the suit of the other beneficiaries would not be affected. *Compare* also *Flatley v. Memphis, etc., R. Co.*, 9 Heisk. (Tenn.) 230.

3. Correcting Misnomer of Defendants. — In an action by an administrator, the defendant company was, by mistake, named in the caption of the petition and in the summons as the "Louisville, Cincinnati & Lexington R. Co.," instead of the "Louisville & Nashville R. Co.," but summons was, in fact, served on the latter company. An answer was filed having the same caption as the petition and containing simply a traverse by "the defendant." After the expiration of more than one year from the killing an amended petition was filed, alleging the mistake in the original petition and asking judgment against the Louisville & Nashville R. Co. That company then filed an answer to the amended petition, relying upon the limitation of one year in bar of the action. It was held that it was evident from all the circumstances that the answer to the original petition was filed in behalf of the Louisville & Nashville R. Co., and had the effect to enter the appearance of that company, and having been filed within one year after the killing occurred, the action was not barred by limitation. *Heckman v. Louisville, etc., R. Co.*, 85 Ky. 631. *Quoting* *Louisville, etc., R. Co. v. Hall*, 12 Bush (Ky.) 131.

4. This section deals with amendments only as they are affected by the statute of limitations.

5. See *Louisville, etc., R. Co. v. Clarke*, 152 U. S. 230, where the subject is discussed at length. *Schlichting v. Wintgen*, 25 Hun (N. Y.) 626.

6. See *infra*, this section, *Laws of Forum and of Place of Injury Must Permit Suit*.

causing a person's death may be brought in any state and in any county of such state where personal service of process can be had upon the defendant.¹ There are, however, authorities to the contrary.²

1. *United States*. — *Dennick v. Central R. Co.*, 103 U. S. 11; *Brisenden v. Chamberlain*, 53 Fed. Rep. 307.

The federal courts will recognize and enforce a right of action for the death of an individual given by the state statute. *Holmes v. Oregon*, etc., R. Co., 5 Fed. Rep. 75.

District of Columbia. — *Weaver v. Baltimore*, etc., R. Co., 21 D. C. 499.

Georgia. — *Central R., etc., Co. v. Swint*, 73 Ga. 651, 26 Am. & Eng. R. Cas. 482.

Indiana. — *Burns v. Grand Rapids*, etc., R. Co., 113 Ind. 169; *Cincinnati*, etc., R. Co. v. *McMullen*, 117 Ind. 439, 10 Am. St. Rep. 67, 38 Am. & Eng. R. Cas. 165; *Hecht v. Ohio*, etc., R. Co., 132 Ind. 507.

Iowa. — *Morris v. Chicago*, etc., R. Co., 65 Iowa 727, 19 Am. & Eng. R. Cas. 180, 54 Am. Rep. 39.

Kentucky. — *Wintuska v. Louisville*, etc., R. Co., (Ky. 1892) 20 S. W. Rep. 819; *Louisville*, etc., R. Co. v. *Shivell*, (Ky. 1892) 18 S. W. Rep. 944; *Bruce v. Cincinnati R. Co.*, 83 Ky. 174; *Chesapeake*, etc., R. Co. v. *Heath*, 87 Ky. 651. Compare *Taylor v. Pennsylvania Co.*, 78 Ky. 348, 39 Am. Rep. 244. And see *Louisville*, etc., R. Co. v. *Graham*, 98 Ky. 688.

Massachusetts. — *Chandler v. New York*, etc., R. Co., 159 Mass. 589.

Mississippi. — *Chicago*, etc., R. Co. v. *Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171; *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291.

Missouri. — *Stoeckman v. Terre Haute*, etc., R. Co., 15 Mo. App. 503.

Nebraska. — *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848.

New Hampshire. — *Laird v. Connecticut*, etc., R. Co., 62 N. H. 254, 43 Am. & Eng. R. Cas. 63.

New York. — *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664 (death on high seas); *Stallknecht v. Pennsylvania R. Co.*, 13 Hun (N. Y.) 451, *affirmed* in 53 How. Pr. (N. Y.) 305.

Pennsylvania. — *Knight v. West Jersey R. Co.*, 108 Pa. St. 250, 56 Am. Rep. 200, 26 Am. & Eng. R. Cas. 485.

Tennessee. — *Nashville*, etc., R. Co. v. *Sprayberry*, 9 Heisk. (Tenn.) 852, 8 Baxt. (Tenn.) 341, 20 Am. Ry. Rep. 55.

Vermont. — *McLeod v. Connecticut*, etc., R. Co., 58 Vt. 727, 28 Am. & Eng. R. Cas. 644.

Virginia. — *Nelson v. Chesapeake*, etc., R. Co., 88 Va. 971, 54 Am. & Eng. R. Cas. 82.

2. A Contrary Rule is upheld in some jurisdictions. It is said that the right of action for the death of a person caused by the wrongful act of a defendant is purely statutory, and that statutes giving this right of action can have no extraterritorial effect; if they are administered at all outside of the state where they were enacted, it must be on principles of comity purely. And in *Kansas* the rule that an action for a wrongful death can be brought only in the state where the injury was done is held to apply although the injured party was a citizen of the state where the suit was

brought and died there. *McCarthy v. Chicago*, etc., R. Co., 18 Kan. 46, 26 Am. Rep. 742. See also, as sustaining the same view, *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679, 54 Am. Rep. 105, 19 Am. & Eng. R. Cas. 176; *Oates v. Union Pac. R. Co.*, 104 Mo. 514; *Woodard v. Michigan Southern*, etc., R. Co., 10 Ohio St. 121; *Hover v. Pennsylvania Co.*, 25 Ohio St. 667. See also *Ash v. Baltimore*, etc., R. Co., 72 Md. 144, 20 Am. St. Rep. 461, 44 Am. & Eng. R. Cas. 676.

A late statute in Kansas authorizes a suit by a nonresident.

The case of *Richardson v. New York Cent. R. Co.*, 98 Mass. 85, which is often cited as upholding this doctrine, is not authority for the rule just stated. It is explained in *Higgins v. Central New England*, etc., R. Co., 155 Mass. 176, 31 Am. St. Rep. 544, 48 Am. & Eng. R. Cas. 513. See the *Wisconsin* statute referred to in *Rudiger v. Chicago*, etc., R. Co., 94 Wis. 191.

The doctrine of the *Kansas* and *Ohio* courts seems to have prevailed, at one time, to a limited extent, in *New York*. *Vanderwerken v. New York*, etc., R. Co., 6 Abb. Pr. (N. Y. Supreme Ct.) 239; *Crowley v. Panama R. Co.*, 30 Barb. (N. Y.) 99.

And it was accordingly held that where a party had left the state permanently and was killed in a foreign state, his administrator or next of kin could maintain no action in New York. *Beach v. Bay State Steamboat Co.*, 30 Barb. (N. Y.) 433, 10 Abb. Pr. (N. Y.) 71, 18 How. Pr. (N. Y.) 335, *reversing* 27 Barb. (N. Y.) 248, 16 How. Pr. (N. Y.) 1, 6 Abb. Pr. (N. Y.) 415.

The fact that the killing was done by a New York corporation would not change the rule. *Whitford v. Panama R. Co.*, 23 N. Y. 465, *affirming* 3 Bosw. (N. Y.) 67.

But these cases with possibly the exception of the first, were decided on the recognized principle that the action must be maintainable under the law of the state where the injury occurred, which law must be pleaded and affirmatively proved by the plaintiff, and a substantially similar statute must exist in the state where the suit was brought. In the cases just cited the plaintiff failed because of his failure to plead and prove the foreign law or because that law was not substantially similar to the New York statute. Later decisions confirm the rule of the text. See *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Stallknecht v. Pennsylvania R. Co.*, 13 Hun (N. Y.) 451, *affirmed* in 53 How. Pr. (N. Y.) 305.

Alabama. — The defendant company was a corporation chartered under the laws of Tennessee, Mississippi, and Alabama. The injury occurred in Mississippi. It was held that the Alabama courts had no jurisdiction of an action for such a death, because the injury was committed in a foreign state by a foreign corporation. *Kahl v. Memphis*, etc., R. Co., 95 Ala. 337.

And the general rule in this state seems to

In County Where Injury Occurred. — The action may always be brought in the county where the injury occurred, provided service of process on the defendant can be had there.¹

2. Where Statute Is Penal. — Where the statute is a penal one the rule that a penal statute will not be enforced except in the state of its origin will preclude a recovery under such statute in a foreign state.²

3. Laws of Forum and of Place of Injury Must Permit Suit — **Laws of State Where the Injury Occurred.** — There being no right of action at common law for an injury causing death, the plaintiff in such an action must specifically aver and prove that the laws of the state where the injury occurred permit such an action,

be that an action will not lie in Alabama, under the statute, for a wrongful death resulting from an injury inflicted in another state, even when the death occurs in Alabama. *Louisville, etc., R. Co. v. Williams*, 113 Ala. 402.

Kentucky. — It is the rule in this state that an administrator appointed in Kentucky cannot maintain an action in the Kentucky courts for an injury resulting in death where the injury occurred in another state, although such an action was maintainable in the latter state by the administrator, since the Kentucky statute allowed no such action by the personal representative. *Taylor v. Pennsylvania Co.*, 78 Ky. 348, 7 Am. & Eng. R. Cas. 23, 39 Am. Rep. 244, citing and approving *Woodard v. Michigan Southern, etc., R. Co.*, 10 Ohio St. 121. See also *Louisville, etc., R. Co. v. Brantley*, 96 Ky. 297.

But where the action is brought by the proper party it may be maintained in Kentucky, although the death and injury occurred in another state. See authorities cited in the preceding note.

Missouri. — In an action brought in this state by an administrator appointed there, it appeared that the law of Kansas, where the injury occurred, provided for the bringing of such a suit by the administrator. The Missouri law provided that the husband or widow might sue, but inhibited the administrator from doing so. The court held that the suit could not be maintained. It recognized that other courts "entertain such actions when the laws of the two states upon the same subject are similar," etc. But it went on to say: "Such principles are not to be narrowed, but they do not justify the courts in going to the extent to which we must go to sustain this action, *i. e.*, to say to an administrator: 'You may sue in the county of the state of your appointment, under the law of another state, when denied the right to bring the same or a like suit by the laws of the state conferring the appointment.'" *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679, 54 Am. Rep. 105, 19 Am. & Eng. R. Cas. 179.

In another case the deceased was a resident of Missouri and was killed in Kansas, under such circumstances as would have entitled him to recover under the Missouri statute had he survived. The Kansas statute provided that the suit should be brought by the personal representative. Under the Missouri statute, the widow should sue. In an action brought by the widow in Missouri, it was held that she could not recover, although it was shown that no administrator could be appointed in Kansas because the deceased left no

property there, and although no action could be brought in either state by an administrator appointed in Missouri. *Oates v. Union Pac. R. Co.*, 104 Mo. 514.

The effect of these decisions has been practically annulled by the Act of April 20, 1891. See *Wilson v. Tootle*, 55 Fed. Rep. 212, where the act is quoted and construed.

1. County Where Injury Occurred. — *Castille v. Caffery Cent. Refinery, etc., R. Co.*, 48 La. Ann. 322.

An action for a wrongful death under the Texas statute is not an action for a "trespass" within the meaning of art. 1198, subd. 8, providing that actions for trespass may be brought in the county where the offense was committed. *Austin v. Cameron*, 83 Tex. 351, following *Ricker v. Shoemaker*, 81 Tex. 22.

Place Where Deceased's Contract of Employment with Defendant Was Made Is Immaterial. — The proper court of the county in which the injury occurred has jurisdiction of the action without regard to where the contract of employment of the deceased with the defendant company was made, it appearing that the injury occurred at the place where he was assigned to duty by the defendant, his employer, and where he was serving the defendant when injured. *Christian v. Columbus, etc., R. Co.*, 79 Ga. 460, 38 Am. & Eng. R. Cas. 261.

Louisiana — Effect of Defendant's Charter. — Under La. Code Prac., art. 165, par. 9, an action for the wrongful killing of a person by a railroad company may be brought in the parish where the injury occurred. This statute is not affected by the provisions of the defendant company's charter subsequently granted. *Houston v. Vicksburg, etc., R. Co.*, 39 La. Ann. 796, 34 Am. & Eng. R. Cas. 77; *Montgomery v. Louisiana Levee Co.*, 30 La. Ann. 607.

Administration May Be Granted by the Probate Court of the county in which the injury occurred for the purpose of enforcing a cause of action for a wrongful death, although the deceased was not an inhabitant of that county or of the state, and left no property therein. *Hutchins v. St. Paul, etc., R. Co.*, 44 Minn. 5.

2. Where the Statute Is Penal. — *Dale v. Atchison, etc., R. Co.*, 57 Kan. 601 (holding *New Mexico* statute, § 2208, a penal one not enforceable in Kansas); *Marshall v. Wabash R. Co.*, 46 Fed. Rep. 269.

The *Massachusetts* statute, Pub. Stat., c. 112, § 212, making railroad companies liable for an injury resulting in death in consequence of their wrongful act and providing that the recovery shall not be less than five hundred dollars nor more than five thousand dollars, is a

unless the action is brought in the state where the injury occurred.¹ And if it appear, from the lack of such averment and proof, or from proof by the defendant, that the laws of the state where the injury occurred provide for no such action, the suit must be dismissed without regard to the provisions of the *lex fori*.²

Foreign Law Must Be Fully Pleaded. — When the plaintiff brings his action in a state where the injury did not occur he must plead the laws of the state where the injury occurred fully, and must set them forth so specifically that it will appear that the defendant had owed a duty which it failed to discharge, and that the injury thereby resulted to the plaintiff, and that such an injury was recognized by the laws of that state.³ The defendant is not bound to allege or show where the injury occurred or that it was committed in another state. It is the plaintiff's duty to allege and prove that he had the right, under the law and the facts, to maintain his action.⁴

penal statute, and an action based on it cannot be maintained in Vermont. *Adams v. Fitchburg R. Co.*, 67 Vt. 76.

1. Plaintiff Must Aver and Prove that the Law of the Place Where Injury Occurred Permits the Action — *Georgia*. — *Selma*, etc., R. Co. v. Lacy, 43 Ga. 461, 49 Ga. 106.

Illinois. — *Chicago*, etc., R. Co. v. Schroeder, 18 Ill. App. 328.

Indiana. — *Jackson v. Pittsburgh*, etc., R. Co., 140 Ind. 241, *Burns v. Grand Rapids*, etc., R. Co., 113 Ind. 169, explaining *Buckles v. Ellers*, 72 Ind. 220, 37 Am. Rep. 156.

Iowa. — *Hyde v. Wabash*, etc., R. Co., 61 Iowa 441, 15 Am. & Eng. R. Cas. 503, 47 Am. Rep. 820.

Kansas. — *Hamilton v. Hannibal*, etc., R. Co., 39 Kan. 56.

Maryland. — *State v. Pittsburgh*, etc., R. Co., 45 Md. 41.

Massachusetts. — *Davis v. New York*, etc., R. Co., 143 Mass. 301, 58 Am. Rep. 138, 28 Am. & Eng. R. Cas. 223; *Le Forest v. Tolman*, 117 Mass. 109, 19 Am. Rep. 400.

Nebraska. — *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848.

New York. — *Vandeventer v. New York*, etc., R. Co., 27 Barb. (N. Y.) 244, 6 Abb. Pr. (N. Y.) 239; *McDonald v. Mallory*, 77 N. Y. 546, 33 Am. Rep. 664; *Whitford v. Panama R. Co.*, 23 N. Y. 465, 3 Bosw. (N. Y.) 67; *Beach v. Bay State Steamboat Co.*, 30 Barb. (N. Y.) 433 (*distinguished* in *Stallknecht v. Pennsylvania R. Co.*, 13 Hun (N. Y.) 451, 53 How. Pr. (N. Y.) 305); *Mahler v. Norwich*, etc., Transp. Co., 35 N. Y. 357, reversing 45 Barb. (N. Y.) 226, 30 How. Pr. (N. Y.) 237; *Debevoise v. New York*, etc., R. Co., 98 N. Y. 377, 25 Am. & Eng. R. Cas. 335, 50 Am. Rep. 683; *Geoghegan v. Atlas Steamship Co.*, 3 Misc. Rep. (N. Y. C. Pl.) 224.

Rhode Island. — *O'Reilly v. New York*, etc., R. Co., 16 R. I. 388, 42 Am. & Eng. R. Cas. 50, 29 Cent. L. J. 210.

Tennessee. — *Nashville*, etc., R. Co. v. Sprayberry, 9 Heisk. (Tenn.) 852, 8 Baxt. (Tenn.) 341, 20 Am. Ry. Rep. 55; *Nashville*, etc., R. Co. v. Eakin, 6 Coldw. (Tenn.) 582.

Texas. — *Willis v. Missouri Pac. R. Co.*, 61 Tex. 432, 48 Am. Rep. 301, 23 Am. & Eng. R. Cas. 379; *De Ham v. Mexican Nat. R. Co.*, (Tex. Civ. App. 1893) 22 S. W. Rep. 249; *St. Louis*, etc., R. Co. v. McCormick, 71 Tex. 660; *Texas*, etc., R. Co. v. Richards, 68 Tex. 375.

Vermont. — *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

2. Suit Must Be Dismissed. — In the absence of a special averment as to the law of the place where the injury occurred, the presumption is conclusive that the common law is in force. *Jackson v. Pittsburgh*, etc., R. Co., 140 Ind. 241.

Error Cannot Be Cured by Amendment. — A complaint by a widow for the wrongful death of her husband by the defendant railroad company in another state, where no such action is recognized, sets out no cause of action and cannot be amended. *Selma*, etc., R. Co. v. Lacey, 49 Ga. 106. A contrary rule is upheld in *Lustig v. New York*, etc., R. Co., 65 Hun (N. Y.) 547, quoting *Lockwood v. New York*, etc., R. Co., 98 N. Y. 523.

Motion in Arrest of Judgment. — In *Brown v. Kansas City*, etc., R. Co., (Tenn. 1894, unreported), the injury occurred in Arkansas, and the suit was brought in Tennessee. The declaration failed to aver that such an action was maintainable in Arkansas. After verdict for the plaintiff the defendant moved in arrest of judgment, which motion was overruled by the trial court, and then appealed. The Supreme Court held that the omission in the declaration was fatal; that the case would not be reversed and remanded for a new trial, but that judgment should be rendered there for the defendant, that being the proper practice on motion in arrest of judgment.

3. McLeod v. Connecticut, etc., R. Co., 58 Vt. 727, 28 Am. & Eng. R. Cas. 644.

In Case of Death Occurring on Ship Near a Foreign Shore, and within the territorial jurisdiction of the foreign country, the declaration must distinctly aver, and it must be proven, that the laws of such country allowed such an action. *Geoghegan v. Atlas Steamship Co.*, 3 Misc. Rep. (N. Y. C. Pl.) 224.

4. Debevoise v. New York, etc., R. Co., 98 N. Y. 377, 25 Am. & Eng. R. Cas. 335, 50 Am. Rep. 683, affirming 30 Hun (N. Y.) 479.

Failure to Show that Suit Was Brought Within Time. — The *Missouri* statute provides that the husband or wife may bring the action, but if he or she fail to sue within six months, the right of action shall vest absolutely in the minor children of the deceased. The wife of a man killed in Missouri brought an action in Kansas to recover damages therefor. The petition alleged that the deceased left minor

The Lex Fori Must Permit Such an Action. — The weight of authority appears to be that when the action is brought in a state where the injury did not occur, the plaintiff must not only aver and prove that the laws of the state where the injury occurred permit such an action as he has brought, but it must also appear that the *lex fori* recognizes such an action.¹

4. Whether the Statutes Must Be Similar. — It is not necessary that the statutes of the state where the injury occurred and those of the state where the suit is brought be exactly alike. It is sufficient if they are shown to be of similar import and character, founded upon the same general principles and having the same general attributes; a mere difference in detail is not material.² There must, however, be a substantial similarity.³

children, but failed to show that the suit was brought within six months after the death. It was held that the omission was fatal. *Hamilton v. Hannibal*, etc., R. Co., 39 Kan. 56.

1. See also cases cited in next note following.

2. Necessity for Similarity Between Statutes. — *Chicago*, etc., R. Co. *v.* *Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171; *Patton v. Pittsburgh*, etc., R. Co., 96 Pa. St. 169, 11 Am. & Eng. R. Cas. 658; *St. Louis*, etc., R. Co. *v.* *McCormick*, 71 Tex. 660; *Texas*, etc., R. Co. *v.* *Richards*, 68 Tex. 375; *Anderson v. Milwaukee*, etc., R. Co., 37 Wis. 321; *Bettys v. Milwaukee*, etc., R. Co., 37 Wis. 323. See also *Richardson v. New York Cent. R. Co.*, 98 Mass. 85.

Instances of Similarity. — In *Higgins v. Central New England*, etc., R. Co., 155 Mass. 176, 31 Am. St. Rep. 544, 48 Am. & Eng. R. Cas. 512, the plaintiff's intestate was domiciled in Massachusetts, and the plaintiff was appointed administrator in that state. The injury and death occurred in Connecticut. The *Connecticut* statute limited the recovery to five thousand dollars, and provided that the damages should be distributed to the husband, widow, heirs, or next of kin, and should not be assets for the payment of the decedent's debts, nor should they pass under any provision of his will. The *Massachusetts* statute contained no such provisions. The statutes of the two states differed also in their provisions with reference to the recovery of expenses of the suit, exemplary damages, and as to the assessment of damages. It was held that the Connecticut statute was not a penal statute within the rule that one state will not enforce the penal statute of another state; and that there was no such dissimilarity between the statutes as would prevent the Massachusetts courts from entertaining jurisdiction and enforcing the plaintiff's rights.

In another case the death occurred in Canada and the suit was brought in Illinois. The only difference between the two statutes was in their provisions regulating the distribution of the damages, and in the fact that the *Illinois* statute limited the amount of damages recoverable, while the *Canada* statute left the whole matter to the jury. It was held that the statutes were substantially similar, and that the action could be maintained in Illinois. *Hanna v. Grand Trunk R. Co.*, 41 Ill. App. 116.

Dissimilar Statutes. — A citizen of Massachusetts was killed in Connecticut and suit was brought in the former state to recover therefor. Under the laws of *Connecticut* the cause of action did not survive death, but the

personal representative had a right to bring a penal action for the benefit of the decedent's estate. It was held that an action could not be maintained in *Massachusetts* under a survival statute. *Pub. Stat. Mass.*, c. 165, § 1; *Davis v. New York*, etc., R. Co., 143 Mass. 301, 28 Am. & Eng. R. Cas. 223, 58 Am. Rep. 138.

In another case the injury occurred in Massachusetts, under such circumstances that an action might have been had under the penal statute of Massachusetts allowing the recovery of a fine. The action was brought in *Rhode Island*, where no such penal statute existed. It was held that there could be no recovery. *O'Reilly v. New York*, etc., R. Co., 16 R. I. 388, 42 Am. & Eng. R. Cas. 50. See also *Gardner v. New York*, etc., R. Co., 17 R. I. 790.

In *St. Louis*, etc., R. Co. *v.* *McCormick*, 71 Tex. 660, which was an action in Texas by a widow to recover for the death of her husband caused by the defendant in Arkansas, it appeared that the *Arkansas* statute permitted the widow, in the absence of an administration on the decedent's estate, to sue as the sole heir in such cases. The *Texas* statute provided that she should sue in her own right as the immediate beneficiary. The *Arkansas* statute made the damages distributable as personal assets of the decedent's estate, while in Texas the damages were required to be divided between the widow and certain other named beneficiaries in such proportion as the jury should fix. The plaintiff in this case dismissed an administration on her husband's estate taken out in Arkansas, removed to Texas, and instituted this action under the Texas statute. It was held that the suit should be dismissed; that the similarity between the statutes of the two states was not sufficient. See also *Willis v. Missouri Pac. R. Co.*, 61 Tex. 432, 48 Am. Rep. 301; *Belt v. Gulf*, etc., R. Co., 4 Tex. Civ. App. 231.

The statutes of *Mississippi* authorizing the personal representative to prosecute any personal action which his intestate might have prosecuted had he lived, and to maintain an action for any trespass to the person or property of the decedent, are not substantially similar to the *Alabama* statute known as the "Employers' Liability Act," and a suit cannot be maintained in Alabama for a death caused in Mississippi, based upon the Mississippi statute. *Kahl v. Memphis*, etc., R. Co., 95 Ala. 337.

3. *Debevoise v. New York*, etc., R. Co., 98 N. Y. 377, 25 Am. & Eng. R. Cas. 335, 50 Am. Rep. 683, affirming 30 Hun (N. Y.) 479.

Proper Party Plaintiff. — In some jurisdictions the rule that the statutes of the two states must be similar is so strictly enforced that an administrator cannot sue in the state of his appointment for the death of his intestate resulting from injuries received in another state, although the laws of the latter state allow such a suit by an administrator, where the law of the former does not provide for a suit by him, but prescribes that other parties shall bring the suit.¹

But the Better Rule seems to be that no such similarity in the statutes is necessary, and that a variance between them in respect of the parties who must sue is not such a variance as will prevent an action in one state for an injury occurring in another by the party entitled, by the laws of the latter state, to institute the suit.²

1. *Kansas*. — *McCarthy v. Chicago, etc.*, R. Co., 18 Kan. 46, 26 Am. Rep. 742. See also *Limekiller v. Hannibal, etc.*, R. Co., 33 Kan. 83, 19 Am. & Eng. R. Cas. 190, 52 Am. Rep. 523.

Kentucky. — In *Taylor v. Pennsylvania Co.*, 75 Ky. 348, 7 Am. & Eng. R. Cas. 23, 39 Am. Rep. 244, the death and the injury occurred in Indiana; the suit was brought in Kentucky by an administrator appointed in the latter state. The laws of Indiana authorized a suit by the administrator, but those of Kentucky provided for a suit by other parties. It was held that the suit could not be maintained. The court said: A personal representative "cannot carry his official character abroad, nor can his official powers and duties at home be affected by foreign laws. A Kentucky administrator suing in a Kentucky court must be able to show that the laws of Kentucky entitle him to the thing sued for. He cannot receive his office from one jurisdiction and appeal to the laws of another jurisdiction for rights or powers not given by the law which created him." Compare, however, *Bruce v. Cincinnati R. Co.*, 83 Ky. 174.

Maryland. — The foregoing language of the Kentucky court is quoted with approval, and the doctrine there announced followed, in *Ash v. Baltimore, etc.*, R. Co., 72 Md. 144, 20 Am. St. Rep. 461, 44 Am. & Eng. R. Cas. 680. See also *State v. Pittsburgh, etc.*, R. Co., 45 Md. 41.

Missouri. — Rev. Stat. Mo. (1879), § 97, expressly inhibits the prosecution, by an administrator, of a civil action for injuries to an intestate. An administrator appointed in Missouri cannot, therefore, sue in that state for an injury occurring in Kansas, though the Kansas law expressly allows such a suit. *Vawter v. Missouri Pac. R. Co.*, 54 Mo. 679, 19 Am. & Eng. R. Cas. 176, 54 Am. Rep. 105, *disapproving* *Stoeckman v. Terre Haute, etc.*, R. Co., 15 Mo. App. 503. But the doctrine is now otherwise by virtue of the Act of April 20, 1891. See *Wilson v. Tootle*, 55 Fed. Rep. 212.

In another case the death occurred in Kansas, where the statute provided for a suit by the personal representative of the deceased. The deceased was a resident of Missouri, and was killed under such circumstances as would have entitled his widow to recover had the death occurred in Missouri. It was held that the widow could maintain no action in Missouri, although it was shown that no administrator could be appointed in Kansas because the deceased left no estate there, and though the

action could not be brought in either state by an administrator appointed in Missouri. *Oates v. Union Pac. R. Co.*, 104 Mo. 514.

2. See *Dennick v. Central R. Co.*, 103 U. S. 11, 1 Am. & Eng. R. Cas. 313, holding that a New York administrator may recover in that state for the death of his intestate caused in New Jersey, the statutes of the two states being practically the same. See also *Boston, etc.*, R. Co. *v. McDuffey*, 79 Fed. Rep. 934, 51 U. S. App. 111, holding that where the laws of Canada, where the death occurred, provide that the widow and children may sue, the suit may be brought by them in Vermont, although the laws of the latter state require the personal representative to sue.

District of Columbia. — *Weaver v. Baltimore, etc.*, R. Co., 21 D. C. 499.

Georgia. — For a homicide caused by a railroad company of this state in Alabama, upon a line of road operated in both states, an Alabama administrator of the deceased may bring an action in Georgia against the defendant, for the use of the widow and children of the deceased, by complying with the statutory requirements in Georgia, and thus having his appointment *quoad hoc* ratified in Georgia, but not otherwise. If the administrator had been appointed in Georgia, he could have brought the suit for like uses. *Central R., etc., Co. v. Swint*, 73 Ga. 651, 26 Am. & Eng. R. Cas. 482.

Illinois. — *Wabash, etc.*, R. Co. *v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791, 12 Am. & Eng. R. Cas. 166.

Iowa. — *Morris v. Chicago, etc.*, R. Co., 65 Iowa 727, 19 Am. & Eng. R. Cas. 180, 54 Am. Rep. 39.

Massachusetts. — The case of *Richardson v. New York Cent. R.*, 47 Am. Rep. 85, is often cited as supporting the contrary view. But that case was decided on the ground that the law of Massachusetts recognized no such action as was sought to be enforced. See this case explained in *Higgins v. Central New England, etc.*, R. Co., 155 Mass. 176, 31 Am. St. Rep. 544, 48 Am. & Eng. R. Cas. 513.

Minnesota. — *Herrick v. Minneapolis, etc.*, R. Co., 31 Minn. 11, 47 Am. Rep. 771.

Mississippi. — *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291.

New Jersey. — *McCarty v. New York, etc.*, R. Co., 62 Fed. Rep. 437. Compare *Lower v. Segal*, 59 N. J. L. 66.

New York. — *Gurney v. Grand Trunk R. Co.*, (Supreme Ct.) 13 N. Y. Supp. 645, 37 N. Y. St. Rep. 557, *affirmed* in 138 N. Y. 638, 53 N. Y. St. Rep. 929; *Wooden v. Western New York, etc.*, R. Co., 126 N. Y. 10, 22 Am. St.

5. Suits in Admiralty Courts. — Originally many of the admiralty courts in this country made a distinction between the common law and the rule in admiralty, and held that an action for damages for a wrongful death could be maintained in such courts. But this view has been disapproved by the Federal Supreme Court, and the supposed distinction is no longer claimed to exist.¹

Enforcement of Statutory Right of Action in Admiralty Courts. — The right of action for wrongful death created by statute may under proper circumstances be enforced in admiralty.²

6. Suits in Federal Courts. — The federal courts sitting in one state will sustain an action for a wrongful death occurring in another state where the statutes of the latter state provide for such an action, if such statutes are not inconsistent with the statutes or policy of the former state.³ And, *a fortiori*, they will sustain an action authorized by the laws of the state in which they sit if the death occurred in such state, if the jurisdictional facts appear.⁴

Rep. 803, *affirming* (Buffalo Super. Ct.) 12 N. Y. Supp. 908, 35 N. Y. St. Rep. 685; Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 38 Am. Rep. 491.

1. Rule in Admiralty Not Different from That at Common Law. — See the title ADMIRALTY JURISDICTION, vol. 1, p. 658.

2. See the title ADMIRALTY JURISDICTION, vol. 1, p. 659. See also the following later cases: The City of Norwalk, 55 Fed. Rep. 98; The Transfer No. 4, 61 Fed. Rep. 364, 20 U. S. App. 570; The Willamette, 70 Fed. Rep. 874, 44 U. S. App. 26, *affirming* 59 Fed. Rep. 797 (action under 1 Hill's Wash. Code, § 1678; 2 Hill's Wash. Code, §§ 138, 148); Robinson *v.* Detroit, etc., Steam Nav. Co., 73 Fed. Rep. 883, 43 U. S. App. 190.

The Oregon statute (§ 371) confers a right of action for an injury resulting in death, and § 3690 creates a lien on all vessels navigating the waters of the state for damages done by them to the person or property of an individual. Under this the personal representative may enforce, in the federal court, a lien on a vessel whose wrongful act caused the death of his intestate. The Oregon, 73 Fed. Rep. 846, *distinguishing* The Corsair, 145 U. S. 344.

The lien created by the Virginia statute (Code of 1887, § 2902) which gives a right of action *in rem* against a vessel wrongfully causing the death of a person may be enforced in the admiralty courts in cases where the injury occurred in waters of the state navigable from the sea. The Glendale, 81 Fed. Rep. 633, *affirming* 77 Fed. Rep. 906.

But in the absence of specific legislation a libel *in rem* for damages resulting from the death of a person killed in a collision between two vessels cannot be maintained. The Wydale, 37 Fed. Rep. 716.

Contributory Negligence defeats the action in admiralty courts, just as it does in the state courts of general jurisdiction. The A. W. Thompson, 39 Fed. Rep. 115.

Action in Admiralty under Lord Campbell's Act. — An action for damages for the death of the plaintiff's intestate, brought under Lord Campbell's Act, was commenced in the Admiralty Division and no application was subsequently made for a transfer of the cause to any other division. It was held that, upon default in

pleading by the defendant, the plaintiff was entitled, under the rules of the court, to enter an interlocutory judgment in his favor and to have the damages assessed and apportioned by a jury. The Orwell, 13 Prob. Div. 80. See The Bernina, 12 Prob. Div. 58; The Gertrude, 12 Prob. Div. 204.

3. Enforcing State Statutes in Federal Courts. — Texas, etc., R. Co. *v.* Cox, 145 U. S. 593.

Where Statute Is Penal. — In Marshall *v.* Wabash R. Co., 46 Fed. Rep. 269, it was held that the provisions of *Missouri* Rev. Stat., 1889, § 4425, providing for the recovery of a penalty of five thousand dollars where the death of a person is caused by the negligent, unskilful, or criminal wrongdoing of another, being penal in their nature, were confined in their operation to the jurisdiction of that state, and a federal court, sitting in another state, would not enforce them.

4. Actions Authorized by Law of State Where Federal Court Sits. — Holmes *v.* Oregon, etc., R. Co., 5 Fed. Rep. 75, 6 Sawy. (U. S.) 262.

In Chicago, etc., R. Co. *v.* Whitton, 13 Wall. (U. S.) 270, which was an action to recover for a wrongful death, brought under the *Wisconsin* statute, it appeared that the statute authorized the representative of the deceased to maintain such an action and to recover damages not exceeding five thousand dollars, "provided that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same." It was held that, notwithstanding the limitation expressed in the statute, the action might be maintained in the federal court sitting in Wisconsin. The court, by Field, J., said: "In all cases where a general right is thus conferred, it can be enforced in any federal court within the state having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such federal court by any provision of state legislation that it shall only be enforced in a state court."

An action accruing under the *Virginia* Code, 1873, c. 145, conferring a right of action on the administrator for the homicide of his intestate, for the benefit of the widow and children of the intestate, if any, otherwise for the benefit of the estate, may be brought in a federal court, though the intestate was a citizen of the same state with the defendant, and his wife and chil-

7. Death Occurring at Sea. — The territorial jurisdiction of a seaboard state extends three miles out to sea, and an action may be brought under the statutes of such a state for an injury inflicted at sea within the three-mile limit, where death results therefrom.¹

VIII. BY WHAT LAW RIGHTS OF PARTIES GOVERNED — **1. The Law of What State — Party Plaintiff — Disposition of Damages Recovered.** — The law of the state where the injury occurred governs as to who must institute the action,² and as to what disposition shall be made of the damages recovered.³

Right to Recover — Negligence — Fellow-servants. — So, also, the law of the state where the injury occurred governs as to the right to recovery as to questions of negligence, contributory negligence, fellow-servants, etc.⁴

dren still reside there. *Harper v. Norfolk*, etc., R. Co., 36 Fed. Rep. 102.

1. Humboldt Lumber Manufacturers' Assoc. v. Christopherson, 73 Fed. Rep. 239, 44 U. S. App. 434, affirming 60 Fed. Rep. 428 (actions under *California* statute).

Death on British Ship — Action in New York. — The *New York* statute being, to all intents and purposes, identical with Lord Campbell's Act, an action may be brought in that state against the owners of a vessel for the death of a person killed on a British ship. *Cavanagh v. Ocean Steam Nav. Co.*, 19 Civ. Pro. Rep. (N. Y. Supreme Ct.) 391.

2. Law of the Place Where Injury Occurred Governs as to Who Must Sue — United States. — *Boston, etc., R. Co. v. McDuffey*, 79 Fed. Rep. 934, 51 U. S. App. 111.

Georgia. — *Western, etc., R. Co. v. Strong*, 52 Ga. 461.

New Jersey. — *Lower v. Segal*, 53 N. J. L. 66.

New York. — *Wooden v. Western New York, etc., R. Co.*, 126 N. Y. 10, 22 Am. St. Rep. 803, affirming 35 N. Y. St. Rep. 685.

Pennsylvania. — *Patton v. Pittsburgh, etc., R. Co.*, 96 Pa. St. 169, 11 Am. & Eng. R. Cas. 658.

Tennessee. — *Nashville, etc., R. Co. v. Sprayberry*, 9 Heisk. (Tenn.) 852, 8 Baxt. (Tenn.) 341, 20 Am. Ry. Rep. 55.

Compare Oates v. Union Pac. R. Co., 104 Mo. 514.

Not a Question of the Remedy. — The law of *New Jersey*, where the injury occurred, requiring the suit to be brought by the administrator of the deceased, the widow cannot sue in her own name in *Pennsylvania*, although the law of the latter state names her as the party to bring the action. The right of a particular person to bring the action is not merely a part of the remedy, and therefore to be governed by the *lex fori*, but is a part of the right conferred by the statute creating the cause of action, and must be governed by the law of the state where the injury occurred, that law being the law by virtue of which the right of action exists. *Usher v. West Jersey R. Co.*, 126 Pa. St. 206, 24 W. N. C. (Pa.) 57, 41 Am. & Eng. R. Cas. 508.

Compare, in this connection, *Perry v. Carmichael*, 95 Ill. 519, 1 Am. & Eng. R. Cas. 174. The deceased was a married woman residing in *Illinois* and was killed in *Indiana*. A person not her husband was appointed administrator in *Illinois* and instituted suit which resulted in a compromise by which he

received one thousand nine hundred dollars, and this amount he paid over to the husband of the deceased. This suit was brought by the heirs of the deceased, after the husband's death, to recover of the administrator the amount received by him. It was held that since the law of *Indiana* vested the right of action in the administrator, he was responsible to the heirs for what he received or ought to have received, and they were entitled to recover of him the one thousand nine hundred dollars.

3. Distribution of Damages Governed by Law of State Where Injury Occurred. — *Dennick v. Central R. Co.*, 103 U. S. 11, 1 Am. & Eng. R. Cas. 313; *Weaver v. Baltimore, etc., R. Co.*, 21 D. C. 499; *McDonald v. McDonald*, (Ky. 1894) 28 S. W. Rep. 482; *Stoeckman v. Terre Haute, etc., R. Co.*, 15 Mo. App. 584; *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848.

The rule of the text is true although the deceased was not a resident of the state where the injury occurred. *Matter of Degaramo*, 86 Hun (N. Y.) 390.

4. As to Right of Recovery. — *Lung Chung v. Northern Pac. R. Co.*, 19 Fed. Rep. 254, 10 Sawy. (U. S.) 17, 16 Am. & Eng. R. Cas. 548; *Western, etc., R. Co. v. Strong*, 52 Ga. 461; *Chandler v. New York, etc., R. Co.*, 159 Mass. 589; *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171; *Derr v. Lehigh Valley R. Co.*, 158 Pa. St. 365, 38 Am. St. Rep. 848; *Nelson v. Chesapeake, etc., R. Co.*, 88 Va. 971, 54 Am. & Eng. R. Cas. 82.

As to Who Are Fellow-servants. — In *McMaster v. Illinois Cent. R. Co.*, 65 Miss. 264, 41 Am. & Eng. R. Cas. 486, 7 Am. St. Rep. 653, the suit was brought in *Mississippi* for a death occurring in *Louisiana*. The deceased was a brakeman on a train, and his death was due to the negligence of an engineer on another train. The *Louisiana* law was that a brakeman and an engineer on the same train were not fellow-servants, but the law as to the same employees when on different trains was not shown. The court held that the *Louisiana* law should govern, but as the law of that state as to the particular facts here involved was not shown, it was further held that the *Mississippi* law should govern, the presumption, in the absence of proof, being that the *Louisiana* law was the same and the *Mississippi* law applied, not being inconsistent with so much of the *Louisiana* law as was proved. The *Mississippi* law being that the deceased and the negligent engineer were fellow-servants, the suit was dismissed.

As to Statute of Limitations. — The limitation prescribed by the law of the state where the injury occurred governs the time within which the action must be brought, regardless of where the suit is tried, if the limitation is contained in the act creating the right of action.¹ But where the statute giving the right of action in such state provides no limitation, the limitation prescribed by the law of the forum will govern.²

2. Law of Place of Injury. — The place where the death occurred is immaterial in determining whether the action will lie, the place where the injury was sustained being the material question.³

3. Law Existing at Time of Injury — *a. GENERALLY.* — The right of any party to maintain an action for the wrongful death of another must be governed by the law existing at the time such death occurred. Subsequent statutes changing the rights of parties can have no retroactive effect.⁴

As to Conditions Precedent to Right of Action. — If, under the law of the state where the killing occurred, a criminal prosecution of the defendant or his agent is not a condition precedent to the civil action for damages, such prosecution need not be proved in an action in another state, although the law of the latter state requires such a prosecution where the killing occurs in such latter state. *South Carolina R. Co. v. Nix*, 68 Ga. 572.

As to Effect of Contributory Negligence. — The deceased was killed in Tennessee under such circumstances as would have entitled him to recover, though his contributory negligence would have gone in mitigation of damages. Under the *Kentucky* law such contributory negligence would be an absolute bar to recovery. In an action in Kentucky it was held that the *Tennessee* law would control. *Louisville, etc., R. Co. v. Whitlow*, (Ky. 1897) 43 S. W. Rep. 711.

As to Interest on Damages. — The law of the place where the injury occurred governs as to whether or not interest on the damages may be allowed. *Kiefer v. Grand Trunk R. Co.*, 12 N. Y. App. Div. 28, 26 Civ. Pro. Rep. (N. Y.) 147.

Law of the Place of Injury Governs All Matters Not Pertaining to the Remedy. — *Shedd v. Moran*, 10 Ill. App. 618; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85; *Crowley v. Panama R. Co.*, 30 Barb. (N. Y.) 99; *Beach v. Bay State Steamboat Co.*, 30 Barb. (N. Y.) 433; *Willis v. Missouri Pac. R. Co.*, 61 Tex. 432, 48 Am. Rep. 301; *Needham v. Grand Trunk R. Co.*, 38 Vt. 204.

1. *Munos v. Southern Pac. Co.*, 51 Fed. Rep. 188, 2 U. S. App. 222; *Boyd v. Clark*, 8 Fed. Rep. 849, 24 Alb. L. J. 508, 13 Rep. 40; *Selma, etc., R. Co. v. Lacey*, 49 Ga. 106; *Cavanagh v. Ocean Steam Nav. Co.*, 19 Civ. Pro. Rep. (N. Y. Supreme Ct.) 301; *Weaver v. Baltimore, etc., R. Co.*, 21 D. C. 499.

2. **When Foreign Statute Provides No Limitation.** — See *Munos v. Southern Pac. Co.*, 51 Fed. Rep. 188, 2 U. S. App. 222, 52 Am. & Eng. R. Cas. 634, *note*, where it is said: "Where torts are committed in foreign countries, or beyond the territorial jurisdiction of the sovereignty in which the action is brought, the *lex fori* governs, no matter whether the right of action depends upon the common law or a local statute, unless the statute which creates or confers the right limits the duration of such right to a prescribed time." *Citing* Pollock on Torts, 130; Wood's Lim. of

Actions, p. 23, § 9; *Nonce v. Richmond, etc., R. Co.*, 33 Fed. Rep. 429; *The Harrisburg*, 119 U. S. 199; *Pittsburg, etc., R. Co. v. Hine*, 25 Ohio St. 629; *O'Shields v. Georgia Pac. R. Co.*, 83 Ga. 621.

3. **Law of Place of Injury.** — *Louisville, etc., R. Co. v. Williams*, 113 Ala. 402; *Rudiger v. Chicago, etc., R. Co.*, 94 Wis. 191, *construing* Sanb. & B.'s Ann. Stat. Wis., § 4255. See also *Western, etc., R. Co. v. Strong*, 52 Ga. 461; *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171; *Lung Chung v. Northern Pac. R. Co.*, 19 Fed. Rep. 254, 10 Sawy. (U. S.) 17, 16 Am. & Eng. R. Cas. 548.

4. **Statutes Can Have No Retroactive Effect.** — *Drake v. Gilmore*, 52 N. Y. 389 (in this case the action was instituted after the amended statute was passed, but the death occurred prior to such amendment; the original statute was held to control); *Van Amburg v. Vicksburg, etc., R. Co.*, 37 La. Ann. 650, 55 Am. Rep. 517; *Kelley v. Boston, etc., R. Co.*, 135 Mass. 448; *Carden v. Louisville, etc., R. Co.*, (Ky. 1896) 37 S. W. Rep. 839; *Chicago, etc., R. Co. v. Pounds*, 11 Lea (Tenn.) 127, 15 Am. & Eng. R. Cas. 510.

The Distribution of the Recovery must be made according to the statute in force at the time the death occurred. *Richmond v. Chicago, etc., R. Co.*, 87 Mich. 374.

Compare *Atchison, etc., R. Co. v. Napole*, 55 Kan. 401, where it is held that Laws of 1889 (Kan.). c. 131, § 1, supplementing § 422 of the code and providing that the right of action given by § 422 shall not be lost by the non-residence of the deceased nor by the non-appointment of an administrator, does not create a new cause of action nor place a limitation on the old. "It simply changes the remedy." The Act of 1889 would therefore apply to a death occurring prior to its passage. See also *Berry v. Kansas City, etc., R. Co.*, 52 Kan. 760.

New York Constitutional Provision. — Under the New York statute it is the death, and not the injury resulting in death, that is the ground of the right of action. Therefore the provision of art 1, § 18, of N. Y. Const. (1895), which abolishes the maximum limit of recovery, applies to a case where the death occurred after the passage of the provision, although the injury may have occurred prior to its passage. *Smith v. Metropolitan St. R. Co.*, 15 Misc. Rep. (N. Y. C. Pl.) 158; *Weber v. Third Ave. R. Co.*, 12 N. Y. App. Div. 512.

b. CONSTITUTIONALITY OF RETROACTIVE STATUTES. — Statutes extending the right of recovery for actions for injuries resulting in death to additional cases, or enlarging the amount of recovery, or conferring the right of action upon new parties, affect not the remedy but the substantial rights of parties, and are void where the constitution of the state prohibits retrospective laws touching civil rights.¹

IX. PARTIES AND BENEFICIARIES — WHO ENTITLED TO RIGHT OF ACTION —

1. The Statute Controls. — The right of action for the death of any person caused by the wrongful act of a defendant is, with the isolated exceptions mentioned before,² purely statutory, and in all cases the statute must be looked to in determining to whom such right belongs.³

a. PLAINTIFF MUST PROVE HIMSELF TO BE WITHIN THE STATUTE. — The right of action for damages for a death resulting from the defendant's wrongful act being purely of statutory origin, a person seeking to maintain such an action must allege such facts as bring him within the provisions of the statute.⁴

b. CONDITIONS PRECEDENT TO RIGHT OF ACTION. — Where the statute grants a right of action to any person under certain conditions precedent, *e. g.*, the existence of certain beneficiaries, the nonexistence of other parties, etc., it becomes a material part of the plaintiff's case to show that these conditions have been satisfied. The defendant is not bound to set up the nonsatisfaction

1. The Tennessee Constitution, art. 1, § 20, provides that "no retrospective law, or law impairing the obligation of contracts, shall be made." This has been uniformly held to mean that "no retrospective law impairing the obligation of contracts shall be made." See *Shields v. Clifton Hill Land Co.*, 94 Tenn. 148, 45 Am. St. Rep. 700, and cases cited.

In the case of *Chicago, etc., R. Co. v. Pounds*, 11 Lea (Tenn.) 127, 15 Am. & Eng. R. Cas. 510, the law, at the time of the death of the deceased for whose wrongful death this action was brought, limited the recovery to such damages as were sustained by the deceased himself, and which he might have recovered had he himself sued. After his death the legislature passed an act (March 26, 1883) amending the law so as to provide that damages resulting to the parties for whose use and benefit the right of action survives shall be recoverable. The court held that it would not give the statute any retroactive effect, since it did not expressly so provide; that the statute affected the substantial rights of the defendants, and if retroactive would be void under art. 1, § 20, of the state constitution. See *Pritchard v. Savannah St., etc., R. Co.*, 87 Ga. 204.

In *New York*, pending an action by a husband to recover for the death of his wife, the legislature amended the statute so as to authorize a recovery by the husband and for his own benefit. The original statute conferred the right to all damages upon the next of kin. In holding that the amendment would not affect the pending suit, the court, by Andrews, J., said: "I am not prepared to deny the power of the legislature, before the recovery of judgment in such an action, to change the rule of distribution, or the direction of the fund which might be recovered in it. But such legislation would be contrary to sound and recognized principles; and a construction of a statute which would deprive one class of persons of the benefit of a recovery

given by a law existing when the action was commenced, and transfer it to another, would so shock the sense of justice and propriety that it should not be adopted in the absence of the clearest expression of legislative intent." *Drake v. Gilmore*, 52 N. Y. 394.

2. See *supra*, this title, *The Right of Action in Absence of Statute.*

3. This section will discuss the decisions under the various statutes, but as such statutes vary greatly in their provisions, the particular statute under which the action is brought and upon which the decision is based must always be consulted for a proper understanding of the decision.

Where a statute creates a cause of action and designates specifically the persons who may sue, they alone may do so. *Oates v. Union Pac. R. Co.*, 104 Mo. 514.

4. *Campbell v. Houston, etc., R. Co.*, 2 Tex. Unrep. Cas. 473.

This rule requires that the declaration or complaint should aver all the facts which are essential to the plaintiff's cause of action. See the title *DEATH BY WRONGFUL ACT*, 5 ENCYC. OF PL. AND PR., p. 868.

Plaintiff Must Bring His Case Clearly Within the Statute. — In a suit brought in *Kansas* for an injury causing death occurring in *Missouri*, the statute of the latter state controls. That statute vests the right of action in the husband or widow of the deceased for six months after the death; after that time the right of action becomes vested absolutely in the surviving minor children, if there are any. In the suit brought by the widow the declaration showed that the deceased left minor children surviving him, and failed to show that the suit was brought within six months after the death of the deceased. It was held that the suit should be dismissed. The right given by the statute to the widow was a conditional one, and could be enforced only upon her complying strictly with the conditions specified. *Hamilton v. Hannibal, etc., R. Co.*, 39 Kan. 56.

of such conditions, nor to prove it, but the burden is on the plaintiff to allege and prove it.¹

2. Specific Parties — *a.* **HUSBAND.** — Many of the statutes fail to provide specifically that the husband may sue for the death of his wife, and where this is true he has no right of action, except as the executor or administrator of her estate.²

1. Conditions Precedent to Right of Action to Be Established — *United States.* — Serensen *v.* Northern Pac. R. Co., 45 Fed. Rep. 407.

Arkansas. — St. Louis, etc., R. Co. *v.* Yocum, 34 Ark. 493.

Connecticut. — Budd *v.* Meriden Electric R. Co., 69 Conn. 272.

Georgia. — Allen *v.* Atlanta St. R. Co., 54 Ga. 503; Chick *v.* Southwestern R. Co., 57 Ga. 357. See also Smith *v.* East, etc., R. Co., 84 Ga. 183.

Illinois. — Chicago, etc., R. Co. *v.* Morris, 26 Ill. 400; Union R., etc., Co. *v.* Shacklet, 119 Ill. 232, 28 Am. & Eng. R. Cas. 193.

Indiana. — Stewart *v.* Terre Haute, etc., R. Co., 103 Ind. 44, 21 Am. & Eng. R. Cas. 209; State *v.* Walford, 11 Ind. App. 392.

Michigan. — Walker *v.* Lake Shore, etc., R. Co., 104 Mich. 606.

Minnesota. — Schwarz *v.* Judd, 28 Minn. 371.

Missouri. — Barker *v.* Hannibal, etc., R. Co., 91 Mo. 86; McIntosh *v.* Missouri Pac. R. Co., 103 Mo. 131; Dulaney *v.* Missouri Pac. R. Co., 21 Mo. App. 597; Baker *v.* Springfield, etc., R. Co., 86 Mo. 75.

The right of action for the death of a husband is in the widow for six months only, after the death. If she does not sue within that time, the right vests in the minor children absolutely. Hamilton *v.* Hannibal, etc., R. Co., 39 Kan. 56, construing Missouri statute.

Nebraska. — Burlington, etc., R. Co. *v.* Crockett, 17 Neb. 570.

New York. — Lucas *v.* New York Central R. Co., 21 Barb. (N. Y.) 345.

But if the complaint shows that the deceased left a widow or next of kin, it need not state that they have sustained damages. Kenney *v.* New York Cent., etc., R. Co., 49 Hun (N. Y.) 535.

Tennessee. — Louisville, etc., R. Co. *v.* Pitt, 91 Tenn. 86 (authorities reviewed at length); East Tennessee, etc., R. Co. *v.* Lilly, 90 Tenn. 563.

Vermont. — Westcott *v.* Central Vermont R. Co., 61 Vt. 438.

Compare Columbus, etc., R. Co. *v.* Bradford, 86 Ala. 574, 38 Am. & Eng. R. Cas. 214; Alabama, etc., R. Co. *v.* Waller, 48 Ala. 459; Warner *v.* Western North Carolina R. Co., 94 N. Car. 250, 25 Am. & Eng. R. Cas. 432; Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. (Va.) 431; Madden *v.* Chesapeake, etc., R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

2. No Specific Provision for Husband — May Sue Only as Representative — *England.* — The husband may, as administrator, recover for the wrongful killing of his wife, the recovery to be for the benefit of himself and her children. Barnes *v.* Ward, 9 C. B. 392, 67 E. C. L. 392, 14 Jur. 334, 2 C. & K. 661, 61 E. C. L. 661, 19 L. J. C. P. 195.

Under Lord Campbell's Act, the husband of a woman killed through the defendant's negli-

gence, suing as her administrator, is entitled to recover damages for himself and her children, although there may be no proof to show that she was entitled for life to any rents or other income. Lett *v.* St. Lawrence, etc., R. Co., 11 Ont. App. 1, 21 Am. & Eng. R. Cas. 165.

United States. — See Western Union Tel. Co. *v.* McGill, 57 Fed. Rep. 699, 12 U. S. App. 651.

Georgia. — The husband could not sue under the original Georgia statute. Georgia R., etc., Co. *v.* Wynn, 42 Ga. 331.

He could not maintain the action, although it may have been, in form, an action to recover for the loss of the wife's services, where it appeared that death was instantaneous. Womack *v.* Central R., etc., Co., 80 Ga. 132 (action for death occurring prior to Act of 1887).

Missouri — The right of action is in the husband for six months from the time of his wife's death, but if he fails to sue within that time, the right vests absolutely in the minor children. 1 Mo. Rev. Stat. 1889, § 4425; Blair *v.* Chicago, etc., R. Co., 89 Mo. 334. See also Hamilton *v.* Hannibal, etc., R. Co., 39 Kan. 56, decided under Missouri statute.

New Jersey. — Under the Act of March 3, 1848 (p. 294 of Revision) a husband cannot maintain an action for the wrongful killing of his wife where it appears that death was instantaneous. Grosso *v.* Delaware, etc., R. Co., 50 N. J. L. 317.

New York. — The statute in force in 1861 provided that in actions for wrongful death the amount to be recovered should be for the "exclusive benefit of the widow and next of kin," and that the jury should give damages with reference "to the pecuniary injuries resulting from such death to the wife and next of kin of the deceased person." In an action by the husband, as administrator of his wife, to recover damages for her death, it was held that he could not recover for the value of her services to him; his recovery must be limited to the pecuniary injuries sustained by her next of kin. The husband cannot be considered as one of the next of kin to his wife. Dickens *v.* New York Cent. R. Co., 23 N. Y. 158, reversing 28 Barb. (N. Y.) 41. Citing Watt *v.* Watt, 3 Ves. Jr. 244, and note in Sumner's ed.; Garrick *v.* Camden, 14 Ves. Jr. 372; 2 Kent's Com. (5th ed.) 176.

The same rule was applied in Drake *v.* Gilmore, 52 N. Y. 389, where the death of the wife occurred before, and the action therefor was brought after, the amendment of 1870, and it was held that the amendment could have no application to the case.

Nor, before the statute of 1870, could the husband recover for the loss of his wife's society. Green *v.* Hudson River R. Co., 2 Abb. App. Dec. (N. Y.) 277, affirming 28 Barb. (N. Y.) 9, and explaining Ford *v.* Monroe, 20 Wend. (N. Y.) 210; Pack *v.* New York, 3 N. Y. 489.

Is Not Next of Kin. — The husband is not within the term "next of kin" of his deceased wife, and cannot sue under a statute giving a right of action to that class.¹

Statutes with Provision for Suit by Husband. — Some of the statutes provide specifically that the husband is entitled to maintain an action for the wrongful death of the wife.²

b. WIDOW. — The statutes always provide that the widow shall be entitled to share in the proceeds of an action for the death of her husband, and in most cases she is given the right to prosecute the action in her own name.³

"Although there are cases in which the husband is spoken of as succeeding to the personal property of his wife, upon her decease, as her next of kin (*Fettiplace v. Gorges*, 1 Ves. Jr. 46; *Schuyler v. Hoyle*, 3 Johns. Ch. (N. Y.) 206), he is not such in a strict legal sense." *Drake v. Gilmore*, 52 N. Y. 393.

1. Husband Not Next of Kin to His Wife. — *Western Union Tel. Co. v. McGill*, 57 Fed. Rep. 699, 12 U. S. App. 651 (authorities reviewed at length); *Watson v. St. Paul City R. Co.*, (Minn. 1897) 73 N. W. Rep. 401.

"The husband is not embraced within the description of next of kin of his wife. Husband and wife, as such, are not of kin to each other in a legal sense, and a husband cannot take under a settlement limited to the next of kin of his wife." *Dickins v. New York Cent. R. Co.*, 23 N. Y. 158, *citing* *Watt v. Watt*, 3 Ves. Jr. 244, and note *a* in Sumner's ed.; *Garrick v. Camden*, 14 Ves. Jr. 372. See also *Drake v. Gilmore*, 52 N. Y. 389.

In *Haraden v. Larrabee*, 113 Mass. 430, in defining the term "next of kin," the court, by Gray, C. J., stated this rule: "The words 'next of kin' are limited in legal meaning, as in common use, to blood relations, and do not include a husband or a wife, unless accompanied by other words clearly manifesting a purpose to extend their signification; and the mere addition of a reference to the statute of distributions is not sufficient." *Citing* *Withy v. Mangles*, 4 Beav. 358, 10 Cl. & F. 215.

Ohio — Contra. — In *Steel v. Kurtz*, 28 Ohio St. 191, it appeared that the statute gave the right of action for the benefit of the widow and next of kin. In deciding that the husband of a deceased wife was a beneficiary under that statute, the court declared that the statute was not ambiguous, but incomplete, and, in order to complete it, held that the husband was the next of kin to his wife. See *Western Union Tel. Co. v. McGill*, 57 Fed. Rep. 699, 12 U. S. App. 651, *criticizing* this case and *explaining* *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553; *Bream v. Brown*, 5 Coldw. (Tenn.) 169; *Merchants' Ins. Co. v. Hinman*, 34 Barb. (N. Y.) 410; *Betsinger v. Chapman*, 88 N. Y. 487.

In *Illinois* the court apparently declines to hold that the husband is one of the next of kin of his wife, but construes a statute which grants a right of action to the "widow and next of kin" as embracing the husband. See *Cleveland, etc., R. Co. v. Baddeley*, 150 Ill. 328, *following* *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553.

In *Tennessee*. — In *Trafford v. Adams Express Co.*, 8 Lea (Tenn.) 111, the statute provided that the right of action of a person injured by the wrongful act of another should

not abate by his death, but should survive to the personal representative of the deceased for the benefit of his widow or next of kin. In holding that this would authorize a suit by the husband for the death of his wife, the court based its holding on the ground that the right of action was a chose in action of the wife while living; that her personal estate, including this right of action, vested in the husband before administration taken out; and that he was entitled to recover *jure mariti*. The court, however, admitted that the holding in *Dickins v. New York Cent. R. Co.*, 23 N. Y. 158, was right, observing that "the same result would follow under our statute if the recovery was, either in whole or in part, as compensation for the injury to the widow and next of kin, to the extent of so much of the recovery."

The rule in *Tennessee* was, however, under the statute, that the husband is entitled to all the damages resulting from the wrongful death of his wife, though he can sue only as administrator. *Chattanooga Electric R. Co. v. Johnson*, 97 Tenn. 667, *citing* and *approving* the case just reviewed. But this has been changed by a recent act which provides that the husband shall divide the recovery equally with his children, he taking a child's part. The action may be brought by him for the benefit of himself and his children, or by the administrator. *Tenn. Acts of 1897*, c. 86, p. 231.

2. Under a statute of Mississippi a husband may maintain an action for the wrongful killing of his wife and child, and where the killing took place in Mississippi an action may be maintained by the husband even in the courts of another state where the statutes authorize no such action. *Nashville, etc., R. Co. v. Sprayberry*, 9 Heisk. (Tenn.) 852, 8 Baxt. (Tenn.) 341. See *Miss. Annot. Code* (1892), § 663.

3. Widow's Right of Action — Colorado. — The widow has the preferred right for one year after the death of her husband to sue therefor, and in some cases may bring an action after the expiration of the year. *Hayes v. Williams*, 17 Colo. 465, *construing* *Mills's Annot. Stat.*, § 1508.

Georgia. — Under the former code, § 2971, the right of action was vested exclusively in the widow and children of the deceased. *Miller v. Southwestern R. Co.*, 55 Ga. 143; *Georgia R., etc., Co. v. Garr*, 57 Ga. 277, 24 Am. Rep. 492.

But the widow cannot sue alone and in her own name where the right of action is given to the personal representative for the use of the widow and children, and it appears that the deceased left children. *Western, etc., R. Co. v. Strong*, 52 Ga. 461, 8 Am. Ry. Rep. 13,

Widow Given Primary Right. — Where, as under the *Tennessee* statute, the widow is given the right of action first, the action should be brought in her name. But if she elects not to sue, the action may be brought in the name of the personal representative, he being the next party named.¹

Can Maintain But One Action. — When the widow institutes the action through the personal representative of her deceased husband and afterwards brings a second action in her own name, she cannot maintain both. If she is the sole beneficiary, she may elect as to which action she will prosecute. If there are children of the deceased who are entitled to share in the recovery, she cannot interfere with the suit by the personal representative.²

Illinois. — See *Barron v. Illinois Cent. R. Co.*, 1 Biss. (U. S.) 412, 453. As to distribution of damages, see *Beard v. Skeldon*, 13 Ill. App. 54.

Kansas. — See *Chicago, etc., R. Co. v. Mills*, 57 Kan. 687.

Kentucky. — Under the provisions of Gen. Stat. Ky., c. 57, § 3, the widow was entitled to maintain the action. See *M'Leod v. Ginther*, 80 Ky. 399, 8 Am. & Eng. R. Cas. 162; *Henderson v. Kentucky Cent. R. Co.*, 86 Ky. 389.

Under the present statutes (Gen. Stat. 1894, §§ 4-6) she may sue in her own name for the causes of action created by §§ 4 and 5, but an action under § 6 must be brought by the personal representative.

Louisiana. — Where the deceased was a husband and father the action was properly brought by the widow individually and as tutrix for her minor children. *Curley v. Illinois Cent. R. Co.*, 40 La. Ann. 870; *Clairain v. Western Union Tel. Co.*, 40 La. Ann. 178; *Helm v. O'Rourke*, 46 La. Ann. 178.

Mississippi. — *Natchez Cotton Mills Co. v. Mullins*, 67 Miss. 672.

Missouri. — 1 Mo. Rev. Stat. 1889, § 4425; *Barker v. Hannibal, etc., R. Co.*, 91 Mo. 86.

Montana. — The widow and the next of kin are entitled to maintain an action for a wrongful death, without showing that they were dependent on the deceased for support. *Serensen v. Northern Pac. R. Co.*, 45 Fed. Rep. 407.

Pennsylvania. — *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95, 12 W. N. C. (Pa.) 47, 7 Am. & Eng. R. Cas. 25.

Under the Act of 1855, the widow may bring the action, but the damages recovered must be distributed to the several persons named in the statute as being entitled to share therein. Such distributees need not, however, be made parties. *Huntingdon, etc., R. Co. v. Decker*, 84 Pa. St. 419.

The widow cannot sue, however, if the death occurred in another state where the statute gave the right of action to the personal representative. *Usher v. West Jersey R. Co.*, 126 Pa. St. 206, 41 Am. & Eng. R. Cas. 508.

Tennessee. — *Stephens v. Nashville, etc., R. Co.*, 10 Lea (Tenn.) 448, 11 Am. & Eng. R. Cas. 671; *Holder v. Nashville, etc., R. Co.*, 92 Tenn. 141, 36 Am. St. Rep. 77, 54 Am. & Eng. R. Cas. 73, note; *Collins v. East Tennessee, etc., R. Co.*, 9 Heisk. (Tenn.) 841, 20 Am. Ry. Rep. 46. See also *Bream v. Brown*, 5 Coldw. (Tenn.) 168; *Greenlee v. East Tennessee, etc., R. Co.*, 5 Lea (Tenn.) 418, 4 Am. & Eng. R. Cas. 351.

Texas. — *International, etc., R. Co. v. Kuehn*, 70 Tex. 582, 35 Am. & Eng. R. Cas. 421;

Texas, etc., R. Co. v. Berry, 67 Tex. 238; *Berry v. Northeastern R. Co.*, 72 Ga. 137, 28 Am. & Eng. R. Cas. 575. See also *San Antonio St. R. Co. v. Renken*, (Tex. Civ. App. 1897) 38 S. W. Rep. 829.

The widow may sue alone although the recovery is for the benefit of herself and the children of the deceased. The children need not be joined as parties. *Houston, etc., R. Co. v. Shaw*, 2 Tex. Unrep. Cas. 553.

She may sue for the benefit of herself and children under *Sayles's Tex. Civ. Stat.*, art. 1211 a, as amended by Act of Feb. 11, 1893. *International, etc., R. Co. v. Sein*, 11 Tex. Civ. App. 386.

Action by Representative — When Two Claim as Widow. — In an action by the personal representative, where two persons claim to be the widow of the deceased the legality of neither of the alleged marriages is material at the trial, since the court must determine that in making the distribution. *Toledo, etc., R. Co. v. Brooks*, 81 Ill. 245.

Suing as Widow and Administratrix. — In *Chicago, etc., R. Co. v. Mills*, 57 Kan. 687, the plaintiff, a widow suing for the death of her husband, was a nonresident of Kansas. She described herself in the complaint as widow and as administratrix of deceased by virtue of an appointment made by the courts of another state. It being shown that she was a widow it was held that she might recover as such, although she had no right to maintain the action as administratrix.

Widow Not Next of Kin to Husband. — *Lima Electric Light, etc., Co. v. Deubler*, 7 Ohio Cir. Ct. Rep. 185.

1. When Widow Has First Right to Sue. — *Webb v. East Tennessee, etc., R. Co.*, 88 Tenn. 119, 42 Am. & Eng. R. Cas. 44. See also *Edmonson v. Kentucky Cent. R. Co.*, (Ky. 1894) 28 S. W. Rep. 789; *Jordan v. Cincinnati, etc., R. Co.*, 89 Ky. 40; *Barker v. Hannibal, etc., R. Co.*, 91 Mo. 86.

Under the South Dakota Statute, the first right of action belongs to the widow, and the personal representative cannot sue if the deceased left a widow. *Belding v. Black Hills, etc., R. Co.*, 3 S. Dak. 369, 52 Am. & Eng. R. Cas. 624.

2. Widow Commencing Two Actions. — In *Henderson v. Kentucky Cent. R. Co.*, 86 Ky. 389, the personal representative of the deceased, at the widow's request, instituted an action under the statute. Subsequently the widow instituted another action against the same defendant upon the same cause of action. The defendant chose to defend the action instituted by the widow, and pleaded the pendency of that action in bar of recovery in the other. It was

Marriage Taking Place After Injury. — The fact that the plaintiff, widow of the deceased, married him after the injury and only a few days before his death will not affect her right to recover, as his widow, for the wrongful death.¹

The Remarriage of the Widow after the wrongful death of her husband does not affect her right of action as vested in her by the statute, either as to her right to sue or as to the measure of damages recoverable by her.²

Wife Living Apart from Her Husband. — The fact that the wife, at the time of her husband's death, was living apart from him will not, of itself, preclude her maintaining an action to recover damages for his death, so long as it appears that the conjugal relation was still existing and she had done nothing to forfeit her right by her own wrong.³

c. PARENT — (1) *In General.* — Where the statute, as is the general rule, confers the right of action upon the personal representative of the deceased, a parent cannot maintain the action in his or her own name although the statute expressly provides that the recovery shall be for his or her benefit; in such cases only the executor or administrator of the deceased may sue.⁴

held that the widow, being a sole beneficiary, had the right to institute the second action, and the defendant had the right to defend either of the actions and plead pendency of either one of them in bar of recovery in the other; though if there had been children of the deceased entitled jointly with the widow to what might be recovered she could not have defeated the action instituted at her request, nor prejudiced their rights, by subsequently commencing another in her own name.

Under the Louisiana Statute, the widow may bring one action in two different capacities; she may sue individually for her own benefit and as tutrix for her infant child. *Curley v. Illinois Cent. R. Co.*, 40 La. Ann. 810.

1. *Gross v. Electric Traction Co.*, 5 Pa. Dist. Rep. 294, 180 Pa. St. 99.

2. **Does Not Affect Her Right of Action nor the Measure of Damages.** — *Georgia R., etc., Co. v. Garr*, 57 Ga. 277, 24 Am. Rep. 492; *International, etc., R. Co. v. Kuehn*, 70 Tex. 582, 35 Am. & Eng. R. Cas. 421.

Joinder of New Husband. — Under Tex. Rev. Stat. 1252, where the widow remarries pending an action for damages for the death of her former husband, the new husband should be made a party, on the suggestion of the marriage. *San Antonio St. R. Co. v. Cailloutte*, 79 Tex. 341.

3. **May Recover.** — *Dallas, etc., R. Co. v. Spicker*, 61 Tex. 427, 21 Am. & Eng. R. Cas. 160, 48 Am. Rep. 297. See, in this connection, *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220.

The fact that a mother who sues for the wrongful killing of her child was living separate and apart from her husband will not affect her right to maintain her action, it appearing that the deceased son supported her. *East Tennessee, etc., R. Co. v. Maloy*, 77 Ga. 237, 31 Am. & Eng. R. Cas. 352.

Living in a State of Prostitution. — But where the wife is living in a state of prostitution, having abandoned her husband, and thus forfeited her right to claim a support from him, she can maintain no action for his death. All right of action was forfeited by her conduct. *Ft. Worth, etc., R. Co. v. Floyd*, (Tex. Civ. App. 1893) 21 S. W. Rep. 544.

4. **As to Parent's Right of Action** — *Alabama.* — The Code (1886), §§ 2590-2593, conferred

upon the personal representative a right of action against a master for the wrongful death of a servant. Section 2588 gave to a father a right of action for the death of his minor son caused by the wrongful act of any person. Under this the father can maintain no action for the death of his son caused by the negligence of a fellow-servant while both were in the employ of the master. Such an action could be maintained only by the personal representative. The father may, however, recover under section 2588 for the loss of his son's services, where, although his death was due to the negligence of a fellow-servant, the son was employed by the defendant master without the father's consent. *Williams v. South, etc., Alabama R. Co.*, 91 Ala. 635; *Lovell v. De Bardelaben Coal, etc., Co.*, 90 Ala. 13. See also *Stewart v. Louisville, etc., R. Co.*, 83 Ala. 493.

Under Ala. Code of 1886, § 2588, the right of action where a minor son is killed by an explosion on a vessel on which he is employed survives to the father, or, if he be dead, to the mother of the deceased. *Grimsley v. Hankins*, 46 Fed. Rep. 400.

Arkansas. — The Act of March 6, 1883 (Sand. & H. Ark. Dig., § 5911, 5912), providing that the action shall be brought by the personal representative and shall be for the benefit of the widow and next of kin, supersedes the Act of Feb. 3, 1875, which provided that where a minor was killed by a railroad train the father, if living, might sue, and that if the father be dead, the mother or guardian might sue. Therefore, damages accruing from the loss of a minor son's services after his death can only be recovered in a suit by the administrator, prosecuted for the benefit of the father, if living, as the child's next of kin. The father cannot prosecute such a suit in his own name. *Davis v. St. Louis, etc., R. Co.*, 53 Ark. 117, 44 Am. & Eng. R. Cas. 690.

California. — The parent is entitled to sue under Cal. Code Civ. Pro., §§ 376, 377. See *Cleary v. City R. Co.*, 76 Cal. 240; *O'Callaghan v. Bode*, 84 Cal. 489; *Munro v. Pacific Coast Dredging, etc., Co.*, 84 Cal. 515, 18 Am. St. Rep. 248 (suit by a mother).

Colorado. — Colo. Gen. Stat. (1883), §§ 1030-1033, provide that the action for a wrongful death shall be brought, first, by the husband

or wife; or, second, if there be no husband or wife, or if he or she fail to sue within one year after the death, then by the heir or heirs of the deceased; or, third, if such deceased be a minor or unmarried, then by the father or mother, who may join, and each shall have an equal interest, etc. Sections 2529, 2530, render children liable for the support of indigent parents. Under these provisions the parents of an unmarried adult are entitled to recover for the pecuniary loss caused to them by his wrongful death. *Denver, etc., R. Co. v. Wilson*, 12 Colo. 20, citing *Chicago v. Keefe*, 114 Ill. 229, 55 Am. Rep. 860.

The expression "heir or heirs of deceased," used in the statute last cited, includes only the lineal descendants of the deceased. *Hindry v. Holt*, (Colo. 1897) 51 Pac. Rep. 1002.

Joinder of the parents in an action for the death of their child is permissive, but not imperative. *Pierce v. Conners*, 20 Colo. 178, 46 Am. St. Rep. 279.

Georgia. — Ga. Code 1895, vol. 2, § 3828.

The Georgia statute does not give a right of recovery to the father or mother unless he or she was dependent upon the child for support, and the child, before his death, contributed to the support of such parent. *Clay v. Central R., etc., Co.*, 84 Ga. 345. See also *Smith v. East, etc., R. Co.*, 84 Ga. 183; *Ellison v. Georgia R. Co.*, 87 Ga. 691; *Augusta R. Co. v. Glover*, 92 Ga. 132; *Atlanta, etc., Air-Line R. Co. v. Graviitt*, 93 Ga. 369.

Until this statute, which was passed in 1887, a parent could only recover for loss of services during the child's minority. *Perry v. Georgia R., etc., Co.*, 85 Ga. 193. See also *McDowell v. Georgia R. Co.*, 60 Ga. 320; *Chick v. Southwestern R. Co.*, 57 Ga. 357; *East Tennessee, etc., R. Co. v. Maloy*, 77 Ga. 237, 31 Am. & Eng. R. Cas. 352.

Illinois. — A widowed mother is entitled to all the rights the father would have had in an action by her for the death of her son. *Bradley v. Sattler*, 54 Ill. App. 504.

Indiana. — Under Rev. Stat. of Ind. (1881), § 266 (see former code, § 27), the father or mother may sue to recover damages for the death of their minor child. This has always been the rule under that statute. *Mayhew v. Burns*, 103 Ind. 328; *Fr. Wayne, etc., R. Co. v. Beyerle*, 110 Ind. 100; *Louisville, etc., R. Co. v. Goodykoontz*, 119 Ind. 111, 12 Am. St. Rep. 371; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259. See also *Pennsylvania Co. v. Davis*, 4 Ind. App. 51.

The action may be brought by the father or, in case of his desertion of his family, by the mother, or by the guardian for his ward. *Pittsburgh, etc., R. Co. v. Vining*, 27 Ind. 513, 92 Am. Dec. 260.

Under Ind. Pract. Act, § 784, a father may sue to recover damages for the wrongful killing of his minor child, and section 353 prohibits the granting of a new trial on the ground of the damages being too small. *Gann v. Worman*, 69 Ind. 438.

Under Ind. Rev. Stat. (1881), § 284, where the child is an adult the action may be brought by his administrator. The father cannot sue under this section as administrator of a minor child, unless there has been an emancipation of such child. An averment in

the complaint that at the time of the child's death such child was not, and for two months prior thereto had not been, in the service of his parents, or either of them, is not a sufficient averment of emancipation. *Berry v. Louisville, etc., R. Co.*, 128 Ind. 484, following *Mayhew v. Burns*, 103 Ind. 328.

Kansas. — Under the Kansas Civil Code, § 422*a*, parents, as such, have no right of action for the death of their son, where he was a non-resident. See *Eureka v. Merrifield*, 53 Kan. 794.

Louisiana. — Upon the death of a minor child, the right to compensatory damages survives in the parent, and he may bring suit to recover them. But the right to punitive damages does not survive. *Hamilton v. Morgan's Louisiana, etc., R., etc., Co.*, 42 La. Ann. 824; *Frank v. New Orleans, etc., R. Co.*, 20 La. Ann. 25 (decided under La. Act of March 15, 1855).

Maryland. — The father may maintain an action for the death of his son if he has sustained pecuniary loss in consequence thereof, whether the son was of age or not. But the action must be in the name of the state. *Maryland v. Baltimore, etc., R. Co.*, 1 Hughes (U. S.) 337.

Minnesota. — The statute (Gen. Stat. 1878, c. 77, § 2), expressly confers the right of action on the personal representative. It is held that, as the right of action is purely statutory, the provisions of the statute must be strictly followed, and that a father cannot maintain the action except after qualifying as executor or administrator. *Nash v. Tousley*, 28 Minn. 5, citing *Atkinson v. Duffy*, 16 Minn. 45; *Jones v. Tainter*, 15 Minn. 512.

Mississippi. — See Code 1892, § 663; Code 1880, § 1510; Acts of 1896, p. 96.

Under these provisions the parent is entitled to bring an action for the death of a child whenever the child, had it survived, could have maintained an action for the injury. *White v. Louisville, etc., R. Co.*, 72 Miss. 12. See also *Meyer v. King*, 72 Miss. 1; *Natchez, etc., R. Co. v. Cook*, 63 Miss. 38.

Under Miss. Const. 1890, § 193, Code 1892, § 3559, extended by Acts 1897, p. 97, providing for a responsibility when death is due to the negligence of a fellow-servant, the action must be brought by the personal representative of the decedent. No right of action is created in favor of the decedent's parent or child, or husband or wife. *Illinois Cent. R. Co. v. Hunter*, 70 Miss. 471.

Missouri. — There can be no recovery by a parent, under Mo. Rev. Stat., § 2122, for the wrongful death of his minor son, unless it is shown both by the pleadings and the proof that the deceased left no widow or surviving children. *Sparks v. Kansas City, etc., R. Co.*, 31 Mo. App. 111.

It seems to have been held that where the mother sues for the wrongful killing of her infant child, basing her action on the loss of his services, she must show that, at the time of his death, he was in her service. *Matthews v. Missouri Pac. R. Co.*, 26 Mo. App. 75. But compare *Schmitz v. St. Louis, etc., R. Co.*, 46 Mo. App. 380. See also *Graham v. Hannibal, etc., R. Co.*, 28 Fed. Rep. 744.

The mother of a deceased illegitimate child

Statute Conferring Right of Action on Heirs.—The same is true where a right of

may maintain an action for his death. *Marshall v. Wabash R. Co.*, 120 Mo. 275. Compare *Marshall v. Wabash R. Co.*, 46 Fed. Rep. 269, where it was held that under the Missouri statute the mother of an illegitimate child had no right of action.

Nebraska.—Under the Nebraska statute, c. 21, § 2, a father has no right of action for the death of his child. See *Wilson v. Bumsted*, 12 Neb. 1.

New Mexico.—See the statute of New Mexico construed in *Isaac v. Denver, etc.*, R. Co., 12 Daly (N. Y.) 340, affirmed in 102 N. Y. 718.

New York.—See *Green v. Hudson River R. Co.*, 10 How. Pr. (N. Y. Supreme Ct.) 263, affirmed 31 Barb. (N. Y.) 260, where an action by the husband, as administrator of his wife, for the benefit of her mother, was sustained; *Kennedy v. New York Cent., etc.*, K. Co. 35 Hun. (N. Y.) 186 (widowed mother allowed to sue for loss of child's services); *McGovern v. New York Cent., etc.*, R. Co., 67 N. Y. 417, 15 Am. Ry. Rep. 119 (father entitled to recover entire damages in one action).

Oregon.—Under the Oregon statute (Code, § 34), a mother, during the continuance of the relation of parent and child, may maintain an action in her own right to recover damages for the wrongful killing of her child. Another statute (Code, § 371) confers upon the personal representative the right of action for an injury which the estate of the deceased may have sustained by reason of his death, where he was an adult or was emancipated from parental service at the time of his death. *Putman v. Southern Pac. Co.*, 21 Oregon 230; *Craft v. Northern Pac. R. Co.*, 25 Oregon 275.

Pennsylvania.—Under the Act of 1855, a widowed mother may recover damages for the wrongful death of a child. *Pennsylvania R. Co. v. Bantom*, 54 Pa. St. 495.

Where deceased left a widow but no children, and also left parents, the widow alone is entitled to recover damages under the Pa. Act of 1855, April 26, and the parents are entitled to no part of the recovery. Parents are only entitled to recover damages for the death of a child where the family relation exists at the time of the accident. If the child be free, either by age or emancipation, and be living apart from his parents, and in no way contributing to their support, they cannot maintain such an action. *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95, 7 Am. & Eng. R. Cas. 25, 12 W. N. C. (Pa.) 47; *Pennsylvania R. Co. v. Keller*, 67 Pa. St. 300. See also *Pennsylvania R. Co. v. Zebe*, 37 Pa. St. 420, holding that an action for the death of a child is properly brought in the name of both parents.

A married woman who has been deserted by her husband may sue and recover for the wrongful death of her and his minor child. *Kerr v. Pennsylvania R. Co.*, 169 Pa. St. 95, 36 W. N. C. (Pa.) 325.

Rhode Island.—Pub. Stat., c. 204, § 20, provide that damages for a wrongful death may be recovered in an action "for the use of the husband, widow, children, or next of kin" in like manner as provided in preceding sections. These sections provide that an action for a wrongful death shall be brought by the per-

sonal representative, or, where there is a widow only, by her in her own name. Under this the father has no right of action for the death of his son. *Goodwin v. Nickerson*, 17 R. I. 478.

South Carolina.—A father is not entitled to recover for the death of his infant son. *Edgar v. Castello*, 14 S. Car. 20, 37 Am. Rep. 714.

Tennessee.—A parent can recover only after qualifying as personal representative. *Holston v. Dayton Coal, etc., Co.*, 95 Tenn. 521. See also *Hall v. Nashville, etc., R. Co.*, *Thomp. Cas.* 205.

Texas.—Under the Texas statute (Rev. Stat., arts. 2903, 2904), the mother can sue for herself and for the benefit of her husband for the wrongful killing of her son. *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220. This was a case where the mother was living with her son, who supported her, but for years had given nothing to his father's support, the father having years before deserted the plaintiff, his wife.

Under the statute, the jury must apportion the damages between the father and mother, whether they sue jointly or the father alone sues. *Houston City St. R. Co. v. Sciacca*, 80 Tex. 350.

The fact that the son for whose wrongful death the action was brought was over twenty-one years old does not prevent a recovery by the parent. *Houston, etc., R. Co. v. Cowser*, 57 Tex. 293. Therefore, a mother may recover for the death of her adult daughter although the latter was a married woman, it appearing she had been in the habit of furnishing her mother with pecuniary assistance out of the earnings of herself and husband. *Guif, etc., R. Co. v. Southwick*, (Tex. Civ. App. 1895) 30 S. W. Rep. 592.

But in *Winnt v. International, etc., R. Co.*, 74 Tex. 32, which was an action by a mother to recover exemplary damages for the death of her son, under Tex. Const., art. 16, § 26, which limits the right of action to the surviving husband, widow, or heirs of his or her body, the court held that the action could not be maintained by the mother. It would seem that the rule would be otherwise if the mother should sue under the statute for compensatory damages.

Under the statute (Rev. Stat., arts. 2903, 2904), providing that the action shall be for "the sole and exclusive benefit of the surviving husband, wife, children, and parents" of the deceased, a father living in another state and not dependent on deceased for support is not a necessary party to the action where the deceased left a wife and children dependent on him for support, the damages provided by the statute being clearly intended only for those who are injured by the death. *St. Louis, etc., R. Co. v. Taylor*, 5 Tex. Civ. App. 668. See also *Texas Cent. R. Co. v. Frazier*, (Tex. Civ. App. 1896) 34 S. W. Rep. 664.

Washington.—Under Wash. Code (1881), § 9, a father may maintain an action for the death of his child although the administrator of the estate of the child may have theretofore received a judgment against the same defendant for causing the child's death. The father's recovery is limited to the value of the child's services until his maturity. The adminis-

action is conferred on the "heir or heirs" of the deceased.¹

But the Common-law Right of Action which a parent had for the loss of the services of his minor child caused by the wrongful act of another is not affected by the statute.²

Parent's Right of Action Conditional — Satisfaction of Conditions Must Be Shown. — Where the right of action in the parent for the death of his child is limited to certain cases, *e. g.*, to where the child is a minor, or unmarried, or to cases where the other parent is dead, the parent bringing the action must allege and prove himself to be within the statute.³

Father Preferred. — When the word "parent" is used in the statute in designating the party entitled to maintain the action, it must be construed to mean the father, if the child left one surviving him.⁴ If the mother is given the right to sue in the event the father is dead, absent, or imprisoned, etc., she

trator's recovery must be for the value of the life after maturity. *Hedrick v. Ilwaco R., etc., Co.*, 4 Wash. 400, 54 Am. & Eng. R. Cas. 45.

In England, under Lord Campbell's Act, the father cannot recover for the wrongful killing of his son unless he is able to show that he has thereby sustained a pecuniary loss. *Sykes v. Northeastern R. Co.*, 23 W. R. 473, 44 L. J. C. P. 191, 32 L. T. 199. Compare *Duckworth v. Johnson*, 4 H. & N. 653, 5 Jur. N. S. 630, 29 L. J. Exch. 25.

If he can show a reasonable expectation of pecuniary benefit from the continuance of his son's life, he may maintain an action. *Franklin v. South Eastern R. Co.*, 3 H. & N. 211, 4 Jur. N. S. 565.

Where it appears that the mother had a legal claim on her son for support and that he was supporting her at the time of his death, she is entitled to a recovery. Even if she had no legal claim on him for support, still the imperfect moral obligation on the part of the son to support his mother, he being her only support at the time of his death, is sufficient to validate her claim. *Weems v. Mathieson*, 4 Macq. H. L. Cas. 215.

Proof that the father was scarcely able to work and that his deceased son had been contributing to his support is sufficient to entitle the plaintiff to go to the jury on the question as to whether he suffered any pecuniary injury by reason of his son's death. *Hetherington v. North Eastern R. Co.*, 9 Q. B. Div. 160, 51 L. J. Q. B. 495, 30 W. R. 797.

But the suit must always be brought in the name of the personal representative. See the statute.

1. Parent Not an Heir — Kentucky Statute. — The word "heir" as used in Ky. Gen. Stat., c. 57, § 3, which provides for an action by the widow, heir, or personal representative of a person killed by the wilful neglect of another, is equivalent to the word "child," and does not include a parent, although he may be in fact an heir of the deceased person. *Louisville, etc., R. Co. v. Coppage*, (Ky. 1890) 13 S. W. Rep. 1086; *Henning v. Louisville Leather Co.*, (Ky. 1889) 12 S. W. Rep. 550, following *Henderson v. Kentucky Cent. R. Co.*, 86 Ky. 389; *Kentucky Cent. R. Co. v. McGinty*, (Ky. 1890) 14 S. W. Rep. 601; *Jordan v. Cincinnati, etc., R. Co.*, 89 Ky. 40. See also *Hackett v. Louisville, etc., R. Co.*, 95 Ky. 236.

A father cannot maintain an action under Ky. Gen. Stat. (1894), § 4, for the wrongful kill-

ing of his child, since that statute names only the widow or minor children as having a right to sue. Nor can he maintain such an action under section 6 of the same statute, since the personal representative must sue. *Harris v. Kentucky Timber, etc., Co.*, (Ky. 1897) 45 S. W. Rep. 462.

2. Davis v. St. Louis, etc., R. Co., 53 Ark. 117, 44 Am. & Eng. R. Cas. 690. See *supra*, this title, *The Right of Action in Absence of Statute — Such Rights Not Affected by Statute.*

3. Plaintiff Must Show Facts Entitling Him to Sue. — Where the parent is allowed to bring an action for the death of an unmarried minor child, the complaint in such an action is defective if it fails to allege that the child was a minor and unmarried. *Dulaney v. Missouri Pac. R. Co.*, 21 Mo. App. 597; *Sparks v. Kansas City, etc., R. Co.*, 31 Mo. App. 111. See also *Baker v. Springfield, etc., R. Co.*, 86 Mo. 75; *Barker v. Hannibal, etc., R. Co.*, 91 Mo. 86.

Under the *Arkansas* statute, a mother can sue for the wrongful killing of her son only when the father is dead. If she sues, it must affirmatively appear that the father is dead. An allegation that she is a widow is not sufficient. *St. Louis, etc., R. Co. v. Yocum*, 34 Ark. 493.

The right of parents to sue under Mo. Rev. Stat. (1879), § 2121, for the wrongful killing of their son, depends in part upon his not having left a widow or minor child surviving him, and this fact must appear, either directly or by clear inference, in the declaration, otherwise no suit can be maintained. *McIntosh v. Missouri Pac. R. Co.*, 103 Mo. 131.

4. Meaning of Parent — Father Preferred. — See *Sorensen v. Balaban*, 11 N. Y. App. Div. 164, 4 N. Y. Ann. Cas. 7.

The *Mississippi* statute (Code of 1880, § 1510) limited the right of action to cases in which the deceased left "a widow or children, or both, or husband or father." A later portion of the statute, providing as to who should bring the action, declared that it should be brought in the name of "the parent." It was held that the word "parent" as there used meant the father previously referred to, and that the mother (although the sole living parent) could not maintain an action in her own name for the wrongful killing of her minor child. *Amos v. Mobile, etc., R. Co.*, 63 Miss. 509, distinguishing *Natchez, etc., R. Co. v. Cook*, 63 Miss. 38.

can maintain the action in her name only upon affirmative proof of the facts named as conditions precedent to her right to sue.¹

Parent's Right Limited to Loss of Services — When. — In some jurisdictions the parent is allowed to recover damages for the death of an infant child, but the recovery is limited to the value of the child's life prior to his maturity; for the damages for any subsequent period, the personal representative must sue.²

(2) *Parent of Illegitimate Child.* — Under some of the statutes giving parents a right of action for the death of a child it has been held that the word "child" does not include an illegitimate child; but this view is not universally adopted.³

(3) *Stepfather.* — A stepfather who has assumed the relation of father to the child of his wife by a former marriage, and has acted as such, is entitled to the services of the child while it remains a member of his family, and may maintain an action for the loss of its services in consequence of its wrongful death, under statutes allowing the father to maintain such an action.⁴

(4) *Parent Allowed to Recover in Two Capacities.* — Where the mother is the only person living entitled to damages for the death of her child, she may maintain a single action for damages and recover, not only for the usual damages allowed for the wrongful death, but also for the value of her child's services during his minority.⁵

(5) *Joinder of Parents as Plaintiffs.* — When the statute confers the right of action upon the parents of the deceased child, they may sue jointly although they were divorced before the right of action accrued.⁶ But when

1. *Mother Given the Right to Sue when Father Is Dead or Imprisoned, etc.* — Louisville, etc., Consol. R. Co. v. Lohges, 6 Ind. App. 288.

2. *When Child Is an Infant.* — Walters v. Chicago, etc., R. Co., 36 Iowa 458; Putman v. Southern Pac. Co., 21 Oregon 230.

Such was formerly the rule in *Georgia*. McDowell v. Georgia R. Co., 60 Ga. 320. But this has been changed by a subsequent statute. See Perry v. Georgia R., etc., Co., 85 Ga. 193.

Emancipation of Child. — The *Missouri* statute (Rev. Stat., § 2121), is both penal and compensatory, and the emancipation of a minor son by his parents is no defense to an action by them to recover for his death. Philpott v. Missouri Pac. R. Co., 85 Mo. 164, 27 Am. & Eng. R. Cas. 323.

3. *Parent of Bastard Has No Right of Action.* — Gibson v. Midland R. Co., 2 Ont. Rep. 658, 15 Am. & Eng. R. Cas. 507, was an action by an administratrix for damages arising from the death of her illegitimate son, who was a brakeman of defendant company's road. The fact of the illegitimacy of the deceased did not appear at the trial, and a verdict was rendered for the plaintiff. On a motion for a new trial, the defendant offered affidavits in support of the motion, showing this illegitimacy. The court held that the Canada statute was not intended to confer any greater rights than existed under the English Act (Lord Campbell's), and that the mother could not recover when it appeared that her deceased child was a bastard. Citing Dickinson v. North Eastern R. Co., 2 H. & C. 735.

In *Indiana* the same view has been taken. McDonald v. Pittsburgh, etc., R. Co., 144 Ind. 459, 55 Am. St. Rep. 185.

Under the *Pennsylvania* Statute, which provided that "the husband, widow, children, or parents of the deceased, and no other relative," shall be entitled to recover for an

injury causing death, the mother of an illegitimate child has no right of action. Harkins v. Philadelphia, etc., R. Co., 15 Phila. (Pa.) 286. See also *Pennsylvania* R. Co. v. Adams, 55 Pa. St. 503.

The Missouri Statute, Rev. Stat. (1889), § 4425, providing that the father and mother may join in a suit for the wrongful death of their child, does not require the joinder of the father where the deceased was a bastard child, since the mother alone, in such a case, has a right of action. Marshall v. Wabash R. Co., 120 Mo. 275. A different view of the *Missouri* law had previously been taken in the federal courts. Marshall v. Wabash R. Co., 46 Fed. Rep. 269.

Stepfather of Bastard Child — Indiana. — A man who marries the mother of a bastard child and takes the child into his home as a member of his family cannot maintain an action for his wrongful death, although, under Rev. Stat. Ind. 1894, § 267, Rev. Stat. 1881, § 266, it is provided that a father may recover for the death of his child. Thornburg v. American Strawboard Co., 141 Ind. 443.

See also the title CHILD — CHILDREN, vol. 5, p. 1095.

4. *Hennesy v. Bavarian Brewing Co.*, 63 Mo. App. 111, 1 Mo. App. Rep. 595, holding that the stepfather, and not the mother, may sue.

5. *Gulf, etc., R. Co. v. Compton*, 75 Tex. 667, 44 Am. & Eng. R. Cas. 637. See also *Winnt v. International, etc., R. Co.*, 74 Tex. 32.

6. *Father and Mother May Sue Jointly.* — Buel v. St. Louis Transfer Co., 45 Mo. 562; *Pennsylvania* R. Co. v. Zebe, 37 Pa. St. 420.

The *Missouri* statute authorizing a joinder of parents as parties does not require the father to be joined as a party where the suit is for the death of a bastard child. Mo. Rev. Stat. (1889), § 4425; Marshall v. Wabash R. Co., 120 Mo. 275.

the statute names a particular parent, the suit must be brought in the name of such parent alone.¹

d. CHILDREN — (1) *Generally.* — The statutes almost without exception make provision for a right of action in favor of the children of the deceased, though the action is usually required to be brought by some one for their benefit.²

Effect of Minority. — Ordinarily the word "child," as used in the statute conferring a right of action for damages for the wrongful death of a parent, would include any child of the deceased, without regard to the age of the child.³

When Father Has Deserted the Mother. — Under the *Pennsylvania* statutes it is held that a mother who has been deserted by her husband may maintain an action in her own name to recover for the negligent killing of her child. *Kerr v. Pennsylvania R. Co.*, 169 Pa. St. 95.

Under the Texas Statute (Tex. Rev. Stat., art. 2903), which gives the right of action to both parents, it is held that where the husband has deserted his wife and ceased to support her, she may sue alone, in her own name, to recover for the wrongful killing of her child upon whom she was partially dependent for support. *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220. In an action under this statute it is generally proper for the father and mother to join as parties plaintiff in an action for the wrongful killing of their child. *Texas, etc., R. Co. v. Hall*, 83 Tex. 675.

1. When Mother Must Sue Alone. — Under the *Mississippi* statute (Code of 1892, § 663), providing that when a person is killed, leaving a mother, she may bring an action for damages, the mother alone must sue, and she cannot join others with her. *Illinois Cent. R. Co. v. Hunter*, 70 Miss. 471. *Compare Philadelphia, etc., R. Co. v. Conway*, 112 Pa. St. 511.

Under the *Colorado* statute, either parent may sue alone, or both may sue jointly, and a parent not originally a party may be made such on application by him or her at any time, even after judgment or after review in an appellate court, the joinder being allowed in order to protect any interest which such parent may have in the recovery. *Pierce v. Conners*, 20 Colo. 178, 46 Am. St. Rep. 279.

Death of One Parent Pending the Action. — The *Missouri* statute provides that if the deceased be a minor and unmarried the action may be brought by the parents, or, if either of them be dead, by the survivor. Under this, where the parents join in the action, and afterwards one of them dies, the survivor may prosecute the action alone. *Senn v. Southern R. Co.*, 124 Mo. 621.

2. Right of Action in Favor of Children — *Missouri.* — The right of action is vested in the husband or wife of the deceased for six months after the death. If he or she fails to sue within that time, the right of action vests absolutely in the minor children of deceased. See *Hamilton v. Hannibal, etc., R. Co.*, 39 Kan. 56.

Georgia. — Under the *Georgia* statute, where the husband or father is killed, the widow, or, if there be no widow, the children, may bring the action. If a wife and mother is killed, the husband and children must join. Code of Ga. (1882), § 2971, amended by Act of Oct. 27, 1887.

If the father is not alive, the children may sue for the death of their mother. *Scott v.*

Central R. Co., 77 Ga. 450. See also *Atlanta, etc., R. Co. v. Venable*, 65 Ga. 55, 7 Am. & Eng. R. Cas. 35; *Snell v. Smith*, 78 Ga. 355.

But under § 2971 of the code, the adult child of a father who has left neither widow nor minor children cannot maintain an action for his father's death. *Mott v. Central R. Co.*, 70 Ga. 680, 43 Am. Rep. 595.

Tennessee. — Under the *Tennessee* statute (Code of 1896), the husband alone is entitled to all the damages recoverable for the death of his wife. The infant child cannot sue, nor is it entitled to share in the recovery. *Chattanooga Electric R. Co. v. Johnson*, 97 Tenn. 677.

But upon the rendition of this decision an act was passed specifically providing that the damages for the death of a married woman shall go to the husband and children equally, he taking a child's part. Acts Tenn. (1897), c. 86, p. 231.

3. Ordinarily Includes Any Child. — *Galveston, etc., R. Co. v. Kutac*, 72 Tex. 643, 76 Tex. 473, 37 Am. & Eng. R. Cas. 470; *San Antonio, etc., R. Co. v. Long*, (Tex. Civ. App. 1894) 26 S. W. Rep. 114; *Tuteur v. Chicago, etc., R. Co.*, 77 Wis. 505. See also the title CHILD — CHILDREN, vol. 5, p. 1084.

In *Duval v. Hunt*, 34 Fla. 85, adult children were allowed to recover upon particular proof.

Under Md. Code, art. 65, §§ 1-2, the adult children may recover for the death of a parent. The statute makes no reference to the age or condition of the parties. *Baltimore, etc., R. Co. v. State*, 60 Md. 449, 12 Am. & Eng. R. Cas. 149.

In Pennsylvania. — The words "parent" and "children," as used in the Act of April 26, 1855, relating to actions for personal injuries, are used to indicate the family relation in point of fact as the foundation of the right of action without regard to age. Where the child is under age, the relation is presumed to exist until the contrary appears. If he is over age, the relation must be affirmatively proven. *Pennsylvania R. Co. v. Adams*, 55 Pa. St. 499.

Adult Child Must Prove Damages. — An adult child cannot recover for the loss of his parent except upon proof of actual pecuniary loss. In case of a suit by a minor child, damages are presumed. *International, etc., R. Co. v. De Bajligethy*, 9 Tex. Civ. App. 108.

It is therefore held that a married daughter, and a son nearly twenty-one years old, neither of whom was being supported by the father before his death, have no right of recovery, since it is plain that no damages could have ensued to them. *St. Louis, etc., R. Co. v. Johnston*, 78 Tex. 536.

But it has been held in a number of jurisdictions that the word includes only a minor child,¹ and in others that it includes only a minor child who was dependent on his deceased parent for support and protection.²

Child Attaining Majority After Death but Before Action Brought. — When the statute confers a right of action in favor of a "minor child" of the deceased, a child who was under age at the time the cause of action accrued is entitled to maintain the action although he may have attained his majority before the action is brought.³

(2) *Illegitimate Offspring.* — Under Lord Campbell's Act, an illegitimate child has no right of action for the death of his parent.⁴ But under a statute in the *United States* giving a right of action to the "next of kin" of the deceased, it has been held that an illegitimate child was within the statute.⁵

(3) *Posthumous Child.* — When the statute gives a right of action for the death of a parent to his child or to his surviving children, the terms include a posthumous child, and such child may maintain the action.⁶ The fact that the mother of such a child had the right to sue for damages for the death of her husband when the cause of action accrued will not set the statute of limitations in motion as against the child.⁷ Nor will a recovery by the mother or other beneficiary under the statute preclude a suit by a posthumous child unless the statute clearly so provides.⁸

(4) *Suit by Next Friend.* — Where the statute gives a right of action to a child of the deceased, the action should be brought in the name of the child's next friend, if such child is not of age at the time.⁹

1. Includes Only Minor Children. — This is the rule under the *Idaho* statute, by virtue of an express provision. But it is not necessary for the complaint to aver that the plaintiff is a minor. The fact that he is of age is a matter of defense to be pleaded and proved by the defendant. *Palmer v. Utah*, etc., R. Co., 2 *Idaho* 290.

Under the *Georgia* statute it was held that where the deceased left neither a widow nor a minor child, his adult son could not recover. This holding, however, was in pursuance of the plain wording of the statute, which allowed the action only where deceased left a widow or minor child. *Mott v. Central R. Co.*, 70 *Ga.* 680, 48 *Am. Rep.* 595.

Under *Ga. Code*, § 2971, providing that a widow or child "may recover for the homicide of a husband or parent," minor children may recover for the homicide of their mother. *Atlanta*, etc., R. Co. *v.* *Venable*, 65 *Ga.* 55, 7 *Am. & Eng. R. Cas.* 35.

Under the *New Mexico* statute, providing that the parents may sue "if such deceased be a minor and unmarried," the word "and" cannot be read as meaning "or," and therefore the parents cannot sue where the deceased was unmarried but was of age. *Isaac v. Denver*, etc., R. Co., 12 *Daly* (N. Y.) 340, *affirmed* 102 *N. Y.* 718.

2. Held to Include Only Dependent Minor Children. — *Pittsburgh*, etc., R. Co. *v.* *Vining*, 27 *Ind.* 513, 92 *Am. Dec.* 269.

3. Minority at Time Cause of Action Accrues Sufficient. — The *Missouri* statute (Rev. Stat. 1879, § 2121) provides that the action may be brought, "first, by the husband or the wife of the deceased; or, second, if there be no husband or wife, or if he or she fail to sue within six months after such death, then by the minor child or children of the deceased." Section 2125 provides that the action shall be

brought within one year after the death. It appeared that the plaintiff was a minor child at the time the cause of action accrued, but attained his majority before action was brought. It was held that he was entitled to maintain it; that the word "minor" was not intended as a limitation of time, and that it referred to the condition of the party at the time the cause of action accrued. *Rutter v. Missouri Pac. R. Co.*, 81 *Mo.* 169, 21 *Am. & Eng. R. Cas.* 212.

4. Illegitimate Child Not Within English Statute. — *Dickinson v. North Eastern R. Co.*, 2 *H. & C.* 735, 33 *L. J. Exch.* 91, 9 *L. T.* 299, 12 *W. R.* 52.

5. Under Ohio Statute. — *Muhl v. Michigan Southern R. Co.*, 10 *Ohio St.* 272.

6. Posthumous Children. — *Nelson v. Galveston*, etc., R. Co., 78 *Tex.* 621, 22 *Am. St. Rep.* 81, 48 *Am. & Eng. R. Cas.* 8; *Texas*, etc., R. Co. *v.* *Robertson*, 82 *Tex.* 657, 27 *Am. St. Rep.* 929; *Chicago*, etc., R. Co. *v.* *Logue*, 47 *Ill. App.* 292 (posthumous child is "next of kin" of his brother, who was killed two months before the former's birth). Such a child had a right of action under Lord Campbell's Act. *The George and Richard*, L. R. 3 *Adm. & Eccl.* 466, 24 *L. T.* 717.

7. Nelson v. Galveston, etc., R. Co., 78 *Tex.* 621, 22 *Am. St. Rep.* 81, 48 *Am. & Eng. R. Cas.* 8.

8. Nelson v. Galveston, etc., R. Co., 78 *Tex.* 621, 22 *Am. St. Rep.* 81, 48 *Am. & Eng. R. Cas.* 8.

9. Duval v. Hunt, 34 *Fla.* 85. See also *International*, etc., R. Co. *v.* *Sein*, 11 *Tex. Civ. App.* 386, *construing* *Sayles' Tex. Civ. Stat.*, art. 1211a, as amended by Act of February 11, 1893.

When Action Is Brought in the Name of the State, on behalf of the minor child, it is not improper to insert the name of the next friend. It is even desirable to do so, particularly where the

(5) *By Guardian.*—The suit for the benefit of the minor children may be brought by their duly appointed guardian.¹ If the guardian sues to recover damages for the death of his ward, the recovery must be limited to the damages caused to the ward's estate; the right to recover for the loss of the minor's services belongs to the parent.²

c. GRANDCHILDREN.—Where the statute does not specifically mention the grandchildren of the deceased, they are not necessary or proper parties to the suit, whatever may be their right to share in the recovery.³

f. PERSONAL REPRESENTATIVE OF DECEASED—(1) *In General.*—Under Lord Campbell's Act, the right of action is expressly conferred upon the personal representative of the deceased. The action must be brought in the name of such representative for the benefit of the parties named in the statute.⁴ The provisions of many of the state statutes are similar.⁵

child is too young to make an affidavit. But it is too late, after verdict, to urge the objection that the name of the next friend had not been inserted. *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159.

A Stepfather may represent his wife's children as their next friend in a suit to recover for the wrongful death of their father. *International, etc., R. Co. v. Kuehn*, 70 Tex. 582, 35 Am. & Eng. R. Cas. 421.

1. The *Texas* statute provided that there should be a right of action in favor of the "heirs, representatives, or relations of deceased persons." Under this, the guardian of the minor children may bring the action for them, and it is immaterial whether the suit is brought in the name of the guardian for his wards, or in the name of the wards by their guardian. *Houston, etc., R. Co. v. Bradley*, 45 Tex. 171, 13 Am. Ry. Rep. 213.

2. Action by Guardian for Death of Ward.—*Louisville, etc., R. Co. v. Goodykoontz*, 119 Ind. 111, 12 Am. St. Rep. 371, 42 Am. & Eng. R. Cas. 40, *construing* Ind. Rev. Stat. 1881, § 266.

Rev. Stat. of Ind. (1881), § 266, provide that the father primarily, and in certain cases the mother, may sue for the damages resulting from the wrongful injury or death of a child, and that the guardian of the child may sue "for the injury or death of his ward," but that when the suit is by the guardian "for an injury to his ward, the damages shall inure to the benefit of his ward." Under this, where it appears that the ward left a mother surviving him and that the guardian had paid nothing from his ward's estate for funeral expenses, the guardian cannot maintain a suit. *Louisville, etc., R. Co. v. Goodykoontz*, 119 Ind. 111, 12 Am. St. Rep. 371.

3. Grandchildren are not proper parties under a statute which provides that the action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the deceased. *Dallas Rapid Transit R. Co. v. Elliott*, 7 Tex. Civ. App. 216.

Right to Share in Recovery.—Under Sayles' Civ. Stat. of *Texas*, art. 2903, providing that the action shall be for the sole benefit of the surviving husband, wife, children, and parents of the deceased, the recovery to be apportioned by the jury in their verdict, the grandchildren of the deceased have no interest whatever in the damages recovered in an action by the husband. *Dallas Rapid Transit R. Co. v. Elliott*, 7 Tex. Civ. App. 216.

4. Lord Campbell's Act — Representative's Right of Action.—The persons in whose behalf the personal representative sues must prove that during the lifetime of the deceased a pecuniary advantage accrued to them owing to their relationship with him. They are not entitled to recover under the statute where the only pecuniary benefit from his life was derived from a contract they had made with him. *Sykes v. North-Eastern R. Co.*, 23 W. R. 473, 44 L. J. C. P. 191, 32 L. T. 199. See, in this connection, *Barnes v. Ward*, 9 C. B. 392, 67 E. C. L. 392, 2 C. & K. 661, 61 E. C. L. 661, 14 Jur. 334, where the widow of the deceased, as his administrator, was allowed to recover for the benefit of herself and the infant children of the deceased.

5. Representative's Right of Action — Alabama.—Sess. Acts of 1885, p. 115, provide that where a workman is killed while in the service of his employer, his heirs at law shall have the same right to damages and the same remedy as if he had not been in the defendant's employ. The only remedy which had existed before was an action by the personal representative under Code of 1876, § 2641. It was held that, under the first named act, the suit must be brought by the personal representative. *Stewart v. Louisville, etc., R. Co.*, 83 Ala. 493. See also *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518; *Selma, etc., R. Co. v. Lacey*, 49 Ga. 106, *construing Alabama* statutes.

Such a suit for the death of an employee is properly brought in the name of the personal representative, and the pleadings need not show that the deceased left heirs at law surviving him. *Columbus, etc., R. Co. v. Bradford*, 86 Ala. 574.

If the person killed was a married woman, the husband is not the only party entitled to sue as her representative. *South, etc., Alabama R. Co. v. Sullivan*, 59 Ala. 272. See also *Savannah, etc., R. Co. v. Shearer*, 58 Ala. 672.

Arkansas.—Under the Arkansas statutes, the right of action is vested solely in the personal representative, and he may bring two actions: one for the benefit of the estate, under the act of 1838, providing that an action "for wrongs done to the person or property of another * * * may be brought by the person injured, or, after his death, by his executor or administrator," and another for the benefit of the widow and next of kin under the act of 1883 (*Mansf. Ark. Dig.*, §§ 5225, 5226). *Davis v. St. Louis, etc., R. Co.*, 53 Ark. 117, 44 Am.

(2) *Representative Must Qualify as Such.*—A widow is not the personal representative of her deceased husband within the meaning of such statutes,

& Eng. R. Cas. 690. See also Little Rock, etc., R. Co. v. Townsend, 41 Ark. 382, 21 Am. & Eng. R. Cas. 619.

California.—See *Kramer v. San Francisco Market St. R. Co.*, 25 Cal. 434.

Colorado.—*Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245.

Connecticut.—*Soule v. New York, etc., R. Co.*, 24 Conn. 575.

Georgia.—The temporary administrator is, for the time being, the "personal representative" of the intestate for the purpose of collecting assets, and so continues until permanent letters are granted. He can maintain an action for homicide of his intestate, the right to which is conferred by statute upon the "personal representative," under the Code, § 2591. *Louisville, etc., R. Co. v. Chaffin*, 84 Ga. 519.

Illinois.—The right of action is confined to the personal representative. *Nixon v. Ludlam*, 50 Ill. App. 273.

The term "personal representative" means the administrator or executor, and does not include the widow. *Hagen v. Kean*, 3 Dill. (U. S.) 124.

Indiana.—The personal representative must sue. But his relation to the fund recovered is not as representative of the deceased, but as trustee for the widow and next of kin. If, therefore, no such widow or next of kin existed, he cannot sue. *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477. See also *Clore v. McIntire*, 120 Ind. 262; *Toledo, etc., R. Co. v. Reeves*, 8 Ind. App. 667.

Iowa.—*Worden v. Humeston, etc., R. Co.*, 72 Iowa 201.

Kansas.—The personal representative has a right of action under § 422, Comp. Laws of Kan. 1879, but none under § 420, although the latter section provides that actions for injuries to the person shall survive. The right given by § 422 is exclusive. See *Hulbert v. Topeka*, 34 Fed. Rep. 510; *Martin v. Missouri Pac. R. Co.*, (Kan. 1897) 49 Pac. Rep. 605.

The effect of the foregoing rule is that the recovery cannot inure to the benefit of the decedent's estate, but must be for the benefit of the next of kin. But see *Missouri Pac. R. Co. v. Bennett*, 5 Kan. App. 231.

Kentucky.—Under Gen. Stat. Ky., c. 57, § 1, the personal representative of one not an employee may maintain the action, and he holds the funds recovered in such action like other assets left by the deceased. The recovery, however, is limited to compensatory damages. *Given v. Kentucky Cent. R. Co.*, 89 Ky. 231. See also *Louisville, etc., R. Co. v. Case*, 9 Bush (Ky.) 728.

The personal representative of one who was killed by the defendant company while in its employ cannot maintain an action for the death under § 1 of c. 57, Gen. Stat. of Ky., although such injured party may live for two days after his injury. *Cincinnati, etc., R. Co. v. Adam*, (Ky. 1890) 13 S. W. Rep. 428. But the representative may, in such a case, recover for the pain and suffering of the deceased, if it appears that there is an appreciable interval between the injury and the death. *Newport News, etc., Co. v. Dentzel*, 91 Ky. 42.

Under Gen. Stat. Ky., c. 57, § 3, the widow and children of one killed by the wilful negligence of the defendant have the prior right of action and the exclusive right to the benefit of the recovery. Consequently, the alternative right of action given to the personal representative can be exercised only for their benefit. *Jordan v. Cincinnati, etc., R. Co.*, 89 Ky. 40. And the personal representative cannot maintain the action where it appears that the deceased left neither widow nor children. *Koenig v. Covington*, (Ky. 1889) 12 S. W. Rep. 128; *Louisville, etc., R. Co. v. Merriwether*, (Ky. 1890) 12 S. W. Rep. 935; *Baker v. Louisville, etc., R. Co.*, (Ky. 1891) 17 S. W. Rep. 191.

Under the constitution of 1891, § 241, the personal representative of a man who left neither widow nor children may maintain an action. *Lexington, etc., Min. Co. v. Huffman*, (Ky. 1895), 32 S. W. Rep. 611. But compare *Wright v. Woods*, 96 Ky. 56; *Thomas v. Royster*, 98 Ky. 206.

But under § 6 of the code, passed in pursuance of § 241 of the constitution, which gives the right of action to the "widow, children, and personal representative," he cannot sue if the deceased left surviving him a widow or children. *Carden v. Louisville, etc., R. Co.*, (Ky. 1896) 37 S. W. Rep. 839.

Where the suit is brought in Kentucky for a death occurring in Tennessee, an administrator appointed in Kentucky is the proper party to bring the suit. *Bruce v. Cincinnati R. Co.*, 83 Ky. 174.

Massachusetts.—The personal representative cannot maintain an action under the Employers' Liability Act (Stat. 1887, c. 270), as amended by Acts of 1888, c. 243. Section 2 of that act confers the right of action on the widow or next of kin where the employee is instantly killed or dies without conscious suffering. This excludes, by implication, an action by the personal representative. *Dacey v. Old Colony R. Co.*, 153 Mass. 112.

Michigan.—The mother has an equal interest with the father of a deceased child and may be appointed administratrix and sue for damages resulting from his death. *Rajnowski v. Detroit, etc., R. Co.*, 74 Mich. 20.

Minnesota.—The representative must bring the action. *Nash v. Tousley*, 28 Minn. 5; *Scheffler v. Minneapolis, etc., R. Co.*, 32 Minn. 125. See also *Boutiller v. The Steamboat Milwaukee*, 8 Minn. 97.

Mississippi.—*Vicksburg, etc., R. Co. v. Phillips*, 64 Miss. 693, 30 Am. & Eng. R. Cas. 587; *Illinois Cent. R. Co. v. Hunter*, 70 Miss. 471.

Missouri.—Rev. Stat. of Mo. (1879), § 2121 (§ 4425 of Stat. of 1889), provides that the action in a certain class of cases shall be brought by (1) the husband or wife of deceased; or (2) if there be no husband or wife, or he or she fails to sue within six months, then by the minor children of deceased; or (3) if deceased be a minor and unmarried, by his father and mother. See *Barker v. Hannibal, etc., R. Co.*, 91 Mo. 86.

An action is not given to the representative. See *Hulbert v. Topeka*, 34 Fed. Rep. 510;

unless she has qualified as his executor or administrator.¹ Nor is a husband the personal representative of his wife.²

Proof of Administration. — In a suit by a personal representative of the deceased, where the statute authorizes the suit to be brought by him, he is not bound to make proof of his letters of administration or of his appointment or right to sue as such unless his representative capacity is put in issue by the defendant's plea.³

(3) *Right of Action in Representative for Benefit of Others.* — When the right of action is vested in the personal representative for the benefit of other named parties, he can sue only where it is alleged and proved that some of the beneficiaries named are in existence.⁴ But it is ordinarily sufficient to

Limekiller v. Hannibal, etc., R. Co., 33 Kan. 83, 52 Am. Rep. 523.

Nebraska. — *Wilson v. Bumstead,* 12 Neb. 1. *New York.* — *Ryall v. Kennedy,* 40 N. Y. Super. Ct. 347.

As to the right of a nonresident of the state, appointed administrator in the state, to sue there for the death of his intestate which occurred in another state, see *Robinson v. Oceanic Steam Nav. Co.,* 112 N. Y. 315, 16 Civ. Pro. Rep. (N. Y.) 255, *affirming* 56 N. Y. Super. Ct. 108, 15 Civ. Pro. Rep. (N. Y.) 88.

The provision that the administrator may sue includes an ancillary administrator. *Lang v. Houston, etc., R. Co.,* 75 Hun (N. Y.) 151.

Ohio. — *Weidner v. Rankin,* 26 Ohio St. 522.

Under the Act of March 25, 1851, an action may be maintained by the administrator of the estate of a deceased person, for the benefit of the next of kin of the deceased, though he leave no widow or children, and though the petition do not contain a statement of special circumstances rendering the death a pecuniary injury to them. Such special circumstances can affect only the amount of the recovery. *Johnston v. Cleveland, etc., R. Co.,* 7 Ohio St. 336, 70 Am. Dec. 75, *followed in* *Groff v. Cincinnati, etc., R. Co.,* 1 Cinc. Super. Ct. Rep. 264.

In an action under Rev. Stat. of Ohio, § 6135, the personal representative is a mere nominal party, though the suit is brought in his name. *Wolf v. Lake Erie, etc., R. Co.,* 55 Ohio St. 517.

Oregon. — See *Holmes v. Oregon, etc., R. Co.,* 5 Fed. Rep. 75, 6 Sawy. (U. S.) 262.

Rhode Island. — *Lubrano v. Atlantic Mills,* 19 R. I. 129.

South Carolina. — *Brickman v. South Carolina R. Co.,* 8 S. Car. 173.

South Dakota. — The statute provides that "the widow, heirs, or personal representative" may sue, etc. Comp. Laws of S. Dak., § 5499. Under this it is held that if the deceased leaves a widow, the personal representative cannot sue. But under § 5498 the personal representative has another and distinct right of action in which he may recover what the deceased might have recovered had he lived, but nothing more. *Belding v. Black Hills, etc., R. Co.,* 3 S. Dak. 369, 52 Am. & Eng. R. Cas. 624.

Tennessee. — *Louisville, etc., R. Co. v. Connor,* 9 Heisk. (Tenn.) 19, 19 Am. Ry. Rep. 368 (personal representative allowed to sue for the death of an infant); *Haly v. Mobile, etc., R. Co.,* 7 Baxt. (Tenn.) 239, 8 Am. & Eng. R. Cas.

541 (suit by representative treated as if the deceased had brought it).

The widow has the prior right to sue, but if she waives her right the suit is properly brought by the personal representative. *Webb v. East Tennessee, etc., R. Co.,* 88 Tenn. 119.

A husband, though entitled to the entire damages recoverable for the death of his wife, can only sue after qualifying as administrator. *Chattanooga Electric R. Co. v. Johnson,* 97 Tenn. 677. But see *Tenn. Acts of 1887, c. 86, p. 231.*

Texas. — See *Galveston City R. Co. v. Nolan,* 53 Tex. 139, 3 Am. & Eng. R. Cas. 387.

Washington. — The personal representative may sue only after the heirs have waived their preference. See *Graetz v. McKenzie,* 3 Wash. 194.

West Virginia. — *Dimmey v. Wheeling, etc., R. Co.* 27 W. Va. 32, 55 Am. Rep. 292 (husband, as executor, may sue for death of wife).

Wisconsin. — *Whiton v. Chicago, etc., R. Co.,* 21 Wis. 305; *McKeigue v. Janesville,* 68 Wis. 50; *Wiltse v. Tilden,* 77 Wis. 152. See also *Chicago, etc., R. Co. v. Whitton,* 13 Wall. (U. S.) 270.

1. Widow Not the Personal Representative of Her Husband. — *Hagen v. Kean,* 3 Dill. (U. S.) 124; *Western, etc., R. Co. v. Strong,* 52 Ga. 461.

2. See *supra*, this section, *Husband.*

3. Not Bound to Prove Capacity until Attacked. — *Union R., etc., Co. v. Shacklet,* 119 Ill. 232, 28 Am. & Eng. R. Cas. 193; *Hughes v. Richter,* 161 Ill. 409, *affirming* 60 Ill. App. 616. See also *Louisville, etc., R. Co. v. Trammell,* 93 Ala. 350.

Where the administrator sues and the defendant pleads the general issue, he cannot question the appointment of the plaintiff as administrator. That question can only be raised by a special plea of *ne unques administrator.* *Denver, etc., R. Co. v. Woodward,* 4 Colo. 1, 162.

The representative character of a plaintiff suing as a personal representative sufficiently appears in the declaration when the declaration is in the name of the plaintiff as administrator, and the deceased is referred to in the body of the declaration as "plaintiff's intestate." *Louisville, etc., R. Co. v. Trammell,* 93 Ala. 350.

4. It Must Appear that Beneficiaries Were in Existence. — *Chicago, etc., R. Co. v. Morris,* 26 Ill. 400; *Chicago v. Major,* 18 Ill. 349, 68 Am. Dec. 553; *Chicago, etc., R. Co. v. Shannon,* 43 Ill. 338; *Conant v. Griffin,* 48 Ill. 410; *Jeffer-*

show the existence of any one of the several beneficiaries, even when the conjunctive "and" is used in the statute designating them.¹

(4) *Suit to Enforce Compromise Agreement.* — The provision requiring that an action for the wrongful death of a person shall be brought by his personal representative for the benefit of his widow has been held not to debar the widow from bringing suit in her own name on a compromise agreement made by the defendant.²

(5) *Conflict of Laws.* — While the general rule is that the law of the state where the injury occurred governs as to who is the proper party to sue, it seems that the administrator, where he is the party to sue, need not be one appointed in the state where the injury occurred, but may be one appointed in the state where the suit is brought.³

Foreign Administrator Held to Have No Right to Sue. — In some jurisdictions the rule is that an administrator has no power whatever outside the territorial limits of the state appointing him, and he cannot sue in a foreign state for the death of his intestate occurring there.⁴ But there are cases allowing suit by a

sonville R. Co. v. Swayne, 26 Ind. 477; *Serensen v. Northern Pac. R. Co.*, 45 Fed. Rep. 407 (*Montana* statute).

The widow cannot sue in her own name under such a statute. *Western, etc., R. Co. v. Strong*, 52 Ga. 461, 8 Am. Ry. Rep. 13.

Under a former *Kentucky* statute (Ky. Gen. Stat. 1887, c. 57, § 3), an executor or administrator could maintain an action for the death of his decedent resulting from wilful negligence only upon alleging and proving that the deceased left a widow or children or both, for whose benefit the action was brought. *Louisville, etc., R. Co. v. Merriwether*, (Ky. 1890) 12 S. W. Rep. 935; *Kentucky Cent. R. Co. v. Wainwright*, (Ky. 1890) 13 S. W. Rep. 438; *Henderson v. Kentucky Cent. R. Co.*, 86 Ky. 389; *Conley v. Cincinnati, etc., R. Co.*, 89 Ky. 402, 41 Am. & Eng. R. Cas. 537; *Cincinnati, etc., R. Co. v. Privitt*, 92 Ky. 223. See also *Jordan v. Cincinnati, etc., R. Co.*, 89 Ky. 40; *Cincinnati, etc., R. Co. v. Adam*, (Ky. 1890) 13 S. W. Rep. 428; *Louisville, etc., R. Co. v. Coppage*, (Ky. 1890) 13 S. W. Rep. 1086, 44 Am. & Eng. R. Cas. 458, note.

But under the present statute (Ky. Stat. 1894, c. 1, § 6), the action for death by wilful neglect no longer exists. *Clark v. Louisville, etc., R. Co.*, (Ky. 1897) 39 S. W. Rep. 840.

And the statute renders it clearly immaterial to the representative's right of action, whether there be a surviving widow or children or not.

1. Proof of Existence of One Beneficiary Sufficient. — In *Oldfield v. New York, etc., R. Co.*, 14 N. Y. 316, the court, by Wright, J., speaking of the New York statute, said: "Nor, as it has been sometimes claimed, is it to be restricted to cases where there are both a widow and next of kin to be the distributees of the recovery. The words 'widow and next of kin' are evidently used for the twofold purpose of designating the persons entitled to a participation in the recovery, and those with reference to whose pecuniary loss by the death in question the damages are to be assessed. * * * Were this otherwise, in the case of a father leaving children but no wife, an action could not be maintained upon the statute; for a conjunctive reading of the words would require that there should be both a 'widow' and 'next

of kin' at the time the action was brought. This was not the intention of the legislature."

2. Widow's Action on Decedent's Compromise Agreement. — Although the right of action for damages is in the personal representative and he alone can sue therefor, yet, since the recovery is for the express use and benefit of the widow, she, being a *feme sole*, may sustain an action to recover of the defendant company certain securities executed by it in settlement of the case. *Schmidt v. Deegan*, 69 Wis. 300.

3. Central R., etc., Co. v. Swint, 73 Ga. 651, 26 Am. & Eng. R. Cas. 482; *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291; *Missouri Pac. R. Co. v. Lewis*, 24 Neb. 848.

New York. — An administrator appointed in New York may sue for the death of his intestate which occurred in another state from injuries received in the latter state, without proving that letters of administration had been taken out in the latter state. *Gurney v. Grand Trunk R. Co.*, (Supreme Ct.) 13 N. Y. Supp. 645, 37 N. Y. St. Rep. 557, affirmed 138 N. Y. 638, 53 N. Y. St. Rep. 929. See also *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491.

Under the statute of *New York*, where the action was brought, the right of action was in the personal representative of the deceased; the statute of *Pennsylvania*, where the death occurred, gave the right of action to the widow for the benefit of herself and children. It was held that the difference between the two statutes in this respect was not material. *Wooden v. Western, etc., R. Co.*, 126 N. Y. 10, 22 Am. St. Rep. 803, affirming (*Buffalo Super. Ct.*) 35 N. Y. St. Rep. 685.

Proof of Administration — Suit by Foreign Administrator. — The *Illinois* statute enacting a right of action for a wrongful death provides no special remedy; the remedy must, therefore, be determined by the ordinary rules of law governing actions in the case. So that where the right of a foreign administrator to sue is not put in issue by proper plea, he is not bound to prove his appointment. *Union R., etc., Co. v. Shacklet*, 119 Ill. 232.

4. In Maysville St. R., etc., Co. v. Marvin, 59 Fed. Rep. 91, 16 U. S. App. 236, reversing

foreign administrator.¹

g. NEXT OF KIN—(1) *The General Rule*—Not Confined to Particular Degree of Consanguinity. — When the statute confers a right of action on the next of kin of the deceased, the term “next of kin” is not confined to any particular degree of consanguinity, but extends to any person coming within it, however remotely.²

The Remoteness of the Relationship can only be considered on the question of the amount of damages recoverable.³

49 Fed. Rep. 436, a citizen and resident of Ohio was killed in Kentucky through a wrongful act of the defendant for which he would have been entitled, had he lived, to maintain an action. His administrator, appointed in Ohio, instituted suit in Kentucky to recover for the death under Ky. Gen. Stat., c. 57, § 1, which gave a right of action to the personal representative of the deceased. It was held that he could not maintain the action in Kentucky, since his powers were limited to the state of his appointment. The case of *Dennick v. Central R. Co.*, 103 U. S. 11, is distinguished. See also *Louisville, etc., R. Co. v. Brantley*, 96 Ky. 297.

Under Recent Missouri Statute. — The Act of April 20, 1891 (Mo.), provided that in certain cases, where the cause of action accrues under the laws of a foreign state, a person appointed in Missouri by the court in which the action is to be enforced must bring the suit. It appeared, in one case, that the deceased was a resident of Minnesota, and it was there that he was injured and died. An administrator appointed in Minnesota brought this action in Missouri, the home of the defendant. The Minnesota statute provided that the action for wrongful death should be brought by the personal representative of the deceased for the benefit of the widow and next of kin. It was held that he could maintain the action; that that portion of the Missouri Act of 1891 which required the action, in such a case, to be brought by an appointee of a Missouri court, was nugatory, since the right given by the Minnesota statute must be taken with all its limitations and provisos, and it was not competent for the Missouri legislature to authorize any person to bring the suit other than the one named in the Minnesota statute. *Wilson v. Tootle*, 55 Fed. Rep. 211. See also *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291.

Kansas. — In *Limekiller v. Hannibal, etc.*, R. Co., 33 Kan. 83, 52 Am. Rep. 523, 19 Am. & Eng. R. Cas. 184, the suit was instituted in Kansas by an administratrix appointed in Missouri. The injury occurred in Kansas. It being shown that the laws of Missouri prohibit the administratrix from bringing suits in this class of cases, but give the right of action to other beneficiaries, it was held that the suit could not be maintained, although the laws of Kansas provide that the administrator shall sue. See also *Hulbert v. Topeka*, 34 Fed. Rep. 510 (same rule adopted). When, however, there is nothing in the record to show otherwise, the Kansas court will presume that the law of the state appointing the administrator is the same as that of Kansas, and will permit a suit by a foreign administrator, on principles of state comity. But neither on grounds of comity or for any other reason can

the administrator appointed in a foreign state exercise, in Kansas, rights and powers not granted to him by the law of the state appointing him. *Kansas Pac. R. Co. v. Cutter*, 16 Kan. 568; *Perry v. St. Joseph, etc., R. Co.*, 29 Kan. 420; *Land Grant R., etc., Co. v. Coffey County*, 6 Kan. 245. See also *McCarthy v. Chicago, etc., R. Co.*, 18 Kan. 46, 26 Am. Rep. 742.

Mississippi. — An administrator appointed in Mississippi may sue in the courts of that state for an injury occurring in Tennessee, although the action could not have been so maintained had the injury occurred in Mississippi. *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291.

1. *Memphis, etc., Packet Co. v. Pikey*, 142 Ind. 304; *McCarty v. New York, etc., R. Co.*, 62 Fed. Rep. 437. See also *Dennick v. Central R. Co.*, 103 U. S. 11.

2. *Not Confined to Any Particular Degree of Consanguinity.* — *Chicago, etc., R. Co. v. Shannon*, 43 Ill. 338.

Under the *Colorado* statute, the existence of any of the next of kin or descendants of the deceased is sufficient to authorize the action. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245.

A mother, upon proof that she was maintained by her son in his lifetime, that he lived with and supported her although he was beyond maturity, and that he was unmarried, is entitled, as his next of kin, to recover for his wrongful death, under the *West Virginia* Act of 1863, c. 98. *Baltimore, etc., R. Co. v. Gettle*, 3 W. Va. 376.

3. *Remoteness of Relationship Material Only on Question of Measure of Damages.* — *Chicago, etc., R. Co. v. Shannon*, 43 Ill. 338.

New Jersey Statute. — The statute is intended for the benefit of all the next of kin of the deceased who may have been deprived of a reasonable expectation of pecuniary benefit from a continuance of the life of the deceased. *Paulmier v. Erie R. Co.*, 34 N. J. L. 151. See also *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513.

Existence, Not Identity of Next of Kin, Material. — Where a personal representative sues for the benefit of the next of kin under the *Illinois* statute, the plaintiff must show that there are next of kin surviving the deceased, but he is not bound to show their names. Therefore, where the complaint avers that A. B. was the wife of the deceased, and F. B. his son, and proof was offered by defendant that A. B. was not the wife nor F. B. the son of the deceased, but that another woman, offered as a witness, was the real wife, it was held that the mistake in the complaint, if any, was not material; that whether the party named in the complaint as the next of kin was really such was not material, so long as it appeared that the deceased

Embraces Illegitimate Child. — The term embraces an illegitimate child unless the statute plainly excludes such a construction.¹

Proof Necessary when Next of Kin's Right of Action Secondary. — Ordinarily, the right of action is vested in the next of kin after the husband, widow, parent, and children, and when such is the case no recovery can be had by the next of kin unless it is alleged and proved that the persons first named do not exist.²

Proof where Next of Kin Sues for Named Beneficiaries. — In other cases, the statute confers the right of action on the next of kin for the benefit of named relations of the deceased person. Where this is true, the existence of such persons must be alleged and proved in order to maintain the action.³

Husband Not Next of Kin to Wife. — A husband is not within the term "next of kin" as to his wife.⁴

(2) **Action Limited to Dependent Next of Kin — Joinder.** — When the statute provides that the next of kin of the deceased who were dependent on him for support may maintain the action, only such of the next of kin as were actually dependent on the deceased for support should or can properly be joined as parties plaintiff.⁵

(3) **Legal Duty to Support Not Essential.** — Where the statute authorizes a right of action in favor of one dependent on the deceased for support,⁶ the fact of dependency is all that is necessary to be shown; it need not appear that such person was one whom it was the legal duty of the deceased to support.⁷

actually left next of kin surviving him. The question as to who were the rightful distributees could be settled after the recovery. *Conant v. Griffin*, 43 Ill. 410.

Deceased Leaving Sister and Brother — Dependent Sister Preferred. — Where an unmarried employee, who was killed instantly, leaves as his sole next of kin a brother who was not dependent on him and a sister who was, an action against the employer to recover damages for the death, brought under Stat. 1887, c. 270, § 2 (Employers' Liability Act), is properly brought in the name of the dependent sister. *Daly v. New Jersey Steel, etc., Co.*, 155 Mass. 1.

1. Includes Illegitimate Child. — *Muhl v. Michigan Southern R. Co.*, 10 Ohio St. 272.

2. Absence of Prior Named Beneficiaries Must Appear. — *Western Union Tel. Co. v. McGill*, 57 Fed. Rep. 699 (construing Gen. Stat. of Kansas (1889), par. 4518). See, in this connection, *Daly v. New Jersey Steel, etc., Co.*, 155 Mass. 1.

Under the *New Jersey* statute, where the deceased leaves no surviving widow, the personal representative of the deceased may maintain an action for the benefit of the next of kin. *Haggarty v. Central R. Co.*, 31 N. J. L. 349.

3. In Next of Kin for Benefit of Others. — *Com. v. Boston, etc., R. Co.*, 121 Mass. 36.

4. Husband Not His Wife's Next of Kin. See *supra*, this section, *Husband*.

5. *Daly v. New Jersey Steel, etc., Co.*, 155 Mass. 1.

6. See *Daly v. New Jersey Steel, etc., Co.*, 155 Mass. 1, construing Mass. Stat. 1887, c. 270, § 2.

7. Deceased Need Not Have Been Legally Bound to Support Beneficiary. — *Chicago, etc., R. Co. v. Branyan*, 10 Ind. App. 570; *Daly v. New Jersey Steel, etc., Co.*, 155 Mass. 1. In this case it was held that an invalid sister, unable to work regularly or to earn enough to pay her doctor's bills, who has received from a brother

on an average from thirty to thirty-five dollars a month for three or four years, and who, in fact, receives her support from him and is dependent upon him for support, comes within the meaning of Mass. Stat. of 1887, c. 270, § 2, and may maintain an action against his employer for causing his instantaneous death. See also *Baltimore, etc., R. Co. v. Gettle*, 3 W. Va. 376, where a mother, upon proving that she was dependent for support upon her unmarried son, who lived with her, though he was beyond maturity, was allowed to recover for his death.

Suit by Mother for Death of Her Son. — A mother brought an action, under the English statute, to recover damages for the death of her son, which had been caused by the defendant's negligence. It was held that, as the mother had a legal claim on her son for support and as he was actually supporting her at the time of his death, she was entitled to maintain the action. But even had there been no legal obligation on the part of the deceased son to maintain his mother, the imperfect moral obligation would have been sufficient, it being shown that he was, in fact, her sole support. *Weems v. Mathieson*, 4 Macq. H. L. Cas. 215.

Under Georgia Statute. — The Act of Oct. 27, 1887, provided that "a mother, or, if no mother, a father, may recover for the homicide of a child, minor or *sui juris*, upon whom she or he is dependent or who contributes to his or her support." This act confers a right of action only upon a parent who was not only dependent on the child, but to whose support the child contributed. *Clay v. Central R., etc., Co.*, 84 Ga. 345, 42 Am. & Eng. R. Cas. 76. See *supra*, this section, *Parent*.

Under the Michigan Statute, no right of action arises for the wrongful killing of a person unless the deceased left some one dependent upon him for support or some one who had a reasonable expectation of receiving some benefit from him during his lifetime. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 55 Am. & Eng. R. Cas.

(4) *Dependency Must Be Actual.* — There must be an actual dependency on the deceased, on the part of the party claiming the right of action. The mere fact that the deceased occasionally contributed to the support of such party, in an irregular way, is not sufficient, where the fact of dependency alone confers the right of action.¹ But it is not essential that the deceased should have been the sole support of the party bringing the action.²

(5) *When Fact of Dependency Not Material.* — The dependency of the plaintiff upon the deceased for support is not essential unless the statute so declares, though it seems the fact may always be shown on the question of the measure of damages.³

(6) *Next of Kin Having Expectation of Pecuniary Benefit.* — Under Lord Campbell's Act and statutes of similar wording, the expectation of a reasonable probability of pecuniary benefit from the income of the deceased is sufficient to entitle the party having such expectation to maintain an action for the death of the deceased. The loss of the probable pecuniary benefit is a damage within the meaning of the statute.⁴

164, citing Chicago, etc., R. Co. v. Bayfield, 37 Mich. 205; Van Brunt v. Cincinnati, etc., R. Co., 78 Mich. 530. See also Grand Trunk R. Co. v. Ives, 144 U. S. 408, 55 Am. & Eng. R. Cas. 159.

1. *Receiving Occasional Assistance Not Enough.* — In Hodnett v. Boston, etc., R. Co., 156 Mass. 86, the plaintiff, the next of kin to the deceased, who was killed while in defendant's employ, testified that she was his half sister and had two children; that he was accustomed to come to see her and sometimes gave her money; that every alternate week he sent her money with which to pay her house-rent; that she had no other means of support except her own earnings; and that since his death she had been obliged to support herself. It was held that this was not sufficient proof that she was dependent upon his wages for support within the meaning of the Massachusetts statute of 1887, c. 270, § 2. See also Houlihan v. Connecticut River R. Co., 164 Mass. 555.

Where the plaintiff bases her right to maintain the action upon the ground that she was dependent on the deceased for support, she must show, regardless of any ties of relationship or strict legal right to such support, that she was, either from disabilities or age or non-age, physical or mental incapacity, coupled with a lack of property or means, dependent in fact upon the deceased for support. And where adults set up such dependence, there must be, because of some of the disabilities above mentioned, an actual inability to support themselves and an actual dependence upon some one for support, coupled with a reasonable expectation of support, or with some reasonable claim to support, from the deceased. Duval v. Hunt, 34 Fla. 85.

Indiana Statute — "Child" Does Not Include All Minors. — The word "child," as used in the Indiana statute, is not synonymous with "minor," but is intended to limit the right of action to persons under age who are dependent on their parent for support and protection. It will not include a son who, though a minor, had assumed the responsibilities of the head of a family. Pittsburgh, etc., R. Co. v. Vining, 27 Ind. 513, 92 Am. Dec. 269.

2. *Deceased Need Not Have Been Plaintiff's Sole Support.* — Thus, a mother may recover for the

death of her unmarried child, where it is shown that he contributed materially to her support, although she was also dependent upon her husband and upon her own labor. Daniels v. Savannah, etc., R. Co., 86 Ga. 236.

3. *Dependency Not Essential Unless by Statute.* — Thus, under the South Carolina statute (Gen. Stat., § 2184) adult children may recover for the death of their parent, although they were not dependent on her for support, and had no legal claim on her therefor. Petrie v. Columbia, etc., R. Co., 29 S. Car. 303, 35 Am. & Eng. R. Cas. 430.

The Illinois statute of Feb. 12, 1853, providing that an action for an injury causing death shall lie in favor of the next of kin, does not exclude next of kin who were not dependent on the deceased for support; nor is it necessary, under that statute, for such next of kin to prove any pecuniary loss. Barron v. Illinois Cent. R. Co., 1 Biss. (U. S.) 412, 453. See also Grotenkemper v. Harris, 25 Ohio St. 510.

4. *Expectation of Benefit.* — Pym v. Great Northern R. Co., 4 B. & S. 396, 116 E. C. L. 396, 10 Jur. N. S. 199, 11 W. R. 922, affirming 2 B. & S. 759, 110 E. C. L. 759, 8 Jur. N. S. 819, 10 W. R. 737; Grotenkemper v. Harris, 25 Ohio St. 510; Pennsylvania R. Co. v. Adams, 55 Pa. St. 499. See also Carpenter v. Buffalo, etc., R. Co., 38 Hun (N. Y.) 116; St. Lawrence, etc., R. Co. v. Lett, 11 Can. Sup. Ct. Rep. 422.

Action by Parent for Death of Adult Child. — Where a parent sues to recover for the death of her adult child, her right of recovery, in most jurisdictions, must depend upon her expectations of pecuniary benefit from his life. The parent must therefore show that her child contributed materially to her support, or show a reasonable expectation of pecuniary benefit to her to be derived from him. An allegation merely that the plaintiff, "as sole surviving parent, has been damaged in the sum of \$10,000 actual damages," does not sufficiently show a right to sue. Winnt v. International etc., R. Co., 74 Tex. 32.

Proof that the plaintiff, an unmarried daughter of the deceased, spent three months each year with her mother, without expense, and that her mother frequently sent her valuable presents, is sufficient to show a right of action in the plaintiff for the death of her mother

h HEIRS OF DECEASED. — When the right of action is given to the heirs of the deceased person, the word "heirs" is to be taken to mean children, and does not include parents or collateral kindred.¹

Heirs Who Are Beneficiaries Not Necessarily Parties. — The fact that the heirs are named as the beneficiaries of the statute does not necessarily indicate that they themselves must sue, but that question must be determined from the statute itself.²

i. NONRESIDENTS MAY SUE. — Unless the statute, in plain terms, excludes nonresident beneficiaries, they are entitled to sue as if they were residents.³

j. CREDITORS OF DECEASED. — Statutes conferring a right of action for wrongful death are to be strictly construed, and the benefits given by them must

under a statute authorizing a recovery only where pecuniary loss can be shown. *Schnatz v. Philadelphia, etc., R. Co.*, 160 Pa. St. 602, 34 W. N. C. (Pa.) 290.

So, also, a married daughter of the deceased may maintain an action upon proof that she was an invalid and that her mother attended her for weeks and months at a time without charge, and constantly sent her presents of eatables and delicacies, etc. *Schnatz v. Philadelphia, etc., R. Co.*, 160 Pa. St. 602, 34 W. N. C. (Pa.) 290.

Expectation of Future Business Advantage. — Where the only expectation of pecuniary profit from the deceased had by the plaintiff was derived from a contract with him, the plaintiff has no right to maintain the action. *Sykes v. North Eastern R. Co.*, 23 W. R. 473, 32 L. T. 199, 44 L. J. C. P. 191. In this case, a father, as administrator of his son, sued the defendant railway company for the death of his son, who had been killed by the defendant's negligence. The deceased was a bricklayer and received from his father the wages of a skilled workman; he was also of great assistance to his father (who was a bricklayer). Owing to the loss of his son's assistance, the plaintiff could not take the contracts which he had taken during his son's lifetime. It was held that he had suffered no such pecuniary loss from the death of his son as would entitle him to sue. *Compare Duckworth v. Johnson*, 4 H. & N. 653, 5 Jur. N. S. 630.

1. "Heir" Means "Child" — Does Not Include Parents or Collateral Relatives. — *Hindry v. Holt*, (Colo. 1897) 51 Pac. Rep. 1002; *Louisville, etc., R. Co. v. Coppage*, (Ky. 1890) 13 S. W. Rep. 1086; *Jordan v. Cincinnati, etc., R. Co.*, 89 Ky. 40; *Henning v. Louisville Leather Co.*, (Ky. 1889) 12 S. W. Rep. 550; *Kentucky Cent. R. Co. v. McGinty*, (Ky. 1890) 14 S. W. Rep. 601.

The Texas Statute in force in 1876 conferred the right of action on "the heirs, representatives, or relations" of the deceased. Under this, the guardian of minor children might bring the action for their benefit. *Houston, etc., R. Co. v. Bradley*, 45 Tex. 171.

Arkansas Statute — "Heirs" Includes Widow. — Under Mansf. Ark. Dig., §§ 5225-5226, providing that if there is no personal representative the right of action shall vest in the heirs at law of the deceased, the widow and all persons entitled to share in the estate of an intestate are heirs at law. *St. Louis, etc., R. Co. v. Needham*, 52 Fed. Rep. 371, 10 U. S. App. 339, 54 Am. & Eng. R. Cas. 88.

South Dakota. — The right of action is vested

exclusively in the heirs of the deceased when he leaves no widow. *Belding v. Black Hills, etc., R. Co.*, 3 S. Dak. 369, 52 Am. & Eng. R. Cas. 624.

Washington. — Section 8 of the Code of 1881 provides that the action may be brought by "heirs or personal representatives." Section 717, containing very similar provisions, provides that the personal representative shall sue. It was held that section 8, having been last enacted, should be taken as the law. *Graetz v. McKenzie*, 3 Wash. 194; *Northern Pac. R. Co. v. Ellison*, 3 Wash. 225.

2. Stewart v. Louisville, etc., R. Co., 83 Ala. 493.

Under California Statute — Minor Children. — The California statute (Code Civ. Pro., § 377) provides that the "heirs or personal representatives" may bring the action. The word "heirs," as there used, includes all persons capable of inheriting from the deceased generally, without regard to the statutes relating to the distribution of community property. It therefore embraces the minor children of the deceased. *Redfield v. Oakland Consol. St. R. Co.*, 110 Cal. 277.

But only one action may be brought for the same death. *Hartigan v. Southern Pac. Co.*, 86 Cal. 142.

3. Rights of Nonresidents. — *Augusta R. Co. v. Glover*, 92 Ga. 132, 58 Am. & Eng. R. Cas. 269 (statute extends to all mothers who were dependent upon their deceased sons for support, regardless of their residence); *Philpott v. Missouri Pac. R. Co.*, 85 Mo. 164, 27 Am. & Eng. R. Cas. 323. *Compare Maysville St. R., etc., Co. v. Marvin*, 59 Fed. Rep. 91, 16 U. S. App. 236, reversing 49 Fed. Rep. 436. See also *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477.

An action will lie, under the *Tennessee* statute (Code of 1884, § 3130), in favor of a nonresident widow and against a railroad company by whose negligence her husband had been killed, in Tennessee, while in the employ of such company, although the deceased was a nonresident of the state and had entered the service of the company outside of the state, and the greater part of the defendant company's road lay beyond the limits of the state. *Chesapeake, etc., R. Co. v. Higgins*, 85 Tenn. 620.

Under the amendment to *Kansas* statutes (Code, § 422a), a nonresident may sue. See *Chicago, etc., R. Co. v. Mills*, 57 Kan. 687.

But under the Pennsylvania Statute (Act of April 20, 1855, Pub. Laws 309) a nonresident alien has no right of action. *Deni v. Pennsylvania R. Co.*, 181 Pa. St. 525.

be confined to the parties described in the statute. If the action is given to the personal representative, for the benefit of certain beneficiaries, he cannot maintain the action unless such beneficiaries exist. He cannot maintain it for the benefit of a creditor of the deceased, in the absence of a specific statutory provision to that effect.¹

k. ACTION IN NAME OF STATE. — In some jurisdictions the action must be brought in the name of the state, but in such cases the state is merely a formal party.² In Massachusetts and other New England states the remedy for a wrongful killing was originally by an indictment in the name of the state against the defendant.³

l. WHERE SEVERAL CLASSES ARE NAMED IN THE STATUTE. — Where the statute names several classes of beneficiaries, in a certain order, no class other than the first named can maintain the action unless it is alleged in the pleadings and shown by the proof that there are no persons living belonging to the classes named before that to which the class bringing the action belongs, or that such persons, if living, have waived their right of preference.⁴

3. The Remedy Is to Individuals, and Not to a Class. — The remedy is to individuals, and not to a class, and therefore where the family of the deceased, as an entirety, suffers no damage, any member of such family may still sustain the action if he suffers damage by reason of a different distribution of the estate after the death of the deceased.⁵

X. WHO CIVILLY LIABLE — PARTIES DEFENDANT — 1. Insane Persons. — It has been held that an insane person or his estate is liable in compensatory damages for the wrongful death of another.⁶

2. Corporations. — Whether the statute specifically mentions corporations or merely provides that an action may be maintained for a death caused by the wrongful act of "any person," corporations are embraced in the provisions of the statutes on this subject, and are liable equally with individuals.⁷ And

1. East Tennessee, etc., R. Co. v. Lilly, 90 Tenn. 563.

2. In Maryland. — This is true under the Maryland statute. See *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159; *Harvey v. Baltimore*, etc., R. Co., 70 Md. 319.

It is not essential that all the children of the deceased be joined as parties for whose use the action is brought by the state. But those who are not joined cannot complain, since they cannot be damaged thereby. Nor can the defendant object, since he cannot be held liable in another action by the children omitted. *Deford v. State*, 30 Md. 179.

3. See the title DEATH BY WRONGFUL ACT, ENCYC. OF PL. AND PR., vol. 5, p. 891.

4. **Nonexistence of Persons in Preceding Classes Must Be Alleged and Proved.** — Thus, the Florida statute (Act of Feb. 28, 1883, c. 3439) confers the right of action for a death wrongfully caused (1) upon the husband or widow; (2) if there be neither of these, then upon the minor child or children; (3) if there be none of these, then upon such person or persons as are dependent for support upon the deceased; and (4) if there be none of these, then upon the executor or administrator of the deceased. It is held that the existence of the right of action in any of these classes of persons, in the numerical order named, commencing with the second class, is wholly dependent upon whether or not there is any person *in esse* belonging to any of the classes who are given the precedent right. The existence or nonexistence of the classes preceding that one bringing the action enters into

the very substance of the right of action and must be clearly alleged and shown. *Duval v. Hunt*, 34 Fla. 85. See the same principle in *Western Union Tel. Co. v. McGill*, 57 Fed. Rep. 699.

Under *Missouri Rev. Stat.*, § 2122, a mother cannot recover for the death of her son unless she alleges and proves that he left no widow or surviving children. *Sparks v. Kansas City*, etc., R. Co., 31 Mo. App. 111. See also *St. Louis*, etc., R. Co. v. *Taylor*, 5 Tex. Civ. App. 668.

5. *Pym v. Great Northern R. Co.*, 4 B. & S. 396, 116 E. C. L. 396, 10 Jur. N. S. 199, 11 W. R. 922, affirming 2 B. & S. 759, 110 E. C. L. 759, 8 Jur. N. S. 819, 6 L. T. 537. In this case the person killed owned personalty amounting to three thousand four hundred pounds, and was tenant for life of an estate worth nearly four thousand pounds, with remainder to his eldest son in tail, and a jointure of one thousand pounds per annum was settled on his wife and twenty thousand pounds secured to the younger children on his death. It was held that his widow and younger children had sufficient expectation of pecuniary interest from the continuance of his life to maintain an action for his death.

6. **Responsibility of Persons Insane.** — *McIntyre v. Sholty*, 121 Ill. 660, 2 Am. St. Rep. 140; *Jewell v. Colby*, 66 N. H. 399.

7. **Corporations Are Within the Statute.** — See *Chase v. American Steamboat Co.*, 10 R. I. 79, construing *Rev. Stat. of R. I.*, c. 176, § 21. See also the title CORPORATIONS, vol. 7, p. 828.

When the statute provides that where the

this is true whether the wrongful act be that of an officer of the corporation or of a mere employee, provided it was committed in the discharge of the duties of his employment.¹

Receivers, Trustees, etc. — The liability of a railroad company for injuries resulting in death, where its road is in the hands of and is being operated by trustees or receivers, is treated under other titles.²

3. Municipal Corporations. — There is no liability on the part of a municipal corporation for an injury resulting in death through its negligence or that of its officials or agents, in the absence of a statute expressly creating such liability.³

4. Liability of Principal. — The liability of a principal for a death wrongfully caused by his agent must, in ordinary cases, be governed by the general rules prescribing the liability of a master for the acts of his servant.⁴ Where, how-

"death of any person is caused by the wrongful act * * * of another," the action may be maintained, the word "another" includes a corporation although the word "person" as there used necessarily refers to an individual. *Lynch v. Southwestern Tel., etc., Co.*, (Tex. Civ. App. 1895) 32 S. W. Rep. 776; *Rigdon v. Temple Water Works Co.*, 11 Tex. Civ. App. 542, following *Fleming v. Texas Loan Agency*, 87 Tex. 238.

New Jersey Statute — Who Constitute a Corporation. — A board of chosen freeholders of a county, charged with the control of county highways, is a corporation under the New Jersey Act of March 3, 1848, (Revision, p. 294), which declares that any person or corporation whose wrongful act shall cause the death of a person shall be liable therefor. Such a board is liable for the death of a person caused by its failure to keep a county bridge in proper repair. *Murphy v. Chosen Freeholders*, 57 N. J. L. 245.

1. See the titles AGENCY, vol. I, p. 1154; CORPORATIONS, vol. 7 p. 824 *et seq.*; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

2. **Railroad Being Operated by Receiver or Trustees.** — See the titles RAILROADS; RECEIVERS (OF RAILROADS); TRUSTEES.

The forfeiture provided by the *Maine* statute (Act of 1855, c. 161) against railroad companies negligently causing death is not enforceable against a company where its road is in the hands of mortgagees and is being operated and controlled by them. *State v. Consolidated European, etc., R. Co.*, 67 Me. 479, 16 Am. Ry. Rep. 371. See also *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9, 34 Am. St. Rep. 49, 53 Am. & Eng. R. Cas. 73, affirming 43 Ill. App. 454.

3. **Liability of Municipal Corporations.** — In an action brought by the mother of one of the Italians who were mobbed and hung in New Orleans in 1891, the pleadings presented the issue whether the city was responsible, admitting that it, through its officials, had been grossly negligent in failing to protect the deceased, who was then a prisoner in the hands of the city officials. The *Louisiana* statute provided that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." This provision was subsequently made expressly applicable to cases where the injury resulted in death. It was held that the city could not be made liable. *New Orleans v. Abbagnato*,

62 Fed. Rep. 240, 23 U. S. App. 533; *Giantone v. New Orleans*, 61 Fed. Rep. 64.

Compare *Racho v. Detroit*, 90 Mich. 92. In this case the *Michigan* statute relating to the recovery of damages for injuries sustained in consequence of defective public highways provided that no municipality should be liable to any person for "bodily injury" sustained in consequence of defective highways except under "the provisions of this act." The statute expressly abrogated the common-law rule on the subject and made no reference to injuries resulting in death. Mich. Pub. Acts 1887, No. 264. It was held that this statute would not prevent a recovery from the city by a personal representative of a person whose death was caused by the negligence of the city in failing to keep a highway in proper repair, under the original statute passed in imitation of Lord Campbell's Act. Laws of 1848, amended by How. Mich. Stat., §§ 8313, 8314.

The *New Hampshire* statute provides specifically for a right of action against a municipal corporation for a death resulting from its defective highways. See *Davis v. Rumney*, 66 N. H. 331.

The *Wisconsin* statute (section 1339) requiring notice to a municipal corporation within ninety days after the injury does not apply to an action by the personal representatives under section 4255. *McKeigue v. Janesville*, 68 Wis. 50.

4. See the titles AGENCY, vol. I, p. 1151; MASTER AND SERVANT.

In *Comitez v. Parkerson*, 50 Fed. Rep. 170, it appeared that the city in which the injury complained of had occurred had been guilty of negligence in not preventing the accident. It was held proper to join the city as a party defendant to the action for the death resulting from such injury. Such joinder was especially proper under Rev. Civ. Code of La., art. 2324, which provides that "he who causes another to do an unlawful act, or assists or encourages in the commission of it, is responsible *in solido* with that person for the damages caused by such act." But see *supra*, this section, *Municipal Corporations*, as to whether the corporation is liable in such a case.

Steamship Line — Negligence of Surgeon. — Under the Act of Congress, Aug. 2, 1882, requiring steamships to carry competent surgeons, it is the duty of the shipowner to provide a competent surgeon whom the passengers may employ if they wish. But the owner

ever, the statute expressly provides for a recovery against the principal for a death wrongfully caused by his agent only in a certain class of cases, it excludes, by implication, a recovery in cases without such class.¹

5. Aider and Abettor. — A person who is present at the consummation of the wrongful act which results in death and who aids and abets the wrongdoer is liable equally with the principal actor.² But to render such a person liable it must appear that his conduct contributed to cause the death; it is not enough merely to show that he was present and made no effort to prevent the act.³

6. Joint Tortfeasors. — Under the general rule that an injured party may sue any one or all of several joint tortfeasors who are responsible for his injury,⁴ a defendant, when sued in an action for a wrongful death, cannot complain that another person equally guilty with himself has not been joined as a party defendant, and the plaintiff cannot be compelled to make such other party a defendant.⁵

XI. MEASURE OF DAMAGES — **1. Distinction Between Survival Actions and Others.** — In determining the measure of damages, the nature of the statute under which the action is brought is to be closely observed. If the statute is merely a survival statute, the recovery is limited to such damages as might have been recovered by the deceased himself had he survived the injury and brought the action.⁶ If the statute, however, as most of the statutes do, creates a new cause of action distinct from that which the deceased might have maintained, the measure of damages is the pecuniary loss sustained by

is not responsible for a death resulting from the negligence of such surgeon, if it has discharged its duty in selecting a competent one. *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272.

1. Where Statute Confines Liability of Principal to a Limited Class of Cases. — The *Texas* statute (Rev. Stat. 1889, art. 2899; Rev. Stat. 1895, art. 3017) provides for an action for a wrongful death where the death is caused (1) by the negligence of the owner of any railroad or other means of public conveyance, or by the negligence, carelessness, etc., of his servants or agents, and (2) "by the wrongful act, negligence, unskillfulness, or default of another." An action was brought under this statute against a sheriff and his bondsmen to recover for the wrongful death of the plaintiff's husband who had been killed by the defendant's deputy while attempting to escape. It was held that the liability of a principal for the act of his agent in this class of cases was confined to the class provided for in the first clause mentioned, and the plaintiff therefore could not recover. *Hendrick v. Walton*, 69 Tex. 192.

In *Louisiana* the statute declares that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Under this the master can be held liable for a death resulting from the wrongful act of his servant under circumstances which would have rendered him liable had death not ensued. *American Sugar Refining Co. v. Johnson*, 60 Fed. Rep. 503, 13 U. S. App. 681; *American Sugar Refining Co. v. Tatum*, 60 Fed. Rep. 514, 13 U. S. App. 700.

2. Aiding and Abetting Wrongdoer. — *Gray v. McDonald*, 28 Mo. App. 477, 104 Mo. 303.

If the evidence is conflicting as to whether the father, who was present at the encounter in which his son killed deceased, aided and

abetted him in doing so, a finding by the jury that he did so will not be disturbed. *Gray v. McDonald*, 104 Mo. 303.

3. When Defendant Merely Fails to Protect Deceased. — *Gray v. McDonald*, 28 Mo. App. 477, 104 Mo. 303.

See generally the title AIDER AND ABETTOR, vol. 2, p. 29.

Furnishing Liquor to Wrongdoer. — The plaintiff's claim was that the defendant furnished liquor to a third person while the latter was drunk, and failed to protect the plaintiff's husband from such person, in consequence of which such person killed the husband in the defendant's saloon, while the defendant was present. It was shown that the deceased was not in the saloon as a guest. It was held that the defendant could not be held liable under the *Georgia* statute authorizing a recovery for death caused by crime or "criminal or other negligence" (Ga. Acts of 1887, p. 45). *Belding v. Johnson*, 86 Ga. 177.

4. See the title TORTS.

5. *Hoosier Stone Co. v. McCain*, 133 Ind. 231.

Railroad Receiver. — Where the receiver of a railroad has not been made a party defendant, but the evidence shows that the injury was sustained before his appointment and fails to show that there have been any net earnings during his receivership, he is a proper, though not a necessary, party to the action. *Dallas Consol. Traction R. Co. v. Hurley*, 10 Tex. Civ. App. 246.

When the Death Results from a Collision of Boats, due to the mutual fault of the operators of the boats, the administrator may hold the owners of both liable for the damages, under the *Oregon* statute. *Holland v. Brown*, 35 Fed. Rep. 43.

6. See *infra*, this section, *Such Damages as Deceased Might Have Recovered*.

the party or parties entitled to the benefit of the action.¹

The measure of damages in the first class of cases, being the same as in actions for ordinary personal injuries, is discussed elsewhere,² and what is presented in this article must be taken as referring to actions of the second of the above classes unless the contrary is plainly indicated.

2. General Rules — *a. DAMAGES LIMITED TO PECUNIARY INJURY.* — The general rule in actions under statutes which create a new cause of action is that the damages must be limited strictly to the pecuniary injury sustained by the person or persons for whose benefit the action is brought. The sole inquiry is how many dollars are necessary to compensate the beneficiaries for the pecuniary loss caused to them by the wrongful death.³ In some jurisdic-

1. See *infra*, this section, *Damages Limited to Pecuniary Injury*.

2. See the title *DAMAGES, ante*. See also the titles *MASTER AND SERVANT*; *NEGLIGENCE*.

3. **General Rule as to Measure of Damages** — *United States.* — Gaither *v.* Kansas City, etc., R. Co., 27 Fed. Rep. 544.

Arkansas. — St. Louis, etc., R. Co. *v.* Mad-dry, 57 Ark. 306.

California. — Morgan *v.* Southern Pac. Co., 95 Cal. 510, 29 Am. St. Rep. 143, 54 Am. & Eng. R. Cas. 101.

Colorado. — Moffatt *v.* Tenney, 17 Colo. 189.
Illinois. — Maney *v.* Chicago, etc., R. Co., 49 Ill. App. 105; Illinois Cent. R. Co. *v.* Baches, 55 Ill. 379, 1 Am. Ry. Rep. 585; North Chicago St. R. Co. *v.* Brodie, 156 Ill. 317, affirming 57 Ill. App. 564; Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25.

Iowa. — Rose *v.* Des Moines Valley R. Co., 39 Iowa 246, 9 Am. Ry. Rep. 7, 20 Am. Ry. Rep. 326.

Kansas. — Just compensation with reference to the pecuniary injury resulting to the beneficiary from the wrongful death is the standard. Union Pac. R. Co. *v.* Dunden, 37 Kan. 1, 34 Am. & Eng. R. Cas. 88.

Kentucky. — An instruction that the measure of damages is "a fair equivalent * * * for the power of the deceased to earn money, lost by his death," states the rule correctly. Louisville, etc., R. Co. *v.* Morris, (Ky. 1892) 20 S. W. Rep. 539.

Michigan. — Richmond *v.* Chicago, etc., R. Co., 87 Mich. 374, 49 Am. & Eng. R. Cas. 367; Hurst *v.* Detroit City R. Co., 84 Mich. 539, 48 Am. & Eng. R. Cas. 16, note; Van Brunt *v.* Cincinnati, etc., R. Co., 78 Mich. 530.

Nebraska. — Anderson *v.* Chicago, etc., R. Co., 35 Neb. 95 (compensatory damages, and not the value of the life, are recoverable).

New Jersey. — Paulmier *v.* Erie R. Co., 34 N. J. L. 158.

North Carolina. — Blackwell *v.* Lynchburg, etc., R. Co., 111 N. Car. 151.

Oregon. — Carlson *v.* Oregon Short Line, etc., R. Co., 21 Oregon 450, 53 Am. & Eng. R. Cas. 135.

Pennsylvania. — Huntingdon, etc., R. Co. *v.* Decker, 84 Pa. St. 419; Caldwell *v.* Brown, 53 Pa. St. 453.

South Carolina. — In this state, under the statute authorizing the recovery of such damages as the jury may think proportionate to the injury resulting to the parties for whose benefit the action is brought, it is held that the damages are not to be limited to the pecuniary

loss. Strother *v.* South Carolina, etc., R. Co., 47 S. Car. 375.

Texas. — March *v.* Walker, 48 Tex. 372, decided under a statute fixing the recovery at "damages proportioned to the injury resulting from such death;" McGown *v.* International, etc., R. Co., 85 Tex. 289.

Vermont. — The recovery is limited to the pecuniary injury sustained by the party entitled to the recovery, and the decedent's cause of action cannot be considered. Needham *v.* Grand Trunk R. Co., 38 Vt. 294.

Virginia. — See Matthews *v.* Warner, 29 Gratt. (Va.) 570, 26 Am. Rep. 396.

Washington. — Klepsch *v.* Donald, 4 Wash. 436, 31 Am. St. Rep. 936.

Wisconsin. — The recovery is limited to what are strictly pecuniary damages, but the jury has a right to compensate the beneficiary for all pecuniary injuries resulting from the death, from whatever source they may proceed, provided they do not exceed the statutory limit. Ewen *v.* Chicago, etc., R. Co., 38 Wis. 613.

Rule in Alabama. — "The measure of damages, in all cases where suit is for injuries causing the death of an employee, is the pecuniary value of the life of the employee to his next of kin, resulting either from a relation of dependency or from expectation of benefit from the distribution of such estate as it may be inferred from the evidence he would have earned and saved but for untimely death." Louisville, etc., R. Co. *v.* Trammell, 93 Ala. 350.

In an action by the personal representative, under the code, §§ 2590, 2591, to recover for the death of a railroad employee, the recovery inuring to the benefit of the distributees of the decedent's estate, the measure of damages is not the aggregate amount of his net earnings during the probable duration of his life, estimated on the basis of his health, ability to labor, sobriety, industry, economy, etc., but such a sum as, estimated on that basis, and with legal interest added, would aggregate that amount at the probable termination of his life, calculated by the ordinary mortality tables. McAdory *v.* Louisville, etc., R. Co., 94 Ala. 272. See also Williams *v.* South, etc., Alabama R. Co., 91 Ala. 635; Louisville, etc., R. Co. *v.* Graham, 98 Ky. 688.

Something more than the mere facts of death and of the age of the deceased is necessary to show pecuniary loss. Louisville, etc., R. Co. *v.* Orr, 91 Ala. 548.

But in an action under the Code of 1886,

tions, however, exemplary damages are allowed where the injury was due to wilful wrongdoing on the part of the defendant.¹

But Evidence as to Pecuniary Loss Is Immaterial and incompetent under statutes like that of *Missouri*,² which provide a fixed penalty, or like that of *Alabama*,³ which is purely a punitive statute and requires the damages to be fixed at whatever sum the jury may assess.⁴ Nor is evidence of the pecuniary loss sustained by the beneficiaries necessary where the action is under a survival statute and the damages recoverable are merely those sustained by the deceased and his estate.⁵

b. WHEN PROBABLE ACCUMULATION THE SOLE BASIS. — Where the beneficiaries are merely collateral kindred of the deceased, and fail to show substantial reasons for expecting assistance and support from him had he lived, the measure of damages recoverable by them is such a sum as he would probably have accumulated after the date of his injury, had he lived.⁶

c. NATURE OF PROOF OF PECUNIARY LOSS REQUIRED. — Damages in cases of this character are not susceptible of exact mathematical calculation,⁷ and specific proof of pecuniary damages is not always requisite. It is sufficient to show facts and circumstances from which the jury may fairly infer pecuniary loss.⁸

d. HOW MEASURED — (1) *In General.* — The pecuniary injury resulting from the death of a person is to be measured by the standard of the pecuniary value of the life of the person to the party entitled to the damages.⁹ The

§ 2589, the damages are punitive and not compensatory. See the next paragraph of the text.

1. See *infra*, this section, *Exemplary or Punitive Damages*.

2. See *infra*, this section, *A Fixed Penalty — Missouri Statute*; *Schlereth v. Missouri* Pac. R. Co., 115 Mo. 87; *Weller v. Chicago*, etc., R. Co., 120 Mo. 635.

3. See Ala. Code, § 2589.

4. *Alabama Statute — Strictly Punitive.* — *Buckalew v. Tennessee Coal, etc., Co.*, 112 Ala. 146; *Richmond, etc., R. Co. v. Freeman*, 97 Ala. 289, *following Savannah, etc., R. Co. v. Shearer*, 58 Ala. 672; *Alabama, etc., R. Co. v. Burgess*, (Ala. 1897) 22 So. Rep. 913.

The foregoing authorities apply only to actions under section 2589 of the Code of 1886. Under the other sections, the damages are compensatory.

5. *Where Action Is under a Survival Statute.* — *Oldfield v. New York, etc., R. Co.*, 14 N. Y. 317. See also *Salem Bedford Stone Co. v. Hobbs*, 11 Ind. App. 27; *Delaware, etc., R. Co. v. Jones*, 128 Pa. St. 308; *Westcott v. Central Vermont R. Co.*, 61 Vt. 438.

6. *Probable Accumulations.* — *Howard v. Delaware, etc., Canal Co.*, 40 Fed. Rep. 195 (decided under *Vermont statute*). Compare *Lowe v. Chicago, etc., R. Co.*, 89 Iowa 420.

Where it appears that up to the time of his death the deceased had accumulated nothing, and there is nothing to indicate that he would have improved in this respect had he lived, the recovery must be limited to nominal damages. *Howard v. Delaware, etc., Canal Co.*, 40 Fed. Rep. 195.

Under the *Michigan* statute (How. Stat. Mich., §§ 3391, 3392), which provides that the jury shall give such damages as they may deem fair and just, to be distributed to the persons entitled thereto under the statute of distributions, the personal representative, in

order to maintain the suit, must show that some person has sustained an actual pecuniary loss by the death. Where it appeared that the deceased left a father and a brother, but that neither of them nor any one else was dependent on him for support, a nonsuit was ordered. *Van Brunt v. Cincinnati, etc., R. Co.*, 78 Mich. 530.

7. See *infra*, this section, *Exact Mathematical Calculation Not a Proper Basis*.

8. See *Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173, 59 Am. & Eng. R. Cas. 463.

In but few cases is the plaintiff able to show direct, specific pecuniary loss suffered by the next of kin from the death, and generally the basis for the allowance of damages must be found in proof of the character, qualities, capacity, and condition of the deceased and in the age, sex, circumstances, and condition in life of the next of kin. The proof may be unsatisfactory and the damages quite uncertain and contingent, yet the jurors in each case must take the elements thus furnished and make the best estimate of damages they can. *Lockwood v. New York, etc., R. Co.*, 98 N. Y. 523.

9. *Value of Life the Standard.* — *Rajnowski v. Detroit, etc., R. Co.*, 74 Mich. 20; *Storrs v. Grand Rapids*, (Mich. 1896) 68 N. W. Rep. 258; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 526. Compare *Norfolk, etc., R. Co. v. De Board*, 91 Va. 700.

The court instructed the jury that the measure of damages is the pecuniary loss suffered by the parties entitled to receive the sum recovered, without any allowance for distress of mind; and that loss — the loss which the parties are in such a case entitled to recover — is what the deceased would have probably earned by his labor in his business or calling during the residue of his life, and which would have gone for the benefit of his heirs or personal representatives, taking into consideration his

verdict should be for the present worth of such pecuniary value, and not its worth at some future time.¹

(2) *Expenses of Deceased to Be Deducted.*—In determining the value of a life the jury must consider not only the earnings of the deceased and his probable accumulations, but also the personal expenses to which he would be subject,² unless, as is the case in *Georgia*,³ the statute provides otherwise.

But No Deduction Should be Made of the amount which the deceased was contributing out of his earnings for the support of his brother or other relatives, nor of the amount which he was saving each month and putting in investments.⁴

Amount of Deduction.—The amount of this deduction is not to be determined merely from what it would ordinarily cost to have clothed and fed the deceased had he lived. His habits, manner of living, and station in life must be considered, and testimony as to these facts should be submitted to the jury.⁵

age, ability, and disposition to labor and his habits of living and expenditure. The instruction was held to be more favorable to the defendant than the law justifies, inasmuch as the statute gave to the jury the power to assess such damages "as under all the circumstances of the case may be just." *McKeever v. Market St. R. Co.*, 59 Cal. 294, 19 Am. & Eng. R. Cas. 123, distinguished in *Munro v. Pacific Coast Dredging, etc., Co.*, 84 Cal. 515, 18 Am. St. Rep. 248.

Need Not Be Itemized.—In an action for the wrongful death of a minor, there is no error in refusing to require the jury to itemize the probable future value of the deceased's services, had he lived, to his next of kin who sue. *Union Pac. R. Co. v. Dunden*, 37 Kan. 1, 34 Am. & Eng. R. Cas. 88.

Exact Mathematical Calculation.—In *Lowe v. Chicago, etc., R. Co.*, 89 Iowa 420, it was held that an instruction is wrong which tells the jury that their verdict should be for such a sum as, when put at interest, would amount to the sum the deceased would have accumulated had he lived out his expectancy of life.

Testimony Need Not State Value of Life in Exact Figures.—It is not essential to a recovery that any witness shall have testified to the pecuniary value of the deceased's services. It is sufficient if facts are shown from which the value may be inferred. *Petrie v. Columbia, etc., R. Co.*, 29 S. Car. 303, 35 Am. & Eng. R. Cas. 430. See also *James v. Richmond, etc., R. Co.*, 92 Ala. 231, 48 Am. & Eng. R. Cas. 522.

1. Present Worth of Pecuniary Value of Life.—See *Pickett v. Wilmington, etc., R. Co.*, 117 N. Car. 616; *Storrs v. Grand Rapids, (Mich.)*, 1896) 68 N. W. Rep. 258. See also *Alabama Mineral R. Co. v. Jones, (Ala.)* 1897) 21 So. Rep. 507.

2. Deduction of Expenses.—*Harrison v. Sutter St. R. Co.*, 116 Cal. 156; *Ohio, etc., R. Co. v. Voight*, 122 Ind. 288.

It is error to charge the jury that "it would perhaps be a fair way to estimate the amount of damages to take the probable amount of his [decedent's] accumulations for the time he might reasonably have been expected to live and find that for the plaintiffs. This * * * may be a fair way of calculating the damages sustained, but * * * if you can find a better rule you are at liberty to adopt it. In estimating his accumulations you will remember that it might not be fair to deduct his family expenses, because his family lived out of it and

now they do not have it to live upon." *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335. See *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95, 7 Am. & Eng. R. Cas. 25, 12 W. N. C. (Pa.) 47.

Prior to the Georgia Statute (*infra*, next note) forbidding any deduction from the value of a life on account of personal or other necessary expenses of the deceased, the value of a life was found by deducting from the total present worth of the life the amount of the necessary expenses of the deceased. And where an instruction allows the deduction not only of necessary expenses but of luxuries also, the defendant cannot complain. *Savannah, etc., R. Co. v. Flannagan*, 82 Ga. 579, 14 Am. St. Rep. 183, 39 Am. & Eng. R. Cas. 661. See also *Atlanta, etc., R. Co. v. Newton*, 85 Ga. 517; *Central R. Co. v. Rouse*, 77 Ga. 393, 80 Ga. 442.

3. Full Value of Life — Georgia Statute.—The Georgia statute provides that the plaintiff may recover for the "full value of the life" of the deceased. It further provides that the "full value of the life of the deceased as shown by the evidence, as used in this section, shall be held to mean the full value of the life of the deceased, as shown by the evidence, without any deduction for necessary or other personal expenses of the deceased had he lived." Act of Oct. 27, 1887, amending § 2971 of Code of 1882. (See Code of 1895, §§ 3828, 3829.) It was objected that this provision was unconstitutional as being a usurpation by the legislature of the function of the courts. But it was held that the legislature was merely prescribing a rule of damages and the act was not objectionable. Nor was the act unconstitutional as special legislation. *Clay v. Central R., etc., Co.*, 84 Ga. 345, 42 Am. & Eng. R. Cas. 76.

Evidence as to Decedent's Wasteful Habits Incompetent.—The effect of the statute is to give to the widow the right to recover the gross value of her husband's life. Therefore evidence that the plaintiff was better provided for after her husband's death than before, that the deceased wasted his money and was constantly involved in criminal cases, is not competent. *Boswell v. Barnhart*, 96 Ga. 521.

4. Louisville, etc., R. Co. v. Morgan, (Ala.) 1897) 22 So. Rep. 20.

5. Amount to Be Deducted.—*Killian v. Augusta, etc., R. Co.*, 79 Ga. 234, 11 Am. St. Rep. 410.

Thus the cost of luxuries in which the de-

e. PECULIARLY A QUESTION FOR THE JURY. — There is no fixed rule to determine what amount of damages should be allowed in actions of this character; each particular case must be determined from its own facts. The question is peculiarly one for the jury. In estimating the damages they should take the facts proved by the evidence, and, connecting them with the knowledge and experience possessed by them in common with men in general, fix the damages at an amount proportionate to the injury sustained by the party for whose benefit the suit is brought.¹ They are not warranted in awarding damages founded on their fancy or based upon visionary estimates of probabilities or chances. Except when the statute clearly provides otherwise, they must confine their award to the actual pecuniary damages resulting from the wrongful death.²

f. SUCH DAMAGES AS DECEASED MIGHT HAVE RECOVERED. — In most jurisdictions the action allowed by the statute is distinct and different from that which the deceased could have maintained had he survived the injury.³ In some instances, however, the recovery is limited to such damages as the deceased himself would have been entitled to had he survived and brought the action. In such cases, the damages are limited to compensation for the pain and suffering endured by the deceased, his loss of time, and his expenses between the time of his injury and his death.⁴

ceased was accustomed to indulge must be deducted. *Savannah, etc., R. Co. v. Flanagan*, 82 Ga. 579, 14 Am. St. Rep. 183, 39 Am. & Eng. R. Cas. 661.

How Personal Expenses May Be Proven. — Where the evidence as to how much of his earnings the deceased required for his own support is conflicting or circumstantial, the number and ages of those dependent on him may be shown. *Alabama Mineral R. Co. v. Jones* (Ala. 1897) 21 So. Rep. 507.

1. Province of Jury. — See *Louisville, etc., R. Co. v. Morgan*, (Ala. 1897) 22 So. Rep. 20; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245; *Missouri Pac. R. Co. v. Perego*, 36 Kan. 424; *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690, 23 Am. & Eng. R. Cas. 429; *Cornwall v. Mills*, 44 N. Y. Super. Ct. 45; *Houston, etc., R. Co. v. Shaw*, 2 Tex. Unrep. Cas. 553.

Special Finding of Jury — Not Disturbed. — Where the jury find the pecuniary loss to be a certain sum (in this case one thousand three hundred and twenty dollars), and, in answer to a specific question, say that the loss consisted of notes and mining stocks, and there is testimony that the deceased had notes and mining stocks which were lost on account of his death, and the amount of the verdict seems to be but a reasonable compensation for such loss, the verdict will be upheld, although the amount named by the jury cannot be deduced from the testimony by any mere addition of the items of an account, and although it is not made perfectly clear in what manner, whether by running of the statute of limitations or otherwise, the death of the deceased brought about the loss of the notes and stocks. *Kansas Pac. R. Co. v. Cutter*, 19 Kan. 83, 17 Am. Ry. Rep. 471.

2. See *supra*, this section, *Damages Limited to Pecuniary Injury*; *Balch v. Grand Rapids, etc., R. Co.*, 67 Mich. 394.

Jury's Discretion Not Unlimited. — They must be guided by the fixed rules of law. It is error to instruct them that the question of the

measure of damages is entirely one for them to determine. *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318.

3. See *supra*, this title, *Right of Action Given by Statute*.

4. Under Survival Statutes. — This is true under all statutes which provide merely for a survival of the right of action which the deceased had and create no new right of action. See *Atchison, etc., R. Co. v. Rowe*, 56 Kan. 411; *Quinn v. Johnson Forge Co.*, 9 Houst. (Del.) 338; *Towns v. Vicksburg, etc., R. Co.*, 37 La. Ann. 630, 55 Am. Rep. 508.

In *East Tennessee, etc., R. Co. v. Toppins*, 10 Lea (Tenn.) 66, 11 Am. & Eng. R. Cas. 222, the jury were instructed that, in addition to the damages which the deceased himself might have recovered if he had lived, damages might also be awarded for the deprivation resulting to the parties for whom the suit was brought, in this case the widow and children. It was held that this charge was error, the court, by McFarland, J., saying: "This charge was justified by several expressions in the published opinions of this court, but there has always been conflict of opinion upon the question, and we have more recently held the true rule to be that the action is the same in its character * * * as if death had not resulted and the action had been brought by the injured party himself."

The rule has been changed by an act passed just after the rendition of the above decision, M. & V. Code, § 3134, and damages sustained by the widow and children are recoverable. See *Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173, 59 Am. & Eng. R. Cas. 463.

Under Kentucky Statute. — Where death results instantly from injuries caused by the neglect of a railroad company other than wilful neglect, the jury, in estimating the damages, can only inquire as to the value of the decedent's power to earn money, that being the measure of damages. It is error, in such a case, under the statute, to instruct the jury that, upon proof of simple negligence, they

g. ANNUITY AS A BASIS. — The proposition has been often urged, in actions by a widow or children for the wrongful death of a husband and father, that where the deceased was earning a definite income, the damages should not exceed a sum which would, at legal interest, furnish an annuity equal to the amount of the decedent's earnings per year.¹

Loss of Specific Annuity. — And the rule is that when the plaintiff has lost, by the death of his intestate, a fixed annuity, the recovery should be such a sum, and no more, as would purchase a similar annuity.²

But Where There Was No Specific Annuity Lost, and the damages sued for are those resulting from the death of a husband and father earning a definite annual income, the damages are not to be measured on the basis of any annuity, but must be such a sum as will fairly compensate for the loss caused by the wrongful death.³

h. EXACT MATHEMATICAL CALCULATION NOT A PROPER BASIS. — On the same principle, it is improper to lay down any rule requiring the jury to arrive at the measure of damages by precise mathematical calculation. The jury must consider all the facts and circumstances, and from them fix their award at such sum as will fairly compensate for the injury resulting from the death.⁴

may give such damages as they may "deem just and proper by way of compensation, not exceeding the amount claimed in the petition." Louisville, etc., R. Co. v. Case, 9 Bush (Ky.) 728. See also *Givens v. Kentucky Cent. R. Co.*, 89 Ky. 231.

Where the Statute Is Not a Survival Statute, evidence as to damages sustained by the deceased or his estate is not proper unless the statute specifically provides for a recovery of such damages. *Gores v. Graff*, 77 Wis. 174.

1. See *St. Louis, etc., R. Co. v. Needham*, 52 Fed. Rep. 371, 54 Am. & Eng. R. Cas. 88, 10 U. S. App. 339.

2. Where Plaintiff Has Lost a Specific Annuity. — *Rowley v. London, etc., R. Co.*, L. R. 8 Exch. 221, 21 W. R. 869, 29 L. T. 180, 42 L. J. Exch. 153.

3. Definite Income — But No Specific Annuity. — "One vice of this instruction is that it positively directs the jury to measure the plaintiff's damages by a mathematical calculation, based upon the yielding power of money when invested in an annuity." While the jury may take such matters into consideration, they must not be governed by them entirely. Such an error is not cured by a subsequent instruction that the whole matter of damages "is, in the end, left entirely to your sound judgment as to what is proper to be allowed." *St. Louis, etc., R. Co. v. Needham*, 52 Fed. Rep. 371, 54 Am. & Eng. R. Cas. 88, 10 U. S. App. 339. See also *Harkins v. Pullman Palace Car Co.*, 52 Fed. Rep. 724.

In *International, etc., R. Co. v. Kindred*, 57 Tex. 491, 11 Am. & Eng. R. Cas. 649, it was held that a mother, in an action for the death of her son, is not restricted to such damages as represent the present value of an annuity for the probable duration of her life for the amount shown to have been actually furnished to her each year by her son.

In another case it appeared that the plaintiff's counsel, in his argument to the jury, said that the deceased's expectancy of life was, according to the mortality tables, forty years, and that in order to arrive at a proper verdict the jury should multiply the annual earnings of

the deceased by forty. The defendant's counsel objected to such language and asked the court to direct the attorney to withdraw it. It was held that the refusal of the court to sustain the objection was error and the error was not cured by a subsequent correct instruction on the measure of damages. *St. Louis, etc., R. Co. v. Farr*, 56 Fed. Rep. 994.

In *The Oceanic*, 61 Fed. Rep. 338, the deceased was thirty-two years old and was earning one thousand five hundred dollars a year. Under such circumstances, it would require twenty-five thousand dollars to purchase an equally good annuity. But it was held that a verdict for ten thousand dollars was amply large, though the statute prescribed no limit to the recovery.

An instruction that the jury should award such a sum as would, with interest, purchase an annuity equal to the decedent's earnings, etc., is specially erroneous when there is no proof as to the expectancy of life of either the deceased or his children. *Redfield v. Oakland Consol. St. R. Co.*, 110 Cal. 277.

4. *Lowe v. Chicago, etc., R. Co.*, 89 Iowa 420; *Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173, 59 Am. & Eng. R. Cas. 463.

Damages Not Ascertainable by Precise Mathematical Calculation. — In the latter case the charge of the court was that "in estimating the damages, the jury should look to the proof as to what was the expectancy of life of the deceased, and see what amount he was able to and was earning at and before his death, and from all the proof * * * decide what he would have earned during that expectancy of life, * * * and then allow her [the plaintiff] such sum as would reasonably compensate her for the loss of what he would have earned during that expectancy of life from the time of his death." It was held that this was error in that it ignored the fact that the deceased was engaged in a most hazardous occupation, and that his expectancy of life while exposed to the dangers of railroad service was more precarious than if he were in a less dangerous occupation. The elements of damage were taken as assumed facts, and the jury were in-

i. **RULE IN THE FEDERAL COURTS.** — The rule as to the measure of damages adopted by the federal courts is ordinarily the rule prevailing in the state where the court is being held. In case of interventions in receivership cases, it is said that the fact that many of the state legislatures have fixed the limit of recovery at ten thousand dollars amounts to a legislative construction that such sum is a fair maximum award, which should not be exceeded by the federal courts.¹

3. In Particular Classes of Cases — a. FOR DEATH OF HUSBAND AND PARENT. — The damages in such a case must be sufficient to compensate for the pecuniary loss which the decedent's wife, or children, or both, have sustained in consequence of his death, and this is such a sum, and no more, as the deceased would probably have earned by his intellectual and bodily labor at his business, profession, or trade during the residue of his probable life, which would have gone for the benefit of his wife and children. In estimating this, the decedent's age, business capacity, ability and disposition to labor, and his habits of living, are to be considered.²

vited to calculate the damages by this uncertain standard instead of being left to determine them from their own sound judgment.

1. Farmers' L. & T. Co. v. Toledo, etc., R. Co., 67 Fed. Rep. 73; *Cheatham v. Red River Line*, 56 Fed. Rep. 248.

2. Measure of Damages — Death of Husband and Parent. — In addition to the cases here cited, see cases in note immediately following.

United States. — In *Harkins v. Pullman Palace Car Co.*, 52 Fed. Rep. 724, which was an action by a wife to recover for the death of her husband, it appeared that he was a laborer and was earning four hundred dollars a year. The defendant insisted that in no event could the recovery exceed a sum which, when invested, would yield an annual income of two hundred dollars, one-half of the husband's annual earnings, that being the proportion she might fairly expect to receive from his earnings. But the court held that such a basis of calculation was too narrow; that the life of an honest, industrious, and kind-hearted husband had, for the wife, a money value in addition to his actual earnings.

Alabama. — In an action brought by the widow as administratrix of her deceased husband, it appeared that she was the only member of his family, and that the deceased had been earning one dollar a day and he "always carried it home and spent it on his family." The deceased was forty years old when killed. It was held that the recovery should be for such a sum as, at legal interest, would give the widow one hundred and fifty dollars a year for twenty-seven years (the probable duration of her life), and exhaust the principal at the end of that time; in other words, such a sum as would purchase a twenty-seven-year annuity of one hundred and fifty dollars. *Louisville, etc. R. Co. v. Trammell*, 93 Ala. 350. *Compare Harkins v. Pullman Palace Car Co.*, 52 Fed. Rep. 724.

Arkansas. — *St. Louis, etc., R. Co. v. Needham*, 52 Fed. Rep. 371, 54 Am. & Eng. R. Cas. 88, 10 U. S. App. 339.

California. — In estimating the damages to be recovered by the children for the death of the father, the widow having died before action brought, it is not proper to estimate what the widow and children would be entitled to

and then deduct from this the sum to which the widow would have been entitled had she lived. The fact that the deceased left a widow surviving should be disregarded. *Taylor v. Western Pac. R. Co.*, 45 Cal. 323.

Colorado. — *Hayes v. Williams*, 17 Colo. 475.

Georgia. — *David v. Southwestern R. Co.*, 41 Ga. 223; *Atlanta, etc., R. Co. v. Venable*, 67 Ga. 697. In this latter case it was held that, the measure of damages being the support of the child until his majority, the damages should be reckoned from the time of the death and not from the time of the injury.

In an action under Irwin's Ga. Code, § 2920, by a widow for the death of her husband, the rule of damages was declared to be the actual pecuniary damage sustained by her, and this must be ascertained by inquiring what would be a reasonable support for the wife, considering the habits, prospects, and occupation of the husband. The loss to the children could not be considered. *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409.

The widow's loss of her husband's companionship cannot be considered. *Georgia R. Co. v. Pittman*, 73 Ga. 325, 26 Am. & Eng. R. Cas. 474.

The widow is entitled, under the Code of 1882, § 2971, to recover the full value of her deceased husband's life. The burden is on her to prove the damages, however, and a necessary element of the proof is as to the number of years the deceased would probably have lived. If there is no proof on this subject, the plaintiff fails to prove her case and judgment should be given for the defendant. *Savannah, etc., R. Co. v. Stewart*, 71 Ga. 427. See also *Central R. Co. v. Rouse*, 77 Ga. 393, 80 Ga. 442 (proper charge to the jury stated); *Savannah, etc., R. Co. v. Flannagan*, 82 Ga. 579, 14 Am. St. Rep. 183, 39 Am. & Eng. R. Cas. 661; *Central R., etc., Co. v. Roach*, 64 Ga. 635, 8 Am. & Eng. R. Cas. 79.

Illinois. — The support the widow would probably have received from her husband is the controlling element in arriving at the pecuniary damages sustained by her in his death. *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379, 1 Am. Ry. Rep. 585.

Indiana. — The widow and children may recover not only for the loss of support the

Value of Parent's Services in Care and Education of His Children.—To the foregoing rule, the weight of authority adds that the value of the father's services in the

deceased furnished them, but also for what he would probably have accumulated if he had lived out his expectancy of life. *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168.

Kentucky.—“The power [of decedent] to earn money had he lived, not exceeding the amount claimed,” is a proper criterion. *Cincinnati, etc., R. Co. v. Sampson*, 97 Ky. 65.

Louisiana.—See *Herman v. New Orleans, etc., Co.*, 11 La. Ann. 5.

Maryland.—*Baltimore, etc., R. Co. v. State*, 60 Md. 449, 12 Am. & Eng. R. Cas. 155. In this case, the court, by Alvey, J., said, *inter alia*: “Thus the children may recover for the loss of the education, comforts, and position in society which they would have enjoyed if their father had lived and retained the income which died with him, and they had continued to form part of his family,” citing *Pym v. Great Northern R. Co.*, 2 B. & S. 759, 110 E. C. L. 759; *Mayne on Dam.*, § 707.

In another case, which was an action for the death of a woman, it appeared that the damages, if any, would go to the married daughter and two sons of the deceased, all above the age of twenty-one. The deceased made her home with the daughter and did the housework, and thus enabled the daughter to work out and earn six dollars a week, which she was unable to do after her mother's death. The deceased was in the habit of nursing the sick members of her sons' families, but there was no evidence to show what was the value of this service nor that the sons were obliged afterwards to employ a nurse. It was held that the daughter was entitled to recover in accordance with the rule of the text, she having shown an expectation of pecuniary benefit from the continuance of her mother's life; but the sons were not entitled to recover anything, no pecuniary damage to them being shown. *Baltimore, etc., R. Co. v. State*, 63 Md. 135, 21 Am. & Eng. R. Cas. 202. See also *Baltimore, etc., R. Co. v. State*, 24 Md. 271; *Baltimore, etc., R. Co. v. State*, 33 Md. 542; *Baltimore, etc., R. Co. v. State*, 41 Md. 268, 6 Am. Ry. Rep. 276.

Missouri.—*McPherson v. St. Louis, etc. R. Co.*, 97 Mo. 253; *Tetherow v. St. Joseph, etc., R. Co.*, 98 Mo. 74, 14 Am. St. Rep. 617; *Fugler v. Bothe*, 43 Mo. App. 44. See also *McGowan v. St. Louis Ore. etc., Co.*, 109 Mo. 518; *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.

But nothing can be allowed to the widow for the loss of the companionship of her husband. *Schaub v. Hannibal, etc., R. Co.*, 106 Mo. 74.

Montana.—*Soyer v. Great Falls Water Co.*, 15 Mont. 1.

Pennsylvania.—*Boyd v. Hutchinson*, 18 Phila. (Pa.) 283; *Pennsylvania Tel. Co. v. Varnan*, (Pa. 1888) 15 Atl. Rep. 624.

The value of the husband's life to the wife is determined by ascertaining how much better off pecuniarily she was with him than she is without him. *Catawissa R. Co. v. Armstrong*, 52 Pa. St. 282.

Tennessee.—The original rule was that the

widow might recover for the pain and suffering of her husband, the necessary expenses incurred in consequence of the injury and death, and the pecuniary loss resulting to the parties entitled to the benefits of the recovery from the wrongful death. *Collins v. East Tennessee, etc., R. Co.*, 9 Heisk. (Tenn.) 841, 20 Am. Ry. Rep. 46; *East Tennessee, etc., R. Co. v. Mitchell*, 11 Heisk. (Tenn.) 400. The whole doctrine, however, was a subject of doubt, and the court finally removed all question by holding that the widow and children could recover only such damages as the deceased himself might have recovered had he lived and brought the action himself. *East Tennessee, etc., R. Co. v. Toppins*, 10 Lea (Tenn.) 66, 11 Am. & Eng. R. Cas. 222.

Since the decision just cited the statute of 1883 (M. & V. Code, § 3134) has been passed, expressly providing that, in addition to the damages which the deceased himself might have recovered, the widow and children may recover all damages sustained by them. The present rule is therefore in accord with the text. See *Illinois Cent. R. Co. v. Spence*, 93 Tenn. 173, 59 Am. & Eng. R. Cas. 463.

Texas.—*Gulf, etc., R. Co. v. Southwick*, (Tex. Civ. App. 1895) 30 S. W. Rep. 592; *Missouri, etc., R. Co. v. Hines*, (Tex. Civ. App. 1897) 40 S. W. Rep. 152.

In an action by a minor child for the death of his father, the measure of damages is “what he could reasonably expect to have received from the father during the probable duration of his [the father's] life.” It is error to admit testimony as to the cost of rearing a child in the county of the plaintiff's residence, since that has nothing to do with the measure of damages in such a case. *International, etc., R. Co. v. Kuehn*, 2 Tex. Civ. App. 210.

Wisconsin.—*Tuteur v. Chicago, etc., R. Co.*, 77 Wis. 505.

In an action brought under Wis. Rev. Stat., §§ 422–526, for the death of the plaintiff's intestate, if the deceased left a widow the damages recoverable are only those sustained by her alone, and are confined to the pecuniary loss. *Schadewald v. Milwaukee, etc., R. Co.*, 55 Wis. 569. She is not entitled to recover what her husband's life would have been worth to her and her children had he lived. *Liermann v. Chicago, etc., R. Co.*, 82 Wis. 286, 33 Am. St. Rep. 37.

But the fact that the children will, in consequence of the husband's death, be dependent on her for their support may be shown by the widow and must be considered in determining her pecuniary loss. *Abbot v. McCadden*, 81 Wis. 563, 29 Am. St. Rep. 910.

The jury should consider the wife's loss of protection and support and also the additions which the earnings of the husband would probably have made to his estate had he continued to live, and the reasonable expectation which the wife had of pecuniary advantage by ultimately sharing in such increase as his heir. *Lawson v. Chicago, etc., R. Co.*, 64 Wis. 447, 21 Am. & Eng. R. Cas. 249, 54 Am. Rep. 634.

attention to and care and superintendence of his children and family, and in the education of his children, of which they are deprived by his death, should also be considered as an element of pecuniary damage.¹

But There Must Be Proof of Such Loss, and therefore when the evidence fails to show that the deceased was fitted by nature or education to furnish his chil-

So, also, in an action for the benefit of the widow and children, the jury are not to be limited to the actual value of the support and protection of herself and the support and education of her children, but they may consider what the earnings of the deceased would have made his property worth had he lived and the reasonable expectation of the widow and children of ultimately inheriting such property. *Castello v. Landwehr*, 28 Wis. 522. See also *Potter v. Chicago, etc.*, R. Co., 21 Wis. 372, 94 Am. Dec. 548, 22 Wis. 615. Compare *St. Louis, etc.*, R. Co. v. *Needham*, 52 Fed. Rep. 371, 54 Am. & Eng. R. Cas. 88, 10 U. S. App. 339.

Insufficient Charge to Jury. — In an action by a minor child for the death of her father, an instruction as to the measure of damages which directs the jury to give such damages as they may deem fair and just under the evidence, with reference to the necessary injury resulting to her from the death of her father, is erroneous in that it fails to point out the distinct elements of damage and the circumstances to be considered, such as the business capacity of the deceased, his experience, his habits, health, energy, economy, etc., as well as his fitness for giving her proper moral and intellectual training, and in failing to say that the plaintiff had a claim on the decedent's wages only during her minority. *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.

That All Children of the Deceased Are Adults does not necessarily limit the damages recoverable by them to a nominal sum. They are entitled to prove and recover substantial damages. *Chicago, etc.*, R. Co. v. *Ptacek*, 171 Ill. 9, affirming 62 Ill. App. 375.

1. Loss of Intellectual and Moral Training of Parent. — The better rule, even where the statute specifically limits the recovery to compensation for the pecuniary damages sustained, is that the jury, in an action for the death of a parent, may take into consideration the loss to the children of the intellectual and moral training which they would have had but for the death, and the loss of the care and nurture a parent ordinarily gives to a child. *St. Lawrence, etc.*, R. Co. v. *Lett*, 11 Can. Sup. Ct. Rep. 422, 26 Am. & Eng. R. Cas. 454, affirming 11 Ont. App. 1, 21 Am. & Eng. R. Cas. 165; *Baltimore, etc.*, R. Co. v. *Wightman*, 29 Gratt. (Va.) 431, 17 Am. Ry. Rep. 351; *Castello v. Landwehr*, 28 Wis. 522; *McKeigue v. Janesville*, 68 Wis. 50. See also *St. Louis, etc.*, R. Co. v. *Sweet*, 60 Ark. 550; *Baltimore, etc.*, R. Co. v. *Stanley*, 54 Ill. App. 215; *Northern Pac. R. Co. v. Freeman*, 83 Fed. Rep. 82. Compare *Walker v. Lake Shore, etc.*, R. Co., 104 Mich. 606.

"Thus, it is established that the jury may take into account, as a pecuniary loss, the deprivation of the advantages of a superior education and of social position and personal comforts of which a father's ample income would have secured the enjoyment had he

lived, when the income ceases with his life; and, *a fortiori*, may they regard as a pecuniary injury the loss of that provision which it may be supposed that the deceased, as a prudent husband and father, would have made for the benefit of his family, by savings from his income, when he knows the income must terminate with his life." 3 *Minor's Inst.*, p. 289, citing *Pym v. Great Northern R. Co.*, 2 B. & S. 766, 110 E. C. L. 766, 8 Jur. N. S. 819, affirmed in 4 B. & S. 396, 116 E. C. L. 396, 10 Jur. N. S. 199.

The correctness of the above rule "depends upon the correctness of the following propositions: (1) That the age, observation, and experience of the father fit him to assist in the physical, mental, and moral training of his child; (2) that the natural affection of father for child affords a reasonable expectation that he will render the assistance that he reasonably can toward such training; and (3) that a proper development of the physical, mental, and moral qualities of the child is of pecuniary value to him, either because it must otherwise be bought or because it is an aid in money-getting in after life. It seems to us that neither of the propositions * * * can be questioned." *St. Louis, etc.*, R. Co. v. *Maddy*, 57 Ark. 306, 58 Am. & Eng. R. Cas. 333. See the note following.

In an action under the *Utah* statute it is proper to instruct the jury that they may consider the benefits of association, comfort and pleasure the family of the deceased would have received from him had his life been spared, as well as the number and ages of his children. *Chilton v. Union Pac. R. Co.*, 8 Utah 47.

In an action by a child to recover for the wrongful death of his father, his recovery is not limited to nominal damages, although there is no proof as to what the earnings of his father were, if any. The loss of a parent's care in the education and maintenance of his child have an appreciable pecuniary value which the jury has a right to consider. *Stoher v. St. Louis, etc.*, R. Co., 91 Mo. 509; *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.

Loss of Mother's Nurture and Instruction a Pecuniary Injury. — In *Tilley v. Hudson River R. Co.*, 29 N. Y. 252, 86 Am. Dec. 297, the court, by Hogeboom, J., said: "The charge of the judge was explicit that the damages must be limited to pecuniary injuries; and he said that in estimating them they [the jury] had a right to consider the loss (that is, the pecuniary loss) which the children had sustained in reference to their mother's nurture and instruction, and moral, physical, and intellectual training. I think this does not imply that the children are necessarily and inevitably subjected to such a loss, but leaves it to the jury to determine whether any such loss has been in fact sustained, and if so, the amount of such loss." Quoted in *Searle v. Kanawha, etc.*, R. Co., 32 W. Va. 370, 37 Am. & Eng. R. Cas. 184.

dren such moral training and care, this element of damage cannot be considered by the jury.¹

Damages Not Limited to Minority of Children.—The damages recoverable by children for the death of their father are not to be confined to prospective losses during their minority. But where the recovery is sought to be extended further, the children must show affirmatively some expectation of pecuniary benefit to accrue to them, from the life of their father after their majority.²

No Allowance for Loss of Prospective Dower.—In an action by the widow for the death of her husband there can be no allowance, by way of damages, for the loss of the dower interest in lands which the deceased would have acquired had he lived. Such a loss is too visionary.³

Where Husband Has Deserted His Wife.—The fact that the deceased husband had been separated from his wife and family for several years, during which time he had contributed nothing to their support, will not limit the recovery by his wife and children to nominal damages merely where there is no proof that the wife, by her own wrongdoing, had forfeited her right to be supported and cared for by her husband.⁴

For Death of Mother.—In an action by children for the death of their mother, the jury may consider the number of years she would probably have lived, the reasonable probability of her property being increased during that time by her efforts, and the reasonable expectation of pecuniary benefit by support, education, or otherwise, which they had in the continuance of her life. The fact that the children are all of age will not affect this rule, though it will necessitate stricter proof of the expectation of benefits.⁵

1. Qualification of General Rule—Fitness of Parent.—*St. Louis, etc., R. Co. v. Maddy*, 57 Ark. 306; *Peoria, etc., Union R. Co. v. O'Brien*, 18 Ill. App. 28; *Illinois Cent. R. Co. v. Weldon*, 52 Ill. 290. See also *Chicago, etc., R. Co. v. Austin*, 69 Ill. 426.

So also where there is no evidence as to the value of such moral and physical training and nurture, the jury cannot consider it as an element of damages. *Walker v. Lake Shore, etc., R. Co.*, (Mich. 1897) 69 N. W. Rep. 1114.

"Pecuniary" to be Liberally Construed.—In *West Virginia*, where the statute limits the recovery to the "pecuniary loss," it is held proper to instruct the jury, in an action for the death of a father, that, "in estimating the pecuniary injury they [the jury] may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the children would have received from their father." *Searle v. Kanawha, etc., R. Co.*, 32 W. Va. 370. See also *Walker v. McNeill*, 17 Wash. 582; *Stoher v. St. Louis, etc., R. Co.*, 91 Mo. 509, 31 Am. & Eng. R. Cas. 229; *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471, 29 N. Y. 285, 86 Am. Dec. 297; *Dimmey v. Wheeling, etc., R. Co.*, 27 W. Va. 57, 55 Am. Rep. 292.

The word "pecuniary" is to be liberally construed. *Vicksburg v. McLain*, 67 Miss. 4.

In *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287, 35 How. Pr. (N. Y.) 36, affirming 47 Barb. (N. Y.) 515, the court held that the "pecuniary injury" mentioned in the statute might be such as arose from the loss of the personal care, intellectual culture, or moral training which the beneficiaries would have received had the deceased lived.

2. Not Confined to Minority of Child.—*Tyler*

Southeastern R. Co. v. Rasberry, (Tex. Civ. App. 1896) 34 S. W. Rep. 794.

The same rule is true in an action by children for the death of a mother. *Redfield v. Oakland Consol. St. R. Co.*, 110 Cal. 277.

The damages recoverable for the loss of the intellectual and moral training of the parent are not necessarily limited to the minority of the child or children, if the jury believe that such training and the beneficial influence of the parent would have been continued after maturity. *Tilley v. Hudson River R. Co.*, 29 N. Y. 252, 86 Am. Dec. 297.

3. Prospective Dower.—*St. Louis, etc., R. Co. v. Needham*, 52 Fed. Rep. 371, 10 U. S. App. 339. In this case it appeared that the husband and wife were each about twenty years old, and that he had no income except his wages, all of which were consumed in the daily support of himself and his wife. It was held improper to allow the jury to consider the possibility that the deceased, had he lived, might have accumulated property in which, at his death, she would have a dower interest. Such damages are purely speculative and depend upon the successful outcome of several contingencies.

4. Baltimore, etc., R. Co. v. State, 81 Md. 371.

5. Death of Mother.—*Tuteur v. Chicago, etc., R. Co.*, 77 Wis. 505. See also the cases *supra*, this subdivision.

In an action by a child for the death of his mother it is proper to charge the jury that they may consider, in estimating the probable support which a mother would give to her child, whether a greater or less sum would be required as the child advanced in years. *Atlanta, etc., R. Co. v. Venable*, 67 Ga. 607.

The Fact That All the Children Were of Age at

6. FOR DEATH OF WIFE.—If the statute confers a right of action on the husband for the death of his wife, he is entitled to recover for the loss of her services, and this is, in most cases, the limit of his right of recovery.¹ The courts are liberal, however, in the admission of evidence as to the educational qualifications and the amiability and kindness of character of the wife, the theory being that such qualities lend an added value to her services.²

the time of their mother's death, for which the action is brought, will not preclude them from recovering for the loss of such pecuniary benefits as they had a reasonable expectation of obtaining from her additional accumulations. *Tuteur v. Chicago, etc., R. Co.*, 77 Wis. 505. See, however, as to proof such adult children must adduce, *Duval v. Hunt*, 34 Fla. 85.

1. Loss of Services the Principal Consideration.—*Gulf, etc., R. Co. v. Southwick*, (Tex. Civ. App. 1895) 30 S. W. Rep. 592 (expenses must be deducted); *Nelson v. Lake Shore, etc., R. Co.*, 104 Mich. 582.

Although damages of a sentimental character are not recoverable in an action by a husband for the death of his wife, yet the loss of household services accustomed to be performed by her, which would have to be replaced by hired services, is a substantial loss for which damages may be awarded, as is also the loss to the children of the care and moral training of their mother. *St. Lawrence, etc., R. Co. v. Lett*, 11 Can. Sup. Ct. Rep. 422, 26 Am. & Eng. R. Cas. 454, *affirming* 11 Ont. App. 1, *reversing* 1 Ont. Rep. 545.

Husband Alone Entitled to Damages for Loss of Wife's Services — Administrator.—The wife's services belong to her husband, and he alone may recover therefor. The administrator is not entitled to recover for the loss of such services. *Earl v. Tupper*, 45 Vt. 275.

Tennessee Rule — Damages to Husband Alone to be Considered.—Under the Tennessee statute the husband alone is entitled to the damages recoverable for the death of his wife. It is, therefore, error, in an action for the death of a wife, to instruct the jury that they may consider the damages sustained by the infant child of the deceased. *Chattanooga Electric R. Co. v. Johnson*, 97 Tenn. 677.

It seems that the rule is otherwise now by virtue of the Act of 1897 (Acts, c. 86, p. 231), which was passed to annul the effect of the decision just cited.

Special Damages — Must Be Specially Pleaded.—Damages for the loss of a wife's services, etc., may be recovered under allegations of general damage, but if the husband seeks to recover for the value of services not usually performed by a wife and of special value to him in his profession or business, he must plead the facts justifying such recovery specially. *Gulf, etc., R. Co. v. Younger*, (Tex. Civ. App. 1897) 40 S. W. Rep. 423.

Services and Companionship of Wife.—In an action by a husband to recover for the wrongful death of his wife, brought under a statute limiting the recovery to the pecuniary loss sustained, there is no error in instructing the jury that they should measure the plaintiff's loss "by a just estimate of the services and companionship of the wife." The relation of husband and wife should be considered in

estimating the value of the wife's services. *Pennsylvania R. Co. v. Goodman*, 62 Pa. St. 329.

Where a Man and His Wife Had Lived Apart for the period of eight years it was held that he had no reasonable expectation of advantage from his wife's chances of coming into possession of a sum of money on the death of her mother, the wife being forty-six years of age and the mother eighty years of age at the time of the action. *Harrison v. London, etc., R. Co.*, 1 C. & E. 540.

Expected Earnings — Husband Entitled To as Against Children.—In an action by a husband for the death of his wife, who left children surviving her, the expectancy of the children to a share in the personal earnings of their mother cannot be considered in estimating the damages. Such earnings would belong to the husband, and the contingency of the father's continuing in possession of the earnings and dying intestate during the life of the children, whereupon they would be entitled to such money, is too remote to be regarded. *Tilley v. Hudson River R. Co.*, 24 N. Y. 471, 23 How. Pr. (N. Y.) 363.

Pecuniary Loss to Plaintiff the Sole Consideration.—In *Galveston, etc., R. Co. v. Matula*, 79 Tex. 577, the plaintiff, while crossing the track of the defendant company with his wife, was struck by an engine and injured. His wife was killed and his horse and wagon destroyed. After stating the measure of the damages recoverable for the personal injuries sustained by the plaintiff and for the loss of his property, the trial court added, "also as to the killing of the wife," etc. It was held that this was a reversible error in that it led the jury to believe that the measure of damages for the death of the wife was the same as for the plaintiff's personal injuries and included compensation for the wife's physical suffering. The injuries resulting to the plaintiff from the death of his wife, and none other, are the elements to be considered. *Gulf, etc., R. Co. v. Southwick*, (Tex. Civ. App. 1895) 30 S. W. Rep. 592.

Evidence that Husband Had Married a Second Wife Not Admissible in Reduction of Damages.—The defendant, in an action by a husband to recover for the wrongful death of his wife, cannot show, in mitigation of damages, that the plaintiff had married a second wife who performed for him the same services and contributed in like manner to the support of his family as his first wife did. *Davis v. Guarnieri*, 45 Ohio St. 470, 4 Am. St. Rep. 548.

2. Education and Amiability of Wife May Be Considered.—Thus, in *Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25, *affirmed* in 30 How. Pr. (N. Y.) 593, *note*, the jury were instructed that they might consider the fact that the plaintiff's wife was an educated and amiable woman.

Influence of Wife Over Husband.—In an action by a husband for the wrongful killing of his wife, it seems that he may introduce evidence to show that after his marriage with her there was a marked improvement in his habits and pecuniary condition, owing to her influence over him, and such evidence may be considered by the jury in determining the damages.¹

c. FOR DEATH OF CHILD.—In an action by a parent to recover for the wrongful killing of his child, the measure of damages is the pecuniary value of the child's services during his minority and the costs and expenses incurred by the parent on account of the injury. The value of such services is to be estimated on the basis of what children in the same condition and station in life, and of like capability, are ordinarily worth, without regard to any peculiar value which the parent might place on such services. From this must be deducted the usual and reasonable expense of caring for and rearing the child.²

1. *Simmons v. McConnell*, 86 Va. 494.

2. **Death of Child**—*United States*.—Hall v. Galveston, etc., R. Co., 39 Fed. Rep. 18.

Alabama.—*Williams v. South*, etc., Alabama R. Co., 91 Ala. 635.

Arkansas.—*St. Louis*, etc., R. Co. v. Freeman, 36 Ark. 41, 4 Am. & Eng. R. Cas. 608; *Little Rock*, etc., R. Co. v. Barker, 33 Ark. 350, 34 Am. Rep. 44; *St. Louis*, etc., R. Co. v. Davis, 55 Ark. 462.

California.—*Cleary v. City R. Co.*, 76 Cal. 240; *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 54 Am. & Eng. R. Cas. 101. Compare *Nehrbas v. Central Pac. R. Co.*, 62 Cal. 320, 14 Am. & Eng. R. Cas. 670.

Colorado.—*Mollie Gibson Consol. Min.*, etc., Co. v. Sharp, 5 Colo. App. 321.

District of Columbia.—See *Buneya v. Metropolitan R. Co.*, 19 D. C. 76.

Florida.—*Duval v. Hunt*, 34 Fla. 85.

Georgia.—The damages recoverable by the father are limited to the value of the child's services during minority. For other damages the mother alone may sue and she may recover only where she was dependent on the child for support. *Augusta Factory v. Davis*, 87 Ga. 648.

Illinois.—*Rockford*, etc., R. Co. v. Delaney, 82 Ill. 198, 25 Am. Rep. 308. See also *Chicago Consol. Bottling Co. v. Tietz*, 37 Ill. App. 599 (proper instruction in such case).

Indiana.—*Louisville*, etc., R. Co. v. Rush, 127 Ind. 545; *Pennsylvania Co. v. Lilly*, 73 Ind. 252, 4 Am. & Eng. R. Cas. 540; *Citizens' St. R. Co. v. Lowe*, 12 Ind. App. 47.

Iowa.—*Benton v. Chicago*, etc., R. Co., 55 Iowa 496; *Hopkinson v. Knapp*, etc., Co., 92 Iowa 328.

Michigan.—*Hurst v. Detroit City R. Co.*, 84 Mich. 539 (under How. Mich. Stat., § 8314. Damages are special and must be pleaded and proved).

Mississippi.—*Vicksburg v. McLain*, 67 Miss. 4. See also *Amos v. Mobile*, etc., R. Co., 63 Miss. 511.

Missouri.—*Rains v. St. Louis*, etc., R. Co., 71 Mo. 164, 36 Am. Rep. 459, 5 Am. & Eng. R. Cas. 610; *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614; *Matthews v. Missouri Pac. R. Co.*, 26 Mo. App. 75.

Nebraska.—See *Post v. Olmsted*, 47 Neb. 893.

New Jersey.—*Telfer v. Northern R. Co.*, 30 N. J. L. 188.

New York.—*Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, affirming 41 Hun (N. Y.) 404, 10 Civ. Pro. Rep. (N. Y.) 52; *Heusner v. Houston*, etc., R. Co., 7 Misc. Rep. (N. Y. C. Pl.) 48; *Cumming v. Brooklyn City R. Co.*, 1 Silv. (N. Y.) 327, 109 N. Y. 95.

Pennsylvania.—*Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95, 12 W. N. C. (Pa.) 47, 7 Am. & Eng. R. Cas. 25; *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; *Pennsylvania Co. v. James*, 81* Pa. St. 194 (expenses of child must be deducted); *Pennsylvania Coal Co. v. Nee*, (Pa. 1888) 13 Atl. Rep. 841.

Texas.—*Houston City St. R. Co. v. Sciacca*, 80 Tex. 350; *Brunswig v. White*, 70 Tex. 504; *Missouri Pac. R. Co. v. Lee*, 70 Tex. 406; *Austin Rapid Transit R. Co. v. Cullen*, (Tex. Civ. App. 1895) 29 S. W. Rep. 256.

Virginia.—The rule in this state is unusually liberal. It allows, in addition to the damages referred to in the text, damages to a mother for the loss of her son's care and protection and for her mental anguish, provided the whole amount does not exceed the statutory limit. *Baltimore*, etc., R. Co. v. Noell, 32 Gratt. (Va.) 394.

Washington.—*Hedrick v. Ilvaco R.*, etc., Co., 4 Wash. 400, 54 Am. & Eng. R. Cas. 45.

Under Survival Statute—Louisiana.—The case of *Hamilton v. Morgan's Louisiana*, etc., R., etc., Co., 42 La. Ann. 824, was an action by a father for the death of his infant child, who was killed instantly. The Louisiana statute is a survival statute, and the suit was for the damages sustained by the child. Large punitive damages were awarded by the jury. The court set the verdict aside, holding that the damages in such a case could only be nominal, but allowed a recovery of two hundred and fifty dollars under the broad equitable powers of the court, the circumstances of the case being such that the father had cause for seeking a judicial investigation.

Under South Dakota Statute (Comp. Laws, § 5499), the right of action is in "the widow, heir, or personal representatives" of the deceased. If a father brings suit as the only heir of his son, who was killed, his recovery must be restricted to such damages as he sustained as parent. *Smith v. Chicago*, etc., R. Co., 6 S. Dak. 583.

Pecuniary Loss Presumed.—Where the child is a minor, and the mother, the father being dead, brings the action, she may recover sub-

Recovery Not Limited to Value of Services During Minority. — The damages recoverable by the parent are not limited, however, to the value of the services of the child during its minority. The parent is entitled to show a pecuniary interest in the life of his child beyond maturity, and, upon proof of a reasonable expectation of pecuniary benefit from a continuance of the child's life, he may recover the fair value of such expectation.¹

stantial damages without proof of pecuniary loss. She is entitled to his services, and pecuniary loss is therefore presumed. *Bradley v. Sattler*, 156 Ill. 603, *affirming* 54 Ill. App. 504. See also *Mollie Gibson Consol. Min., etc., Co. v. Sharp*, 5 Colo. App. 321; *Atrops v. Costello*, 8 Wash. 149.

Apportioning Damages Between Two Parents. — Under the *Texas* statute (Rev. Stat., art. 2903), the jury, in an action for the death of a child, is required to apportion the damages, and this must be done whether the parents sue jointly or the father sues alone. *Houston City St. R. Co. v. Sciacca*, 80 Tex. 350. Compare, however, *San Antonio St. R. Co. v. Mechler*, (Tex. Civ. App. 1894) 29 S. W. Rep. 202, holding that a failure by the jury to apportion the damages in such a case is no error.

Exact Amount of Damages in Dollars and Cents Need Not be Shown. — It is enough to show actual pecuniary damage, leaving it to the jury to estimate its exact amount. *Pennsylvania R. Co. v. Keller*, 67 Pa. St. 300. See also *Ohio, etc., R. Co. v. Wangelin*, 152 Ill. 138.

The value of the child's services need not be definitely proved, as the jury can estimate it from evidence as to its age and health. *Callaway v. Spurgeon*, 63 Ill. App. 571.

1. Recovery Not Limited to Value of Services During Minority — *United States*. — *Barley v. Chicago, etc., R. Co.*, 4 Biss. (U. S.) 430.

In an action by a mother to recover for the death of her son, the jury should award such damages as will afford an adequate compensation for the loss of the pecuniary support she would have received, taking into consideration the age of the mother and her probable duration of life. *Maryland v. Baltimore, etc., R. Co.*, 1 Hughes (U. S.) 337.

Arkansas. — *St. Louis, etc., R. Co. v. Davis*, 55 Ark. 462.

Colorado. — *Pierce v. Conners*, 20 Colo. 178, 46 Am. St. Rep. 279.

Idaho. — *Holt v. Spokane, etc., R. Co.*, (Idaho 1893) 35 Pac. Rep. 39.

Illinois. — *McLean County Coal Co. v. McVey*, 38 Ill. App. 158.

Iowa. — *Walters v. Chicago, etc., R. Co.*, 41 Iowa 71.

Kansas. — *Atchison, etc., R. Co. v. Cross*, (Kan. 1897) 49 Pac. Rep. 599.

New York. — *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, *affirming* 41 Hun (N. Y.) 404; *Coghlan v. Third Ave. R. Co.*, 25 Civ. Pro. Rep. (N. Y. Supreme Ct.) 249, 16 Misc. Rep. (N. Y.) 677.

Pennsylvania. — *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372; *Pennsylvania R. Co. v. Bantom*, 54 Pa. St. 495.

Texas. — *Gulf, etc., R. Co. v. Compton*, 75 Tex. 667; *International, etc., R. Co. v. Kindred*, 57 Tex. 491, 11 Am. & Eng. R. Cas. 649; *San Antonio St. R. Co. v. Mechler*, (Tex. Civ.

App. 1894) 29 S. W. Rep. 202; *Texas, etc., R. Co. v. Burnes*, 2 Tex. Unrep. Cas. 239; *Galveston, etc., R. Co. v. Davis*, 4 Tex. Civ. App. 468.

Reasonable Expectation of Pecuniary Benefit Extending Beyond Child's Minority. — It appeared that the father of the deceased was a poor man, afflicted with rheumatism since his youth, and was compelled to saw wood for a living. The mother at times worked away from home. It was held proper to admit evidence of these facts on the ground that "the jury may take into account the reasonable expectation of pecuniary benefit from the continuance of the life even beyond the minority." *Johnson v. Chicago, etc., R. Co.*, 64 Wis. 425, 25 Am. & Eng. R. Cas. 341, *citing* *Potter v. Chicago, etc., R. Co.*, 21 Wis. 375, 94 Am. Dec. 548, 22 Wis. 615.

The age, health, condition in life, habits of industry, and capacity for earning money must all be considered in this connection. *Pierce v. Conners*, 20 Colo. 178, 46 Am. St. Rep. 279.

Although the evidence fails to show that the son had ever assisted his father, a recovery may be had if the circumstances and conditions indicated that he would do so. And evidence that the son was preparing to advance his father a loan may be given as indicating his willingness to help him. *Mollie Gibson Consol. Min., etc., Co. v. Sharp*, 5 Colo. App. 321.

The damages in this connection are based upon the reasonable expectation of benefit to the parents. An instruction is therefore erroneous in telling the jury that they should consider such pecuniary benefits as the child "might" confer on its parents after its majority. It should have referred to what "might reasonably be expected." *Fort Worth, etc., R. Co. v. Hyatt*, 12 Tex. Civ. App. 435.

The pecuniary damages are not to be awarded with reference to the loss of a legal right, but also with reference to the reasonable expectation which the parent had of assistance from his son, not as a matter of right or obedience, but based upon the disposition and ability of the son to assist him. *Hall v. Galveston, etc., R. Co.*, 39 Fed. Rep. 18.

In an action by a widow for the death of her fourteen-year-old son, who had never earned wages, the jury, in estimating the damages, may consider the probability that he would have enabled his mother to earn more or would have contributed a part of his earnings to her support. *Condon v. Great Southern, etc., R. Co.*, 16 Ir. C. L. Rep. 415.

Under the Georgia Statute the father's recovery is limited to the value of the child's services during minority. For loss of expected benefit after the child's maturity the mother alone may sue. *Augusta Factory v. Davis*, 87 Ga. 648.

Care and Attendance of Child. — In an action by an aged and infirm father to recover for the

Affirmative Proof Necessary.— But such damages are only recoverable upon affirmative proof by the plaintiff that he had a right to expect a pecuniary advantage from his child after the latter's maturity.¹

Deducting Expense of Child's Support.— The expense of caring for and supporting the child must be deducted from the estimated value of his services. But the rule being that, if the child has property of his own, such property is chargeable with his support before his mother is bound by law to support him, the income from property belonging to the child must be considered in estimating the net value of his services to his mother.²

The Mental, Moral, and Physical Characteristics of the child must be considered, as well as his capacity and his expectation of life, in determining the extent of the pecuniary aid he would probably extend to his parents.³

death of his adult female child, the jury may consider the care and attendance she would probably have bestowed on the plaintiff, based upon her custom in the past, and also the pecuniary contributions she would probably make to him. *Bowles v. Rome*, etc., R. Co., 46 Hun (N. Y.) 324, affirmed in 113 N. Y. 643.

Michigan.— *Compare State v. Baltimore*, etc., R. Co., 24 Md. 84, 87 Am. Dec. 600; Agricultural, etc., Assoc. v. State, 71 Md. 86, 17 Am. St. Rep. 507, where it was held that the mother (the father being dead) was entitled to recover only the value of the child's services during minority; the chances of her surviving him and of his ability or willingness to support her were matters too vague to be considered in estimating the damages. See also *Cooper v. Lake Shore*, etc., R. Co., 66 Mich. 261, 11 Am. St. Rep. 482.

Father Suing as Administrator.— Where the father sues as administrator to recover damages for the death of his nine-year-old son, he is entitled to recover in one action the entire expectation of benefit from a continuance of his son's life. It is, therefore, proper to refuse an instruction that "the father is entitled to the earnings and services of his minor son until such son is twenty-one years of age," and that the jury cannot, in this action, allow anything, by way of damages, for the value of the child's services during his minority. *Illinois Cent. R. Co. v. Slater*, 129 Ill. 91.

When Mother and Sister Sue — Death of Adult.— Where a mother and sister sue, under *How. Mich. Stat.*, § 3391, for the death of an adult son and brother, the measure of damages for the mother is the amount which he would have contributed to her support during her expectancy of life, calculated upon the basis of the amount he was giving her at the time of his death. The amount to be awarded on behalf of the sister is such sum as he would have contributed to her support after the death of his mother, such amount to be limited to his expectancy of life. *Richmond v. Chicago*, etc., R. Co., 87 Mich. 374.

Under Illinois Statute — Damages Not Limited to Loss Sustained by Father.— Under *Rev. Stat. Ill.*, c. 70, § 2, providing that the action shall be brought by the personal representative, the recovery to be for the "widow and next of kin," and to be distributed among them as personal property left by an intestate, the damages recoverable for the death of a child who left a father surviving him are not limited to the pecuniary loss sustained by the father, but

must include the loss, if any, sustained by the decedent's other next of kin. *Baltimore*, etc., R. Co. v. Then, 159 Ill. 535, affirming 59 Ill. App. 561.

1. Affirmative Proof by Parent Must Be Given.— *Potter v. Chicago*, etc., R. Co., 21 Wis. 372, 94 Am. Dec. 548, 22 Wis. 615.

Declarations of the Deceased, a son, may be proven in an action by the father for his death, in order to show the son's disposition to aid his father. *Galveston*, etc., R. Co. v. Bonnet, (Tex. Civ. App. 1896) 38 S. W. Rep. 813.

What Amounts to Such Proof.— In *Augusta R. Co. v. Glover*, 92 Ga. 132, 58 Am. & Eng. R. Cas. 269, it appeared that the parents and their minor child all lived together and were mutually dependent upon the labor of the family for support. The boy was fifteen years old, and this action was brought, under the *Georgia* statute, by the mother to recover for his death. It was held that the fact that the proceeds of the boy's labor went into the common fund was sufficient proof that he contributed substantially to the support of his mother. See also *Colorado Coal*, etc., Co. v. Lamb, 6 Colo. App. 255; *Armour v. Cizschki*, 59 Ill. App. 17; *Southern Pac. Co. v. Lafferty*, 57 Fed. Rep. 536, 15 U. S. App. 193. *Compare Deni v. Pennsylvania R. Co.*, 19 Pa. Co. Ct. Rep. 7, 6 Pa. Dist. Rep. 15.

Instruction as to Measure of Damages.— When the charge of the court leaves the matter in doubt, in an action by a father for the death of his son, it is error to refuse to charge specifically that "the father has no claim on the earnings of the son beyond the age of twenty-one years, except in case the father becomes poor, unable to support himself, and the son is shown to have means." *Keenan v. Brooklyn City R. Co.*, 145 N. Y. 348.

2. Expense of Child's Support.— *Cuming v. Brooklyn City R. Co.*, 1 Silv. (N. Y.) 327. This case was reversed on appeal, but the reversal was on another ground. The rule of the text was distinctly recognized. *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95.

The operation of the rule of the text seems to be confined to actions by the mother. See *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441.

3. The Circumstances to Be Considered.— *Heusner v. Houston*, etc., R. Co., 7 Misc. Rep. (N. Y. C. Pl.) 48; *Pierce v. Connors*, 20 Colo. 178, 46 Am. St. Rep. 279; *Callaway v. Spurgeon*, 63 Ill. App. 571; *Telfer v. Northern R. Co.*, 30

Probability of Marriage. — As to the question whether the probability of the child's marrying is a proper consideration in determining the extent of the father's pecuniary interest in her life in so far as it extends beyond majority, reference is made to a subsequent portion of this title.¹

When the Personal Representative Sues for the death of a minor child, he is entitled to recover only the value of the child's life after its maturity; the services of the child up to that time belong to its father.²

Emancipation of Child — Effect of. — The fact that the child, though a minor, had been emancipated, must be considered in determining the damages, but it does not necessarily preclude the recovery of substantial damages by his parents.³

A Liberal Construction of Term "Pecuniary." — The word "pecuniary," as used in this connection, is not, however, to be given a strict construction, but must be liberally interpreted. It embraces the loss of not only present but of prospective advantages to be derived from a continuance of the child's life.⁴ Nor does the rule restrict the recovery of the parent to nominal damages, when there is no proof as to the value of the child's services or the amount of expenses incurred for it. The jury may determine this without proof on that particular subject.⁵

Recovery Limited by Parent's Expectancy of Life. — In estimating the measure of damages for the death of a child, the parent's expectancy of life must be taken into consideration. If the child's expectancy of life exceeded that of his parent, an instruction that the measure of damages is the probable earnings of the child during his probable life, less expenses, etc., is erroneous in that it permits the parent to recover, as a loss to himself, the earnings of the child for a period after the parent is presumed to have died.⁶

In Case of Adult Child. — When the action is by a parent for the death of an adult son, substantial damages are recoverable only by showing that the deceased had been of actual pecuniary benefit to his parent, or that such benefit might be reasonably expected by the continuance of his life, the reasonable character of such expectation to appear from the facts in evidence. Otherwise, only nominal damages may be recovered.⁷

d. WHERE SUIT IS BY NEXT OF KIN. — In a suit by the next of kin the measure of damages is the pecuniary benefit which they might reasonably have expected to receive during the life of the deceased, had he lived, and the increase in their inheritance from him had he lived longer.⁸

N. J. L. 188; Galveston, etc., R. Co. v. Davis, 4 Tex. Civ. App. 468.

1. See *infra*, *Elements to Be Considered — Likelihood of Decedent's Marrying*.

2. Alabama Connelssville Coal, etc., Co. v. Pitts, 98 Ala. 285. See also the cases preceding, in this subdivision.

3. **Effect of Child's Emancipation.** — In an action to recover for the wrongful killing of a minor child, brought under § 422 of Code of Kansas, the fact that the parents had released to the child his time and services during his minority may properly be considered by the jury in estimating the damages to the parents, but it will not prevent the parents from recovering any pecuniary damages, such as the loss of support, etc., which may have resulted to them from his death. St. Joseph, etc., R. Co. v. Wheeler, 35 Kan. 185, 26 Am. & Eng. R. Cas. 173. See also Philpott v. Missouri Pac. R. Co., 85 Mo. 164, 27 Am. & Eng. R. Cas. 323. Compare Johnson v. Chicago, etc., R. Co., 64 Wis. 425, 25 Am. & Eng. R. Cas. 338.

4. Vicksburg v. McLain, 67 Miss. 4; Walker v. McNeill, 17 Wash. 582.

5. **Not Restricted to Nominal Damages.** — Parsons v. Missouri Pac. R. Co., 94 Mo. 286; Birket v. Knickerbocker Ice Co., 110 N. Y. 504, *affirming* 41 Hun (N. Y.) 404, 10 Civ. Pro. Rep. (N. Y.) 52.

6. Fordyce v. McCants, 51 Ark. 509, 14 Am. St. Rep. 69. See also Illinois Cent. R. Co. v. Crudup, 63 Miss. 303.

7. **Death of Adult Child.** — Fordyce v. McCants, 51 Ark. 509, 14 Am. St. Rep. 69; Cherokee, etc., Coal, etc., Co. v. Limb, 47 Kan. 469; Winn v. International, etc., R. Co., 74 Tex. 32. See also North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15.

In such cases the family relationship must be shown to exist in point of fact. Deni v. Pennsylvania R. Co., 6 Pa. Dist. Rep. 15.

8. **Where Next of Kin Sue.** — See Johnson v. Long Island R. Co., 80 Hun (N. Y.) 306; Richmond v. Chicago, etc., R. Co., 87 Mich. 374; Kelley v. Central R. Co., 48 Fed. Rep. 663; McCrary (U. S.) 653.

If the Next of Kin Are in No Way Dependent on the Deceased, the recovery should be such sum as, with legal interest, would produce, at the

4. Prospective Damages. — The old rule of law that in common-law actions the recovery was limited to such damages as had been sustained up to the time the action was brought¹ has no application, in its strict sense, to actions for injuries causing death. In such actions, all damages resulting to the plaintiff or beneficiaries from the wrongful death are recoverable in one suit.² In estimating the damages, the jury are to consider prospective losses which they believe will actually result as a proximate consequence of the wrongful killing.³

Expectation of Pecuniary Benefit. — The jury may therefore consider the reasonable expectation of pecuniary benefit to which the plaintiff would be entitled from a continuance of the life of the deceased,⁴ and, to this end, may take into consideration the reasonable expectation of life of the deceased at the time of his injury.⁵

Damages Limited in Point of Time. — The damages to be estimated are not to be calculated for an illimitable period of time, but must be limited to such a period as the beneficiaries may have had a right to expect pecuniary benefit from the deceased. The damages to the wife must be limited to the period of expectancy of the joint lives of herself and husband, and those of the chil-

end of the decedent's life expectancy, the sum which he could reasonably be expected to have accumulated at the end of that time, taking into consideration his business ability, health, etc. *McAdory v. Louisville, etc., R. Co.,* 94 Ala. 272.

Where Next of Kin Are Minors. — In *Duval v. Hunt*, 34 Fla. 85, it is said that the damages which minor sisters and nieces of the deceased may recover should be limited to such an amount as would compensate them for the loss of what they could reasonably have expected from the deceased until they became of age.

Nominal Damages Only are recoverable in a suit by the next of kin where it appears that the deceased was an habitual drunkard, unable to support himself, and from whom his wife had secured a divorce, it appearing also that the next of kin was an adult brother who was in no way dependent on him. *North Chicago St. R. Co. v. Brodie*, 156 Ill. 317, *affirming* 57 Ill. App. 564; *Armour v. Czischki*, 59 Ill. App. 17. See also *Anderson v. Chicago, etc., R. Co.*, 35 Neb. 95; *Cherokee, etc., Coal, etc., Co. v. Limb*, 47 Kan. 469. And see *infra*, this section, *Nominal Damages*.

But Failure to Show Specific and Exact Damages does not restrict the plaintiff's recovery to mere nominal damages where the pecuniary loss is plain. Thus where the plaintiff is an orphan, and sues for the death of her only brother, who was a young man, unmarried, and who had supported her, she is entitled to substantial damages, although the evidence fails to show with any certainty the extent of her pecuniary loss. *Ohio, etc., R. Co. v. Wangelin*, 152 Ill. 138. See also *Korrady v. Lake Shore, etc., R. Co.*, 131 Ind. 261; *Baltimore, etc., R. Co. v. Then*, 159 Ill. 535; *Lustig v. New York, etc., R. Co.*, 65 Hun (N. Y.) 547, *following* *Lockwood v. New York, etc., R. Co.*, 98 N. Y. 523.

1. The Original Rule. — See *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 109, 53 Am. Rep. 123, note, 54 Am. Rep. 661, 23 Am. & Eng. R. Cas. 9, where this rule is elaborately discussed. See also the title *DAMAGES, ante*.

2. Rule in Actions for Death. — *Searle v. Kanawha, etc., R. Co.*, 32 W. Va. 370, 37 Am.

& Eng. R. Cas. 179; *Williams v. Walton, etc., Co.*, 9 Houst. (Del.) 322.

Compare Chicago, etc., R. Co. v. Swett, 45 Ill. 197.

3. *Searle v. Kanawha, etc., R. Co.*, 32 W. Va. 370, 37 Am. & Eng. R. Cas. 179; *Baltimore, etc., R. Co. v. State*, 33 Md. 542; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, *affirming* 41 Hun (N. Y.) 404. See *supra*, the subdivisions under the division *In Particular Classes of Cases*.

It is proper to instruct the jury that while they must assess the damages with reference to the pecuniary injuries sustained by the next of kin in consequence of the death, they are not limited to the losses actually sustained at the precise period of her death, but may include also prospective losses, provided they are such as the jury believe, from the evidence, will actually result to the next of kin as the proximate consequence of the wrongful death. *Tilley v. Hudson River R. Co.*, 29 N. Y. 252, 86 Am. Dec. 297.

4. Expectation of Pecuniary Benefit. — *Dalton v. South-Eastern R. Co.*, 4 C. B. N. S. 296, 93 E. C. L. 296, 4 Jur. N. S. 711, 27 L. J. C. P. 227; *Franklin v. South-Eastern R. Co.*, 3 H. & N. 211, 4 Jur. N. S. 565; *Collins v. Davidson*, 19 Fed. Rep. 83; *Scheffler v. Minneapolis, etc., R. Co.*, 32 Minn. 518, 19 Am. & Eng. R. Cas. 173; *Kesler v. Smith*, 66 N. Car. 154; *Nashville, etc., R. Co. v. Stevens*, 9 Heisk. (Tenn.) 12, 19 Am. Ry. Rep. 363. See also *Pym v. Great Northern R. Co.*, 4 B. & S. 396, 116 E. C. L. 396. And see *supra*, the subdivisions under the division *In Particular Classes of Cases*.

"If the plaintiffs had a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, they may recover for it, and the greater the value of the life to them, in a pecuniary point of view, the more perfect the right of recovery." *Collins v. East Tennessee, etc., R. Co.*, 9 Heisk. (Tenn.) 841, 20 Am. Ry. Rep. 46; *Shear. & Red. on Neg.* 612.

5. See *Baltimore, etc., Turnpike Road v. State*, 71 Md. 573; and *infra*, this title, *Elements to Be Considered in Estimating Damages — Expectancy of Life of Deceased*.

dren to their maturity in the absence of special circumstances.¹

5. Exemplary or Punitive Damages. — Whether such damages are recoverable in an action for wrongfully causing the death of a person must depend upon the provision of the statute fixing the damages to be recovered. Where the statute, expressly or by clear implication, limits the damages recoverable to the pecuniary injury sustained by the beneficiaries by reason of the wrongful death, the damages must be compensatory merely, and nothing can be allowed as exemplary or punitive damages.² When the statute does not so

1. Limitation in Point of Time. — In *Baltimore, etc., Turnpike Road v. State*, 71 Md. 573, which was an action by a wife and her infant children for the death of the husband and father, the court, by Robinson, J., said: "The pecuniary loss sustained by them is what they might have reasonably expected to receive from the deceased during the probable duration of his life." * * * In estimating the pecuniary loss or prospective damages sustained by the infant children, the jury are to take into consideration their ages and condition in life and what they might reasonably have expected to receive from the deceased for their support and education up to the time of their majority. And in case of the widow, they are to take into consideration her age and health and the probable duration of her life, or, to state it in terms more explicit, the probable duration of the joint lives of herself and husband." See also *supra*, the subdivisions under the division *In Particular Classes of Cases*.

2. When Statute Limits Recovery to the "Pecuniary" Injury Sustained — *Alabama*. — Under the statute which entitles the personal representative of an employee, whose death is caused by the negligence of the employer, to maintain an action (Code, §§ 2590, 2591), the recovery is limited to actual compensation for the pecuniary loss suffered by those entitled to inherit his estate according to the statutes of distribution. *McAdory v. Louisville, etc., R. Co.*, 94 Ala. 272; *James v. Richmond, etc., R. Co.*, 92 Ala. 231; *Louisville, etc., R. Co. v. Trammell*, 93 Ala. 350; *Louisville, etc., R. Co. v. Orr*, 91 Ala. 548. And the damages recoverable by the father for the death of his minor son (Code, § 2588) are compensatory merely, and not punitive. *Williams v. South, etc., Alabama R. Co.*, 91 Ala. 635.

In *Richmond, etc., R. Co. v. Freeman*, 97 Ala. 289, § 2589, Code 1886, was held to be punitive in its nature, and to require the jury to assess, without regard to actual compensation, such damages as they may deem necessary to effect the punishment of the defendant for the wrongful act by which the death of the plaintiff's intestate was caused. See *Kansas City, etc., R. Co. v. Sanders*, 98 Ala. 293. See also *Savannah, etc., R. Co. v. Shearer*, 58 Ala. 672; *South, etc., Alabama R. Co. v. Sullivan*, 59 Ala. 272.

California. — *Lange v. Schoettler*, 115 Cal. 388; *Munro v. Pacific Coast Dredging, etc., Co.*, 84 Cal. 515, 18 Am. St. Rep. 248; *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, construing § 377 of Code of Civ. Pro.

But under the Act of April 26, 1862, exemplary damages were recoverable for the death of an infant. *Myers v. San Francisco*, 42 Cal. 215.

Illinois. — No such damages are recoverable in this class of actions, and therefore evidence as to the wealth of the defendant is not competent. *Conant v. Griffin*, 48 Ill. 410. See also *Chicago Consol. Bottling Co. v. Tietz*, 37 Ill. App. 599 (proper instruction).

Iowa. — The rule seems to be that the jury must be confined to a consideration of the actual pecuniary damages, and cannot award punitive damages. See *Donaldson v. Mississippi, etc., R. Co.*, 18 Iowa 290, 87 Am. Dec. 391; *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246. Compare *Sherman v. Western Stage Co.*, 24 Iowa 515, where the question as to whether such damages could be allowed was left undetermined.

Louisiana. — No such damages are recoverable in an action by a father to recover for the death of his child. *Hamilton v. Morgan's Louisiana, etc., R. etc., Co.*, 42 La. Ann. 824.

Minnesota. — *Hutchins v. St. Paul, etc., R. Co.*, 44 Minn. 5.

Mississippi. — It seems that exemplary damages are not recoverable. The statute (Code of 1892, § 663) provides that the damages shall be "fair and just with reference to the injury resulting from such death to the person suing." In *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291, the court, in construing the Tennessee statute, held that it did not warrant a recovery of exemplary damages, though a different construction has been placed on that statute by the Tennessee courts. See *infra*, this title, next note. In *Mobile, etc., R. Co. v. Watly*, 69 Miss. 145, the court, in denying the right of the father to recover damages for the loss of the society of his son, said, by Campbell, C. J.: "Compensation for the injury is to be measured by the value of the pecuniary interest of the father in his child."

* * * It is a question of dollars enough to pay for the loss the father has sustained by the death of his child." It may be that the rule is changed by the Act of 1896 (Acts of 1896, p. 96), where § 663 of the Code of 1892 is amended and the jury are directed to consider "all the circumstances" of the case in estimating the damages.

New York. — Under the Act of 1847 the measure of damages is the pecuniary loss sustained by the widow or next of kin in consequence of the wrongful death. The jury cannot award vindictive damages nor damages by way of punishment to the offender. *Wise v. Teerpenning*, 2 Edm. Sel. Cas. (N. Y. Supreme Ct.) 112.

Oregon. — *Holmes v. Oregon, etc., R. Co.*, 6 Sawy. (U. S.) 262, 5 Fed. Rep. 523, an action by an administrator under Oregon Civ. Code, § 367.

Pennsylvania. — Under Pa. Act of April 4, Volume VIII.

limit the recovery, it seems that such damages may be allowed where the proof shows that the death was due to the wilful wrong-doing of the defendant or to such gross negligence on his part as indicated a wilful disregard of the rights of the deceased.¹

1868, limiting the recovery to such damages as are proven "to have been pecuniarily suffered or sustained," exemplary damages are not recoverable. *Cleveland, etc., R. Co. v. Rowan*, 66 Pa. St. 393; *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315.

Washington. — Such damages are not recoverable under Code Pro., § 130, in an action for the death of a child. *Atrops v. Costello*, 8 Wash. 149.

1. Recovery Not Limited — Exemplary Damages Allowed. — In saying here that such damages may be recovered, it is, of course, to be understood that they can be allowed only where the proof is such as to warrant such damages under the general rules of law. See the title EXEMPLARY DAMAGES.

Connecticut. — Punitive damages may be awarded in a proper case. *Murphy v. New York, etc., R. Co.*, 29 Conn. 496. See also *Linsley v. Bushnell*, 15 Conn. 225, 38 Am. Dec. 79.

Kansas. — In *Kansas Pac. R. Co. v. Cutter*, 19 Kan. 83, exemplary damages for causing the death of a passenger were not allowed because the evidence did not justify a finding of such negligence on the part of the defendant as would warrant a recovery of such damages. But it was indicated that such damages were recoverable in proper cases.

Kentucky. — See *Clark v. Louisville, etc., R. Co.*, (Ky. 1897) 39 S. W. Rep. 840, holding that such damages are recoverable upon proof that "the act is wilful or the negligence is gross;" *Bowler v. Lane*, 3 Metc. (Ky.) 311. See also *Claxton v. Lexington, etc., R. Co.*, 13 Bush (Ky.) 636, 17 Am. Ry. Rep. 12; *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 137, 4 Am. St. Rep. 135; *Owensboro, etc., R. Co. v. Barclay*, (Ky. 1897) 43 S. W. Rep. 177 (action arising prior to enactment of Gen. Stat. 1894, § 6).

In an action under Ky. Gen. Stat., c. 57, § 3, punitive damages may or may not be awarded by the jury, in their discretion. It is error to instruct them that they "should" give punitive damages if they found defendant guilty of "wilful neglect." *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 129, 4 Am. St. Rep. 135.

Where the action is based on § 1 of c. 57, Ky. Gen. Stat., which gives the personal representative a right of action for the negligent killing of his intestate, if the deceased was not an employee of the railroad company, the right of action is the same as that which the deceased would have had if he had lived, and there can be no recovery of punitive damages on the ground that the death was caused by the wilful neglect of the company or its agents. *Cincinnati, etc., R. Co. v. Privitt*, 92 Ky. 223.

A recovery of punitive damages for the loss of life under § 3 of the Ky. Act of 1854 bars any other action for the injury or any of its consequences; and if a personal representative elects to sue and enforce the right of action

that survives to him, he will not be allowed afterwards to avail himself of the benefits of the punitive statute and recover under its provisions. *Hansford v. Payne*, 11 Bush (Ky.) 380, *distinguished* in *Conner v. Paul*, 12 Bush (Ky.) 144.

In an action under § 1 and § 3 of Ky. Gen. Stat., c. 57, an allegation of wilful negligence includes all inferior degrees of negligence, and if the plaintiff fails to make out a case for exemplary damages by showing wilful negligence, he may still recover compensatory damages upon proof of negligence, if the deceased was not an employee of the defendant company. *Claxton v. Lexington, etc., R. Co.*, 13 Bush (Ky.) 636, 17 Am. Ry. Rep. 12. *Compare Cincinnati, etc., R. Co. v. Privitt*, 92 Ky. 223.

Such damages are recoverable under Ky. Stat., § 6, passed in pursuance of Const. of Ky. (1861), § 241. *Louisville, etc., R. Co. v. Kelly*, (Ky. 1897) 40 S. W. Rep. 452; *Clark v. Louisville, etc., R. Co.*, (Ky. 1897) 39 S. W. Rep. 840.

Missouri. — Under Mo. Rev. Stat. (1879), § 2123 (§ 4425 Stat. 1889), which provides that such damages may be recovered, not exceeding five thousand dollars, as "the jury may deem fair and just with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default," exemplary damages are recoverable where the proof is sufficient to warrant an award of them. *Gray v. McDonald*, 104 Mo. 303; *Nichols v. Wilfrey*, 79 Mo. 544; *Smith v. Wabash, etc., R. Co.*, 92 Mo. 360, 1 Am. St. Rep. 729; *Haehl v. Wabash R. Co.*, 119 Mo. 325.

The case of *Porter v. Hannibal, etc., R. Co.*, 71 Mo. 66, 36 Am. Rep. 454, in so far as it asserted a different doctrine, has been disapproved. See also *McGowan v. St. Louis Ore. Co.*, 109 Mo. 518; *Fugler v. Bothe*, 43 Mo. App. 44, *construing* Rev. Stat. of Missouri, §§ 4426, 4427.

But where the wrongful act was not accompanied by any aggravating circumstance, and the injury appears to have been the result merely of the want of ordinary care on the part of the defendant, exemplary damages are not recoverable. Nor can anything be allowed to the father by way of a *solatium* for the mental agony and distress occasioned by the death of his son. *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286.

The Revised Statutes of 1879, § 2123, provide that in an action for the death of an employee the jury may give such damages as they may deem fair and just (not exceeding two thousand dollars) "with reference to the necessary injury resulting from such death to the surviving parties, * * * and also having regard to the mitigating or aggravating circumstances attending" such death. In the absence of evidence tending to show aggravating circumstances, the word "necessary"

There Can Be No Recovery of Exemplary Damages Unless Actual Damages Are Proven, even though the statute expressly provides for the recovery of exemplary damages in actions for wrongful death.¹

6. Solatium for Wounded Feelings—*a. GENERAL RULE*—NO RECOVERY.—Unless the statute expressly so provides, nothing can be allowed to the plaintiff, by way of damages, as a solatium to compensate him for his wounded feelings or for the mental anguish the death of his relative may have caused him, and proof of such mental suffering is not admissible on the question of damages.²

means "pecuniary," and the damages must be compensatory merely. *Hickman v. Missouri Pac. R. Co.*, 22 Mo. App. 344.

Tennessee.—In *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291, the Mississippi court, construing the Tennessee statute (Act of 1883, M. & V. Code, § 3134), held that it did not authorize the recovery of punitive or exemplary damages.

The statute provided that the plaintiff should be entitled to "recover for the mental and physical suffering, loss of time and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives." M. & V. Code (1884), § 3134; Shannon's Code (1896), § 4029.

But the Tennessee courts have construed the statute differently and have held that it authorizes an award of exemplary damages. See *Haley v. Mobile, etc., R. Co.*, 7 Baxt. (Tenn.) 239, 8 Am. & Eng. R. Cas. 541; *Kansas City, etc., R. Co. v. Daughtry*, 88 Tenn. 721, 45 Am. & Eng. R. Cas. 69. Each of these cases holds that such damages are recoverable although the death of the deceased was instantaneous. See also *Chesapeake, etc., R. Co. v. Hendricks*, 88 Tenn. 710.

Texas.—Such damages are recoverable. *March v. Walker*, 48 Tex. 372 (decided under Act of Feb. 2, 1860); *Houston, etc., R. Co. v. Bradley*, 45 Tex. 171; *Southern Cotton Press, etc., Co. v. Bradley*, 52 Tex. 587.

The statute (Rev. Stat. of Texas, art. 2901) provides that where "death is caused by the wilful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered." But the proof of gross negligence must be clear; it must be shown that the act complained of was done by the direction of the employer or had been ratified and approved by him, or that he had been guilty of gross negligence in the selection of his employees. *International, etc., R. Co. v. McDonald*, 75 Tex. 41, 42 Am. & Eng. R. Cas. 211.

In *Houston, etc., R. Co. v. Baker*, 57 Tex. 419, 11 Am. & Eng. R. Cas. 667, it was held that a father cannot recover exemplary damages for the wrongful killing of his son, he not being an "heir of the body" to the deceased.

Virginia.—*Matthews v. Warner*, 29 Gratt. (Va.) 570, 26 Am. Rep. 396. See also *Norfolk, etc., R. Co. v. De Board*, 91 Va. 700.

1. *Ritz v. Austin*, 1 Tex. Civ. App. 455. See the title EXEMPLARY DAMAGES.

2. **Wounded Feelings**—*England.*—The subject is well considered in *Blake v. Midland R. Co.*, 18 Q. B. 93, 83 E. C. L. 93, 16 Jur. 562, 21 L. J. Q. B. 233, where the court, in construing

the provision of Lord Campbell's Act, which required that the jury should assess such damages as to them should seem "proportioned to the injury" sustained, held that such damages were not recoverable. See also *Pym v. Great Northern R. Co.*, 4 B. & S. 396, 116 E. C. L. 396, 10 Jur. N. S. 199, 31 L. J. Q. B. 249, 6 L. T. 537, 10 W. R. 737; *Rowley v. London, etc., R. Co.*, L. R. 8 Exch. 221, 21 W. R. 869, 42 L. J. Exch. 153; *Canadian Pac. R. Co. v. Robinson*, 14 Can. Sup. Ct. Rep. 105, reversing 2 Montreal L. R. Q. B. 25.

Scotland.—In *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748, it is said that while no such damages are recoverable in England, they may be recovered in Scotland.

United States.—*Barley v. Chicago, etc., R. Co.*, 4 Biss. (U. S.) 430; *Atchison, etc., R. Co. v. Wilson*, 48 Fed. Rep. 57, 4 U. S. App. 25; *Hall v. Galveston, etc., R. Co.*, 39 Fed. Rep. 18.

"This is not a solace given for affliction and wounded feelings of affection; not at all. It is a cold, unsympathetic, and unimpassioned matter of dollars and cents—compensation for the loss of decedent's services as a bread and meat winner, so to speak." *Hammond, J.*, in *Au v. New York, etc., R. Co.*, 29 Fed. Rep. 75.

Alabama.—*Louisville, etc., R. Co. v. Orr*, 91 Ala. 548; *Louisville, etc., R. Co. v. Trammell*, 93 Ala. 350; *James v. Richmond, etc., R. Co.*, 92 Ala. 231, 48 Am. & Eng. R. Cas. 522. The statutory provision is that the plaintiff may recover "such damages as the jury may assess." Code of Ala., § 2589. See also *Louisville, etc., R. Co. v. Graham*, 98 Ky. 688, construing Alabama statute.

Arkansas.—*St. Louis, etc., R. Co. v. Freeman*, 36 Ark. 41, 4 Am. & Eng. R. Cas. 608; *Little Rock, etc., R. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44.

California.—Nothing can be allowed as a solatium; loss of society can only be considered for the purpose of estimating the pecuniary loss. *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 54 Am. & Eng. R. Cas. 101; *Munro v. Pacific Coast Dredging, etc., Co.*, 84 Cal. 515, 18 Am. St. Rep. 248; *Pepper v. Southern Pac. Co.*, 105 Cal. 389. Compare cases cited in next note.

Colorado.—*Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245.

District of Columbia.—*Bunyea v. Metropolitan R. Co.*, 19 D. C. 76.

Georgia.—*Killian v. Augusta, etc., R. Co.*, 79 Ga. 234, 11 Am. St. Rep. 410.

Illinois.—*Chicago, etc., R. Co. v. Harwood*, 80 Ill. 88; *Chicago City R. Co. v. Gillam*, 27 Ill. App. 386; *Chicago, etc., R. Co. v. Becker*, 76 Ill. 25; *Chicago, etc., R. Co. v. Shannon*, 43 Ill. 338; *Conant v. Griffin*, 48 Ill. 410; *Chi-*

b. A MODIFIED DOCTRINE. — In some jurisdictions, however, where the legislature has provided that the jury shall assess such damages as they deem fair and just with reference to the injury resulting from the death, thus omit-

cago *v. Major*, 18 Ill. 349, 68 Am. Dec. 553; Chicago, etc., *R. Co. v. Morris*, 26 Ill. 400; Rockford, etc., *R. Co. v. Delaney*, 82 Ill. 198, 25 Am. Rep. 308; Illinois Cent. *R. Co. v. Baches*, 55 Ill. 379, 1 Am. Ry. Rep. 585; Chicago, etc., *R. Co. v. Ptacek*, 62 Ill. App. 375, *affirmed* 171 Ill. 9.

Indiana. — *Pennsylvania Co. v. Lilly*, 73 Ind. 252, 4 Am. & Eng. R. Cas. 540. *Compare* *Howard County v. Legg*, 93 Ind. 530.

An instruction to the jury that, in estimating the damages, they may estimate not only the pecuniary loss resulting to the plaintiff from the death of her son, but may consider also such other circumstances as have injuriously affected the plaintiff in person, in her peace of mind, or in her happiness, is error. *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259.

Iowa. — *Donaldson v. Mississippi, etc., R. Co.*, 18 Iowa 280, 87 Am. Dec. 391.

Kansas. — *Kansas Pac. R. Co. v. Cutter*, 19 Kan. 83, 17 Am. Ry. Rep. 471; *Atchison, etc., R. Co. v. Brown*, 26 Kan. 443, 6 Am. & Eng. R. Cas. 228.

Maryland. — *Baltimore, etc., Turnpike Road v. State*, 71 Md. 573; *Baltimore, etc., R. Co. v. State*, 60 Md. 449, 63 Md. 135, 21 Am. & Eng. R. Cas. 202; *State v. Baltimore, etc., R. Co.*, 24 Md. 84, 87 Am. Dec. 600.

Michigan. — See *Hyatt v. Adams*, 16 Mich. 180.

In *Mynning v. Detroit, etc., R. Co.*, 59 Mich. 257, 23 Am. & Eng. R. Cas. 320, the deceased left a wife and two children. The statute provided that the action should be brought by the personal representative and the damages distributed as personal property of the deceased; that "the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death," to those entitled to receive the damages. The trial court instructed the jury that in addition to other damages they might give "the value of his [deceased's] services in the superintendence, attention to and care of his children, and the education of his children." It was held that this instruction was error.

Minnesota. — No compensation can be allowed for wounded feelings or for the loss of the comfort and companionship of the dead relative. *Hutchins v. St. Paul, etc., R. Co.*, 44 Minn. 5.

Mississippi. — The statute (Code of 1892) provided that the jury should assess such damages as they might deem "fair and just, with reference to the injury resulting from such death to the party suing," omitting the word "pecuniary" before injury. In *Mobile, etc., R. Co. v. Watly*, 69 Miss. 145, the trial court, acting on the presumption that the omission of the word "pecuniary" from the statute indicated an intention on the part of the legislature to establish a different rule from that prevailing under Lord Campbell's Act, instructed the jury that in an action by a father for the death of his child they might

consider "the loss of its society and the comfort the father might take in rearing him and bringing him up to manhood, and the reliance he might place upon him in future years for his support," etc. It was held, on appeal, that this was error, the court saying: "It is a question of dollars enough to pay for the loss the father has sustained," and not for mental agony.

Missouri. — *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286 (action by father for death of son); *Schaub v. Hannibal, etc., R. Co.*, 106 Mo. 74 (action by a widow); *James v. Christy*, 18 Mo. 162; *Schultz v. Moon*, 33 Mo. App. 329. See also *Tobin v. Missouri Pac. R. Co.*, (Mo. 1891) 18 S. W. Rep. 996.

In an action by a minor daughter for the death of her father, she is entitled to nothing as a solatium for mental anguish or suffering resulting from the death or the loss of her father's society. *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.

The loss of the companionship or society of her husband cannot, under the Missouri statute, be considered on the question of damages in an action by the widow. *Atchison, etc., R. Co. v. Wilson*, 48 Fed. Rep. 57, 4 U. S. App. 25. *Compare* *Blair v. Chicago, etc., R. Co.*, 89 Mo. 335.

North Carolina. — *Kesler v. Smith*, 66 N. Car. 154.

New York. — In an action by a husband for the death of his wife, brought under the New York Act of 1847, amended by Act of 1849, the loss of the society of the wife cannot be considered, although it was further held that the jury might consider the fact that the wife was an educated and amiable woman. *Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25, *affirmed* 30 How. Pr. (N. Y.) 593, note.

In an action for the death of a child, neither the suffering of the child nor the mental anguish of the parent can be considered on the question of damages. *Dorman v. Broadway R. Co.*, (Brooklyn City Ct.) 16 N. Y. St. Rep. 753, 1 N. Y. Supp. 334.

Ohio. — *Au v. New York, etc., R. Co.*, 29 Fed. Rep. 72; *Atkyn v. Wabash R. Co.*, 41 Fed. Rep. 193, 22 Ohio L. J. 151.

Oregon. — *Carlson v. Oregon Short Line, etc., R. Co.*, 21 Oregon 450, 53 Am. & Eng. R. Cas. 135; *Holmes v. Oregon, etc., R. Co.*, 6 Sawy. (U. S.) 262, 5 Fed. Rep. 523.

Pennsylvania. — *Pennsylvania R. Co. v. Vandever*, 36 Pa. St. 298; *Caldwell v. Brown*, 53 Pa. St. 453; *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335; *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372; *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; *Pennsylvania Tel. Co. v. Varnau*, (Pa. 1888) 15 Atl. Rep. 624.

Tennessee. — In *Nashville, etc., R. Co. v. Smith*, 9 Lea (Tenn.) 474, 15 Am. & Eng. R. Cas. 469, a charge was held erroneous "in instructing the jury that in estimating damages they might take into consideration the loss of social relation of husband and wife, parent and child, etc., and the advice and protection of the deceased as wife and mother."

ting to limit the damages to the "pecuniary" injury, it is held that the jury may consider the loss of society caused from the death, and the comfort which a parent would have derived from rearing his child.¹ The plaintiff has also been allowed to show the kindly disposition of her deceased husband to her, and the affectionate relations existing between her and him.²

7. Nominal Damages — *a.* WHEN RECOVERABLE. — The *English* rule is that, in the absence of proof of pecuniary injury to the parties entitled to sue, not

In Nashville, etc., *R. Co. v. Stevens*, 9 Heisk. (Tenn.) 12, it was held error for the trial court to charge the jury that if they find that the injury resulted in sudden death, they may, in assessing the damages, consider "the shock to the feelings of the wife." The statute allows no compensation for grief or mere mental suffering of the plaintiff or beneficiary.

Texas. — *McGown v. International, etc.*, *R. Co.*, 85 Tex. 289; *March v. Walker*, 48 Tex. 372; *Galveston, etc., R. Co. v. Worthy*, 87 Tex. 459; *Storrie v. Marshall*, (Tex. Civ. App. 1894) 27 S. W. Rep. 224.

Nothing can be recovered by a father, in an action for the death of his son, on account of the physical or mental suffering and anguish endured by the father on account of the death, nor can his loss of his son's society be considered. *Hall v. Galveston, etc., R. Co.*, 39 Fed. Rep. 18 (action under the Texas statute); *Taylor, etc., R. Co. v. Warner*, 84 Tex. 122.

Utah. — In *Hyde v. Union Pac. R. Co.*, 7 Utah 356, which was an action by a father to recover for the death of his child, it was held error to admit evidence as to the grief of the father. But it appearing that the verdict was for only two thousand dollars, and this amount not being claimed to be excessive, the error would not justify a reversal, since it clearly did not influence the jury.

An instruction which tells the jury that damages may be recovered for the mental pain and suffering caused to the mother, who is the heir of the deceased, is error. *Webb v. Denver, etc., R. Co.*, 7 Utah 17. 44 Am. & Eng. R. Cas. 683. See also *Openshaw v. Utah, etc., R. Co.*, 6 Utah 132.

Washington. — *Walker v. McNeill*, 17 Wash. 582.

1. Doctrine Modified in Some Jurisdictions. — The fact that in the *Virginia* statute the word "pecuniary" found in other similar acts has been omitted by the legislature has been regarded as indicating an intention on the part of the legislature to depart from the rule confining the jury in assessing damages to the actual pecuniary injury suffered. See *Matthews v. Warner*, 29 Gratt. (Va.) 570, 26 Am. Rep. 396.

In an action by a widow for damages resulting from the death of her husband, it was held that the jury might take into consideration the relation existing between the plaintiff and the deceased at the time of the latter's death, and the injury sustained by her in the loss of his society. *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20. See also *Nehrbas v. Central Pac. R. Co.*, 62 Cal. 336, 14 Am. & Eng. R. Cas. 670; *Cook v. Clay St. Hill R. Co.*, 60 Cal. 604, 6 Am. & Eng. R. Cas. 175; *McKeever v. Market St. R. Co.*, 59 Cal. 294; *Cleary v. City R. Co.*, 76 Cal. 240 (mental anguish and suffering of parents to be considered); *Howard*

County v. Legg, 93 Ind. 530. But see these cases explained in *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 54 Am. & Eng. R. Cas. 101.

Cons. Stat. of Canada, c. 78, § 3, provide that "the judge or jury may give such damages as they think proportioned to the injury resulting from such death." Under this it is held that although, on the death of a wife, the husband cannot recover damages of a sentimental character, yet the loss of household services usually performed by the wife is a substantial loss for which damages may be allowed, as also is the loss to the plaintiff's children of the care and moral training of their mother. *St. Lawrence, etc., R. Co. v. Lett*, 11 Can. Sup. Ct. Rep. 422, 26 Am. & Eng. R. Cas. 454, affirming 11 Ont. App. 1, 21 Am. & Eng. R. Cas. 165, and approving *Tilley v. Hudson River R. Co.*, 24 N. Y. 474. Compare *Nashville, etc., R. Co. v. Smith*, 9 Lea (Tenn.) 470.

Suit by Widow and Daughter — Loss of Companionship, Nurture, etc. — An instruction to the jury that in estimating the damages they should include any loss which the widow and daughter of the deceased have sustained, or may hereafter sustain, by being deprived of the support, care, nurture, companionship, assistance, and protection of the deceased, is not erroneous in leading the jury to believe that they might assess damages for mental suffering flowing from loss of companionship, where another part of the instruction expressly cautioned the jury that nothing could be allowed on account of the mental suffering of the widow and daughter or as a solace to their feelings. *Wells v. Denver, etc., R. Co.*, 7 Utah 482; *Webb v. Denver, etc., R. Co.*, 7 Utah 363.

2. Kindly Disposition and Affectionate Relations. — In *Missouri Pac. R. Co. v. Bond*, 2 Tex. Civ. App. 104, which was an action by a widow to recover for the death of her husband, it was held proper to allow a witness to testify that the husband was kind and affectionate to his family, and was an indulgent father and husband.

In *Cook v. Clay St. Hill R. Co.*, 60 Cal. 604, 6 Am. & Eng. R. Cas. 175, the plaintiff, a widow suing for the death of her husband, was allowed to show that it was her deceased husband's custom to be at home after business hours, that his domestic relations were happy, and that he was kind and attentive to his invalid wife, and was a kind and indulgent father. This holding, however, has been declared erroneous. See *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 54 Am. & Eng. R. Cas. 101. The statute under which the above holding was made provided that the jury should give such damages "as under all the circumstances of the case may be just." Cal. Code Civ. Pro., § 377.

even nominal damages are recoverable.¹ But a different rule prevails in many of the *United States*.²

b. WHEN RECOVERY LIMITED TO SUCH DAMAGES.—Where the statute confines the recovery to the pecuniary loss sustained by the beneficiaries of the deceased, nothing more than nominal damages can be recovered in the absence of specific affirmative proof of such injury.³ So also, where it appears, in a

1. Nominal Damages—Rule in England.—

Boulter v. Webster, 13 W. R. 289, 11 L. T. 598.

Proof of the death and of the relationship of the parties plaintiff to the deceased does not give the plaintiffs a right to nominal damages. Actual pecuniary injury must be shown, and in the absence of such showing the defendant is entitled to judgment. *Duckworth v. Johnson*, 4 H. & N. 653, 5 Jur. N. S. 630, 29 L. J. Exch. 25; *Bourke v. Cork*, etc., R. Co., 4 L. R. 1r. 652.

The Michigan Rule is the same. *Hurst v. Detroit City R. Co.*, 84 Mich. 539.

2. General Rule in United States.—"As a general rule, where the law gives an action for a wrongful act, the doing of the act itself imports a damage, and even if no actual pecuniary damage may have been shown or suffered, still the legal implication of damage follows the wrongful act, and nominal damages, at least, may be recovered." *Atchison*, etc., R. Co. v. *Weber*, 33 Kan. 543, 21 Am. & Eng. R. Cas. 424, 52 Am. Rep. 543, citing *Chicago*, etc., R. Co. v. *Swett*, 45 Ill. 197; *Chicago v. Scholten*, 75 Ill. 468; *Lehman v. Brooklyn*, 29 Barb. (N. Y.) 234; *Quin v. Moore*, 15 N. Y. 432; *Ihl v. Forty-second St.*, etc., R. Co., 47 N. Y. 317, 7 Am. Rep. 450, 2 Am. Ry. Rep. 409; *Gorham v. New York Cent.*, etc., R. Co., 23 Hun (N. Y.) 449; *Thompson on Neg.*, p. 1293. See also *Richmond*, etc., R. Co. v. *Freeman*, 97 Ala. 289; *Corliss v. Worcester*, etc., R. Co., 63 N. H. 404, 21 Am. & Eng. R. Cas. 208; *Lockwood v. New York*, etc., R. Co., 98 N. Y. 523.

New York Rule.—The New York rule is that proof of pecuniary or special damage to the next of kin suing for the death of his intestate is not necessary in order to maintain the action. "The absence of proof of special pecuniary damage to the next of kin, resulting from the death of the child, would not have justified the court in nonsuiting the plaintiff or in directing the jury to find only nominal damages. It was within the province of the jury, who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages." *Ihl v. Forty-second St.*, etc., R. Co., 47 N. Y. 317, 7 Am. Rep. 450; *Oldfield v. New York*, etc., R. Co., 14 N. Y. 310, affirming 3 E. D. Smith (N. Y.) 103; *Cornwall v. Mills*, 44 N. Y. Super. Ct. 45; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287, 35 How. Pr. (N. Y.) 36, affirming 47 Barb. (N. Y.) 515; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504.

The damages, under Laws 1847, c. 450, as amended by Laws 1849, c. 256, may consist of special damages, *i. e.*, of actual definite loss, and of general damages. Only the former need be specially proven. *Houghkirk v. Delaware*, etc., Canal Co., 92 N. Y. 219, 44 Am. Rep. 370, reversing 28 Hun (N. Y.) 407.

3. Only Nominal Damages Recoverable Where There Is No Affirmative Proof of Pecuniary Injury

—*United States*.—*Howard v. Delaware*, etc., Canal Co., 40 Fed. Rep. 195, 41 Am. & Eng. R. Cas. 473.

Illinois.—*North Chicago St. R. Co. v. Brodie*, 156 Ill. 317, affirming 57 Ill. App. 564; *Chicago*, etc., R. Co. v. *Swett*, 45 Ill. 197; *Armour v. Czeschki*, 59 Ill. App. 17; *Falkenau v. Rowland*, 70 Ill. App. 20.

Kansas.—*Cherokee*, etc., Coal, etc., Co. v. *Limb*, 47 Kan. 469.

Nebraska.—*Orgall v. Chicago*, etc., R. Co., 46 Neb. 4; *Anderson v. Chicago*, etc., R. Co., 35 Neb. 95.

New York.—*Silberstein v. Wm. Wicke Co.*, 29 Abb. N. Cas. (N. Y. Super. Ct.) 291. Compare *Howell v. Rochester R. Co.*, 24 N. Y. App. Div. 502.

Wisconsin.—*Topping v. St. Lawrence*, 86 Wis. 526.

Thus where an administrator sues for the benefit of the next of kin, and the evidence shows that such next of kin were not dependent on the deceased for support either wholly or partially, only nominal damages can be allowed. *Chicago*, etc., R. Co. v. *Swett*, 45 Ill. 197.

But if it appears that the deceased actually contributed to the support of his next of kin, the recovery will not be confined to nominal damages merely because the exact extent of such contribution is not shown. *Ohio*, etc., R. Co. v. *Wangelin*, 43 Ill. App. 324.

Children of Full Age and Living Apart from Father.—The fact that the children of the deceased are of full age and were not living with him at the time of his death does not, of itself, show that they have sustained no pecuniary injury from the death, and will not confine their recovery to nominal damages merely. *Lockwood v. New York*, etc., R. Co., 98 N. Y. 523.

Probability that Deceased Would Have Died from Other Causes.—The fact that there was a probability that the deceased, if he had not died from the effects of the accident in question, would have died from some other cause in a very short time, is not a ground for restricting the damages to a nominal sum. The probabilities as to his living a longer or shorter time, as well as his health, ability to labor, etc., are a question for the jury. *Thomas v. Utica*, etc., R. Co., 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 353, affirmed 98 N. Y. 649.

Mere Proof of Death and of Age, Occupation, and Family of Deceased.—In an action under the *Maryland Act of 1852*, c. 299, by the widow for the death of her husband, evidence was given to show the age, habits, health, and occupation of the deceased at the time of his death, and also as to the number of his family and their condition before and after his death. No proof was offered as to the specific wages

suit by a personal representative, that the deceased left no persons surviving him who are entitled to share as distributees of his estate, nothing more than nominal damages can be recovered.¹

8. Limit Fixed by Statute — *a. MAXIMUM LIMIT.* — In some of the statutes creating a right of action for wrongful death, the recovery is confined to a sum not in excess of a fixed maximum limit. In actions under such statutes it is the duty of the trial court to inform the jury of the statutory limit.² The wisdom and propriety of such limitations have always been a subject of grave question, and they have been abrogated in many of the states.³

earned by the deceased at the time of his death. It was held that the trial judge properly refused to instruct the jury that under such proof, if the plaintiff recovered at all, she could only recover nominal damages. *Baltimore, etc., R. Co. v. State*, 24 Md. 271. See also *Salem v. Harvey*, 29 Ill. App. 483, *affirmed* 129 Ill. 344.

Where a Husband Sues to Recover for the Death of His Wife, only nominal damages are recoverable if there is no proof of special loss or injury. *Mitchell v. New York Cent., etc., R. Co.*, 2 Hun (N. Y.) 535; 5 *Thomp. & C.* (N. Y.) 122, 64 N. Y. 655. Compare, however, *Dickens v. New York Cent. R. Co.*, 1 *Abb. App. Dec.* (N. Y.) 504.

Where the Injured Party Was Struck by a Locomotive and Remained in an Unconscious Condition until His Death, his administrator can recover only nominal damages, in the absence of evidence of any considerable expense or loss incurred between the time of his injury and the death. *Tully v. Fitchburg R. Co.*, 134 *Mass.* 499, 14 *Am. & Eng. R. Cas.* 682. See also *Kennedy v. Standard Sugar Refinery*, 125 *Mass.* 90, 28 *Am. Rep.* 214; *Mulchahey v. Washburn Car-Wheel Co.*, 145 *Mass.* 281, 1 *Am. St. Rep.* 458.

Bodily Mutilation of the Deceased cannot be considered on the question of damages, where he is shown to have remained unconscious from the time he was injured until his death. *Corcoran v. Boston, etc., R. Co.*, 133 *Mass.* 507, 12 *Am. & Eng. R. Cas.* 226.

Substantial Damages Must Be Proved. — In an action against a railway company (under *Mansf. Ark. Dig.*, §§ 5223, 5226), to recover the damages resulting to a father from the killing of his son, who was of age but unmarried, substantial damages can be recovered only by showing that the deceased gave assistance to his father, contributed money to his support, or that the father had reasonable expectation of pecuniary benefit from the continued life of his son — the reasonable character of such expectation to appear from the facts in proof. In the absence of such proof only nominal damages can be recovered. *Fordyce v. McCants*, 51 *Ark.* 509, 14 *Am. St. Rep.* 69. See also *Hennesey v. Bavarian Brewing Co.*, 63 *Mo. App.* 111, 1 *Mo. App. Rep.* 595.

1. Where Deceased Left No Distributees. — *James v. Richmond, etc., R. Co.*, 92 *Ala.* 231, 48 *Am. & Eng. R. Cas.* 522 (construing §§ 2590, 2591 of the code). In this case the question was not directly involved, and the Supreme Court reversed and remanded the case because the trial court had limited the plaintiff's recovery to one cent. But the rule was announced in the opinion, that "to authorize recovery of substantial damages, when the

suit is by the personal representative, there must be some person or persons, filling the relation of next of kin, entitled to inherit 'according to the statute of distributions.' This, however, need not be averred, as the law presumes there would be surviving relations entitled to inherit."

The statutory provision involved in this case was: "A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act," etc. *Code of Ala.*, § 2589.

2. Statutory Maximum Limit — Illinois. — An instruction that the jury should assess such damages as to them may seem fair and just, with reference to the pecuniary injury sustained, "not exceeding the sum of five thousand dollars," is not open to the objection that it required a verdict for not less than five thousand dollars. That was a mere statement of the statutory maximum limit. *Lake Shore, etc., R. Co. v. Parker*, 131 *Ill.* 557, 41 *Am. & Eng. R. Cas.* 339, *affirming* 33 *Ill. App.* 405.

Indiana. — The statute of March 29, 1879, which provided for the recovery of damages sustained in consequence of an injury caused by the failure of a railroad company to give the statutory signals at a crossing, but limiting the recovery to five thousand dollars, was repealed by the statute of April 8, 1881, conferring generally a right of action for a death caused by a wrongful act and fixing the maximum limit at ten thousand dollars. *Pittsburgh, etc., R. Co. v. Burton*, 139 *Ind.* 357.

Missouri. — The *Rev. Stat.* of 1879, §§ 2121-2123, provide that a fixed penalty of five thousand dollars shall be recovered where the death results from certain causes. See *infra*, this title, *A Fixed Penalty — Missouri Statute*. See also the same statute in *Rev. Stat. of Mo.* (1889), § 4425 *et seq.*

Where the death results from other causes than those specified, the recovery is to be such an amount as the jury may fix, not exceeding five thousand dollars. See *infra*, this title, *A Fixed Penalty — Missouri Statute*, where the cases are reviewed.

Under *Rev. Stat.* of 1879, § 2123, in an action for injuries resulting in the death of an employee, the measure of damages is fixed at "such damages, not exceeding two thousand dollars, as [the jury] may deem fair and just, with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act," etc. See *Hickman v. Missouri Pac. R. Co.*, 22 *Mo. App.* 344.

3. Damages Not Limited. — *New York.* — The limitation was formerly five thousand dollars, but the last constitution abolished all limita-

b. MINIMUM LIMIT.—The *Connecticut* statute of 1853¹ fixed the minimum limit of recovery in an action against a person wrongfully causing the death of another at one thousand dollars and the maximum limit at five thousand.²

c. A FIXED PENALTY — MISSOURI STATUTE.—The Missouri statute provides that whenever any person shall die from injuries occasioned through the negligence of an officer or employee of a railroad or steamship company in operating a train or steamboat, or from injuries due to the negligence of the driver of a stage coach or other public conveyance, or whenever a passenger shall die from an injury caused by any defect or insufficiency in a railroad, steamboat, stage coach, or other public conveyance, the corporation or individual in whose employ such employee or driver is at the time of the injury shall forfeit and pay a fixed penalty of five thousand dollars to certain beneficiaries.³ This is a penal statute, and is therefore to be construed strictly in so far as it fixes the measure of recovery.⁴

tions. See Const. of 1895, art. 1, § 18, providing that "the right of action now existing to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation." See *Medinger v. Brooklyn Heights R. Co.*, 6 N. Y. App. Div. 42.

The limitation, while in force, applied to all actions for injuries resulting in death, brought in the courts of New York, although the law of the state where the injury occurred fixed no limit. *Wooden v. Western New York, etc.*, R. Co., 126 N. Y. 10, 22 Am. St. Rep. 803, *affirming* (*Buffalo Super. Ct.*) 35 N. Y. St. Rep. 685, 12 N. Y. Supp. 908.

The provision of the Constitution of 1895, prohibiting the fixing of any maximum limit of recovery, applies to cases where the injury occurred prior to the adoption of the constitution, if it appears that the death occurred after the adoption. *Weber v. Third Ave. R. Co.*, 12 N. Y. App. Div. 512; *Smith v. Metropolitan St. R. Co.*, 15 Misc. Rep. (N. Y. C. Pl.) 158.

The provision has no retroactive effect. But an error in allowing a plaintiff, whose cause of action accrued before the adoption of the constitution, to increase the amount of damages asked for in his complaint, is a harmless one where the verdict is for an amount less than the original limit. *Burns v. Houston, etc.*, R. Co., 15 Misc. Rep. (N. Y. Super. Ct.) 19.

Pennsylvania.—The Act of 1868 (April 4), § 2, limited the recovery in actions against railroad companies for injuries causing death to five thousand dollars, and provided in § 4 that the limitation should apply to all railroad companies accepting the act and complying with its provisions. The Constitution of 1874, art. 3, § 21, provided that "no act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property."

The Act of 1868 also provided that "upon the acceptance of the provisions [of this act] by any carrier or corporation, the same shall become a part of its act of incorporation." In an action against the Pennsylvania Railroad Company which had formally adopted the said act, it was at first held that the limitation of the act was still in force as to that company; that the act had become a part of the company's charter, and the benefits of it could not be taken away by subsequent legislation, whether by a

constitutional convention or otherwise. *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21, 37 Am. Rep. 651, 1 Am. & Eng. R. Cas. 87. But this case has been *overruled*. The doctrine now is that the provisions of the Constitution of 1874, art. 3, § 21, are binding as to all corporations. *Pennsylvania R. Co. v. Bowers*, 124 Pa. St. 183, 37 Am. & Eng. R. Cas. 353; *Lewis v. Hollahan*, 103 Pa. St. 425. See also *Philadelphia, etc., R. Co. v. Conway*, 112 Pa. St. 511, 17 Phila. (Pa.) 71; *Gloninger v. Pittsburgh, etc., R. Co.*, 139 Pa. St. 13; *Thirteenth St., etc., R. Co. v. Boudron*, 92 Pa. St. 475, 37 Am. Rep. 707, 2 Am. & Eng. R. Cas. 30; *Philadelphia, etc., R. Co. v. Boyer*, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172.

1. Rev. Stat. Conn. 1886, p. 202.

2. If the plaintiff is entitled to recover at all, the lowest amount that can be allowed him is one thousand dollars. The statute is remedial and not penal. *Lamphear v. Buckingham*, 33 Conn. 237. See also *Goodsell v. Hartford, etc., R. Co.*, 33 Conn. 51.

The Massachusetts Statute (Pub. Stat. 1882, c. 112, § 213), fixes the recovery in a certain class of cases at not less than five hundred dollars.

See the Various Local Statutes for such provisions.

3. *Fixed Penalty — Missouri.*—For the complete statute consult Mo. Rev. Stat. 1879, § 2121, amended Laws 1885, p. 153; Mo. Rev. Stat. 1889, § 4425.

Another Missouri statute gives a right of action, in case of death by wrongful act, to the representative of the deceased. Mo. Rev. Stat. 1889, § 4426. Under this statute the damages not to exceed five thousand dollars are assessed by the jury. Mo. Rev. Stat. 1889, § 4427.

4. *To What Cases the Missouri Statute Applies.*—Where the negligence complained of is the failure of an employee to have the headlight on a locomotive burning, in consequence of which the deceased was killed at a crossing, the case is within the statute and the penalty of five thousand dollars is recoverable. *Becke v. Missouri Pac. R. Co.*, 102 Mo. 544, 45 Am. & Eng. R. Cas. 174.

Where the negligence complained of was that of an officer in failing to comply with a municipal ordinance which required the defendant, a street-car company, to have bells on the horses drawing the car, the case is within the statute and the penalty recoverable,

9. Excessive Damages. — The general rule is that a verdict of a jury will not be reversed on appeal on the ground that the damages awarded were excessive, unless the damages are so large as, under the circumstances, to shock the sense of justice, or to indicate that they were the result of passion or prejudice on the part of the jury.¹

although the deceased may have been a minor child. *Lynch v. Metropolitan St. R. Co.*, 112 Mo. 420, 56 Am. & Eng. R. Cas. 571.

Where the engineer fails to ring the bell or sound the whistles of his locomotive on approaching a public crossing, as required by § 2608 of the Rev. Stat. Mo. (1889), and the death of a person crossing the track is thereby occasioned, the penalty is recoverable under Rev. Stat. Mo. (1889), § 4425 (§ 2121 of Rev. Stat. 1879). *Kenney v. Hannibal*, etc., R. Co., 105 Mo. 270; *King v. Missouri Pac. R. Co.*, 98 Mo. 235.

An injury caused by the foreman and conductor of a construction train in moving the train without having given timely warning is within the statute. *Miller v. Missouri Pac. R. Co.*, 109 Mo. 350, 32 Am. St. Rep. 673, 53 Am. & Eng. R. Cas. 598.

The "damages" provided for in § 2608, Rev. Stat. 1889, for failure to give the statutory signals on approaching a public crossing, include the fixed penalty. No damages beyond such penalty are recoverable. *Kenney v. Hannibal*, etc., R. Co., 105 Mo. 270.

Where the deceased and the servant guilty of the negligence are both employees, but the negligent servant is not a fellow-servant of the deceased, the legal representatives of the latter may recover the penalty. *Miller v. Missouri Pac. R. Co.*, 109 Mo. 350, 32 Am. St. Rep. 673, 53 Am. & Eng. R. Cas. 598; *Schlereth v. Missouri Pac. R. Co.*, (Mo. 1892) 19 S. W. Rep. 1134, second appeal 115 Mo. 87. Compare, however, *Schlereth v. Missouri Pac. R. Co.*, 96 Mo. 509, the first appeal of the case just cited, where it was held that the fixed penalty was not recoverable, but only damages not in excess of five thousand dollars. The divergence between the holding in this first appeal and that in the last two appeals is not explained in the opinions. See also *Flynn v. Kansas City*, etc., R. Co., 78 Mo. 195, 47 Am. Rep. 99, 18 Am. & Eng. R. Cas. 23; *Holmes v. Hannibal*, etc., R. Co., 69 Mo. 536; *Elliott v. St. Louis*, etc., R. Co., 67 Mo. 272, which held that the damages in such a case are such as the jury may fix, not exceeding five thousand dollars.

The fact that the deceased was a minor child does not affect the right of his parents to recover the full amount of the penalty. *Tobin v. Missouri Pac. R. Co.*, (Mo. 1891) 18 S. W. Rep. 996; *Lynch v. Metropolitan St. R. Co.*, 112 Mo. 420, 56 Am. & Eng. R. Cas. 571.

A person killed while walking on the track of the railroad company may recover the penalty where it is shown that the accident was due to the gross negligence of the company's servants in operating the train and in failing to use proper exertion to prevent injury after they had, or ought to have, seen the deceased on the track. *Guenther v. St. Louis*, etc., R. Co., 108 Mo. 18; *Le May v. Missouri Pac. R. Co.*, 105 Mo. 361. See also, for other cases,

Sullivan v. Missouri Pac. R. Co., 97 Mo. 113; *Senn v. Southern R. Co.*, 135 Mo. 512.

When Penalty Not Recoverable. — In several cases it has been held that in an action by an employee the fixed penalty is not recoverable, but only such damages, not exceeding five thousand dollars, as the jury may fix. See *Flynn v. Kansas City*, etc., R. Co., 78 Mo. 195, 47 Am. Rep. 99, 18 Am. & Eng. R. Cas. 23, and cases cited; *Schlereth v. Missouri Pac. R. Co.*, 96 Mo. 509; *Tetherow v. St. Joseph*, etc., R. Co., 98 Mo. 74, 14 Am. St. Rep. 617. But see *supra*, this note.

In *Crumpley v. Hannibal*, etc., R. Co., 93 Mo. 34, 37 Am. & Eng. R. Cas. 357, the deceased was killed by a collision at a crossing on the defendant's road. He was not a passenger, but was a pedestrian. The action was based on two grounds: (1) the negligence of the company in failing to give the statutory signals on approaching the crossing, and (2) the failure of the company to provide a suitable crossing over its right of way as the statute required. Upon the first ground the penalty was recoverable; under the second, the damages were to be assessed by the jury. As the case was submitted to the jury to determine upon which of the two grounds the plaintiff was entitled to recover, it was held error in the trial court to instruct them, without qualification, that they should fix the damages at five thousand dollars if they found for the plaintiff.

Where the deceased was killed while passing over a crossing and the negligence complained of was the failure of the defendant company to erect a signboard, as required by § 2123 of Rev. Stat. 1879, the penalty is not recoverable, but the damages are to be assessed by the jury, not in excess of five thousand dollars. Such a death is not the result of negligence in the operation of a train. *King v. Missouri Pac. R. Co.*, 98 Mo. 235. See also *Rapp v. St. Joseph*, etc., R. Co., 106 Mo. 423.

So, also, the statute does not apply to a case where the negligence relied on is the wrongful conduct of the defendant railroad company in maintaining obstructions along its right of way, in consequence of which the deceased was killed while crossing the track. *Rapp v. St. Joseph*, etc., R. Co., 106 Mo. 423.

1. See the title *DAMAGES*, *ante*.

Excessive Damages. — For illustrations where the damages were, under the circumstances, held excessive, see the following cases:

England. — *Franklin v. Southeastern R. Co.*, 3 H. & N. 211, 4 Jur. N. S. 565 (L75).

United States. — *Sorensen v. Northern Pac. R. Co.*, 45 Fed. Rep. 407 (\$1,750).

Alabama. — *McAdory v. Louisville*, etc., R. Co., 94 Ala. 272 (\$9,395.45).

Arkansas. — *St. Louis*, etc., R. Co. v. *Robbins*, 57 Ark. 377 (\$7,500); *Little Rock*, etc., R. Co. v. *Barker*, 33 Ark. 350, 35 Am. Rep. 44 (\$4,500).

California. — *Harrison v. Sutter St. R. Co.*,

XII. ELEMENTS TO BE CONSIDERED IN ESTIMATING DAMAGES — 1. Character of the Statute Material. — In determining what facts and circumstances are to

116 Cal. 156 (\$8,000); *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143 (\$20,000); *Fox v. Oakland Consol. St. R. Co.*, 118 Cal. 55 (\$6,000).

Georgia. — *Yonge v. Kinney*, 28 Ga. 111 (\$3,916.66).

Illinois. — *Illinois Cent. R. Co. v. Weldon*, 52 Ill. 290 (\$5,000); *Chicago, etc., R. Co. v. Adamick*, 33 Ill. App. 412 (\$5,000); *Chicago City R. Co. v. Gillam*, 27 Ill. App. 386 (\$4,000); *Chicago, etc., R. Co. v. Gunderson*, 65 Ill. App. 638 (\$5,000); *Leiter v. Kinnare*, 68 Ill. App. 558 (\$5,000).

Indiana. — *Pennsylvania Co. v. Lilly*, 73 Ind. 252 (\$1,800).

Iowa. — *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246, 9 Am. Ry. Rep. 7, 20 Am. Ry. Rep. 326 (\$10,000); *Sherman v. Western Stage Co.*, 24 Iowa 515 (\$8,000).

Kansas. — *Atchison, etc., R. Co. v. Brown*, 26 Kan. 443, 6 Am. & Eng. R. Cas. 228, 31 Kan. 1, 15 Am. & Eng. R. Cas. 271 (\$10,000).

Louisiana. — *Cline v. Crescent City R. Co.*, 42 La. Ann. 35 (\$7,500).

Maine. — *Welch v. Maine Cent. R. Co.*, 86 Me. 552 (\$8,000).

Michigan. — *Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205 (\$3,400); *Balch v. Grand Rapids, etc., R. Co.*, 67 Mich. 394 (\$4,000); *Nelson v. Lake Shore, etc., R. Co.*, 104 Mich. 582 (\$7,000).

Minnesota. — *Gunderson v. Northwestern Elevator Co.*, 47 Minn. 161 (\$3,000).

Mississippi. — *Vicksburg v. McLain*, 67 Miss. 4 (\$4,000).

Missouri. — *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286 (\$5,000); *Hickman v. Missouri Pac. R. Co.*, 22 Mo. App. 344 (\$2,250); *Hurt v. St. Louis, etc., R. Co.*, 94 Mo. 255, 4 Am. St. Rep. 374 (\$4,500).

New Jersey. — *Paulmier v. Erie R. Co.*, 34 N. J. L. 151 (\$3,000); *Jackson v. Consolidated Traction Co.*, 59 N. J. L. 25 (\$5,000).

New York. — *Klemm v. New York Cent., etc., R. Co.*, 78 Hun (N. Y.) 277 (\$5,000); *Carpenter v. Buffalo, etc., R. Co.*, 38 Hun (N. Y.) 116 (\$4,000); *Schmitt v. Metropolitan L. Ins. Co.*, 13 N. Y. App. Div. 120 (\$25,000); *Taylor v. Long Island R. Co.*, 16 N. Y. App. Div. 1 (\$10,000); *Medinger v. Brooklyn Heights R. Co.*, 6 N. Y. App. Div. 42 (\$7,500); *Dinnihan v. Lake Ontario Beach Imp. Co.*, 8 N. Y. App. Div. 509 (\$4,000); *Seeley v. New York Cent., etc., R. Co.*, 8 N. Y. App. Div. 402 (\$6,000).

Rhode Island. — *Flaherty v. New York, etc., R. Co.*, 19 R. I. 604 (\$5,000).

Tennessee. — *Louisville, etc., R. Co. v. Stacker*, 86 Tenn. 343, 6 Am. St. Rep. 840 (\$12,000).

Texas. — *Gulf, etc., R. Co. v. Johnson*, 1 Tex. Civ. App. 103 (\$18,000); *Saint Louis, etc., R. Co. v. Johnston*, 78 Tex. 536 (\$2,500); *Mexican Nat. R. Co. v. Finch*, 8 Tex. Civ. App. 409 (\$6,000).

Utah. — *Riley v. Salt Lake Rapid Transit Co.*, 10 Utah 428 (\$7,000).

Washington. — *Walker v. McNeill*, 17 Wash. 582 (verdict for \$40,000 was reduced by \$15,000).

Wisconsin. — *Potter v. Chicago, etc., R. Co.*, 22 Wis. 615 (\$3,775).

For Instances of Awards of Damages Held Not Excessive see the following cases:

England. — *Walker v. Southeastern R. Co.*, L. R. 5 C. P. 640, 23 L. T. 14 (£50).

Canada. — *Secord v. Great Western R. Co.*, 15 U. C. Q. B. 631 (\$3,000).

United States. — *Central Trust Co. v. Wabash, etc., R. Co.*, 34 Fed. Rep. 616 (\$4,000); *Whiton v. Chicago, etc., R. Co.*, 2 Biss. (U. S.) 282 (\$5,000); *Harkins v. Pullman Palace Car Co.*, 52 Fed. Rep. 724 (\$7,000); *Ross v. Texas, etc., R. Co.*, 44 Fed. Rep. 44 (\$2,500); *Ladd v. Foster*, 31 Fed. Rep. 827 (\$1,500); *Nickerson v. Bigelow*, 62 Fed. Rep. 900 (\$4,000); *Cheatham v. Red River Line*, 56 Fed. Rep. 248 (\$2,500); *The Oceanic*, 61 Fed. Rep. 338 (\$1,000); *Humboldt Lumber Manufacturers' Assoc. v. Christopherson*, 73 Fed. Rep. 239, 44 U. S. App. 434, *affirming* 60 Fed. Rep. 428 (\$7,000 and \$5,000, respectively, for the death of the master and cook of a vessel).

Arkansas. — *St. Louis, etc., R. Co. v. Robins*, 57 Ark. 377 (\$2,500); *St. Louis, etc., R. Co. v. Maddry*, 57 Ark. 306, 58 Am. & Eng. R. Cas. 327 (\$7,500); *Fordyce v. McCants*, 55 Ark. 384 (\$2,931.50); *Little Rock, etc., R. Co. v. Voss*, (Ark. 1892) 18 S. W. Rep. 172 (\$6,500); *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550 (\$10,000); *St. Louis, etc., R. Co. v. Davis*, 55 Ark. 462 (\$5,000).

California. — *Cook v. Clay St. Hill R. Co.*, 60 Cal. 604, 6 Am. & Eng. R. Cas. 175 (\$8,000); *O'Callaghan v. Bode*, 84 Cal. 489 (\$3,000); *Redfield v. Oakland Consol. St. R. Co.*, 110 Cal. 277 (\$14,000); *Nehrbas v. Central Pac. R. Co.*, 62 Cal. 320 (\$10,800).

Georgia. — *Georgia R. Co. v. Pittman*, 73 Ga. 325, 26 Am. & Eng. R. Cas. 474 (\$5,500); *Cleveland v. Central R. Co.*, 73 Ga. 793 (\$6,000); *Richmond, etc., R. Co. v. Johnston*, 89 Ga. 560 (\$5,000).

Illinois. — *Chicago, etc., R. Co. v. Bonifield*, 104 Ill. 223, 8 Am. & Eng. R. Cas. 493 (\$1,400); *Wabash, etc., R. Co. v. Schevers*, 18 Ill. App. 52 (\$5,000); *Chicago, etc., R. Co. v. Snyder*, 18 Ill. App. 640 (\$5,000); *Bradley v. Sattler*, 156 Ill. 603, *affirming* 54 Ill. App. 504 (\$5,000); *Chicago, etc., R. Co. v. Ptacek*, 62 Ill. App. 375 (\$3,000); *Marschall v. Laughran*, 47 Ill. App. 29 (\$2,000); *Chicago, etc., R. Co. v. Shannon*, 43 Ill. 338 (\$2,000); *Chicago, etc., R. Co. v. Blank*, 24 Ill. App. 438 (\$2,150); *Joliet v. Weston*, 123 Ill. 641, *affirming* 22 Ill. App. 225 (\$1,000); *Chicago, etc., R. Co. v. Kneirim*, 152 Ill. 458, 43 Am. St. Rep. 259, *affirming* 48 Ill. App. 243 (\$5,000); *Baltimore, etc., R. Co. v. Stanley*, 54 Ill. App. 215 (\$5,000).

Indiana. — *Howard County v. Legg*, 110 Ind. 479 (\$5,000); *Jeffersonville, etc., R. Co. v. Riley*, 39 Ind. 568, 10 Am. Ry. Rep. 325 (\$2,333.35); *Wabash v. Carver*, 129 Ind. 552 (\$1,000); *Chicago, etc., R. Co. v. Branyan*, 10 Ind. App. 570 (\$2,000); *Pittsburgh, etc., R. Co. v. Burton*, 139 Ind. 357 (\$9,400).

Iowa. — *McDermott v. Iowa Falls, etc., R. Co.*, (Iowa 1891) 47 N. W. Rep. 1037 (\$10,500); *Walter v. Chicago, etc., R. Co.*, 39 Iowa 33 (\$4,500); *Moore v. Keokuk, etc., R. Co.*, 89 Iowa 223 (\$600); *Haas v. Chicago, etc., R. Co.*, 90 Iowa 259 (\$8,000).

be considered in estimating the damages, the character of the statute is very material.

When the Statute Is Punitive and not designed to afford compensation, none of the elements of damages hereinafter stated are proper to go to the jury.¹

When the Statute Is a Survival Statute purely, the pecuniary condition of the beneficiaries and similar facts are not to be considered, the recovery being confined to the damages which the deceased himself might have recovered if the suit had been by him.²

Kansas. — *Union Pac. R. Co. v. Dunden*, 37 Kan. 1, 34 Am. & Eng. R. Cas. 88 (\$3,000); *Atchison, etc., R. Co. v. Hughes*, 55 Kan. 491 (\$7,830); *St. Louis, etc., R. Co. v. French*, 56 Kan. 584 (\$4,500).

Kentucky. — *Louisville, etc., R. Co. v. Brooks*, 83 Ky. 129, 4 Am. St. Rep. 135 (\$10,000); *Louisville, etc., R. Co. v. Shivel*, (Ky. 1892) 18 S. W. Rep. 944 (\$15,000); *Louisville, etc., R. Co. v. Graham*, 98 Ky. 688 (\$6,900).

Maine. — *Hobbs v. Eastern R. Co.*, 66 Me. 572 (\$5,000).

Michigan. — *Staal v. Grand Rapids, etc., R. Co.*, 57 Mich. 239 (\$5,000); *Cooper v. Lake Shore, etc., R. Co.*, 66 Mich. 261, 11 Am. St. Rep. 482 (\$1,500).

Minnesota. — *Bolinger v. St. Paul, etc., R. Co.*, 36 Minn. 418, 29 Am. & Eng. R. Cas. 408 (\$5,000); *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543 (\$2,300).

Missouri. — *Franke v. St. Louis*, 110 Mo. 516 (\$1,846).

Nebraska. — *Post v. Olmsted*, 47 Neb. 893 (\$2,400); *Omaha v. Richards*, 49 Neb. 244 (\$2,800).

New Jersey. — *Williams v. Camden, etc., R. Co.*, (N. J. 1897) 37 Atl. Rep. 1107 (\$3,800).

New York. — *Moskovitz v. Lighte*, 68 Hun (N. Y.) 102 (\$2,000); *Heinz v. Brooklyn Heights R. Co.*, (Supreme Ct.) 36 N. Y. Supp. 675 (\$3,500); *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445, 98 Am. Dec. 61 (\$1,500); *Huerzeler v. Central Crosstown R. Co.*, 1 Misc. Rep. (N. Y. C. Pl.) 136 (\$2,000); *Hooghkirk v. Delaware, etc., Canal Co.*, 63 How. Pr. (N. Y. Supreme Ct.) 328 (\$5,000); *Bierbauer v. New York Cent., etc., R. Co.*, 15 Hun (N. Y.) 559, affirmed in 77 N. Y. 588 (\$500); *Pineo v. New York Cent., etc., R. Co.*, 34 Hun (N. Y.) 80, 99 N. Y. 644 (\$3,500); *Potter v. New York Cent., etc., R. Co.*, 61 N. Y. Super. Ct. 351 (\$5,000); *Felice v. New York Cent., etc., R. Co.*, 14 N. Y. App. Div. 345 (\$5,000); *Kelly v. Twenty-third St. R. Co.*, 14 Daly (N. Y.) 418 (\$1,000); *Bowles v. Rome, etc., R. Co.*, 46 Hun (N. Y.) 324, affirmed in 113 N. Y. 643, 22 N. Y. St. Rep. 997 (\$4,000); *Purcell v. Lauer*, 14 N. Y. App. Div. 33, 4 N. Y. Ann. Cas. 129 (\$3,000); *Conklin v. Tice*, (Supreme Ct.) 1 N. Y. Supp. 803 (\$3,500); *Johnson v. Long Island R. Co.*, 80 Hun (N. Y.) 306 (\$5,000); *Walls v. Rochester R. Co.*, 92 Hun (N. Y.) 581 (\$1,500); *Lyons v. Second Ave. R. Co.*, 89 Hun (N. Y.) 374 (\$5,000); *Kane v. Mitchell Transp. Co.*, 90 Hun (N. Y.) 65 (\$3,000).

Tennessee. — *Chesapeake, etc., R. Co. v. Hendricks*, 88 Tenn. 717 (\$15,000); *Kansas City, etc., R. Co. v. Daughtry*, 88 Tenn. 722 (\$8,000); *Rosenbaum v. Shoffner*, 98 Tenn. 634 (\$10,000.) See also *Tennessee Coal, etc., Co.*

v. Roddy, 85 Tenn. 400, 31 Am. & Eng. R. Cas. 340.

Texas. — *Texas, etc., R. Co. v. Geiger*, 79 Tex. 13 (\$10,000); *Texas, etc., R. Co. v. Robertson*, 82 Tex. 657, 27 Am. St. Rep. 929 (\$10,000); *East Line, etc., R. Co. v. Smith*, 65 Tex. 167 (\$15,000); *Missouri Pac. R. Co. v. Lehmborg*, 75 Tex. 61 (\$10,000); *San Antonio St. R. Co. v. Watzlavzick*, (Tex. Civ. App. 1894) 28 S. W. Rep. 115 (\$3,500); *International, etc., R. Co. v. Ormond*, 64 Tex. 485, 27 Am. & Eng. R. Cas. 139 (\$12,000); *Texas, etc., R. Co. v. Lester*, 75 Tex. 56 (\$4,200); *Missouri Pac. R. Co. v. Henry*, 75 Tex. 220 (\$3,550); *Gulf, etc., R. Co. v. Johnson*, 10 Tex. Civ. App. 254 (\$14,500); *International, etc., R. Co. v. McNeel*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1133 (\$10,000); *Texas, etc., R. Co. v. Hudman*, 8 Tex. Civ. App. 309 (\$6,000); *Paschal v. Owen*, 77 Tex. 583 (\$6,250); *Bonner v. Whitcomb*, 80 Tex. 178 (\$9,000); *Saint Louis, etc., R. Co. v. Johnston*, 78 Tex. 536 (\$5,000); *San Antonio, etc., Pass. R. Co. v. Harding*, 11 Tex. Civ. App. 497 (\$16,000); *Tyler Southeastern R. Co. v. McMahon*, (Tex. Civ. App. 1896) 34 S. W. Rep. 796 (\$11,000); *Missouri Pac. R. Co. v. Bridges*, 74 Tex. 520, 15 Am. St. Rep. 856 (\$3,000); *Taylor, etc., R. Co. v. Warner*, (Tex. Civ. App. 1895) 31 S. W. Rep. 66 (\$5,000); *Gulf, etc., R. Co. v. Duvall*, 12 Tex. Civ. App. 348 (\$3,800); *Galveston, etc., R. Co. v. Arispe*, 5 Tex. Civ. App. 611 (\$3,000); *San Antonio St. R. Co. v. Renken*, (Tex. Civ. App. 1897) 38 S. W. Rep. 829 (\$5,000).

Utah. — *Webb v. Denver, etc., R. Co.*, 7 Utah 363 (\$4,995). See also *Wells v. Denver, etc., R. Co.*, 7 Utah 482.

Virginia. — *Bertha Zinc Co. v. Black*, 88 Va. 303 (\$10,000).

Washington. — See *Walker v. McNeill*, 17 Wash. 582, where a verdict for \$40,000 was allowed to stand after a remittance of \$15,000 had been entered.

West Virginia. — *Dimmey v. Wheeling, etc., R. Co.*, 27 W. Va. 32, 55 Am. Rep. 292 (\$5,000). See *Turner v. Norfolk, etc., R. Co.*, 40 W. Va. 675.

Wisconsin. — *Annas v. Milwaukee, etc., R. Co.*, 67 Wis. 46, 27 Am. & Eng. R. Cas. 102, 58 Am. Rep. 848 (\$2,500); *Bright v. Barnett, etc., Co.*, 88 Wis. 299 (\$4,000); *Wiltse v. Tilden*, 77 Wis. 152 (\$2,000); *Schrier v. Milwaukee, etc., R. Co.*, 65 Wis. 457 (\$2,000); *Johnson v. Chicago, etc., R. Co.*, 64 Wis. 425, 25 Am. & Eng. R. Cas. 338 (\$2,500).

1. See *supra*, this title. *Measure of Damages — Damages Limited to Pecuniary Injury.*

2. See *infra*, this section, *Pecuniary Condition of Plaintiff or Beneficiary; Health and Capacity of Beneficiary or Plaintiff; Number and Ages of Decedent's Children.*

So Also Where the Statute Is Not a Survival Statute, but creates a new and separate cause of action, distinct from that which the deceased would have had, the pain and suffering of the deceased is not to be considered.¹

Elements in Common. — But many of the elements of damage apply to all three classes of cases, and all are here considered together.²

2. Matters Relating to Beneficiaries — *a.* **HEALTH AND CAPACITY OF BENEFICIARY OR PLAINTIFF.** — Evidence as to the health of the party for whose benefit the action is brought is ordinarily inadmissible.³ But it is competent to introduce such evidence for the purpose of showing the dependency of such party upon the deceased for support and maintenance,⁴ and as showing the probable length of time such party would have enjoyed the benefits he could expect to derive from a continuance of the life of the deceased.⁵

b. **DEGREE OF RELATIONSHIP OF PLAINTIFF TO DECEASED.** — Where the statute confers a right of action on the next of kin, the degree of relationship of the plaintiff is immaterial, in so far as his right to bring the action is concerned, if it appears that he is the next of kin.⁶

But in Estimating the Damages recoverable, the degree of relationship between the plaintiff or beneficiary and the deceased is important as bearing upon the reasonable expectation of benefit such party was entitled to claim from a continuance of the life of the deceased, and it may be shown.⁷

c. **PLAINTIFF'S INHERITANCE FROM DECEASED NOT CONSIDERED.** — The fact that the plaintiff, by the death of the deceased, has come into a large property by inheritance from him, cannot be considered by the jury in estimating the damages to which the plaintiff is entitled in a suit for wrongfully causing the death of the deceased.⁸

1. See *infra*, this section, *Physical and Mental Suffering of Deceased*.

2. The foregoing explanation is made to prevent the misapprehension which might otherwise arise from the various elements of damage being arranged under one general head, and to avoid the necessity of repeating, under each subdivision, the principles just stated.

3. **Evidence as to Health of Beneficiary.** — *Benton v. Chicago, etc., R. Co.*, 55 Iowa 496; *Rigdon v. Temple Water Works Co.*, 11 Tex. Civ. App. 542.

The fact that the widow is deformed and disabled can in no wise increase or diminish the amount of damages she may be entitled to recover. *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379, 1 Am. Ry. Rep. 585.

4. **Such Evidence Admissible as Proof of Dependency.** — See *Maryland v. Baltimore, etc., R. Co.*, 1 Hughes (U. S.) 337.

In an action by parents to recover for the death of their child, evidence as to their health, and means of support, and of any other facts tending to show that the parents would be dependent on the earnings of their child and will therefore suffer by reason of his death, is admissible. *Ewen v. Chicago, etc., R. Co.*, 38 Wis. 613; *Johnson v. Chicago, etc., R. Co.*, 64 Wis. 425, 25 Am. & Eng. R. Cas. 338.

Evidence that some of the younger children of the plaintiff's intestate were in poor health is competent as tending to show that her death was a pecuniary loss to them especially. *McKeigue v. Janesville*, 68 Wis. 50.

In an action under Lord Campbell's Act for the benefit of the father of the deceased, evidence was given that the father, who was fifty-nine years of age, was nearly blind, and

injured in his leg and hands, and was not so able to work as he had been, but worked when he could; that the son used to contribute to his support; that five or six years previously, the father being out of work for six months, the son had assisted him pecuniarily out of his earnings, but had not done so since. It was held that there was evidence for the jury of pecuniary injury to the father from the son's death. *Hetherington v. North Eastern R. Co.*, 9 Q. B. Div. 160, 6 Am. & Eng. R. Cas. 490.

Mother May Show Physical Condition of Child's Father, Who Survives. — The rule of the text has been carried so far as to allow a mother, in an action for the death of her minor child, to show his father's physical disability to labor as tending to prove her partial dependence on her son. *Augusta R. Co. v. Glover*, 92 Ga. 132, 58 Am. & Eng. R. Cas. 269.

5. **The Probable Duration of Plaintiff's Life** is an important element to be considered in estimating the damages. *Hall v. Galveston, etc., R. Co.*, 39 Fed. Rep. 18.

6. **Degree of Kinship.** — *Chicago, etc., R. Co. v. Shannon*, 43 Ill. 338.

7. **Important on Question of Damages.** — *Houghkirk v. Delaware, etc., Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370, reversing 28 Hun (N. Y.) 407.

8. **Plaintiff's Inheritance Not to Be Considered.** — *Terry v. Jewett*, 78 N. Y. 346, affirming 17 Hun (N. Y.) 395. See also remarks of Bramwell, B., in *Bradburn v. Great Western R. Co.*, L. R. 10 Exch. 1, 11 Moak 330.

It has been held in *Canada*, however, that in an action by a widow to recover for the negligent killing of her husband, the defendant may obtain answers to interrogatories asking for a copy of the testator's will; inquiring what amount of assets the plaintiffs had real-

To Show Value of Deceased's Life. — But evidence as to the amount of property owned by the deceased is admissible for the purpose of showing what was the value to the estate of the life of the deceased.¹

Distribution Changed by Deceased's Death. — And the plaintiff may show that, by the death of the deceased, the mode of distribution of the latter's income had the effect of making the plaintiff's share less than it was during the life of the deceased.²

d. INSURANCE LEFT BY DECEASED. — The measure of damages recoverable is not affected in any way by the fact that the beneficiaries of the recovery have received the proceeds of a life or accident insurance policy taken out by the deceased in his lifetime, and evidence as to such insurance is incompetent.³ The fact that the insurance company may have a right of action over against

ized over and above all debts and liabilities due by the testator, and whether any of the legatees or devisees had any further expectations, reversions, or interest not included in the preceding interrogatories and which might be derivable from any other real or personal estate in which the testator had an interest, and if so, that they be set forth fully, and their value, as bearing on the measure of damages. *Ferrie v. Great Western R. Co.*, 15 U. C. Q. B. 513.

In San Antonio, etc., *Pass. R. Co. v. Long*, 87 Tex. 148, 47 Am. St. Rep. 87, *reversing* (Tex. Civ. App. 1894) 26 S. W. Rep. 114, which was an action by adult children for the death of their mother, it appeared that the only aid she had ever given them since their majority was a part of the income from certain property. It was held that the defendant had a right to show that the plaintiffs inherited this property and that their pecuniary condition was therefore in no way affected by their mother's death.

1. *Beems v. Chicago, etc., R. Co.*, 58 Iowa 150, 10 Am. & Eng. R. Cas. 658.

As to whether the plaintiff may show that the deceased left no property, see *Koosorowska v. Glasser*, (Buffalo Super. Ct.) 8 N. Y. Supp. 197.

2. Distribution of Estate Changed by Death of Deceased. — See *Pym v. Great Northern R. Co.*, 4 B. & S. 396, 116 E. C. L. 396, 10 Jur. N. S. 199, 11 W. R. 922, 32 L. J. Q. B. 377, *affirming* 2 B. & S. 759, 110 E. C. L. 759, 8 Jur. N. S. 819, 6 L. T. 537, 10 W. R. 737.

What the Plaintiff Would Have Inherited Had the Deceased Lived Out His Expectancy of Life may be considered on the question of damages. See *Johnson v. Long Island R. Co.*, 80 Hun (N. Y.) 306. See also *Spaulding v. Chicago, etc., R. Co.*, 98 Iowa 205, holding that while such inheritance may be considered, it is not the limit of damages recoverable.

3. Evidence as to Insurance Left by Deceased — England. — *Clark v. Blythinc*, 2 B. & C. 254, 9 E. C. L. 77; *Bradburn v. Great Western R. Co.*, L. R. 10 Exch. 1, 11 Moak 330; *Mason v. Sainsbury*, 3 Doug. 61, 26 E. C. L. 36.

Canada. — *Grand Trunk R. Co. v. Beckett*, 16 Can. Sup. Ct. Rep. 713, *affirming* 13 Ont. App. 174, 8 Ont. Rep. 601; *Grand Trunk R. Co. v. Jennings*, L. R. 13 App. 800, 15 Ont. App. 477.

Georgia. — *Western, etc., R. Co. v. Meigs*, 74 Ga. 857.

Illinois. — *Pittsburg, etc., R. Co. v. Thompson*, 56 Ill. 138.

Indiana. — *Sherlock v. Alling*, 44 Ind. 184; *Jeffersonville, etc., R. Co. v. Goldsmith*, 47 Ind. 43.

Missouri. — *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239, 57 Am. Rep. 382, 26 Am. & Eng. R. Cas. 268.

New York. — *Althorf v. Wolfe*, 22 N. Y. 355, *affirming* 2 Hilt. (N. Y.) 344; *Kellogg v. New York Cent., etc., R. Co.*, 79 N. Y. 72; *Terry v. Jewett*, 78 N. Y. 338.

Pennsylvania. — *North Pennsylvania R. Co. v. Kirk*, 90 Pa. St. 15, 1 Am. & Eng. R. Cas. 45; *Coulter v. Pine Tp.*, 164 Pa. St. 543, 35 W. N. C. (Pa.) 399.

Texas. — *Tyler Southeastern R. Co. v. Raspberry*, (Tex. Civ. App. 1896) 34 S. W. Rep. 794; *Houston, etc., R. Co. v. Weaver*, (Tex. Civ. App. 1897) 41 S. W. Rep. 846.

Vermont. — *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304, *Congdon v. Howe Scale Co.*, 66 Vt. 255.

Virginia. — *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. (Va.) 431, 17 Am. Ry. Rep. 351.

See also, in this connection, *Yates v. Whyte*, 4 Bing. N. Cas. 272, 33 E. C. L. 349, 5 Scott 640; *Jones v. Whyte*, 1 Arn. 85, 2 Jur. 303; *The Propeller Monticello v. Mollison*, 17 How. (U. S.) 152; *Drinkwater v. Dinsmore*, 80 N. Y. 390, 36 Am. Rep. 624, *reversing* 16 Hun (N. Y.) 250; *Spaulding v. Chicago, etc., R. Co.*, 98 Iowa 205.

The only case in which the doctrine of the text has ever been denied is that of *Hicks v. Newport, etc., R. Co.*, cited in *Pym v. Great Northern R. Co.*, 4 B. & S. 403, 116 E. C. L. 403, note a, in which Lord Campbell instructed the jury that if there was an insurance by some company on the life of the person killed and the parties instituting the suit were entitled to receive the amount of the policy, the sum so received by them from the insurance company ought to be deducted from the aggregate amount of damages which would otherwise be recoverable from the defendant. See this case *reviewed* in *Harding v. Townshend*, 43 Vt. 541, 5 Am. Rep. 304.

Where Statute Is a Survival Statute. — It has been suggested that where the statute is a survival statute and the basis of the action is the injury sustained by the decedent's estate in consequence of his death, the proceeds of the decedent's life insurance, not payable to any named beneficiary, should be deducted. But this is not upheld. See *Ladd v. Foster*, 12 Sawy. (U. S.) 547, 31 Fed. Rep. 827.

the defendant for the amount of insurance it was compelled to pay in consequence of its wrongful act does not change the rule.¹

c. **LOSS OF PENSION MONEY AND COMMISSIONS.** — If the deceased was, at the time of his death, drawing a monthly pension from the government, the jury may, in an action by his widow and children to recover for his wrongful death, consider the stoppage of the pension as an element of the damages.² But the fact that the widow and children, upon his death and upon the performance of certain conditions, were entitled to a pension under the statutes, cannot be shown in reduction of the damages.³

f. **REMARRIAGE OF PLAINTIFF.** — In an action by a husband to recover for the wrongful killing of his wife, in which one of the principal elements of damage is the loss to him of his wife's services, the defendant cannot show, in reduction of damages, that the plaintiff has married a second wife who performs for him all the services rendered by his deceased wife.⁴

g. **PECUNIARY CONDITION OF PLAINTIFF OR BENEFICIARY — When Such Evidence Admissible.** — Wherever the right of recovery is based wholly or partially upon the dependency of the plaintiff or beneficiary on the deceased for support or maintenance, or upon an expectation of pecuniary benefit, the pecuniary condition of the plaintiff or beneficiary may be shown for the purpose of showing not only the fact, but the extent, of the dependency or expectation.⁵ The plaintiff may also show that he or the beneficiary had no other

1. See cases cited in the preceding note. As to the right of an insurance company to an action over against the person wrongfully causing the death, see *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754; *Randal v. Cockran*, 1 Ves. 98. See also the titles *CARRIERS OF GOODS*, vol. 5, p. 420; *SUBROGATION*.

2. **Loss of Pension Money.** — *St. Louis, etc., R. Co. v. Maddy*, 57 Ark. 306, 58 Am. & Eng. R. Cas. 327; *Ewen v. Chicago, etc., R. Co.*, 38 Wis. 613 (proof may be made although no allegation as to the loss of pension is made in the declaration). See also *Pennsylvania R. Co. v. Adams*, 55 Pa. St. 499.

Commissions — Administration. — In *Burton v. Wilmington, etc., R. Co.*, 82 N. Car. 504, there was evidence adduced showing that the deceased was the administrator of an estate at the time of his death. It was held error to instruct the jury that, in estimating the damages, they might consider the amount of the assets and debts of the estate and the commissions usually allowed for administering estates.

3. In *St. Louis, etc., R. Co. v. Maddy*, 57 Ark. 306, 58 Am. & Eng. R. Cas. 328, the court, after stating the right, under the federal statutes, of the widow and children to a pension, said: "But this right is conditional, not absolute. It is confined to the widow and children under sixteen, and the older children do not share in it; and it is a new right conferred upon the widow and young children, and not an old one passing from the deceased to them." It was therefore held proper for the trial court to refuse to allow the defendant to ask the plaintiff (the widow): "What is the amount of the pension to be granted you by the government?" See also *Davis v. Guarneri*, 45 Ohio St. 470, 4 Am. St. Rep. 548.

4. **Remarriage Cannot Be Shown in Reduction of Damages.** — *Davis v. Guarneri*, 45 Ohio St. 470, 4 Am. St. Rep. 548. See also *St. Louis, etc., R. Co. v. Maddy*, 57 Ark. 306, 58 Am. & Eng. R. Cas. 329; *Gulf, etc., R. Co. v. Younger*, 90 Tex. 387.

The same rule applies where the suit is by a wife who has married since the death of her husband for whose wrongful death the suit is brought. *Philpott v. Pennsylvania R. Co.*, 175 Pa. St. 570.

5. **Showing Pecuniary Condition of Plaintiff or Beneficiary — United States.** — *Hall v. Galveston, etc., R. Co.*, 39 Fed. Rep. 18.

Arkansas. — *Little Rock, etc., R. Co. v. Leverett*, 48 Ark. 333, 3 Am. St. Rep. 230, 28 Am. & Eng. R. Cas. 464.

Michigan. — Evidence showing the pecuniary circumstances of the parents of a child is admissible in an action to recover for its death. *Cooper v. Lake Shore, etc., R. Co.*, 66 Mich. 261, 11 Am. St. Rep. 482. Compare *Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205, which was an action under Mich. Comp. Laws, §§ 2350, 2351, where it was held that the actual pecuniary condition of the widow or next of kin could not be shown. And see *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513.

Mississippi. — *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 303.

New York. — See *Carpenter v. Buffalo, etc., R. Co.*, 38 Hun (N. Y.) 116; *Pressman v. Mooney*, 5 N. Y. App. Div. 121; *Lockwood v. New York, etc., R. Co.*, 98 N. Y. 523.

Texas. — *Sills v. Ft. Worth, etc., R. Co.*, (Tex. Civ. App. 1894) 28 S. W. Rep. 908; *Galveston, etc., R. Co. v. Bonnet*, (Tex. Civ. App. 1896) 38 S. W. Rep. 813.

Virginia. — The condition and circumstances of the family of the deceased may be shown, and the damage suffered by them in the loss of his care, nurture, and instruction. *Baltimore, etc., R. Co. v. Wightman*, 29 Gratt. (Va.) 431, 17 Am. Ry. Rep. 351.

Wisconsin. — *Johnson v. Chicago, etc., R. Co.*, 64 Wis. 425, 25 Am. & Eng. R. Cas. 338; *Thompson v. Johnston*, 86 Wis. 576 (widowed mother allowed to testify as to her homestead being mortgaged); *Thoresen v. La Crosse City R. Co.*, 94 Wis. 129; *Potter v. Chicago, etc., R. Co.*, 21 Wis. 372, 94 Am. Dec. 548.

means of support than those provided by the deceased.¹

When Such Evidence Inadmissible. — But such evidence is admissible only for the purposes stated. It cannot be introduced for the purpose of enhancing the damages by creating a sympathy on the part of the jury. The measure of damages recoverable, except in so far as the question of dependency or expectation of pecuniary benefit is concerned, is the same whether the plaintiff or beneficiary is wealthy or indigent.²

Competency of Such Evidence Questioned. — Some of the authorities hold, however, that such evidence is not admissible at all on the measure of damages, but can be used only for the purpose of establishing the plaintiff's right to sue by showing a dependency or an expectation of pecuniary benefit.³

h. **PROOF THAT DECEASED FURNISHED SUPPORT FOR PLAINTIFF.** — Evidence of the fact that the deceased contributed to the support of the plaintiff is admissible on the question of the measure of damages to the same extent and for the same purposes as testimony relating to the plaintiff's pecuniary condition, being, in fact, in the nature of proof of his pecuniary condition.⁴

Compare Mahoney *v.* San Francisco, etc., R. Co., 110 Cal. 471, holding that in an action by the widow and children of the deceased, evidence that the children are without means is not competent.

Action by Daughter for Death of Mother — Poverty of Plaintiff's Father May Be Shown. — Evidence as to the poor financial condition of the plaintiff's father in such a case is admissible as showing the expectation the plaintiff had of benefit from her mother. Gulf, etc., R. Co. *v.* Younger, 90 Tex. 387.

1. See authorities cited in foregoing note. See also *infra*, this section, *Proof that Deceased Furnished Support for Plaintiff.*

2. Pennsylvania Co. *v.* Roy, 102 U. S. 451, 1 Am. & Eng. R. Cas. 225 (personal injury case). See also Pennsylvania Co. *v.* Keane, 41 Ill. App. 317, 143 Ill. 172.

In Central R. Co. *v.* Moore, 61 Ga. 151, it was held that the fact that the widow who sues to recover damages for the wrongful death of her husband worked in the field for a livelihood after his death is not competent and should be excluded from the jury as immaterial and irrelevant.

Plaintiff's Inability to Employ Servants. — In an action by a father for the death of his child, the plaintiff's pecuniary condition and his inability to employ servants to take care of his children are not proper subjects for the consideration of the jury in estimating the damages. Indianapolis, etc., R. Co. *v.* Pitzer, 109 Ind. 179, 58 Am. Rep. 387, 25 Am. & Eng. R. Cas. 313.

3. **Doctrine that Such Evidence Is Not Admissible at All on Measure of Damages.** — International, etc., R. Co. *v.* Kindred, 57 Tex. 491, 11 Am. & Eng. R. Cas. 652; Mahoney *v.* San Francisco, etc., R. Co., 110 Cal. 471; Illinois Cent. R. Co. *v.* Baches, 55 Ill. 379, 1 Am. Ry. Rep. 585; Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 205; Overholt *v.* Vieths, 93 Mo. 422.

4. See *supra*, this section, *Pecuniary Condition of Plaintiff or Beneficiary.*

England. — Hetherington *v.* North Eastern R. Co., 51 L. J. Q. B. 475.

United States. — Southern Pac. Co. *v.* Lafferty, 57 Fed. Rep. 536; Baltimore, etc., R. Co. *v.* Mackey, 157 U. S. 72.

Arkansas. — Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 3 Am. St. Rep. 230, 23 Am. & Eng. R. Cas. 464. *Citing* Ewen *v.* Chicago, etc., R. Co., 38 Wis. 622; Barley *v.* Chicago, etc., R. Co., 4 Biss. (U. S.) 434.

Georgia. — Augusta, etc., R. Co. *v.* Glover, 92 Ga. 132, 58 Am. & Eng. R. Cas. 269.

Illinois. — In Chicago, etc., R. Co. *v.* Moranda, 93 Ill. 302, 34 Am. Rep. 168, the action was brought by the administrator, and it was held that while it was proper to show that the plaintiff was the wife of the deceased and that they had minor children, it was wholly immaterial whether such next of kin has or has not other pecuniary resources after his death, and it was therefore error to admit proof that the plaintiff and her children had no other means of support save his daily earnings.

In a later case it was held that while it was technically erroneous to admit evidence that the family of the deceased were entirely dependent on him for support, the admission was harmless in that particular case. Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512, 8 Am. & Eng. R. Cas. 225.

In Chicago, etc., R. Co. *v.* May, 108 Ill. 288, 15 Am. & Eng. R. Cas. 320, which was an action by a widow to recover for the death of her husband, evidence had been admitted showing that the deceased had supported the plaintiff in his lifetime. In sustaining the correctness of this admission, it was said: "In a case of this character, where the action is founded solely upon the hypothesis that the plaintiff, by reason of the husband's death, has been injured in her means of support, such evidence is not only admissible but highly proper — indeed, almost indispensable — and there is nothing in the cases referred to sustaining a contrary view."

The foregoing and other cases are reviewed in Pennsylvania Co. *v.* Keane, 143 Ill. 172, reversing 41 Ill. App. 317. The court, in holding that plaintiff, who was the widow and administratrix of the deceased, might testify that deceased was, at the time of his death, her sole support, said: "The rule deducible from the cases is substantially this: That it is not competent to show what the pecuniary circumstances of the widow, family, or next of kin

But in an Action by a Father for the Death of an Adult Son, evidence that the son, during his minority, gave his father all the wages earned by him, is not competent. The father was entitled to such wages as a matter of law, and the fact that his son recognized the right cannot be offered as proof that the father had a reasonable expectation of pecuniary benefit from the life of his son after he had attained his majority.¹

i. **DISTINCTION BETWEEN DEPENDENCY ARISING FROM MORAL OBLIGATION AND THAT ARISING FROM LEGAL DUTY.** — Some of the authorities make a distinction between cases in which the dependency or expectation of benefit arises from a mere moral obligation and those in which either arises from an obligation imposed by law, holding that in the former class only evidence of the plaintiff's or beneficiary's pecuniary condition is admissible.² The better rule seems to be, however, that the right of recovery, in so far as it relates to the expectation of pecuniary benefit, does not depend upon any legal claim for support the plaintiff may have had on the deceased, although such claim be shown in proof of the expectancy.³

are or have been since the decease of the intestate, but that it is competent to show that the wife, children, or next of kin were dependent upon him for support before and at the time of his death." See also Chicago, etc., R. Co. v. Howard, 6 Ill. App. 569; Chicago, etc., R. Co. v. Henry, 7 Ill. App. 322; Illinois, etc., R. Co. v. Whalen, 19 Ill. App. 116; John Morris Co. v. Burgess, 44 Ill. App. 27, Swift v. Foster, 163 Ill. 50.

It is not necessary, in an action by an administrator, to prove the amount the intestate had been contributing to his next of kin, the beneficiary, in order to recover substantial damages, when there is evidence that he did actually contribute to such support and that such next of kin was in need of financial assistance. Ohio, etc., R. Co. v. Wangelin, 43 Ill. App. 324.

In Chicago, etc., R. Co. v. Swett, 45 Ill. 197, which was an action by a mother to recover for the death of her son, it was held that the question for the jury was whether he assisted his mother in his lifetime and whether he was bound to do so, and it was error to instruct the jury that they might consider the disposition he may have shown to support his mother.

Indiana. — It is proper for plaintiff to prove that the deceased had been in the habit of turning over his wages to his wife and permitting them to be expended for the support of the family. Such evidence is competent as showing the loss sustained by the decedent's family in consequence of his death. Lake Erie, etc., R. Co. v. Mugg, 132 Ind. 168.

Kansas. — It is competent to show the plaintiff's health, prospects, and pecuniary condition and her need and prospects of receiving aid from the deceased, her dependence upon him for support, and his ability and willingness to render her such aid and support. Missouri Pac. R. Co. v. Perego, 36 Kan. 424.

Michigan. — See Cooper v. Lake Shore, etc., R. Co., 66 Mich. 261, 11 Am. St. Rep. 482.

Minnesota. — Opsahl v. Judd, 30 Minn. 126.

Missouri. — Hachl v. Wabash R. Co., 119 Mo. 325.

Texas. — Galveston, etc., R. Co. v. Gormley, (Tex. Civ. App. 1896) 35 S. W. Rep. 488; San Antonio, etc., Pass. R. Co. v. Long, 87 Tex. 148, 47 Am. St. Rep. 87.

Wisconsin. — Annas v. Milwaukee, etc., R. Co., 67 Wis. 46, 57 Am. Rep. 388 note, 27 Am. & Eng. R. Cas. 102; McKeigue v. Janesville, 68 Wis. 50; Wiltse v. Tilden, 77 Wis. 152.

1. Bonnet v. Galveston, etc., R. Co., 89 Tex. 72. See *supra*, this title, *Measure of Damages — For Death of Child.*

2. **Moral Obligation — Legal Duty — Distinction.** — Thus, in Texas, etc., R. Co. v. Harrington, 62 Tex. 597, 21 Am. & Eng. R. Cas. 574, which was an action by a wife to recover damages for the death of her husband, the trial court permitted the plaintiff to testify "that she was very poor, that they had no means of support except the labor of her husband, and that she had no means of supporting or educating her children." The reason assigned for admitting this testimony was that it "was submitted as tending to show the expectation of plaintiff's pecuniary aid from deceased." In holding that the admission of this evidence was error and that it prejudiced the rights of the defendant company, the Supreme Court said: "It was a legal obligation resting upon Harrington [the deceased] to support his wife and to support and educate his children. The law imposed the duty, and no other presumption than compliance on his part would be indulged. This is not a suit for contributions which might or might not have continued if the party had lived, but a suit for compensation for the loss of husband and father, whose duty it was to furnish support, etc." See also language used in Illinois Cent. R. Co. v. Crudup, 63 Miss. 303; International, etc., R. Co. v. Kindred, 57 Tex. 491, 11 Am. & Eng. R. Cas. 652; Atlanta, etc., R. Co. v. Venable, 67 Ga. 697; Chicago, etc., R. Co. v. Swett, 45 Ill. 197. And see Deni v. Pennsylvania R. Co., 6 Pa. Dist. Rep. 15, 19 Pa. Co. Ct. Rep. 7.

3. **Legal Claim on Deceased for Support Not Essential.** — Illinois Cent. R. Co. v. Barron, 5 Wall. (U. S.) 90; Baltimore, etc., R. Co. v. State, 60 Md. 449, 12 Am. & Eng. R. Cas. 155; Hall v. Galveston, etc., R. Co., 39 Fed. Rep. 18.

In an action under Gen. Stat. of South Carolina (1882), § 2184, providing that "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties," it is not necessary to show

j. **EXPECTANCY OF LIFE OF BENEFICIARY.** — In most cases it is the expectancy of life of the deceased which is the element to be considered.¹ But in cases where the respective ages of the beneficiary and the deceased indicate that the former's expectancy of life was the less, as in an action by a parent for the death of his child, it is the expectancy of life of the beneficiary which must be considered.² And where there is no such disparity between the ages of the deceased and the beneficiary as to indicate clearly which had the better expectancy of life, the expectancy of life of both parties should be shown.³

k. **NUMBER AND AGES OF DECEDENT'S CHILDREN.** — Where the action is brought by a widow for the death of her husband, who left children surviving him, it is competent for her to show the number of the children and their respective ages, and such testimony may be considered by the jury in determining the measure of damages.⁴ The ground of the admissibility of such

that the children of the deceased for whose benefit the action is brought had a legal claim on him for support. *Petrie v. Columbia, etc., R. Co.,* 29 S. Car. 303, 35 Am. & Eng. R. Cas. 430.

Rule in Illinois — Distinction Material Only as Affecting Degree of Proof. — In *Illinois* the rule seems to be that in an action by the next of kin the fact that the deceased was under no legal obligation to aid or support the plaintiff merely has the effect of requiring affirmative proof by the plaintiff of pecuniary loss. Such damage is presumed where there was such an obligation on the deceased. *Armour v. Czischki,* 59 Ill. App. 17.

1. See *infra*, this section, *Expectancy of Life of Deceased.*

2. **When Beneficiary's Expectancy of Life Is to Be Shown.** — In *Illinois* Cent. R. Co. *v.* *Crudup,* 63 Miss. 201, it is held that where a father sues for the killing of his son, it is error to admit in evidence mortuary tables showing the expectation of life of the deceased when living, since it is the expectation of life of him who must soonest die, in the ordinary course of nature, which should be made the basis of the award of damages. The expectation of the father's life being presumably shorter than the son's, the expectancy of the plaintiff should have been shown instead of that of the deceased. See also *Little Rock, etc., R. Co. v. Voss,* (Ark. 1892) 18 S. W. Rep. 172; *Fordyce v. McCants,* 55 Ark. 384; *Louisville, etc., R. Co. v. Wright,* 134 Ind. 509; *Baltimore, etc., R. Co. State,* 41 Md. 268; *Maryland v. Baltimore, etc., R. Co.,* 1 Hughes (U. S.) 337. Compare *Gulf, etc., R. Co. v. Compton,* 75 Tex. 667, holding that a parent need not show her expectancy of life in order to recover for the loss of her son's life, even where she seeks to recover for the value of his life after maturity.

How Expectancy Proven. — See *infra*, this section, *Expectancy of Life of Deceased*, sub-heading *How Shown — Mortality Tables.*

3. **Expectancy of Both Parties.** — *Duval v. Hunt,* 34 Fla. 85.

"The husband may be advanced in years, and in feeble health, and the wife may be in the prime of life, and in such cases it would not be just to estimate the pecuniary loss suffered by her by taking into consideration the probable duration of her life, irrespective of the probable duration of the life of her hus-

band. So the correct rule in this respect is the probable duration of the joint lives of the husband and wife." *Robinson, J., in Baltimore, etc., Turnpike Road v. State,* 71 Md. 573.

4. **Proof of Number and Ages of Children — United States.** — *Atchison, etc., R. Co. v. Wilson,* 48 Fed. Rep. 57, 4 U. S. App. 25; *Felton v. Spiro,* 78 Fed. Rep. 576, 47 U. S. App. 402.

Alabama. — *Alabama Mineral R. Co. v. Jones,* (Ala. 1897) 21 So. Rep. 507.

District of Columbia. — *Mackey v. Baltimore, etc., R. Co.,* 19 D. C. 282.

Michigan. — *Breckenfelder v. Lake Shore, etc., R. Co.,* 79 Mich. 560.

Missouri. — *Tetherow v. St. Joseph, etc., R. Co.,* 98 Mo. 74, 14 Am. St. Rep. 617; *Soeder v. St. Louis, etc., R. Co.,* 100 Mo. 673, 18 Am. St. Rep. 724; *O'Mellia v. Kansas City, etc., R. Co.,* 115 Mo. 205; *Schlereth v. Missouri Pac. R. Co.,* 115 Mo. 87; *Haehl v. Wabash R. Co.,* 119 Mo. 325.

Tennessee. — *Spiro v. Felton,* 73 Fed. Rep. 91, an action brought under the Tennessee statute.

Utah. — *English v. Southern Pac. Co.,* 13 Utah 407; *Chilton v. Union Pac. R. Co.,* 8 Utah 47, 54 Am. & Eng. R. Cas. 99, note; *Pool v. Southern Pac. Co.,* 7 Utah 303.

Virginia. — *Baltimore, etc., R. Co. v. Sherman,* 30 Gratt. (Va.) 602.

Wisconsin. — *Abbot v. McCadden,* 81 Wis. 563, 29 Am. St. Rep. 910; *Thompson v. Johnston,* 86 Wis. 576.

In Kentucky the same rule prevails. *Louisville, etc., R. Co. v. Mahony,* 7 Bush (Ky.) 235. The case of *Louisville, etc., R. Co. v. Mitchell,* 87 Ky. 327, sometimes cited to the contrary, was a personal injury case and not an action for an injury resulting in death. The court expressly stated, in the latter case, that such evidence would be competent in an action by a widow for the death of her husband.

Decedent's Stepchild. — In *Soeder v. St. Louis, etc., R. Co.,* 100 Mo. 673, 18 Am. St. Rep. 724, the plaintiff, a widow suing for the killing of her husband, was allowed to show that she had a child by a former marriage. It was held that while the admission of such evidence was technically erroneous, it was not a reversible error, it appearing that the verdict of the jury was justified by the other evidence.

Fact of Dependency Must Appear. — The fact that the deceased left a wife and minor child

evidence is that by the death of the father the responsibility of supporting and rearing the children is cast upon the plaintiff, their mother, and it is proper to show the extent and character of this responsibility thus cast upon her in consequence of the defendant's wrongful act.¹

l. OTHER FAMILY RELATIONS.—The family relations of the deceased may be shown in evidence on the question of damages.²

m. COST OF SUPPORTING FAMILY OF DECEASED.—The measure of damages being the loss actually sustained by the death of the deceased, it is error

dependent on him is not admissible unless followed up by proof of expenditures by the deceased for their benefit. "The mere fact of relationship, although it is one which apparently indicates dependency, without proof of expenditure in that direction affecting the net income, cannot strengthen the right to recovery or affect the measure of damages." *Bromley v. Birmingham Mineral R. Co.*, 95 Ala. 397.

Some of Children Adults.—The fact that the plaintiff, in proving the number of the decedent's children, showed that some of them were adults, if an error at all, is one which cannot be raised for the first time on appeal. *Hughes v. Richter*, 161 Ill. 409.

Contra—Iowa.—In *Beems v. Chicago, etc.*, R. Co., 58 Iowa 150, 6 Am. & Eng. R. Cas. 222, 10 Am. & Eng. R. Cas. 658, such evidence was held improper and its admission was a reversible error, the court, by Day, J., observing that "observation and experience do not teach that one's income is likely to increase in the same ratio as the number of his children." Two of the five judges dissented, however, on the ground that such evidence "tended to show circumstances stimulating the intestate to industry and providence which would largely add to the value of his personal services to his own estate." And, in the opinion of the court, by Day, J., it was admitted that "it may also be competent to show that the deceased was a married man, for, from observation and experience, it may fairly be assumed that a married man will be more frugal and industrious, and hence will accumulate a larger estate, than a single man."

In *Donaldson v. Mississippi, etc.*, R. Co., 18 Iowa 280, 87 Am. Dec. 391, it was held proper to show the decedent's earnings, age, health, habits, and family. See also *Van Gent v. Chicago, etc.*, R. Co., 80 Iowa 526.

North Carolina.—In *Kesler v. Smith*, 66 N. Car. 154, evidence as to the number of children left by the deceased was held inadmissible as being irrelevant and calculated to mislead and prejudice the jury.

Illinois—Washington.—See also, as upholding same rule, *Illinois Cent. R. Co. v. Ashline*, 56 Ill. App. 475; *Klepsch v. Donald*, 4 Wash. 436, 31 Am. St. Rep. 936.

Under a Penal Statute.—A *Missouri* statute provides that when the death resulted from certain named causes, the recovery shall be five thousand dollars, no more, no less. In an action arising within this statute, evidence as to the number and ages of children left by the deceased is incompetent as being calculated to prejudice the jury. The question as to the measure of damages not being an open one in such cases, the evidence is improper,

though it has, in some cases, been held harmless. See *Schlereth v. Missouri Pac. R. Co.*, 115 Mo. 87.

1. Theory of Such Evidence.—"As the damages to be assessed were to compensate the widow and children for their loss, it was proper to inform the jurors by competent evidence how many children there were, and the treatment that the deceased gave his family, because its value would depend on the kind of attention and care given; and it was proper to inform the jurors that they might take into consideration the number and ages of the children, because young children should receive more care and training, and they would be likely to need and receive it longer, than children of mature years, and it would be more valuable to them." *Chilton v. Union Pac. R. Co.*, 8 Utah 47, 54 Am. & Eng. R. Cas. 99, note, citing *Pool v. Southern Pac. Co.*, 7 Utah 303.

2. Family Relations—May Be Given in Evidence.—*Kansas Pac. R. Co. v. Cutter*, 19 Kan. 83, 17 Am. Ry. Rep. 471; *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 20; *Groff v. Cincinnati, etc.*, R. Co., 1 Cinc. Super. Ct. Rep. 264.

In an action by the administrator, evidence showing the relations of the deceased, an unmarried man of thirty years of age, to his father and mother, his moral obligation to support them, and their dependence upon him, is competent. *Bright v. Barnett, etc.*, Co., 88 Wis. 299. Citing *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 699; *Lowe v. Chicago, etc. R. Co.*, 89 Iowa 420; *Ewen v. Chicago, etc.*, R. Co., 38 Wis. 615; *Potter v. Chicago, etc.*, R. Co., 22 Wis. 615.

The plaintiff who sues for the death of her son may show that she and her husband had been divorced and that, by the decree, she had been given the custody of her child. *Wiltse v. Tilden*, 77 Wis. 152.

In *Beems v. Chicago, etc.*, R. Co., 58 Iowa 150, 6 Am. & Eng. R. Cas. 227, 10 Am. & Eng. R. Cas. 658, it was said that it would be competent to show that the deceased was a married man. See this case *supra*, this section, *Number and Ages of Decedent's Children*.

An instruction to the jury that, in estimating the damages, they may consider the fact that the deceased left a widow and children, is not a prejudicial error where another part of the charge specifically limits the damages to the pecuniary loss suffered by the plaintiff. *Consolidated Coal Co. v. Machl*, 130 Ill. 551.

Evidence that the Plaintiff and the Deceased Were Negroes and that family ties are not strong between people of that race is not competent. *Texas, etc.*, R. Co. v. *Moody*, (Tex. Civ. App. 1893) 23 S. W. Rep. 41.

to admit evidence showing the annual cost of supporting the family left by the deceased.¹ But it seems that when the proof also shows that the deceased furnished the entire support for his family, the cost of such support may be shown as a means of arriving at the extent of the loss occasioned by the death.²

3. Matters Relating to Deceased—*a. CONTRIBUTORY NEGLIGENCE OF DECEASED.*—In nearly all jurisdictions the contributory negligence of the deceased is material only as to the plaintiff's right to recover at all, and has no bearing on the measure of damages recoverable.³ But in *Tennessee* the rule is that the contributory negligence of the deceased, his condition, conduct, and bearing at the time of the injury, may be shown in mitigation of damages.⁴

b. HEALTH OF DECEASED.—The expectancy of life of the deceased is always material in estimating the damages resulting from his death, and it is always competent to show the health of the deceased before his death as bearing on his expectancy of life.⁵

1. Cost of Support.—*Ohio, etc., R. Co. v. Simms*, 43 Ill. App. 260.

2. How Far Such Evidence Is Competent.—In *Savannah, etc., R. Co. v. Flannagan*, 82 Ga. 579, 14 Am. St. Rep. 183, 39 Am. & Eng. R. Cas. 664, evidence was admitted to show that the deceased did not have extravagant habits; that he got less benefit from his wages than his wife derived from them; that her clothes and medical attendance cost more than his; that she was sick very often, etc. The court held that "while some or all of this testimony was perhaps inadmissible, according to the strict rules of law, it did not, under the charge of the court, so enter into the measure of damages as to prejudice the railway company. And in this respect the present case is distinguishable from *Central R. Co. v. Rouse*, 77 Ga. 393. In that case the court recognized an estimate made upon what would be required to support the wife and children, as an element in arriving at the amount of damages. No such standard was pointed to in this case."

3. See the titles *COMPARATIVE NEGLIGENCE*, vol. 6, p. 360; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368; *DAMAGES; NEGLIGENCE*.

4. Rule in Tennessee.—In *Louisville, etc., R. Co. v. Conner*, 2 Baxt. (Tenn.) 382, 21 Am. Ry. Rep. 194, the trial court instructed the jury that they might consider the condition of the deceased at the time of the accident, and "how far his condition and conduct, his carelessness, recklessness, and imprudence, contributed to the result," only in estimating the exemplary damages they should award; that they should award full compensatory damages in any event, the defendant having violated the statute prescribing certain duties to be discharged by him. This was held error, the Supreme Court saying that the contributory negligence of the plaintiff could be shown in mitigation of compensatory damages. The case of *Smith v. Nashville, etc., R. Co.*, 6 Coldw. (Tenn.) 592, in so far as it held otherwise, was *disapproved*. See also *Louisville, etc., R. Co. v. Burke*, 6 Coldw. (Tenn.) 51; *Nashville, etc., R. Co. v. Smith*, 6 Heisk. (Tenn.) 174; *Nashville, etc., R. Co. v. Carroll*, 6 Heisk. (Tenn.) 367; *Nashville, etc., R. Co. v. Nowlin*, 1 Lea (Tenn.) 523; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 139, 18 Am. & Eng. R. Cas. 347; *Louisville, etc., R. Co. v. Howard*, 90 Tenn. 144.

The Tennessee rule applies although the action is brought in Kentucky, where contributory negligence is an absolute bar, if the injury occurred in Tennessee. *Louisville, etc., R. Co. v. Whitlow*, (Ky. 1897) 43 S. W. Rep. 711.

Rule in Georgia.—The Georgia statute (Code 1882, § 3034; Code 1895, § 2322) provides that "if the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him." See *Georgia R. Co. v. Pittman*, 73 Ga. 325, 26 Am. & Eng. R. Cas. 474. See also *Atlanta, etc., R. Co. v. Newton*, 85 Ga. 517, 45 Am. & Eng. R. Cas. 211; *Killian v. Augusta, etc., R. Co.*, 79 Ga. 234, 11 Am. St. Rep. 410; *Richmond, etc., R. Co. v. Johnston*, 89 Ga. 560.

Virginia.—See *Matthews v. Warner*, 29 Gratt. (Va.) 570, 26 Am. Rep. 396.

5. Health of Deceased May Be Shown as Bearing on His Expectancy of Life and His Earning Capacity—*United States.*—*Hogue v. Chicago, etc., R. Co.*, 32 Fed. Rep. 365; *Kelley v. Central R. Co.*, 48 Fed. Rep. 663; *Southern Pac. Co. v. Lafferty*, 57 Fed. Rep. 536.

Alabama.—*Richmond, etc., R. Co. v. Hammond*, 93 Ala. 181; *McAdory v. Louisville, etc., R. Co.*, 94 Ala. 272; *Columbus, etc., R. Co. v. Bridges*, 86 Ala. 448, 11 Am. St. Rep. 58.

Colorado.—*Denver, etc., R. Co. v. Woodward*, 4 Colo. 1, 162; *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94.

District of Columbia.—*Mackey v. Baltimore, etc., R. Co.*, 19 D. C. 282.

Georgia.—*Savannah, etc., R. Co. v. Stewart*, 71 Ga. 427.

Iowa.—*Wheelan v. Chicago, etc., R. Co.*, 85 Iowa 167, 49 Am. & Eng. R. Cas. 693; *Donaldson v. Mississippi, etc., R. Co.*, 18 Iowa 280, 87 Am. Dec. 391.

Kansas.—*Missouri Pac. R. Co. v. Peregoy*, 36 Kan. 424.

New Jersey.—*Telfer v. Northern R. Co.*, 30 N. J. L. 188.

New York.—*Thomas v. Utica, etc., R. Co.*, 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 353, affirmed in 98 N. Y. 649.

North Carolina.—*Coley v. Statesville*, 121 N. Car. 301.

Oregon.—*Skottowe v. Oregon Short Line*,

c. LIKELIHOOD OF DECEDENT'S MARRYING. — In an action by a father to recover for the death of his minor child, a girl, the jury cannot consider the chances of her marrying before she arrives at full age, where there is no clear evidence before them by which they could arrive at any reasonably definite conclusion on the subject.¹

d. CHANCES FOR PROMOTION OF DECEASED. — It is not competent to show that the deceased, an employee, was in the line of promotion and that he would have received larger wages had he lived and been promoted. The chances of such promotion are too remote and depend upon too many contingencies to be considered.²

e. SPECIAL PROFITS ABOUT TO BE ACQUIRED BY DECEASED. — The plaintiffs may show that the deceased, at the time of his death, was about to acquire some special advantage or profit of which they would have received the benefit. But the rule admitting such evidence must be given a strict application. The anticipated advantage must be shown to be practically assumed; if it depends upon more than one contingency, or if such contingency be remote, it cannot be shown.³

f. PECUNIARY CONDITION OF DECEASED. — In some cases evidence as to the pecuniary condition of the deceased has been held inadmissible,⁴ but in others a contrary view has been taken.⁵

etc., R. Co., 22 Oregon 430, 51 Am. & Eng. R. Cas. 444.

Texas. — Galveston, etc., R. Co. v. Gormley, (Tex. Civ. App. 1894) 27 S. W. Rep. 1051.

Virginia. — Baltimore, etc., R. Co. v. Wightman, 29 Gratt. (Va.) 431, 17 Am. Ry. Rep. 351.

On the question of damages, it is competent for the plaintiff's counsel to ask a witness to state from his knowledge of the decedent's age, habits, health, and physical condition, how long he would have been useful to his family. Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315.

In another case it appeared that the deceased had sustained a serious injury some years before the injury complained of, which former injury, the evidence tended to show, might have had a permanent effect upon him. It was held that it was not prejudicial error to permit his brother to testify, in effect, that such injury had no effect at all upon the decedent's health, after the wound had healed, so far as he knew; especially where the witness had before testified, in substance, to the same thing, without objection. Van Gent v. Chicago, etc., R. Co., 80 Iowa 526.

Evidence for Defendant. — The fact that the deceased, at the time of his death, was suffering from a pulmonary disease which affected the probable continuance of his life is admissible on behalf of the defendant. Columbus, etc., R. Co. v. Bridges, 86 Ala. 448, 11 Am. St. Rep. 58, 38 Am. & Eng. R. Cas. 136.

1. Likelihood of Marriage. — Seaman v. Farmers' L. & T. Co., 15 Wis. 578. Compare Dinnihan v. Lake Ontario Beach Imp. Co., 8 N. Y. App. Div. 509; Louisville, etc., R. Co. v. Wright, 134 Ind. 509.

The probability that, had the deceased lived, he would have married and had children born to him who would have inherited his estate to the exclusion of the plaintiff, is too remote to be considered. Tennessee Coal, etc., Co. v. Henderson, 100 Ala. 451.

2. Chances of Promotion — Such Evidence Not Admissible. — Colorado Coal, etc., Co. v.

Lamb, 6 Colo. App. 255; Brown v. Chicago, etc., R. Co., 64 Iowa 652; Chase v. Burlington, etc., R. Co., 76 Iowa 675, 38 Am. & Eng. R. Cas. 148. See also Brown v. Cummings, 7 Allen (Mass.) 507.

In Saint Louis, etc., R. Co. v. Johnston, 78 Tex. 536, it was held competent to prove the monthly wages the deceased had been receiving and also his probable chances of promotion. See also Gulf, etc., R. Co. v. John, 9 Tex. Civ. App. 342.

But in a later case the rule of the text is recognized, and it is held that where the deceased was a bridge workman, but was preparing himself to be an engineer, evidence as to the pay engineers received is too remote to be competent. Bonnet v. Galveston, etc., R. Co., 89 Tex. 72.

3. Expected Bounty Money. — In Pennsylvania R. Co. v. Adams, 55 Pa. St. 499, it appeared that the deceased had made an arrangement to become a substitute for a drafted man and had declared his intention of giving his bounty to his parents. He was on his way to consummate the arrangement when he was killed on the defendant's railroad. It was held that these facts might be shown on the question of the continuance of the family relation.

4. Evidence of Deceased's Pecuniary Condition. — In Hunn v. Michigan Cent. R. Co., 78 Mich. 513, 41 Am. & Eng. R. Cas. 452, the trial court admitted testimony showing the extent of the decedent's means and the incumbrance on his property. But it was held that this was reversible error. Citing Chicago, etc., R. Co. v. Bayfield, 37 Mich. 214.

On the same principle, evidence that the deceased, many years before his death, lived in a state of squalor and wretchedness is incompetent. Walter v. Chicago, etc., R. Co., 39 Iowa 33, 9 Am. Ry. Rep. 78, 20 Am. Ry. Rep. 319.

5. See Illinois Cent. R. Co. v. Crudup, 63 Miss. 303; Phelps v. Winona, etc., R. Co., 37 Minn. 485, 5 Am. St. Rep. 867; San Antonio, etc., Pass. R. Co. v. Long, 87 Tex. 148, 47 Am. St. Rep. 87.

g. **HOUSEHOLD EXPENSES OF DECEASED.** — The household expenses of the deceased may be proved for the purpose of showing the extent of the loss to his family resulting from his death.¹

h. **AGE, OCCUPATION, HABITS, CHARACTER, AND ABILITY OF DECEASED.** — Evidence as to all these and similar matters bearing upon the probability of a continuance of the life of the deceased, and showing the extent of his probable usefulness to his beneficiaries, is competent and may be offered by either party.² So also when the action is for the death of a child, it is competent to

In *Koosorowska v. Glasser*, (Buffalo Super. Ct.) 8 N. Y. Supp. 197, the admission of evidence in behalf of the plaintiff that the deceased left her no property was held no error.

The wife of the deceased may properly testify that her husband was economical and industrious, and that all the property he had at the time of his death he had accumulated since his marriage with her. *McKelvy v. Burlington, etc., R. Co.*, (Iowa 1894) 58 N. W. Rep. 1068.

1. Household Expenses of Deceased. — *Hudson v. Houser* 123 Ind. 309. See also *Alabama Mineral R. Co. v. Jones*, (Ala. 1897) 21 So. Rep. 507.

How Much Deceased Saved out of His Earnings. — In *Baltimore, etc., R. Co. v. State*, 81 Md. 371, which was an action in the name of the state for the benefit of the widow and children of the deceased, it was held proper to refuse to allow the defendant to ask whether the deceased saved anything out of his earnings.

2. Evidence of Age, Occupation, Habits, etc., of Deceased — *United States*. — "The age of the deceased, his probable expectancy of life, his occupation, his ability to labor, his accustomed earnings, were all proper elements of the inquiry as to the compensation proper to be awarded on account of his death." *Louisville, etc., R. Co. v. Clarke*, 152 U. S. 230 [citing *Wade v. Leroy*, 20 How. (U. S.) 34; *Nebraska City v. Campbell*, 2 Black. (U. S.) 590; *District of Columbia v. Woodbury*, 136 U. S. 450; *Texas, etc., R. Co. v. Volk*, 151 U. S. 73; *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72; *Collins v. Davidson*, 19 Fed. Rep. 83; *Hall v. Galveston, etc., R. Co.*, 39 Fed. Rep. 18; *Serensen v. Northern Pac. R. Co.*, 45 Fed. Rep. 407]. See also *Kelley v. Central R. Co.*, 5 McCrary (U. S.) 653, 48 Fed. Rep. 663; *Morris v. Chicago, etc., R. Co.*, 26 Fed. Rep. 22; *Hogue v. Chicago, etc., R. Co.*, 32 Fed. Rep. 365.

Alabama. — *Richmond, etc., R. Co. v. Hammond*, 93 Ala. 181; *Louisville, etc., R. Co. v. Graham*, 98 Ky. 688. Compare *McAdory v. Louisville, etc., R. Co.*, 94 Ala. 272; *Buckalew v. Tennessee Coal, etc., Co.*, 112 Ala. 146.

Arkansas. — *St. Louis, etc., R. Co. v. Sweet*, 60 Ark. 550.

California. — The business, education, and habits of sobriety and economy of the deceased are to be considered. *Taylor v. Western Pac. R. Co.*, 45 Cal. 323.

Colorado. — *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94; *Pierce v. Connors*, 20 Colo. 178, 46 Am. St. Rep. 279; *Hayes v. Williams*, 17 Colo. 465.

The estimated accumulations of the deceased during the probable remainder of his life,

having reference to his age, occupation, habits, health, and ability, furnish the true measure of damages. *Denver, etc., R. Co. v. Woodward*, 4 Colo. 1, 162.

District of Columbia. — *Mackey v. Baltimore, etc., R. Co.*, 19 D. C. 282.

Georgia. — *Central R. Co. v. Thompson*, 76 Ga. 770; *Georgia R. Co. v. Pittman*, 73 Ga. 325, 26 Am. & Eng. R. Cas. 474.

The income of the deceased, a railway employee, may be considered, deducting therefrom his personal expenses. But the amount thus to be deducted is not merely the cost of his food and clothing. The personal habits of the deceased, his station in life, and his manner of living may all be proved and are to be considered by the jury. *Killian v. Augusta, etc., R. Co.*, 79 Ga. 234, 11 Am. St. Rep. 410; *Central R. Co. v. Rouse*, 77 Ga. 393. The fact having been established that the deceased had been a farmer since his majority and had never followed any other calling, it was proper to admit evidence showing his mental and physical capacity in order to show his ability to earn money as a farmer. It was not proper to allow witnesses to state their opinions as to the value of his services in occupations in which he had never engaged. *Atlanta, etc., R. Co. v. Newton*, 85 Ga. 517.

Evidence that the deceased had engaged, at various times, in different pursuits, and of what he had made or was capable of making in each of these, is competent, although the deceased, at the time of his death, had not, for a number of years, acted in one of them, it being shown that his capacity had not been impaired. What he had earned in it would not serve as a direct basis for estimating the value of his life, but may be looked to by the jury in estimating his capacity to command continuous profitable employment should he cease to pursue the business vocation in which he was engaged when he was killed. Evidence that at that time he held the offices of postmaster and tax-collector, and of the amount of his income from the same, would also be competent to show the pecuniary loss for the unexpired term of office, but not for the purpose of furnishing a basis of direct compensation for any longer period. *Christian v. Columbus, etc., R. Co.*, 90 Ga. 124.

The decedent's ability to furnish care and attention to his family and the probable diminution of that ability to labor with the lapse of time may be shown. *Chattanooga, etc., R. Co. v. Clowdis*, 90 Ga. 258; *Central R., etc., Co. v. Roach*, 64 Ga. 635, 8 Am. & Eng. R. Cas. 79.

Illinois. — *Chicago, etc., R. Co. v. Travis*, 44 Ill. App. 466; *Illinois Cent. R. Co. v. Rear-don*, 157 Ill. 372.

show the general nature of the father's occupation as tending to prove what the

Indiana. — Ohio, etc., R. Co. v. Voight, 122 Ind. 288.

It may be shown that the deceased was an habitual drunkard, and this fact may be considered in mitigation of damages. *Wright v. Crawfordsville*, 142 Ind. 636.

Iowa. — *Van Gent v. Chicago, etc.*, R. Co., 80 Iowa 526; *Donaldson v. Mississippi, etc.*, R. Co., 18 Iowa 280, 87 Am. Dec. 391; *Spaulding v. Chicago, etc.*, R. Co., 98 Iowa 205; *Lowe v. Chicago, etc.*, R. Co., 89 Iowa 420. The measure of damages is the present worth of the deceased to his estate. In determining this, evidence as to his age, probable duration of life, habits of industry and sobriety, his health, means, business, earnings, business capacity, his ability to labor, and whether he is married or single, is admissible. *Wheeler v. Chicago, etc.*, R. Co., 85 Iowa 167, 49 Am. & Eng. R. Cas. 693.

In *Simonson v. Chicago, etc.*, R. Co., 49 Iowa 87, it was held that the jury might properly consider the fact that the deceased, a young man of seventeen years of age, had no money and was dependent upon his earnings, as a circumstance in regard to the probable continuance of his industry. It was said that "it is nearly certain that a young man in good health, who is dependent upon his earnings, will earn something." But in a later case this holding was criticised, and it was declared that it went "to the verge of propriety." *Beems v. Chicago, etc.*, R. Co., 58 Iowa 150, 6 Am. & Eng. R. Cas. 227, 10 Am. & Eng. R. Cas. 658.

Kansas. — It is proper to charge the jury that they are not to take into consideration the pain suffered by the deceased, or the wounded feelings of the surviving relatives, but may consider the relations between him and the next of kin, the amount of his property, the character of his business, and the prospective increase of wealth likely to accrue to a man of his age, with the business and means which he had, and also the possibility of a decrease in his wealth. *Kansas Pac. R. Co. v. Cutter*, 19 Kan. 83, 17 Am. Ry. Rep. 471.

Kentucky. — See *Louisville, etc.*, R. Co. v. Graham, 98 Ky. 688; *Chesapeake, etc.*, R. Co. v. Lang, (Ky. 1896) 38 S. W. Rep. 503.

Maryland. — *Baltimore, etc.*, R. Co. v. State, 24 Md. 271. In this case such evidence was admitted, and it was further held that it was proper for the trial court to refuse an instruction that "in the absence of proof (other than the death, age, and condition of health, and members and state of the family of said K.) of actual damage, the verdict of the jury, in the event of its being for the plaintiff, must be for nominal damages only."

Michigan. — *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513, 41 Am. & Eng. R. Cas. 460.

Minnesota. — Evidence as to the amount of property the deceased had acquired, his habits of industry, his ability to make money, and his success in business, is admissible as affording a basis for estimating the damages caused by his death. *Shaber v. St. Paul, etc.*, R. Co., 28 Minn. 103, 2 Am. & Eng. R. Cas. 185 (action brought under Minn. Gen. Stat. 1873, c. 77, § 2); *Opsahl v. Judd*, 30 Minn. 126; *Clapp v.*

Minneapolis, etc., R. Co., 36 Minn. 6, 1 Am. St. Rep. 629.

The plaintiff may show what property the deceased had twenty years prior to his death, what occupation he had followed, and what he was worth at the time of his death, such evidence being proper for the purpose of showing the reasonable expectation of pecuniary benefit to his family from a continuance of his life. *Phelps v. Winona, etc.*, R. Co., 37 Minn. 485, 5 Am. St. Rep. 867, 32 Am. & Eng. R. Cas. 56.

Missouri. — *Hogue v. Chicago, etc.*, R. Co., 32 Fed. Rep. 365; *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.

Montana. — *Soyer v. Great Falls Water Co.*, 15 Mont. 1 (age of deceased may be shown).

New York. — *Tilly v. Hudson River R. Co.*, 24 N. Y. 471, 23 How. Pr. (N. Y.) 363, 29 N. Y. 252, 86 Am. Dec. 297; *Thomas v. Utica, etc.*, R. Co., 6 Civ. Pro. Rep. (N. Y. Supreme Ct.) 353, affirmed 98 N. Y. 649.

The age and sex, the general health and intelligence of the deceased, and the situation and condition of the survivors, together with their relation to the deceased, are all facts to be considered by the jury in estimating the damages. *Houghkirk v. Delaware, etc., Canal Co.*, 92 N. Y. 219, 44 Am. Rep. 370, reversing 28 Hun (N. Y.) 407.

North Carolina. — *Kesler v. Smith*, 66 N. Car. 154; *Blackwell v. Lynchburg, etc.*, R. Co., 111 N. Car. 151; *Coley v. Statesville*, 121 N. Car. 301 (decedent's habits of drunkenness).

In an action under *Battle's N. Car. Rev. Stat.*, c. 45, § 121, to recover damages for a death caused by the defendant's negligence, the reasonable expectation of pecuniary advantage from the continuance of life of the deceased is the proper guide to the jury in estimating the amount of damages, and to this end evidence of the age, habits, industry, means, and business of the deceased is not only proper but indispensable. *Burton v. Wilmington, etc.*, R. Co., 82 N. Car. 504.

Oregon. — The age, sex, general health and intelligence of the deceased, his habits and capacity, mental and physical, to earn money and acquire property, are all to be considered in estimating the damages. And this would include his skill in the management of wealth or his capacity to manage affairs. *Skottowe v. Oregon Short Line, etc.*, R. Co., 22 Oregon 430, 51 Am. & Eng. R. Cas. 444.

Pennsylvania. — In *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315, it was held that on the question of damages it is competent for the plaintiff to ask a witness: "From your knowledge of decedent's age, habits, health, and physical constitution, how long would he have been useful to his family?" See also *Boyd v. Hutchinson*, 18 Phila. (Pa.) 283; *Pennsylvania Tel. Co. v. Varnau*, (Pa. 1888) 15 Atl. Rep. 624; *Mansfield Coal, etc., Co. v. McEnery*, 91 Pa. St. 185, 36 Am. Rep. 662.

Tennessee. — The character of the deceased as a drunken, worthless man, who made no provision for his family, but was a burden on them and dependent on them for his support, may be shown in reduction of damages.

pursuits and earnings of the child would probably have been had he survived.¹

Decedent's Declining Ability Because of Age. — In considering the health, ability and capacity for labor, etc., the jury must be warned to have regard to the fact that the ability of the deceased to labor would decline with age, and that they are not to estimate the damages solely on the basis of the capacity and strength of the deceased at the time of his death.²

The Fact that the Deceased Was Dependent on His Own Earnings may be shown as indicating an inducement to industry on his part.³

As to How Deceased Spent His Money. — It is competent to prove what disposition the deceased made of his wages as showing the fact and extent of the expectation of pecuniary benefit claimed by the plaintiffs.⁴

The Decedent's Skill in the Care and Management of Property and business affairs may be shown on the question of damages.⁵

The Extent and Character of Investments made by the deceased may be shown as bearing on his ability to earn money.⁶

Decedent's Size and Stature. — Evidence as to these facts is incompetent on the question of damages unless it tends in some way to show the health and capacity for labor of the deceased.⁷

Reputation of Deceased. — This may be shown on the question of damages where the witnesses can speak from definite knowledge, but its competency is confined to the question of damages.⁸

Nashville, etc., R. Co. *v.* Prince, 2 Heisk. (Tenn.) 580.

In an action by a widow for the death of her husband, an engineer, it was proper to show that he was temperate and regular in his habits, as bearing on his capacity for labor, as well as his skill in his art, his business and profession, for the purpose of showing what he was capable of earning. East Tennessee, etc., R. Co. *v.* Gurley, 12 Lea (Tenn.) 46, 17 Am. & Eng. R. Cas. 568.

The same rule is announced in a later case, but it was held improper to show what was the minimum value of the crop raised by the deceased, a farmer, for the year or years preceding his death. "This was mere speculation." Louisville, etc., R. Co. *v.* Howard, 90 Tenn. 151.

Texas. — Dallas, etc., R. Co. *v.* Spicker, 61 Tex. 427, 21 Am. & Eng. R. Cas. 160, 48 Am. Rep. 297; Saint Louis, etc., R. Co. *v.* Johnston, 78 Tex. 536; International, etc., R. Co. *v.* Kuehn, 2 Tex. Civ. App. 210 (may show how much cotton and corn the deceased could raise in a year); Hall *v.* Galveston, etc., R. Co., 39 Fed. Rep. 18.

Utah. — Openshaw *v.* Utah, etc., R. Co., 6 Utah 133. Where the deceased was a brakeman, evidence as to his being a good railroad man was not admissible on the question whether or not he was guilty of contributory negligence, but it was competent on the question of damages. Wells *v.* Denver, etc., R. Co., 7 Utah 482. See also Pool *v.* Southern Pac. Co., 7 Utah 303.

Virginia. — Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. (Va.) 431, 17 Am. Ry. Rep. 351.

Wisconsin. — Wiltse *v.* Tilden, 77 Wis. 152.

1. Evidence as to Occupation of Father of Deceased Child. — Walters *v.* Chicago, etc., R. Co., 41 Iowa 71.

2. Decedent's Declining Ability to Labor Owing to Age. — Central R., etc., Co. *v.* Roach, 64 Ga. 635, 8 Am. & Eng. R. Cas. 79. See also Western, etc., R. Co. *v.* Moore, 94 Ga. 457;

Central R. Co. *v.* Thompson, 76 Ga. 770; St. Louis, etc., R. Co. *v.* Sweet, 60 Ark. 550.

Whether the capacity of the deceased to earn money and to labor successfully would be diminished from old age, and, if so, how much, must depend largely upon the character of the labor and the expectation of life of the deceased. Such a question is for the jury. Georgia R. Co. *v.* Pittman, 73 Ga. 325.

A verdict will be set aside as excessive where the jury, in arriving at it, acted on the theory that the decedent's earning capacity would remain the same throughout his expectancy of life, and failed to make any allowances for the chances of his being out of employment or of being disabled, by his age, from working as he had done, it appearing that he was sixty-nine years old when killed. Harrison *v.* Sutter St. R. Co., 116 Cal. 156.

3. Fish *v.* Illinois Cent. R. Co., 96 Iowa 702; Galveston, etc., R. Co. *v.* Gormley, (Tex. Civ. App. 1896) 35 S. W. Rep. 488.

4. Evidence offered by the defendant that the deceased spent the larger part of his wages on a prostitute is competent to contradict the testimony of the plaintiff, his mother, that he spent all his earnings for the support of her (the mother) and his children. Galveston, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1896) 36 S. W. Rep. 776.

5. Skottowe *v.* Oregon Short Line, etc., R. Co., 22 Oregon 430.

6. Spaulding *v.* Chicago, etc., R. Co., 98 Iowa 205.

7. Birmingham Electric R. Co. *v.* Clay, 108 Ala. 233.

Photograph — Deceased a Child. — In an action for the death of a child a photograph, though taken two years before, may be given in evidence as indicating his probable physical development in future and the capacity for labor he would have attained. Taylor, etc., R. Co. *v.* Warner, 88 Tex. 642.

8. Reputation. — See Wells *v.* Denver, etc., R. Co., 7 Utah 482, holding that evidence of

i. EXPECTANCY OF LIFE OF DECEASED — (1) *An Important Element.* — In all cases where the measure of damages is the pecuniary injury sustained by the parties entitled to the benefit of the recovery, the expectancy of life of the deceased is a material element for consideration.¹ It is not only material, but indispensable.²

(2) *How Shown — Mortality Tables.* — Where the expectancy of life of the deceased is proper to be considered, standard mortality tables are admissible to prove what that expectancy was.³ These tables may be shown by reprints

the good reputation of the deceased as a railroad man was competent on the question of damages, but could not be introduced for the purpose of raising a presumption that he had been free from contributory negligence.

In an action by a father for the death of his son, letters written by the son to his father tending to show the good character of the son, his affection for his father and relatives, and his good intentions in their behalf, are not admissible. *Quinn v. Power*, 29 Hun (N. Y.) 183.

1. Deceased's Expectancy of Life. — *Louisville, etc., R. Co. v. Clarke*, 152 U. S. 230. See also the cases cited in the succeeding notes; *infra*, this section, *How Shown — Mortality Tables*; *Wheeler v. Chicago, etc., R. Co.*, 85 Iowa 167, 49 Am. & Eng. R. Cas. 693; *Baltimore, etc., R. Co. v. State*, 33 Md. 542; *Missouri Pac. R. Co. v. Baier*, 37 Neb. 235.

As to when it is proper to show the expectancy of life of the beneficiary, see *supra*, this section, *Expectancy of Life of Beneficiary*.

2. If the widow, in an action for the death of her husband, fails to show his expectancy of life, she can recover nothing in so far as her action is based on the right to recover for the value of his life. *Savannah, etc., R. Co. v. Stewart*, 71 Ga. 427.

3. Mortality Tables — England. — *Rowley v. London, etc., R. Co.*, L. R. 8 Exch. 221; *Phillips v. London, etc., R. Co.*, 5 C. P. Div. 291, 49 L. J. Q. B. 233.

United States. — *Vicksburg, etc., R. Co. v. Putnam*, 118 U. S. 545; *The Ferryboat D. S. Gregory*, 2 Ben. (U. S.) 239, *affirmed* in 9 Wall. (U. S.) 513; *Southern Pac. Co. v. Lafferty*, 57 Fed. Rep. 536, 15 U. S. App. 193.

Alabama. — American mortuary tables may be used. *McAdory v. Louisville, etc., R. Co.*, 94 Ala. 272; *Mary Lee Coal, etc., Co. v. Chambliss*, 97 Ala. 171, 53 Am. & Eng. R. Cas. 254.

Colorado. — *Denver, etc., R. Co. v. Woodward*, 4 Colo. 1, 162; *Kansas Pac. R. Co. v. Lundin*, 3 Colo. 94 (Carlisle tables).

Georgia. — The "Northampton tables of mortality" may be shown. *Georgia R., etc., Co. v. Oaks*, 52 Ga. 410, 7 Am. Ry. Rep. 143. See also, as allowing mortality tables to be shown in evidence, *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409; *Atlanta, etc., R. Co. v. Newton*, 85 Ga. 517, 45 Am. & Eng. R. Cas. 211; *South-Western R. Co. v. Paulk*, 24 Ga. 356; *Central R. Co. v. Richards*, 62 Ga. 306.

Iowa. — In an action to recover for the death of a brakeman on a railroad, standard life tables are admissible to show the probable duration of the life of a person of the decedent's age, and thus aid in estimating the damages, and this notwithstanding the hazardous nature of the employment of the deceased. *Coates v. Burlington, etc., R. Co.*, 62 Iowa

486, 15 Am. & Eng. R. Cas. 265. See also *Walters v. Chicago, etc., R. Co.*, 41 Iowa 71; *Worden v. Humeston, etc., R. Co.*, 76 Iowa 310; *Beems v. Chicago, etc., R. Co.*, 67 Iowa 435; *McDonald v. Chicago, etc., R. Co.*, 26 Iowa 124, 96 Am. Dec. 114.

In *Nelson v. Chicago, etc., R. Co.*, 38 Iowa 564, which was a suit for injuries not resulting in death, such tables were held to be incompetent as evidence. But this case has been *overruled*. *Chase v. Burlington, etc., R. Co.*, 76 Iowa 675, 38 Am. & Eng. R. Cas. 148; *Knapp v. Sioux City, etc., R. Co.*, 71 Iowa 41. The case of *Simonson v. Chicago, etc., R. Co.*, 49 Iowa 88, is declared to be not opposed to these cases. See also *Donaldson v. Mississippi, etc., R. Co.*, 18 Iowa 280, 87 Am. Dec. 391.

Kentucky. — *Louisville, etc., R. Co. v. Mahony*, 7 Bush (Ky.) 235; *O'Donnell v. O'Donnell*, 3 Bush (Ky.) 216.

Michigan. — In *Klanowski v. Grand Trunk R. Co.*, 57 Mich. 525, 21 Am. & Eng. R. Cas. 648, Haswell's tables of mortality were held to be competent, and a witness was allowed to make computations from them aided by the testimony in the case. *Citing Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205. See also *Hunn v. Michigan Cent. R. Co.*, 78 Mich. 513, 41 Am. & Eng. R. Cas. 460.

The American tables have been adopted by statute. But a defendant cannot complain of the use of English tables which show a less expectancy of life than those adopted by the statute. *Cooper v. Lake Shore, etc., R. Co.*, 66 Mich. 261, 11 Am. St. Rep. 482.

But the mortality tables adopted by statute and printed in How. Mich. Stat. 1084 cannot be admitted where the deceased was a child of only five years, since such tables do not give the expectancy of life of persons under ten years old. *Rajnowski v. Detroit, etc., R. Co.*, 74 Mich. 15, 20.

Minnesota. — *Deisen v. Chicago, etc., R. Co.*, 43 Minn. 454; *Scheffer v. Minneapolis, etc., R. Co.*, 32 Minn. 518, 19 Am. & Eng. R. Cas. 175.

Mississippi. — See *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291.

Missouri. — The reasonable expectancy of the decedent's life as shown by the testimony of a physician and by mortality tables is a proper fact to be considered by the jury in estimating the damages. *O'Mellia v. Kansas City, etc., R. Co.*, 115 Mo. 205; *McGowan v. St. Louis Ore, etc., Co.*, 109 Mo. 518.

Nebraska. — *Sellers v. Foster*, 27 Neb. 118.

New York. — *Sauter v. New York Cent., etc., R. Co.*, 66 N. Y. 50, 23 Am. Rep. 18, *affirming* 6 Hun (N. Y.) 446; *Johnson v. Hudson River R. Co.*, 6 Duer (N. Y.) 633.

Pennsylvania. — Being based upon general population and not upon selected or insurable

of them in works of standard authority.¹

But Such Tables Are Not Conclusive; the jury may consider them in connection with the other evidence and award such damages as they may deem fair and just. They are not bound absolutely by the expectancy shown in such tables.²

The Value of Such Tables, when applied to a particular case, must depend largely upon other circumstances — the state of health, the habits and manner of life, and the social condition of the person injured, and the attention of the jury should be called to these qualifying circumstances.³

lives, the Carlisle tables are admissible in actions for wrongful death and may be considered by the jury in determining what the expectancy of life of the deceased was. *Steinbrunner v. Pittsburgh, etc.*, R. Co., 146 Pa. St. 504, 28 Am. St. Rep. 806, *distinguishing* *Shippen's Appeal*, 80 Pa. St. 391.

Tennessee. — In *Mississippi, etc.*, R. Co. v. Ayres, 16 Lea (Tenn.) 729, American mortality tables having been allowed in evidence by the trial court, it was objected that such tables could only be admitted on proof of universal adoption as authority for life expectancy. But the court, by Cooper, J., said: "But we do not think any such proof is required. * * * There are several such tables, English and American, and any of them shown to be used by reputable insurance companies, with such other proof as the parties may offer, either as to the condition of the individual or the general mortality of the community, would be admissible." *Citing* *Carnes v. Polk*, 5 Heisk. (Tenn.) 244.

Texas. — *San Antonio, etc.*, R. Co. v. Bennett, 76 Tex. 151; *Houston, etc.*, R. Co. v. Cowser, 57 Tex. 304; *Gulf, etc.*, R. Co. v. Johnson, 10 Tex. Civ. App. 254; *Galveston, etc.*, R. Co. v. Leonard, (Tex. Civ. App. 1894) 29 S. W. Rep. 955.

In the first of these cases a witness was allowed to testify, from the mortality tables, as to the number of years the deceased would probably have lived. In the last case the tables were admitted for the purpose of showing the decedent's expectancy of life, although he was in poor health.

Wisconsin. — *McKeigue v. Janesville*, 68 Wis. 50; *Mulcairns v. Janesville*, 67 Wis. 24; *Berg v. Chicago, etc.*, R. Co., 50 Wis. 427.

See generally the title MORTALITY TABLES.

1. Tables May Be Proven by Standard Reprints. — Thus the *Encyclopædia Britannica*, being a standard work of science and of unquestioned authority, may be introduced to show the tables of mortality. *Worden v. Humeston, etc.*, R. Co., 76 Iowa 310.

Judicial Notice. — In *Scheffler v. Minneapolis, etc.*, R. Co., 32 Minn. 518, 19 Am. & Eng. R. Cas. 175, the court, by Berry, J., speaking with reference to such tables in actions of this character, said: "We think that they are to be received upon judicial notice of their genuineness and authoritativeness. As in regard to many other matters of which judicial notice is taken, it is proper for a court to inform itself in the premises by reference to books and other sources of information; but legal proof of such genuineness and authoritativeness is not required. In a given case it is for the court to say, without such proof, that they are or are not genuine or authoritative, and that they are or are not admissible accordingly."

Citing *Stephens on Ev.*, art. 59, note; 1 *Greenleaf on Ev.*, § 6.

A Certain Book Offered in Evidence Having Been Identified by a witness who is familiar with such books, as "a standard and scientific work," it is admissible for the purpose of showing the decedent's expectancy of life. *Gorman v. Minneapolis, etc.*, R. Co., 78 Iowa 509.

A Witness May Testify that He Is Familiar with the Tables used by life insurance companies in estimating the probable duration of life of a person at any given age, and that the American mortality tables are used for that purpose by practically every company in this country. *Mary Lee Coal, etc., Co. v. Chambliss*, 97 Ala. 171, 53 Am. & Eng. R. Cas. 254.

Printed in Law Book. — The Carlisle tables may be proven by a copy of them as printed in a law book of general acceptance and authority in the courts of the state, without other proof of their authenticity. *Sellers v. Foster*, 27 Neb. 118.

2. Such Tables Not Conclusive. — *Vicksburg, etc.*, R. Co. v. Putnam, 118 U. S. 545. See also *Armstrong v. South-Eastern R. Co.*, 11 Jur. 758; *Williams's Case*, 3 Bland (Md.) 186; *Scheffler v. Minneapolis, etc.*, R. Co., 32 Minn. 518, 19 Am. & Eng. R. Cas. 175; *Deisen v. Chicago, etc.*, R. Co., 43 Minn. 454; *Nelson v. Lake Shore, etc.*, R. Co., 104 Mich. 582.

3. Steinbrunner v. Pittsburgh, etc., R. Co., 146 Pa. St. 504, 28 Am. St. Rep. 806; *Savannah, etc.*, R. Co. v. Stewart, 71 Ga. 427.

The common knowledge of jurors is sufficient for the proper determination of the life expectancy, and they can measure the damages sufficiently well upon mere proof of the age, character, health, and capacity of the deceased. *Louisville, etc.*, R. Co. v. Morgan, (Ala. 1897) 22 So. Rep. 20.

Mortality Tables Not Absolutely Necessary. — Thus, where the evidence shows that the deceased was twenty-five years old; was an active and industrious man, in good health; that he had a fair education, and was, at the time of his death, earning forty-five dollars per month, these facts are sufficient to authorize an award of substantial damages, without the introduction of life tables to show the probable duration of his life if he had not been killed. *Beems v. Chicago, etc.*, R. Co., 67 Iowa 435. See also *Atchison, etc.*, R. Co. v. Hughes, 55 Kan. 491; *Boswell v. Barnhart*, 96 Ga. 521.

Instruction as to Weight of Such Tables as Evidence. — The jury are supposed to know, without instruction, that the Carlisle tables showing the expectancy of life are not to be regarded as proving the plaintiff's right to recover for the years therein mentioned, and that the decedent would have been liable to die at any time, and that there is no presump-

(3) *Opinion Evidence.*—The question as to what is the value of a life is exclusively for the jury, and while the parties may prove all the surrounding facts and circumstances, including the age, health, and capacity of the deceased, they cannot introduce witnesses to state what they consider the pecuniary value of any life.¹ The same rule prevails as to the expectancy of life.²

(4) *Other Evidence.*—As tending to show the decedent's life expectancy, a witness may be allowed to testify as to the longevity of the father and mother of the deceased.³ Testimony as to the physical condition of the deceased is competent as indicating whether his expectancy was greater or less than the average shown by the mortality tables.⁴

(5) *From What Period Calculated.*—The expectancy of life is always to be calculated from the time of the death of the deceased, and not from the time he would have become of age, and the evidence must be based upon his age at the time death occurred.⁵

j. VALUE OF DECEDENT'S SERVICES.—The value of the services of the deceased may be shown, and is proper to be considered in determining the measure of damages. This may be shown by proof of his age, habits, capacity, etc.,⁶ or by more direct evidence.⁷ The proof, however, must be confined

tion that he would have been diligent in acquiring or successful in saving property; accordingly, it is not error for the court to refuse instructions embodying such statements. *Andrews v. Chicago, etc., R. Co.*, 86 Iowa 677, 52 Am. & Eng. R. Cas. 252.

1. Such testimony would be a mere expression of opinion on the very question which it is the province of the jury to decide. See *supra*, this title, *Measure of Damages—General Rules—Peculiarly a Question for the Jury.*

Compare *Rajnowski v. Detroit, etc., R. Co.*, 74 Mich. 15, 20, where witnesses who were fathers of children and had reared them from infancy to manhood, and were thus familiar with the subject on which they assumed to speak, were allowed to state their opinion as to the value of a child's life.

2. *Opinion as to Expectancy of Life.*—After a physician has stated the health and physical condition of the deceased, a child of five years, it is improper to allow him to state whether, in his opinion, the child would have survived the injury had he been of greater strength and better health. *Ilwaco R., etc., Co. v. Hedrick*, 1 Wash. 446, 22 Am. St. Rep. 169.

See the title *EXPERT AND OPINION EVIDENCE.*

3. *Proof of Parents' Longevity.*—*Chattanooga, etc., R. Co. v. Clowdis*, 90 Ga. 258.

4. See *supra*, this section, *Health of Deceased.*

Proof of Prior Injury as Affecting Expectancy of Life.—The fact that the deceased, a short time before the accident which caused his death, had sustained a severe injury, is competent evidence as bearing on his expectancy of life. This is true although, by a stipulation of the parties, every issue in the suit except that of damages had been determined in a prior case. *Slaven v. Germain*, 64 Hun (N. Y.) 506.

5. *From What Period Expectancy of Life Calculated.*—*Wheelan v. Chicago, etc., R. Co.*, 85 Iowa 167, 49 Am. & Eng. R. Cas. 693.

The rule of the text is true, although the plaintiff had no interest in the life of the deceased except after his maturity. *Walters v. Chicago, etc., R. Co.*, 41 Iowa 71.

A very proper distinction is noted in *Scheffler v. Minneapolis, etc., R. Co.*, 32 Minn.

518, 19 Am. & Eng. R. Cas. 175, where the court said: "But in this case the question was not, as appears to have been supposed, what was the expectation of life of a person twenty-one years of age, but what was the 'expectation of life,' after the age of twenty-one years, of a person eighteen months old. * * * In the latter case the expectation is less than in the former."

6. See *supra*, this section, *Age, Occupation, Habits, Character, and Ability of Deceased.*

7. *May Be Shown by Proof of All the Facts.*—*McKeever v. Market St. R. Co.*, 59 Cal. 294, 19 Am. & Eng. R. Cas. 123; *Missouri Pac. R. Co. v. Baier*, 37 Neb. 235.

Value of Wife's Services.—In an action for the death of the plaintiff's wife the plaintiff cannot be allowed to testify as to the value of her services to himself and family per year. He should testify as to the facts relating to her services. The conclusion as to what they were worth is to be deduced by the jury from the facts. *Chicago, etc., R. Co. v. Roberts*, 35 Ill. App. 137.

The husband is not bound to show actual pecuniary loss. In the absence of proof to the contrary the jury may presume that the deceased was an industrious and useful wife, and that her services were therefore valuable. *Delaware, etc., R. Co. v. Jones*, 128 Pa. St. 308.

Nor is it necessary that the jury should estimate the value of the probable future services of the deceased. *Union Pac. R. Co. v. Dunden*, 37 Kan. 1.

Average Wages.—It has been held that the value of the deceased's services may be shown by proof of the average wages of a man in his situation and the chances of his promotion. *Saint Louis, etc., R. Co. v. Johnston*, 78 Tex. 536. But *compare*, as to proof of chances of promotion, *supra*, this section, *Chances for Promotion of Deceased.*

In an Action by a Widow for the Wrongful Death of Her Husband, she may testify as to the amount of money the deceased brought home to her every month while he was at work, and that he had no income except his wages.

to the value of his services at the time of his death and not at some future period,¹ although the jury is to say what the prospective value of such services would be.² Mere proof of the age, health, etc., of the deceased is not sufficient to warrant an award of substantial damages, however, when there is no proof as to his earning capacity.³

k. PHYSICAL AND MENTAL SUFFERING OF DECEASED—(1) *In General*—When to Be Considered.—The character of the action given by the statute must determine whether, in assessing the damages, the jury may consider the physical and mental suffering of the deceased. When the action is by the personal representative of the deceased and the statute fixes the basis of the recovery the same as the deceased might have recovered, such suffering is an element of damage to be considered. Such an action is for the benefit of the estate, and is entirely distinct from the right of action by the widow or next of kin (if such an action is allowed) based on the pecuniary injury sustained by them in consequence of the death.⁴

Western, etc., R. Co. v. Moore, 94 Ga. 457.

Where the Action Is by a Father for the Death of His Son, an apprentice, he may testify that his son was accustomed to give him a certain sum each week or month as going to show that the son was earning that sum. *Kimmer v. Weber*, 81 Hun (N. Y.) 599.

Proof that the Decedent Offered to Work for Certain Wages is competent to rebut the evidence of the plaintiff that the deceased was earning a much larger sum. *Galveston, etc., R. Co. v. Harris*, (Tex. Civ. App. 1896) 36 S. W. Rep. 776.

1. Proof Must Be Limited to Value of Services at Time of Death.—Thus, in an action by an administrator to recover for the death of a boy of fifteen years, a witness cannot be allowed to testify what the services of the boy would have been worth when he reached maturity, if he had lived. *Nave v. Alabama G. S. R. Co.*, 96 Ala. 264, 54 Am. & Eng. R. Cas. 151. See also *Bonnet v. Galveston, etc., R. Co.*, 89 Tex. 72.

2. Jury May Estimate Value of Prospective Services.—Where the deceased was a child too young to be capable of earning anything or of rendering services of any value, the value of its probable future services to the parent, during minority, is a matter of conjecture for the jury to determine. And this may be done without the testimony of witnesses. *Little Rock, etc., R. Co. v. Barker*, 39 Ark. 491, 19 Am. & Eng. R. Cas. 195.

Income of the Deceased.—It is proper to show what the deceased usually earned and how he earned it. *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287, 35 How. Pr. (N. Y.) 36, affirming 47 Barb. (N. Y.) 515. To the same effect is *Louisville, etc., R. Co. v. Clarke*, 152 U. S. 230.

The Income for a Particular Period may be shown as bearing upon the ability and capacity for labor of the deceased and the damage resulting to the plaintiff from the death. *Louisville, etc., R. Co. v. Clarke*, 152 U. S. 242.

3. McHugh v. Schlosser, 159 Pa. St. 480, 39 Am. St. Rep. 609, 34 W. N. C. (Pa.) 33.

4. Physical and Mental Suffering of Deceased.—*California.*—See *Leahy v. Southern Pac. R. Co.*, 65 Cal. 150, 15 Am. & Eng. R. Cas. 230, where evidence was admitted as to the condition of the remains of the deceased.

Connecticut.—Under the statute of 1853 (Rev. Stat. 1866, p. 202) the damages are based upon the injury to the deceased and not upon the pecuniary loss to his relatives, although they are to receive the benefit of such damages as are awarded. *Goodsell v. Hartford, etc., R. Co.*, 33 Conn. 51.

Delaware.—*Quinn v. Johnson Forge Co.*, 9 Houst. (Del.) 338.

Iowa.—In *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462, the injured party, after commencing an action to recover for personal injuries caused by the defendants, died, and his administrator was substituted as plaintiff. It was held that the administrator might recover the amount due the deceased at the time the suit was brought, including compensation for bodily pain and suffering. The rule appears to be different now. See *Kelley v. Central R. Co.*, 48 Fed. Rep. 663.

Kansas.—The personal representative is entitled to recover the same amount as damages for the pain and suffering endured by the deceased as the deceased himself might have recovered had he survived and brought the action. *Atchison, etc., R. Co. v. Rowe*, 56 Kan. 411.

Kentucky.—Under Gen. Stat. Ky., c. 57, §§ 1-3, the personal representative may recover for the pain and suffering endured by the deceased between the time of his injury and the death, only where the injury was the result of the gross or wilful neglect on the part of the defendant. *Louisville, etc., R. Co. v. Coniff*, 90 Ky. 560.

Where the evidence is not conflicting as to the loss of time, the pain and suffering of the deceased, the court may assume, in instructing the jury, that such facts are true, and instruct that they be considered in estimating the damages. *Louisville, etc., R. Co. v. Earl*, 94 Ky. 368.

It is questionable whether such damages are recoverable at all under Const. of Ky., § 241, and the statute (Stat. 1894, c. 1, § 6), passed in pursuance of the constitution.

In *Hansford v. Payne*, 11 Bush (Ky.) 380, the death of the deceased was caused by the defendant's having sold him poison. It was held that although the declaration would not sustain an action under the statute for wilful neglect, the administrator was entitled to re-

When Not to Be Considered.—When the basis of the recovery is the pecuniary injury sustained by the widow or next of kin or other survivors of the deceased, the suffering of the deceased is to be disregarded entirely in estimating the damages, and the admission of evidence as to such suffering will constitute a reversible error as having excited the sympathy and prejudice of the jury. The question, in such cases, is merely how many dollars are required to supply the pecuniary loss sustained in consequence of the death.¹

cover for the suffering and mental agony of the deceased between the time of taking the poison and the death.

Louisiana.—The plaintiff is entitled to recover only such damages as the deceased himself could have claimed had he recovered the moment he died; that is, compensation for the pain and suffering endured by him between the time of the injury and his death. *Towns v. Vicksburg, etc., R. Co.,* 37 La. Ann. 630, 55 Am. Rep. 508. Compare *Cheatham v. Red River Line,* 56 Fed. Rep. 248.

Massachusetts.—See *Mulchahey v. Washburn Car-Wheel Co.,* 145 Mass. 281, 1 Am. St. Rep. 458.

Mississippi.—Section 663 of the Code of 1892 (Code of 1880, § 1510) gives a right of action to the widow or other survivors of a deceased person for an injury causing the death of the deceased, and the recovery is confined to the pecuniary damages sustained by the party suing. Section 1916 (Code of 1880, § 2078) provides that the administrator of a deceased person may maintain any action which the deceased might have maintained. This latter section confers a right of action on the personal representative separate and distinct from that conferred by the former section. See *Vicksburg, etc., R. Co. v. Phillips,* 64 Miss. 693. In an action by a personal representative, therefore, he can recover just what his intestate might have recovered, and this would include damages for loss of time, medical expenses, and compensation for pain and suffering.

New Hampshire.—Under the Act of 1879, c. 135, the damages recoverable were confined to the suffering of the deceased before his death, and did not extend to injuries beyond his life or to the next of kin. *Clark v. Manchester,* 62 N. H. 577. See also *Jewett v. Keene,* 62 N. H. 701.

The damages recoverable are for the expense of board, nursing, medical attention, etc., and for the loss of time, and physical and mental suffering of the deceased, including such sum as the jury may think ought to be given for the distress and anxiety of mind endured by the deceased in view of approaching death while in imminent danger from the injury, up to the close of life. *Corliss v. Worcester, etc., R. Co.,* 63 N. H. 404, 21 Am. & Eng. R. Cas. 208.

Compare *Sawyer v. Concord R. Co.,* 58 N. H. 517, which was an action of trespass brought by the administrator to recover for an injury to the property of his intestate happening during his lifetime from the gross negligence of the defendant, whereby the intestate was mortally wounded. It was held that neither the personal injury to the deceased nor the injury to his feelings nor his death could be considered on the question of damages.

Oregon.—Under *Oreg. Code Civ. Pro.,* § 367 (Code 1892, § 371), the damages recoverable by the personal representative become, when recovered, assets of the estate. They include nothing beyond what the deceased himself might have recovered. The element of pain and suffering of the deceased is an important one. *Ladd v. Foster,* 31 Fed. Rep. 827.

South Dakota.—See *Belding v. Black Hills, etc., R. Co.,* 3 S. Dak. 369, 52 Am. & Eng. R. Cas. 624.

Tennessee.—The Tennessee statute originally provided that the right of action which a person killed would have had against the wrongdoer in case death had not ensued should not abate or be extinguished by his death, but should pass to his widow, or, if there were no widow, to his children or to his administrator, etc. *M. & V. Code* (1884), § 3130; *Shannon's Code* (1896), § 4025. Under this, the administrator may recover all such damages as the deceased might have recovered had he lived, including compensation for the pain and suffering endured by the deceased. *Nashville, etc., R. Co. v. Prince,* 2 Heisk. (Tenn.) 585; *Nashville, etc., R. Co. v. Smith,* 6 Heisk. (Tenn.) 174; *Collins v. East Tennessee, etc., R. Co.,* 9 Heisk. (Tenn.) 841, 20 Am. Ry. Rep. 46; *East Tennessee, etc., R. Co. v. Mitchell,* 11 Heisk. (Tenn.) 400; *East Tennessee, etc., R. Co. v. Toppins,* 10 Lea (Tenn.) 58, 11 Am. & Eng. R. Cas. 222.

The case of *Louisville, etc., R. Co. v. Burke,* 6 Coldw. (Tenn.) 45, holds the same way, but holds also that the administrator cannot recover for the pecuniary loss suffered by the widow and children. It was overruled by the above cases as to this last proposition, but followed as to the first.

Wisconsin.—See *McKeigue v. Janesville,* 68 Wis. 50, where testimony was admitted as to expressions of pain uttered by the deceased.

1. *United States.*—*Kelley v. Central R. Co.,* 48 Fed. Rep. 663 (Iowa statute). See also *infra*, this note, *Iowa*.

Illinois.—The agony and pain suffered by the injured person, the loss of earnings while sick, or the disabling effects of the injury are not to be considered. The pecuniary loss to the widow and next of kin is the sole subject of inquiry. *Maney v. Chicago, etc., R. Co.,* 49 Ill. App. 105; *Illinois Cent. R. Co. v. Baches,* 55 Ill. 379, 1 Am. Ry. Rep. 585.

Iowa.—*Dwyer v. Chicago, etc., R. Co.,* 84 Iowa 479.

Kansas.—*Kansas Pac. R. Co. v. Cutter,* 19 Kan. 83, 17 Am. Ry. Rep. 471.

Michigan.—*Mynning v. Detroit, etc., R. Co.,* 59 Mich. 257, 23 Am. & Eng. R. Cas. 317.

Missouri.—An instruction against such damages was held to have been properly refused, but it was because the statute under

Proof of Pain and Suffering.—When such evidence is proper, proof of the pain and suffering undergone by the deceased in consequence of the injury may be made by the testimony of eyewitnesses and physicians, or by showing the circumstances of the injury.¹

(2) *Nature of the Injury.*—Where the pain and suffering of the deceased are an element of damage, the nature of the injury inflicted may be given in evidence as bearing on the extent and character of the suffering.² But when this element of damage cannot be considered, testimony as to the nature of the injury is incompetent.³

Mangling of Remains of Deceased.—Where the case is of such a character that the plaintiff is entitled to recover for the physical pain and suffering caused to the deceased, it seems that evidence showing the mutilation of his body is competent as indicating the extent of such suffering.⁴ But the fact that the body of the deceased was mangled cannot be shown where it appears that he was unconscious from the time of the injury until his death.⁵

(3) *Death Practically Instantaneous.*—Independently of whether or not the statute allows a recovery for the pain and suffering endured by the deceased as a consequence of the injury, there can be no recovery for this element where the death of the deceased was practically instantaneous or where he was un-

which the action was brought fixed the recovery at a certain penal sum *Tobin v. Missouri Pac. R. Co.*, (Mo. 1891) 18 S. W. Rep. 996.

And even where the statute fixes no penalty, but provides merely for compensatory damages, such pain and suffering cannot be considered. *Goss v. Missouri Pac. R. Co.*, 50 Mo. App. 614.

New York.—*Dorman v. Broadway R. Co.*, (Brooklyn City Ct.) 1 N. Y. Supp. 334, 16 N. Y. St. Rep. 753.

Pennsylvania.—*Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318.

Texas.—Art. 2909 of the Rev. Stat., authorizing the jury, in an action for wrongful death, to give such damages as they may think proportional to the injury, does not include damages for the pain and suffering of the deceased, but refers only to the pecuniary loss sustained by his relatives. *Southern Cotton Press, etc., Co. v. Bradley*, 52 Tex. 587; *March v. Walker*, 48 Tex. 372; *Houston, etc., R. Co. v. Cowser*, 57 Tex. 293; *Galveston, etc., R. Co. v. Matula*, 79 Tex. 577.

Vermont.—The intestate's cause of action cannot be considered. *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

Wisconsin.—See *Ewen v. Chicago, etc., R. Co.*, 38 Wis. 613.

1. See *Clark v. Manchester*, 64 N. H. 471.

Fright and Suffering Immediately Preceding Death.—Where the vessel on which the deceased, a young girl, was being carried, met with an accident and sank ten minutes later, drowning the libellant's daughter, no action for the pain and suffering from fright during the ten minutes between the accident and the drowning can be maintained separate and apart from the action for the death. *The Corsair*, 145 U. S. 335.

Pain Inferred from Manner of Death.—Proof that the deceased died from drowning in muddy, slimy water is sufficient without other evidence to warrant the jury in finding that the deceased suffered pain. *Clark v. Manchester*, 64 N. H. 471.

2. **Declarations of the Injured Person** as to the nature of his injuries may be proven in order to show the extent of his injuries. *Lange v. Schoettler*, 115 Cal. 388.

3. **Nature of Injury.**—See *Maney v. Chicago, etc., R. Co.*, 49 Ill. App. 105.

But it seems that the admission of such testimony is not error when the court specifically charges the jury that nothing can be allowed for the pain and suffering endured by the deceased nor for the grief of his relatives. *St. Louis, etc., R. Co. v. Hicks*, 79 Fed. Rep. 262, 49 U. S. App. 112.

4. **Mangling of Body—When Such Evidence Is Competent.**—See *Leahy v. Southern Pac. R. Co.*, 65 Cal. 150, 15 Am. & Eng. R. Cas. 230.

Under Alabama Punitive Statute.—Under the Ala. Code of 1886, § 2589, which gives a right of action for injuries resulting in death in certain cases, the damages recoverable are "entirely punitive" and in no sense compensatory. Therefore, where there is no dispute as to how the deceased came to his death, it is proper to exclude the testimony of witnesses tending to show the condition of the decedent's body when found. *Buckalew v. Tennessee Coal, etc., Co.*, 112 Ala. 146.

A Harmless Error.—In *Cook v. Clay St. Hill R. Co.*, 60 Cal. 604, 6 Am. & Eng. R. Cas. 175, which was an action by a widow for the death of her husband, it was held that where there is nothing showing that any damages were asked or given at the trial for the suffering undergone by the deceased, evidence by the widow as to finding pieces of flesh immediately after the accident and on the scene of it is not ground for reversal, but will be regarded as having been admissible merely as a circumstance attendant upon the inquiry. See also *Texas, etc., R. Co. v. Lester*, 75 Tex. 56, where the admission of evidence that the deceased "moaned until he died" was held an immaterial error, the jury being specifically instructed that no damages could be allowed for the physical suffering of the deceased.

5. *Corcoran v. Boston, etc., R. Co.*, 133 Mass. 507, 12 Am. & Eng. R. Cas. 226.

conscious from the time of the injury up to his death.¹

4. Wealth of Defendant. — With the possible exception of cases where the question of exemplary damages is involved,² the wealth of the defendant cannot be considered in determining the measure of damages recoverable, and the admission of evidence showing the pecuniary condition of the defendant is a reversible error.³

5. Other Suits Pending Arising out of Same Accident. — Whether the damages sought to be recovered are punitive or merely compensatory, the defendant cannot show, in mitigation of damages in a particular case, that he is being sued by other parties in similar actions for damages arising out of the same accident.⁴

6. Specific Items — *a.* **FUNERAL EXPENSES.** — The expenses of the funeral of the deceased, when they have been paid by the parties for whose benefit the action is brought, or where such parties are legally liable therefor, may be considered in estimating the damages to be recovered, and are to be included in the recovery.⁵

1. When Death Instantaneous. — In *Cheatham v. Red River Line*, 56 Fed. Rep. 248, which was an action under the *Louisiana* statute, it was held that no recovery could be had for the pain and agony of the deceased between the time he fell into the water and his death from drowning immediately thereafter. Under such circumstances, the death is considered practically simultaneous with the injury. See also *The Corsair*, 145 U. S. 335.

Deceased Unconscious. — Where the evidence shows that the deceased fell some twenty feet, and upon striking the ground became unconscious and remained so until he died from the effects of the injury, there can be no recovery for the pain and suffering endured by him while falling. *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90, 28 Am. Rep. 214. See also *Corcoran v. Boston*, etc., R. Co., 133 Mass. 507, 12 Am. & Eng. R. Cas. 226.

2. Pecuniary Condition of Defendant. — See *supra*, this title, *Measure of Damages* — *Exemplary or Punitive Damages*. See also the title **EXEMPLARY DAMAGES**.

3. *Conant v. Griffin*, 48 Ill. 410; *Chicago*, etc., R. Co. *v. Bayfield*, 37 Mich. 205.

4. Other Damage Suits Arising from Same Accident. — In *Kansas City*, etc., R. Co. *v. Sanders*, 98 Ala. 293, 58 Am. & Eng. R. Cas. 156, the accident which caused the death of the plaintiff's intestate also caused the death of several other persons, on behalf of whom suits similar to the plaintiff's had been instituted. The action was brought under section 2589 of the code, which allowed punitive damages. (See *supra*, this title, *Measure of Damages* — *Exemplary or Punitive Damages*.) The defendant requested an instruction that "the jury are authorized to consider, in mitigation of the amount of damages they may award against the defendant in this case by way of punishment, the fact that the defendant may be subsequently again punished for the same act of negligence in the other suits pending in the other courts for the death of other persons killed in the same collision," etc. It was held that the instruction was properly refused.

5. Funeral Expenses Are Recoverable — *Arkansas*. — *Little Rock*, etc., R. Co. *v. Barker*, 33 Ark. 350, 34 Am. Rep. 44.

District of Columbia. — *Bunyea v. Metropolitan R. Co.*, 19 D. C. 76.

Indiana. — *Pennsylvania Co. v. Lilly*, 73 Ind. 252, 4 Am. & Eng. R. Cas. 540; *Mayhew v. Burns*, 103 Ind. 328.

Missouri. — *Rains v. St. Louis*, etc., R. Co., 71 Mo. 164, 36 Am. Rep. 459, 5 Am. & Eng. R. Cas. 610.

New Jersey. — *Consolidated Traction Co. v. Hone*, 59 N. J. L. 275.

New York. — *Kennedy v. New York Cent.*, etc., R. Co., 35 Hun (N. Y.) 186.

Pennsylvania. — *Cleveland*, etc., R. Co. *v. Rowan*, 66 Pa. St. 393; *Pennsylvania Co. v. James*, 81* Pa. St. 194.

South Carolina. — *Petrie v. Columbia*, etc., R. Co., 29 S. Car. 303, 35 Am. & Eng. R. Cas. 430.

Texas. — *Gulf*, etc., R. Co. *v. Southwick*, (Tex. Civ. App. 1895) 30 S. W. Rep. 592.

Washington. — *Hedrick v. Ilwaco* R., etc., Co., 4 Wash. 400, 54 Am. & Eng. R. Cas. 48.

See also *Augusta Factory v. Davis*, 87 Ga. 648.

In an action under the *New York* Act of 1847, c. 450, as amended by Laws of 1870, c. 78, the necessary funeral expenses of the deceased are proper elements of damage where it appears that any of those for whose benefit the action is brought are legally bound to pay such expenses, and proof of such expenses is therefore competent. It is immaterial that all of those interested in the recovery are not legally bound to pay such expenses. *Murphy v. New York Cent.*, etc., R. Co., 88 N. Y. 445, 8 Am. & Eng. R. Cas. 490, *affirming* 25 Hun (N. Y.) 311, and *disapproving* the English cases cited in this note. See also *Brassell v. New York Cent.*, etc., R. Co., 81 N. Y. 241; *Houghkirk v. Delaware*, etc., Canal Co., 92 N. Y. 219, 44 Am. Rep. 370.

Evidence that the Defendant Paid the Funeral Expenses of the deceased is inadmissible either in bar or in mitigation of damages. *Murray v. Usher*, 117 N. Y. 542.

English Rule Contra — No Recovery for Funeral Expenses. — Compensation for funeral expenses of the deceased and for the family mourning is not recoverable under the English statute. *Dalton v. South-Eastern R. Co.*, 4 C. B. N. S. 296, 93 E. C. L. 296, 4 Jur. N. S. 711, 27 L. J. C. P. 227; *Boulter v. Webster*, 13 W. R. 289.

b. MEDICAL EXPENSES. — In some jurisdictions medical expenses incurred during the period between the injury to the deceased and his death are properly a part of the damages recoverable against the person causing the injury.¹ A different rule obtains, however, in other jurisdictions.²

Under Oregon Statute — Funeral Expenses Not Recoverable. — The damages given to an administrator for the death of his intestate by the Oregon statute (Comp. L. 1887, § 371) are, when recovered, assets of the estate; they do not include anything but what is consequent on the death, and therefore no allowance can be made for the expenses of the illness attendant on the injury which caused the death, or of the burial of the deceased. *Holland v. Brown*, 13 Sawy. (U. S.) 284, 35 Fed. Rep. 43.

Rule in Arkansas. — In an action by a mother to recover for the death of her infant child, it was held that "any necessary expenses incurred by her for nursing and medical attendance before its death and for burial expenses afterwards were proper elements" of damage to be considered by the jury. *Little Rock, etc., R. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44, citing the Pennsylvania cases above cited.

But in *St. Louis, etc., R. Co. v. Sweet*, 57 Ark. 287, the court held that it was not proper for the trial court to allow the plaintiff to show "that neither she nor the railroad company had paid for the casket in which the body of the deceased was buried, as this action was not brought for the benefit of the estate of the deceased, and the evidence could have tended only to mislead or confuse the jury. The funeral expenses were not an element of damages in this case. The action was brought for the benefit of the widow and next of kin alone." No authorities were cited.

In a later hearing of the same case the court held that since the estate of the decedent was not liable for funeral expenses, unless the claim therefor had been presented within the statutory period of two years, it was error for the trial court to permit the jury to consider such expenses, there being no evidence that the claim had been proved against the estate in the manner and within the time required by law. *St. Louis, etc., R. Co. v. Sweet*, 63 Ark. 563.

Awarding Funeral Expenses to the Parents Jointly is not an error of which the defendant can complain, although the statute provides that they shall be a part of the damages awarded to the father. *Missouri, etc., R. Co. v. Evans*, (Tex. Civ. App. 1897) 41 S. W. Rep. 80. See *infra*, this title, *Distribution and Apportionment of Recovery*.

The Minnesota Statute Provides for Payment of Funeral Expenses out of the Recovery. — See Gen. Laws of Minn. (1891), c. 123, § 1; State v. Probate Ct., 51 Minn. 241.

1. Medical Expenses, Nursing, etc., Recoverable — Arkansas. — *Little Rock, etc., R. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44.

Georgia. — *Augusta Factory v. Davis*, 87 Ga. 648.

Indiana. — *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Mayhew v. Burns*, 103 Ind. 328.

Missouri. — *Rains v. St. Louis, etc., R. Co.*, 71 Mo. 164, 36 Am. Rep. 459, 5 Am. & Eng. R. Cas. 610.

New Hampshire. — *Corliss v. Worcester, etc., R. Co.*, 63 N. H. 404, 21 Am. & Eng. R. Cas. 208.

Pennsylvania. — *Cleveland, etc., R. Co. v. Rowan*, 66 Pa. St. 393; *Pennsylvania Co. v. James*, 81* Pa. St. 194; *Pennsylvania R. Co. v. Bantom*, 54 Pa. St. 495.

See also *Bunyea v. Metropolitan R. Co.*, 19 D. C. 76.

Such expenses are not recoverable in the absence of proof that the claim for them had been filed in the administration of the decedent's estate, as required by law, and within the statutory period. *St. Louis, etc., R. Co. v. Sweet*, 63 Ark. 563.

Death Occurring After Action Brought. — After commencing a suit for injuries caused by the defendant company, the deceased died and his administrator was substituted as plaintiff. It was held that the administrator, as such, might recover the amount due the deceased at the time the suit was brought, including everything which was a proper charge against the deceased and which he was obliged to pay in consequence of the injury, such as the expense of nursing, lodging, board, etc. *Muldowney v. Illinois Cent. R. Co.*, 36 Iowa 462.

2. Medical Expenses Held Not Recoverable — Illinois. — In an action under the statute of 1874, the sole measure of damages is the pecuniary loss of the widow or next of kin. Expenses incurred for medical attendance, care, and nursing, or otherwise, in the endeavor to effect a cure, are not recoverable. *Maney v. Chicago, etc., R. Co.*, 49 Ill. App. 105.

Oregon. — Such expenses are not recoverable in an action by the administrator under Comp. Laws of Oregon (1887), § 371. *Holland v. Brown*, 35 Fed. Rep. 43, 13 Sawy. (U. S.) 284.

Doctrine in New York. — In *Kennedy v. New York Cent., etc., R. Co.*, 35 Hun (N. Y.) 186, which was an action by a widowed mother to recover for the wrongful killing of her infant child, it was held that she, being entitled to the child's services, was bound to maintain and care for him, and was personally liable for the child's medical expenses and was entitled to recover for them. See also *Cuming v. Brooklyn City R. Co.*, 109 N. Y. 95. Compare *Lang v. New York, etc., R. Co.*, 51 Hun (N. Y.) 603, affirmed in 123 N. Y. 656.

But in *Murray v. Usher*, 117 N. Y. 542, affirming 46 Hun (N. Y.) 404, the court, in holding that it was not competent for the defendant to show in mitigation or reduction of damages that he had paid the medical and funeral expenses of the deceased, said: "The expenses incurred by a person injured, for medical treatment or for support between the happening of the injury and the death resulting therefrom, are not recoverable by his administrator in the statutory action given by the Act of 1847; and it would seem to follow that the payment of such expenses by the wrongdoer cannot be shown either in bar or in mitigation of damages. If they were paid in satisfaction of the wrong, under an

c. INTEREST ON DAMAGES.¹ — As a general rule, a verdict for damages bears interest only from the time it was rendered,² though the matter is sometimes regarded as being in the discretion of the jury.³ In some jurisdictions the statute expressly provides that in actions for injuries resulting in death the damages awarded shall bear interest from the date of the decedent's death.⁴

XIII. DISTRIBUTION AND APPORTIONMENT OF RECOVERY — 1. By Whom Made.

— Where the statute provides for the prosecution of the action by the personal representative for the benefit of certain beneficiaries who are to share in the recovery in fixed proportions, the responsibility of making a proper distribution does not rest upon the defendant, but upon the personal representative,⁵ the court, or the jury.⁶

agreement with the intestate, and under circumstances which would sustain a plea of accord and satisfaction and show an extinguishment of the cause of action in favor of the deceased in his lifetime," they might be available as a defense. See *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271.

1. See the titles DAMAGES, *ante*; INTEREST.

2. Until a verdict, the damages are unascertained and unascertainable, and interest cannot be allowed. *Western, etc., R. Co. v. Young*, 81 Ga. 397, 37 Am. & Eng. R. Cas. 490 (see next note).

3. In Discretion of the Jury. — In *Central R. Co. v. Sears*, 66 Ga. 499, which was an action by a widow to recover for the wrongful killing of her husband, it was held error for the trial court to instruct the jury as a matter of law that they should add interest to whatever amount of damages they might find were sustained at the date of the killing. The question of thus increasing the damages in such a case is for the jury. See also *Western, etc., R. Co. v. McCauley*, 68 Ga. 818.

This doctrine was repudiated, however, in a later case, where the court, in criticising a charge in which the jury were instructed that they might, in their discretion, add interest at the legal rate, said: "There is no authority of law for treating the jury as clothed with a double discretion — a discretion to be exercised, first, in fixing the amount of the plaintiff's damages, and then in augmenting that amount by an assessment in the nature of interest for detention of the money or delay of payment. As long as the principal sum was not only unascertained but unascertainable, save by the enlightened conscience of impartial jurors, the law neither appointed a day of payment nor exacted any tender." *Western, etc., R. Co. v. Young*, 81 Ga. 397, 37 Am. & Eng. R. Cas. 490. See also *Ratteree v. Chapman*, 79 Ga. 574.

In *New York* the statute expressly provides for interest in such cases. (See *infra*, note immediately following.) Prior to that statute, the jury might consider, as affecting the measure of damages, the time elapsing between the death and the trial, but they could not agree on a certain sum as damages and add thereto interest as such for that time. *Cook v. New York Cent. R. Co.*, 10 Hun (N. Y.) 426.

4. New York Statute. — The New York statute of 1870, c. 78, provided that damages recovered for the wrongful killing of a person should draw interest from the time of the death and that such interest should be added to the verdict and entered as a part of the judgment. This statute is not unconstitu-

tional. *Cornwall v. Mills*, 44 N. Y. Super. Ct. 45.

Under this statute, the jury have nothing to do with the question of interest. The interest is to be added to the damages and inserted in the entry of judgment by the clerk. This is true although the jury, in making up the damages, awarded interest and included it in their finding of the aggregate amount. In such a case, the remedy of the defendant is to move to set the verdict aside. *Manning v. Port Henry Iron Ore Co.*, 91 N. Y. 664, *reversing* 27 Hun (N. Y.) 219.

When the plaintiff, in his declaration, demands a specified amount and the jury find damages to the full extent of his demand, interest from the time of the death cannot be added thereto, notwithstanding the statute. *Robostelli v. New York, etc., R. Co.*, 34 Fed. Rep. 719.

The rate of interest must be according to the law existing at the time the verdict was rendered. And this is true although the statute changing the rate of interest to six per cent. (Acts of 1879, c. 538, § 1) expressly provided that nothing therein contained should affect obligations made before the passage of the act. *Salter v. Utica, etc., R. Co.*, 86 N. Y. 401, 8 Am. & Eng. R. Cas. 215, *affirming* 23 Hun (N. Y.) 533.

Where the Death Occurred in Another State, the law of which makes no provision for the allowance of interest on damages, the New York statute does not apply and no interest can be added by the clerk. *Kiefer v. Grand Trunk R. Co.*, 12 N. Y. App. Div. 28, 26 Civ. Pro. Rep. (N. Y.) 147.

5. Representative to Provide for Apportionment. — *Weidner v. Rankin*, 26 Ohio St. 522.

The representative is chargeable with the distribution of such damages on the same ground that he is required to distribute properly the decedent's personal estate. See the title EXECUTORS AND ADMINISTRATORS; and *infra*, this section, *How Distributed*.

Where, in a suit by the personal representative, two persons claim as widow of the deceased, the legality of neither marriage is material at the trial, since that must be determined by the court in making the distribution. *Toledo, etc., R. Co. v. Brooks*, 81 Ill. 245.

6. Distribution Fixed by the Jury. — Lord Campbell's Act provided that the amount recovered, after deducting all costs not recovered of the defendant, "shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct." 9 & 10 Vict., c. 93, § 2.

By the Court or Jury. — In some jurisdictions the statutes expressly provide that the court or the jury shall fix the proportions in which the recovery shall be divided among the several beneficiaries.¹

2. When Subject to Debts of Deceased. — Where the recovery is, under the statute, regarded as personal assets of the decedent's estate, it seems that, in the absence of an express provision to the contrary, the recovery is subject to the payment of the decedent's debts.² But where the action is given to certain beneficiaries or to the administrator for their benefit, it belongs to them free from any liability on account of the decedent's debts.³

Texas. — Under the Texas statute the jury is required to apportion the damages among the several beneficiaries. Sayles's Civ. Stat., art. 2909.

Where the plaintiffs are husband and wife the recovery is community property and the statute has no application. *San Antonio St. R. Co. v. Mechler*, (Tex. Civ. App. 1894) 29 S. W. Rep. 202. See also *Gulf, etc., R. Co. v. Burleson*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1107; *Missouri, etc., R. Co. v. Evans*, (Tex. Civ. App. 1897) 41 S. W. Rep. 80.

If all the beneficiaries are parties, the fact that the verdict gives a lump sum to all the children of deceased collectively, if it is an error at all, is not an error of which the defendant can complain and will not authorize a reversal on the defendant's appeal. *Texas, etc., R. Co. v. Hudman*, 8 Tex. Civ. App. 309.

The complaint may apportion the damages claimed among the beneficiaries, and the jury cannot award any beneficiary a greater sum than that allotted by the complaint. *International, etc., R. Co. v. McDonald*, 75 Tex. 41, 42 Am. & Eng. R. Cas. 211.

Where the only parties plaintiff are the husband and the adult son of deceased, the defendant cannot complain that the entire verdict was for the husband where the son, in open court, waived his claim. *Dallas Rapid Transit R. Co. v. Elliott*, 7 Tex. Civ. App. 216.

So also the defendant cannot complain that the damages, including the funeral expenses, were awarded in a gross sum to both parents, they being the sole beneficiaries, particularly where no special instruction on the matter was asked in the trial court. *Missouri, etc., R. Co. v. Evans*, (Tex. Civ. App. 1897) 41 S. W. Rep. 80.

Distribution Governed by Law in Force at the Time the Death Occurred. — See *Richmond v. Chicago, etc., R. Co.*, 87 Mich. 374.

Distribution in Chancery. — Where a railway company pays money to the executors of a person killed by it, the Chancery Division, in a suit brought by the executors asking for a declaration as to the persons entitled to the money, may distribute the funds among such relatives of the deceased as suffered damage by reason of the death, in the same manner as a jury could have done under Lord Campbell's Act. *Bulmer v. Bulmer*, 25 Ch. Div. 409, 53 L. J. Ch. 402, 32 W. R. 380.

1. Court May Distribute where Jury Fails to Do So. — It is no ground for a new trial under the *Nova Scotia* statute, that the jury did not make separate awards for the widow and children respectively. The court can make the distribution if necessary. *McLeod v. Windsor, etc., R. Co.*, 23 Nova Scotia 69.

Under the English Statute — Distribution of Money Paid into Court. — Lord Campbell's Act, 9 & 10 Vict., c. 93, provided that the jury should apportion the recovery. By 27 & 28 Vict., c. 95, § 2, it was provided that the defendant, upon being advised to pay the money into court, may pay it as compensation in one sum to all the parties entitled thereto, without specifying the sums into which it shall be divided by the jury.

In *Sanderson v. Sanderson*, 36 L. T. 847, the widow and administratrix of S., who was killed by a railway company, brought an action against the company, and the company paid eight thousand five hundred pounds into court under the act just mentioned, which sum the widow accepted in full. The deceased had left four infant children. The widow and children had been entirely dependent for their maintenance on the professional earnings of deceased. It was held that, by analogy to the statute of distributions, the widow should take one-third and the children the remaining two-thirds.

In another case, the money having been paid into court, the widow was allowed to draw it out on a consent signed by her being made an order of court, whereby she agreed to a division of the money in certain specified proportions between herself and three infant children. *Shallow v. Vernon*, 9 Ir. R. C. L. 150.

Where the husband received the entire sum and no apportionment was ever made by the jury or otherwise between himself and the two sons of the deceased, it was held that the two sons could not maintain an action in the same court in which the recovery was had to compel an apportionment, but their remedy, if any, was in the chancery court. *Condliff v. Condliff*, 29 L. T. 831, 22 W. R. 325.

2. Recovery a Part of Decedent's Estate. — Where the statute is merely a survival statute and only provides that a right of action for personal injuries shall not abate with the death of the injured person, but may be revived in the name of his personal representatives, the proceeds of the recovery are to be regarded as personal property belonging to his estate. *Missouri Pac. R. Co. v. Bennett*, 5 Kan. App. 231.

3. When Not Subject to Decedent's Debts. — *Griswold v. Griswold*, 111 Ala. 572.

An administrator holds the fund recovered solely for the use and benefit of those entitled to it under the statute and free from the claims of legatees or creditors of deceased. It is subject, however, to commissions and reasonable counsel fees. See Code of N. Car. (1883), § 1500; *Baker v. Raleigh, etc., R. Co.*, 91 N. Car. 308. Compare *Wynkoop v. Myers*, 17 Civ.

3. How Distributed.—In a number of the states the statutes prescribe specifically how the damages recovered shall be distributed, and the statutes must therefore be first consulted on this subject.

Where the Statute Is a Survival Statute.—If the statute is purely a survival statute, and the personal representative is designated as the party to sue, the recovery, in the absence of a direction in the statute, becomes personal assets of the estate of the deceased and must be distributed as other personal assets are.¹

Administrator's Liability for Improper Distribution.—The liability of the administrator in this connection is governed by the general rules of law governing administrators.²

Party Authorized to Sue May Employ Counsel.—A party upon whom the statute confers a right of action, either for his own use or for the use of others, or both, is entitled to employ counsel for prosecuting the action and may pay his fees out of the recovery before distributing it.³

Among Whom the Distribution Is to Be Made must be determined from the statute, and, in the absence of a special provision in the statute creating the right of action, by the statute of distributions.⁴

Pro. Rep. (N. Y. City Ct.) 443, where it is held that although the statute provides that the recovery shall be exclusively for the benefit of the next of kin, yet it is nevertheless subject to the payment of the decedent's debts and the expenses of administration.

Under the Minnesota Statute, Gen. Laws, 1891, c. 123, § 1, providing that out of any money recovered by the personal representative for the wrongful death of the deceased, "any demand for the support of the deceased and funeral expenses, duly allowed by the Probate Court," shall first be paid, the damages recovered by the personal representative do not become subject to the general debts of deceased nor to debts incurred by him for the support of himself or family, but only to such debts as were contracted by him for his support, etc., after his injury. *State v. Probate Ct.*, 51 Minn. 241.

Under Texas Statute.—Money recovered for the benefit of the parent of one who has been killed by the defendant's negligence forms no part of the decedent's estate, and therefore can in no event be paid to his creditors or distributed generally to his heirs or distributees under the statutes of descent and distribution. Rev. Stat. of Tex., art. 1882, has no application to any matter not strictly and properly pertaining to decedent's estate. This construction of the statute is not affected by the fact that the law confers authority on the executor or administrator to prosecute the action for wrongful death, if suit be not brought within three months after the death by the parties first entitled to the benefit of the action. *Houston, etc., R. Co. v. Hook*, 60 Tex. 403.

1. Recovery to Be Distributed as Personal Assets of Decedent's Estate.—South, etc., *Alabama R. Co. v. Sullivan*, 59 Ala. 272; *Sherman v. Western Stage Co.*, 24 Iowa 515; *Ladd v. Foster*, 12 Sawy. (U. S.) 547, 31 Fed. Rep. 827 (construing Oregon statute).

In Virginia—Money Received in Compromise Settlement.—Under the *Virginia* statute, money received in compromise of a right of action for a wrongful death must, after payment of costs and counsel fees, be distributed according to the general statute of distributions. *Powell v. Powell*, 84 Va. 415.

2. See the titles EXECUTORS AND ADMINISTRATORS; FOREIGN EXECUTORS AND ADMINISTRATORS.

Administrator Held Liable for Wrongful Distribution.—An important case in this connection is *Perry v. Carmichael*, 95 Ill. 519, 1 Am. & Eng. R. Cas. 174. A Mrs. R., who was a resident citizen of Illinois, while traveling in Indiana, was killed in a railway accident. The Indiana statute required the administrator to bring the suit. P. was appointed in Illinois as administrator instead of R., the deceased's husband. He instituted suit and then compromised with the railway company for \$1,900, which he paid over to R.; R. having subsequently died, the heirs of Mrs. R. brought this suit against P. to compel him to pay to them their share of the \$1,900. It was held that they were entitled to recover their proportion; that the act of P. as administrator in paying over the whole amount to R. was illegal; he should have accounted for it as administrator and allowed the probate court to order its distribution.

3. See *Lee v. Van Voorhis*, 78 Hun (N. Y.) 575. In this case the statute expressly authorizes the personal representative to deduct the expenses of the action from the recovery.

4. Among Whom Distributed.—Under Rev. Stat. Wis., §§ 4255-56, the damages recoverable under section 4425 belong exclusively to the widow. *Gores v. Graff*, 77 Wis. 174.

Pennsylvania.—The original statute (Act of April 26, 1855) provided that the persons entitled to recover damages should be the husband, widow, children, or parents of deceased, the recovery to be distributed among them as if it were personal property left by intestate. Under this provision, the widow, upon receiving the amount awarded her in the action for the death of her husband, cannot retain the whole sum for the use of herself and family, but must distribute to the children their portion. *Allison v. Powers*, 179 Pa. St. 531, 39 W. N. C. (Pa.) 522.

Tennessee.—Under the original rule, the husband was entitled to all the damages recoverable for the death of his wife. *Trafford v. Adams Express Co.*, 8 Lea (Tenn.) 111; *Chattanooga Electric R. Co. v. Johnson*, 97

Specific Beneficiaries Named by the Statute.—When the statute vests the right of action in the administrator for the benefit of the widow or children or others, the damages recovered are not assets of the decedent's estate, to be distributed in the same manner as other personalty, but must go directly to the parties for whose benefit suit was brought.¹

DEBAR. (See also the title ATTORNEY AND CLIENT, vol. 3, p. 300.)—To debar is to cut off from entrance, to preclude; to hinder from approach, entry, or enjoyment; to shut out or exclude.²

DEBAUCH—DEBAUCHED. (See also the titles CRIMINAL CONVERSATION, *supra*; RAPE; SEDUCTION.)—See note 3.

Tenn. 667. But by Acts of 1897, c. 86, p. 231, the children are entitled to share equally with him.

The amendment of 1871 to T. & S. Tenn. Code, §§ 2291, 2292 (now M. & V. Code, §§ 3130, 3131), which gives a right of action to the widow, and, if there be no widow, to the children, or to the personal representative of the deceased, for the benefit of the widow and next of kin, does not affect the right of the children to share in the damages with the widow. *Felton v. Spiro*, 78 Fed. Rep. 576, 47 U. S. App. 402.

1. Statute Naming Beneficiaries—Damages to be Awarded Directly.—*Jeffersonville, etc., R. Co. v. Swayne*, 26 Ind. 477; *Baker v. Raleigh, etc., R. Co.*, 91 N. Car. 308.

Where the right to recover for the death of a minor child is given to the administrator for the benefit of the father, he is entitled to receive the entire recovery, and a payment of the amount to him will discharge the administrator. *Perry v. Carmichael*, 95 Ill. 519, 1 Am. & Eng. R. Cas. 183.

A recovery had under Gen. Stat. of Ky., c. 57, § 3, does not devolve by inheritance nor pass by a will. It must be distributed directly to the beneficiaries named in the statute. *Carrithers v. Cox*, (Ky. 1890) 14 S. W. Rep. 599.

Administrator Recovers as Trustee for Beneficiaries.—Under the *Kansas* statute (code, § 422), which vests the right of action in the administrator for the benefit of the widow and children or next of kin of the deceased, the damages recovered are not a part of the estate of the deceased, to be administered under the general law governing the administration of estates, but belong to the beneficiaries. The administrator sues, not for himself, but as trustee for the beneficiaries named. *Perry v. St. Joseph, etc., R. Co.*, 29 Kan. 420, 11 Am. & Eng. R. Cas. 663; *Union Pac. R. Co. v. Dunden*, 37 Kan. 1, 34 Am. & Eng. R. Cas. 88.

2. Webster's Dict., quoted in *Printup v. Alexander*, 69 Ga. 556.

3. "The word *debauched*, which in our ordinary dictionaries is defined 'enticed, led astray, vitiated, or corrupted,' has, especially when used as a legal word, a more extended signification. The verb 'to *debauch*' is a word of French origin, compounded of the preposition *de*, 'from,' and *bauche*, an old Armorican word in use in Brittany, meaning 'shop,' and signifying, in its compound sense, to entice or draw one away from his

work, employment, or duty. It is in this sense of enticing and corrupting that it came into use in our language, as will be found by a reference to one of the earliest authorities for the meaning of English words, Phillips's *New World of Words* (1696), where it is defined, 'to corrupt one's manners, to make lewd, to mar or spoil,'—a sense in which it had been previously used by Ben Jonson and by Shakespeare. Bailey, in his dictionary, some twenty years after, adds further, 'to seduce and vitiate a woman.' As applied to a woman, the word as thus defined meant merely seduction. But in the folio edition of Bailey by Scott (1755), the meaning of the word was extended to 'seduce and violate a woman.' It is in this twofold sense that it is used in the law form, which it has now fully acquired as a general word. Mackenzie, in his *English Synonyms* (London, 1854), defines it 'to ravish, deflower, violate;' and it is used in Worcester's Dictionary (Boston, 1847) as an appropriate definition for the word 'constuprate,' from the Latin *constupro*, meaning 'to violate.'" *Koenig v. Nott*, 8 Abb. Pr. (N. Y. C. Pl.) 389, 2 Hilt. (N. Y.) 329, where it was held upon demurrer that a complaint in an action by a female alleging "that the defendant, with force and arms, illtreated and made an assault upon her, and then and there *debauched* and carnally knew her," was a sufficient averment of an assault and battery.

Criminal Conversation.—In an action by a husband for damages for seducing and *debauching* his wife the gravamen of the action is criminal conversation, without proof of which he cannot recover. *Wood v. Mathews*, 47 Iowa 409. Here the court said: "Appellee insists, however, that the allegation in the petition that defendant *debauched* plaintiff's wife imports that he led her astray, corrupted her, corrupted her affections, her conscience, her judgment, and that by reason of that the plaintiff was injured; and that a wife may be *debauched*, and yet the crime of adultery be not committed. Such is not the sense in which the term *debauch* is employed in law, nor is such its usual and ordinary acceptance. The term is employed in our statute in connection with the crime of seduction. * * * Can a person be sent to the penitentiary five years for corrupting the affections, the conscience, and the judgment of an unmarried woman of previously chaste character? That such conduct would be very reprehensible, *in foro conscientia*, no one can doubt; but it belongs to a domain into which

penal statutes have not yet entered, and to one in which it is doubtful if they ever can profitably enter. Besides, if the word *debauch* here defines a wrong distinct from that of having carnal knowledge, the plaintiff has violated the rules of pleading by blending two distinct causes of action in one count."

Seduction.—An act of carnal intercourse with an unmarried woman, to which her assent was obtained by a promise of marriage made at the time, and to which without such promise she would not have yielded, constitutes the offense of "seducing and *debauching*" under a statute. *People v. Millspaugh*, 11 Mich. 278.

Same—Debauch and Seduce Distinguished.—In *State v. Reeves*, 97 Mo. 668, it is said: "There are two steps necessary to be taken in order to consummate the crime under discussion: First, the female must be seduced,—that is, corrupted, deceived, drawn aside from the path of virtue which she was pursuing; her affections must be gained, her mind and thoughts polluted; and, second, in order to complete the offense, she must be *debauched*—that is, she must be carnally known—before the guilty agent becomes amenable to

human laws. Thus, it will be seen that a female may be seduced without being *debauched*, or *debauched* without being seduced. If Joseph Andrews had yielded to the salacious solicitations of Lady Booby, as she lay naked in her bed, he would have been guilty of *debauching* her person, but certainly not of corrupting her mind. A similar view of the proper construction to be given to a statute substantially identical with our own was taken in Pennsylvania (*Com. v. McCarty*, 4 Pa. L. J. 136), and *cited with approval* in *State v. Patterson*, 88 Mo. 88." See also *Putnam v. State*, 29 Tex. App. 454; *State v. Wheeler*, 108 Mo. 662.

But, in *Stoudt v. Shepherd*, 73 Mich. 588, it was held that there was no substantial difference between seduce and *debauch* as a ground of action for loss of service.

Debauched Habits.—Evidence that a widow with a family of small children had taken into her house a profligate man who had abandoned his wife and children, and that she was living with him as his wife, and had had two illegitimate children by him, is sufficient to show that she was a woman of "*debauched habits*." *Wickwire's Appeal*, 30 Conn. 86.

DEBENTURES.

BY WILLIAM L. CLARK, JR.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles ASSIGNMENTS, vol. 2, p. 1007; BILLS OF SALE, vol. 4, p. 555; CHATTEL MORTGAGES, vol. 5, p. 945; CORPORATIONS (PRIVATE), vol. 7, p. 620; ESTOPPEL; FRAUDS (STATUTE OF); MORTGAGES; MUNICIPAL SECURITIES; OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS); PLEDGE AND COLLATERAL SECURITY; PROMOTERS; RAILROAD SECURITIES;

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TRUST DEEDS AND POWER OF SALE MORTGAGES; ULTRA
VIRES*

I. DEFINITION AND NATURE — 1. In England and Canada — Evidences of Debt Issued by Corporation. — It is chiefly in England that the term "debenture" is used. Even there, though it has been used for some time, it has never been clearly and fully defined either by statute or by the courts.¹ It is used in a broad sense as including any instrument issued by a corporation which creates or acknowledges a debt.² It is used in the same sense in Canada.³

Other Meanings of the Term. — The term is used in other senses,⁴ but it is only in the sense stated above that it is treated in this article.

Municipal and State Debentures. — Debentures issued by municipal corporations and by the state are treated in another part of this work.⁵

Debentures Creating Charge on Property of Company. — Generally debentures charge the undertaking, property, and effects of the company as security for the payment of the debt thereby created, and give the holders an equitable lien entitling them to priority in equity over general creditors. These are sometimes called mortgage debentures.⁶

1. See *British India Steam Nav. Co. v. Inland Revenue Com'rs*, 7 Q. B. Div. 165.

2. **Definition.** — "In my opinion," said Chitty, J., "a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a 'debenture.'" *Levy v. Abercorris Slate, etc., Co.*, 37 Ch. Div. 260, 58 L. T. 218, 57 L. J. Ch. 202. See also *British India Steam Nav. Co. v. Inland Revenue Com'rs*, 7 Q. B. Div. 165; *Edmonds v. Blaina Furnaces Co.*, 36 Ch. Div. 215. Compare *Topham v. Greenside Glazed Fire-Brick Co.*, 37 Ch. Div. 281, 58 L. T. 274, 57 L. J. Ch. 583.

"A debenture merely means an instrument which shows that the party owes and is bound to pay." *Per Sir R. Malins, V. C.*, in *In re Imperial Land Co.*, L. R. 11 Eq. 489.

That an Instrument Is Called a Debenture on Its Face does not necessarily make it so. *In re Imperial Land Co.*, L. R. 11 Eq. 478; *In re General Estates Co.*, L. R. 3 Ch. 758; *Edmonds v. Blaina Furnaces Co.*, L. R. 36 Ch. Div. 220.

Nor does the fact that it is not called a debenture prevent it from being so. *Edmonds v. Blaina Furnaces Co.*, 36 Ch. Div. 220; *Levy v. Abercorris Slate, etc., Co.*, 37 Ch. Div. 260, 58 L. T. 218, 57 L. J. Ch. 202; *In re Florence Land, etc., Co.*, 10 Ch. Div. 530.

In the case last cited a company issued instruments called "obligations" and "bonds." They were expressed to be made under a power conferred by the articles of association, which authorized the directors to borrow money by "bonds, debentures, or mortgage debentures," and bound "themselves, their successors, assigns, and all their estate, property, and effects." It was held that these instruments were debentures charging the property of the company.

The fact that the company issuing an instrument calls it a debenture is entitled to weight in determining its character. See *British India Steam Nav. Co. v. Inland Revenue Com'rs*, 7 Q. B. Div. 165.

3. **In Canada.** — See *Geddes v. Toronto St. R. Co.*, 14 U. C. C. P. 513; *Toronto Bank v. Cobourg, etc., R. Co.*, 7 Ont. Rep. 1; *Macfarlane*

v. St. Cesaire, 2 Montreal L. Rep. Q. B. 160, 9 Leg. N. (Quebec) 202.

4. **Certificate for Drawback of Duties.** — The term "debenture" is also applied to "a certificate given in pursuance of law by the collector of a port of entry, for a certain sum due by the United States, payable at a time therein mentioned, to an importer for drawback of duties on merchandise imported and exported by him, provided the duties arising on the importation of the said merchandise shall have been discharged prior to the time aforesaid." *Bouv. Law Dict.*, title Debenture. See the title *REVENUE LAWS*.

5. **Municipal Corporations and States.** — See the titles *MUNICIPAL SECURITIES; STATES*.

6. **Debentures Creating Charge.** — In *Edmonds v. Blaina Furnaces Co.*, 36 Ch. Div. 215, a memorandum of agreement between a company and several persons named in a schedule thereto, called the lenders, whereby the company covenanted to pay, on a day named, to each of the lenders, the sum advanced by him, with interest, and as security for the payment thereof charged all its undertaking, property, estate, and effects, was held by Chitty, J., to be a debenture within the meaning of the Bills of Sale Acts, excepting debentures from the requirement of registration. And see the cases cited in the note following.

Agreement to Give a Charge on Property. — An instrument creating or acknowledging a debt and promising to give a charge on the property of the company to secure its payment is a charge in equity, and may be a debenture. *Levy v. Abercorris Slate, etc., Co.*, 37 Ch. Div. 260, 57 L. J. Ch. 202, 58 L. T. 218; *Ross v. Army, etc., Hotel Co.*, 34 Ch. Div. 43. Compare *Topham v. Greenside Glazed Fire-Brick Co.*, 37 Ch. Div. 281, 58 L. T. 274, 57 L. J. Ch. 583.

Covering Deed to Secure Debentures. — It seems that a covering deed to secure debentures which contains a covenant to pay, and a charge on the personal property of the company, is a debenture. It is not a bill of sale within the Bills of Sale Acts. *Richards v. Kidderminster*, 65 L. J. Ch. 502, (1896) 2 Ch. 212, 74 L. T. 483, 44 W. R. 505.

Mere Floating Securities. — Such debentures, charging generally the undertaking and assets of the company with payment of the debt, are called "floating securities." They are merely a charge upon the assets of the company for the time being, and leave the company at liberty to carry on its business and deal with its property as it sees fit until stopped either by the appointment of a receiver or a winding up.¹

Corporate Seal. — Debentures may be, and perhaps generally are, under the corporate seal, in which case they are called debenture bonds.² But an instrument need not be under seal to be a debenture. It may be a simple acknowledgment or promise to pay, like a promissory note,³ unless the contract be one for which the law requires a seal.⁴

Debentures Not Charging Property. — Nor, though such is generally the case, need a debenture create any charge on the property of the company. It may simply create or acknowledge a debt.⁵

Necessity for Acknowledgment of Debt. — The term "debenture" always imports the acknowledgment of a debt, and generally, if not always, a covenant or agreement to pay. Without this an instrument is not a debenture.⁶

Distinguished from Mortgage. — "Debentures, strictly so called, differ from mortgages in not conferring upon the grantees the legal title, or any of the ordinary rights of ownership of the property upon which a charge is created. They are at most only equitable mortgages. The charge they create upon the property of the company confers only equitable rights, either as against other creditors or as against the corporation, and in fact the true test whether an instrument is a debenture or mortgage is found in the inquiry whether the holder has any legal right to interfere with the company's use or control of the property in whatever way it pleases. If the instrument confers a charge which can be protected and enforced only in equity, it is strictly a debenture." Jones's Corp. Bonds and Mort., § 32.

Power of Sale. — That the Conveyancing and Law of Property Act, 1881, conferring on a mortgagee, where the mortgage is by deed, a power of sale, does not apply to the debentures of a joint-stock company, see *Blaker v. Herts, etc., Waterworks Co.*, 41 Ch. Div. 399, 58 L. J. Ch. 497, 60 L. T. 776, 37 W. R. 601.

As to the Rights of Holders of debentures to priority over general creditors, see *infra*, this title, *Rights and Liabilities of Holders — Lien or Charge*.

1. Are Mere "Floating Securities." — *In re Florence Land, etc., Co.*, 10 Ch. Div. 530; *In re Colonial Trusts Corp.*, 15 Ch. Div. 465; *In re Panama, etc., Mail Co.*, L. R. 5 Ch. 318; *In re Marine Mansions Co.*, L. R. 4 Eq. 601; *In re General South American Co.*, 2 Ch. Div. 337; *In re Hamilton's Windsor Ironworks*, 12 Ch. Div. 707. See *infra*, this title, *Rights and Liabilities of Holders — Lien or Charge*.

2. Sealed Instruments. — See *In re Colonial Trusts Corp.*, 15 Ch. Div. 465; *In re General South American Co.*, 2 Ch. Div. 337.

3. Instruments Not under Seal. — See *British India Steam Nav. Co. v. Inland Revenue Com'rs*, 7 Q. B. Div. 165.

An instrument is none the less a promissory note because it is called a debenture. *Per Sir R. Malins, V. C.*, in *In re Imperial Land Co.*, L. R. 11 Eq. 489. And see *In re General Estates Co.*, L. R. 3 Ch. 758.

4. See the title *CORPORATIONS*, vol. 7, p. 620.

5. Debentures Not Creating Charge. — See *In re Imperial Land Co.*, L. R. 11 Eq. 478; *In re General Estates Co.*, L. R. 3 Ch. 758.

In British India Steam Nav. Co. v. Inland Revenue Com'rs, 7 Q. B. Div. 165, the question was whether an instrument was chargeable under the stamp act with a debenture stamp or a promissory note stamp. The act required a different stamp for each, but did not define the term "debenture." The instrument, after giving the name of the company issuing it, the date of incorporation, and information as to its capital, was in these words: "The British India Steam Navigation Company, Limited, will, on the 30th day of November, 1882, pay £100, the amount of this debenture, to Mr. P. W. Armour, or order, at the City Bank, London, or at the registered office of the company." Following this was a similar promise to pay interest on presentation of annexed coupons. The court held that this was a debenture within the stamp act, though in the form of a promissory note.

6. Acknowledgment of Debt. — *In Topham v. Greenside Glazed Fire-Brick Co.*, 37 Ch. Div. 281, 58 L. T. 274, 57 L. J. Ch. 583, a brick-making company had deposited its title deeds to certain real property with its bankers, with a memorandum stating that the deposit was made to secure to them "payment of all sums of money which we are now, or at any time hereafter may be, indebted to you, whether on current account for principal, interest, commission, and charges, or on any other account whatsoever. * * * And in consideration of the advances now made to us, and of our account being continued, we * * * undertake to execute, when thereunto requested, a proper mortgage, with immediate power of sale, or such further security as may be necessary for the purpose of effectually transferring to any person or persons whom you may designate for that purpose the legal estate in the property to which this security relates." The memorandum did not contain any acknowledgment of a specific debt, nor any covenant or agreement by the company to pay, except in so far as the same was implied in the agreement to execute a legal mortgage of the prop-

Separate and Single Debentures.— Usually debentures are issued serially as separate documents, like bonds and certificates of stock, but they need not be so. A debenture may consist of a single instrument covenanting or promising to pay to each of a number of persons.¹

Debenture Stock.— The English Companies Clauses Act and other acts provide for the issue of debenture stock. This differs from pure debentures, and is not a debenture at all. It is a preferred stock, entitling the holder to a fixed and perpetual preferential interest payable out of the earnings of the company. Except as to this there is no debt. The capital cannot be called in nor paid off.²

2. In the United States.— The term "debenture" as applied to securities issued by a corporation is comparatively new in the United States, and is not met with as often as in England. In late years, however, securities called debentures have come into use. These are instruments in the form of a note or bond, issued generally as a series, reciting on their face that they are secured by bonds, mortgages, or other securities deposited with trustees. They have been issued in large amounts by loan and investment companies and by railroad companies. They are in effect bonds or notes secured by a pledge of bonds or other securities as collateral.³

II. ISSUE OF DEBENTURES — 1. Power of Company to Issue — a. IN GENERAL.— Power to issue debentures is frequently expressly conferred upon companies, but this is not necessary. In the absence of express restriction, any company having the power to borrow money, or otherwise create a debt, has the implied power to issue its debentures therefor. And any company having the power to mortgage or charge its property to secure the payment of money borrowed or a debt otherwise contracted may issue debentures constituting a charge on its property.⁴

erty. It was held by North, J., that the instrument was not a debenture within the meaning of the Bills of Sale Acts. The instrument, it was said, contained no acknowledgment of or agreement to pay any specific debt.

1. Single Document.— "No doubt as a rule," said Chitty, J., in *Edmonds v. Blaina Furnaces Co.*, 36 Ch. Div. 221, "the instruments called debentures are issued so that each person gets his own document and can deal with it separately. He has greater facility of dealing with it in the market than is afforded by this instrument, but it would be unreasonable to hold that because the obligation to pay and the security in favor of several persons is contained in one single document, therefore the instrument is not within the protection of the section. There would not be any principle in doing that. I do not see why a single debenture should not be given to half a dozen persons and still be a good debenture within the act." See the form of the instrument in this case given in a preceding note under this section. See also *Levy v. Abercorris Slate, etc., Co.*, 37 Ch. Div. 260, 58 L. T. 218, 57 L. J. Ch. 202.

2. Debenture Stock.— See *Attree v. Hawe*, 9 Ch. Div. 337. See the titles STOCK; STOCK-HOLDERS.

3. Debentures in the United States.— See *Ward v. Johnson*, 95 Ill. 215, where a savings bank established an investment department and issued certificates to depositors secured by notes, etc., deposited in the hands of a trustee. See also *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) 414, where bonds issued by a canal company pledging the real and personal property of the company with

payment of the debt and interest were treated in equity as a mortgage.

Bonds to a large amount called debentures have in late years been issued by loan and mortgage companies in the United States. They have been secured by depositing with trustees bonds and mortgages taken by the companies for loans made by them in the course of their business. Like the English debenture, the security is a "floating" one, for the bonds and mortgages in the hands of the trustees may be paid off, or sold by the company, and others substituted.

Receivers' Certificates.— The term "debentures" is also applied in the United States to certificates of indebtedness issued by receivers of railroad companies for debts incurred in operating, maintaining, and repairing the road while under their management. 2 *Spelling Corp.*, § 883. See the title RECEIVERS OF RAILROADS.

4. Power to Issue in General — England.— *In re General South American Co.*, 2 Ch. Div. 337; *In re Marine Mansions Co.*, L. R. 4 Eq. 601; *In re Inns of Court Hotel Co.*, L. R. 6 Eq. 82; *In re Anglo-Danubian Steam Nav., etc., Co.*, L. R. 20 Eq. 339, 44 L. J. Ch. 502, 33 L. T. 118, 23 W. R. 783.

Canada.— See *Geddes v. Toronto St. R. Co.*, 14 U. C. C. P. 513; *Toronto Bank v. Cobourg, etc., R. Co.*, 7 Ont. Rep. 1.

See the title CORPORATIONS, vol. 7, p. 620.

Issue to Promoters.— When a person forms a company to carry on a business previously owned and conducted by himself, and sells the business to the company when formed, the company may issue to him in payment its

Issue at a Discount. — In the absence of express restriction debentures may be issued at a discount.¹

Pledge as Collateral Security. — And they may be pledged as collateral, without regard to provisions as to the amount for which they may be issued.²

b. PROPERTY THAT MAY BE CHARGED. — Debentures may, in the absence of restriction, charge not only property in existence at the time of issue, but also property to be afterwards acquired,³ including book accounts and other debts to accrue afterwards.⁴

Power to Charge Unpaid Capital. — They cannot charge unpaid capital unless there is express authority to do so, and such authority is not included in a power to charge the "property" or the "funds" of the company.⁵ Such authority, however, may be conferred.⁶

c. CHARTER OR STATUTORY RESTRICTIONS. — A company may, under some circumstances, be held liable on debentures issued in violation of express or implied charter or statutory restrictions.⁷ But such an issue is always *ultra vires*, and in the absence of special circumstances it is void.⁸

Limitation as to Amount. — Thus a company has no right to issue debentures

debentures secured by a charge on the business; and the fact that he is virtually the sole owner of the concern, the other shareholders having only a nominal interest, and being members of his family, does not affect his rights as against unsecured creditors. *Salomon v. Salomon*, 65 L. J. Ch. 35, (1897) App. 22, 75 L. T. 426, 45 W. R. 193, 4 Manson 89. See the title PROMOTERS.

Issue to Pay Debts. — Under a general power to borrow money, debentures may be issued in discharge, wholly or in part, of existing debts. *In re Inns of Court Hotel Co.*, L. R. 6 Eq. 82.

Negotiable Instruments. — As to the power to issue negotiable instruments, see the title CORPORATIONS, vol. 7, p. 620.

As to the negotiability of debentures, see *infra*, this title, *Rights and Liabilities of Holders — Assignment and Transfer*.

Defense of Ultra Vires. — See *infra*, this title, *Rights and Liabilities of Holders*. And see the title ULTRA VIRES.

1. Issue of Debentures at a Discount. — *In re Compagnie Générale de Bellegarde*, 4 Ch. Div. 470; *In re Anglo-Danubian Steam Nav.*, etc., Co., L. R. 20 Eq. 339, 44 L. J. Ch. 502, 33 L. T. 118, 23 W. R. 783; *Webb v. Shropshire R. Co.*, 7 Reports 231, (1893) 3 Ch. 307, 63 L. J. Ch. 80, 69 L. T. 533.

As to issue of bonds at a discount, see the title CORPORATIONS, vol. 7, p. 620.

2. Pledge as Collateral Security. — That unissued debentures may be pledged as collateral security for money advanced, though the amount advanced is less than the amount for which the company could sell them under the powers conferred upon it, see *In re Regent's Canal Ironworks Co.*, 3 Ch. Div. 43. In this case the directors of a company were empowered to issue one hundred mortgage debentures at £95 for £100. Sixty of these debentures were duly taken up, and the other forty were afterwards pledged by the directors by way of collateral security for an advance of money. It was held that the pledge was not *ultra vires*, and that the mortgagees would receive dividends on the whole amount expressed to be secured by their debentures,

pari passu with the holders of the other sixty debentures.

3. Property Subject to Charge — After-acquired Property — *In re Panama*, etc., Mail Co., L. R. 5 Ch. 318; *In re Colonial Trusts Corp.*, 15 Ch. Div. 465; *In re Dublin Drapery Co.*, 13 L. R. Ir. 174. And see *infra*, this title, *Rights and Liabilities of Holders — Extent of Charge*.

4. Book Accounts Not Accrued. — *Bloomer v. Union Coal*, etc., Co., L. R. 16 Eq. 383.

5. Unpaid Capital. — Thus in South Australia *Bank v. Abrahams*, L. R. 6 P. C. 265, 44 L. J. P. C. 76, 23 W. R. 668, 32 L. T. 277, it was held that a power in a deed of settlement of a company authorizing the directors to mortgage or charge the property of the company did not authorize them to include in the mortgage or charge future calls, or, in other words, unpaid capital, as unpaid capital was not property of the company.

And in Matter of Joint-Stock Companies Winding-up Acts, 4 DeG. J. & S. 407, it was held that authority to charge unpaid capital was not included in a power to charge the "property and funds" of the company.

See also *In re Colonial Trusts Corp.*, 15 Ch. Div. 465. And see *infra*, this title, *Rights and Liabilities of Holders — Extent of Charge*; and the title CORPORATIONS, vol. 7, p. 620.

6. In re Colonial, etc., Gas Co., 23 L. T. 759, 19 W. R. 344. In this case it was held to be included in authority to raise money in such manner as the directors should deem best. See also *In re Opera*, (1891) 3 Ch. 260, 60 L. J. Ch. 839, 65 L. T. 371, 39 W. R. 705; *In re Streatham*, etc., Co., (1897) 1 Ch. 15, 66 L. J. Ch. 57, 75 L. T. 574, 45 W. R. 105; *Page v. International Agency*, etc., Trust, 3 Reports 596, 62 L. J. Ch. 610, 68 L. T. 435.

7. Express Prohibition or Restriction. — *Royal British Bank v. Turquand*, 6 El. & Bl. 327, 33 E. C. L. 327; *Agar v. Athenæum L. Assur. Soc.*, 3 C. B. N. S. 725, 91 E. C. L. 725; *Webb v. Herne Bay*, L. R. 5 Q. B. 642. And see the title ULTRA VIRES.

8. Fountaine v. Carmarthen R. Co., L. R. 5 Eq. 316; *West Cornwall R. Co. v. Mowatt*, 12 Jur. 407. See also, on this question, the title CORPORATIONS, vol. 7, p. 620.

in excess of a limit prescribed by its charter or articles, and if it is authorized to issue them to a certain amount this is an implied limitation.¹

Limitation as to Indebtedness. — Nor can it lawfully issue debentures which will increase its indebtedness beyond the limit fixed by its charter or articles.²

Requirements as to Subscription or Payment of Capital before borrowing money and issuing debentures must be observed.³

Issue for Ultra Vires Purpose. — Since a corporation has such powers only as are expressly conferred upon it and such as are reasonably necessary to carry those powers into effect, it cannot issue debentures for a purpose foreign to the objects for which it was created.⁴

2. Agreement to Issue. — An agreement to issue debentures constituting a charge on the property and undertaking of the company will be treated in equity as a charge, though the debentures are not issued.⁵

Agreement to Issue When Authorized. — An agreement to issue debentures when the company shall be authorized is valid, though there is no authority to issue them when the agreement is made.⁶ And, of course, debentures issued when authorized, in performance of such an agreement, are valid.⁷

3. Authority of Officers. — With respect to the authority of the officers of a company issuing debentures, the principles of law are the same as in the case of any other contract and charge.⁸ Debentures, to bind the company, must be issued by officers having authority, express or implied, and the officers must act within the scope of their authority.⁹

1. Limitation as to Amount. — *Fountainne v. Carmarthen R. Co.*, L. R. 5 Eq. 316.

In *England* it is held that debentures issued by a corporation in excess of the amount authorized by its charter are void. *Fountainne v. Carmarthen R. Co.*, L. R. 5 Eq. 316.

Perhaps in the *United States* most of the courts would hold otherwise, for the prevailing doctrine there is, in effect, that the doctrine of *ultra vires* cannot be interposed by a corporation, to escape liability on a contract, after having had the benefit of the consideration. See the title *ULTRA VIRES*.

A statute limiting the amount of debentures which a corporation may issue is not violated by issuing new debentures in the place of old ones that have been paid, the unpaid old ones and the new ones not being together in excess of the statutory limit. *Fountainne v. Carmarthen R. Co.*, L. R. 5 Eq. 316.

2. Limitation as to Indebtedness. — It has been held in *England* that debentures issued at a time when the liabilities of the company exceed the limit fixed by its charter or articles of association are absolutely void. *In re Pooley Hall Colliery Co.*, 18 W. R. 201, 21 L. T. N. S. 690.

There can be no doubt that they are *ultra vires*, but whether they are void is another question. Some courts hold that bonds and other evidences of debt so issued are not absolutely void. See the titles *CORPORATIONS*, vol. 7, p. 620; *ULTRA VIRES*.

3. Payment of Capital. — In *England* it seems that if there is a prohibition against issuing debentures before the whole or a certain percentage of the capital has been subscribed or paid, debentures issued before then are void. See *Chambers v. Manchester, etc.*, R. Co., 5 B. & S. 588, 117 E. C. L. 588. On this point see generally the titles *CORPORATIONS*, vol. 7, p. 620; *ULTRA VIRES*.

4. See the title *CORPORATIONS*, vol. 7, p. 620.

5. Agreement to Issue. — *Levy v. Abercorris*

Slate, etc., Co., 37 Ch. Div. 260, 57 L. J. Ch. 202, 58 L. T. 218; *In re New Durham Salt Co.*, 2 Meg. 360. See *infra*, this title, *Rights and Liabilities of Holders*.

6. Agreement to Issue When Authorized. — That an agreement by a company to deliver debentures as soon as it shall be in a position to do so legally is not invalid, see *West Cornwall R. Co. v. Mowatt*, 15 Q. B. 521, 69 E. C. L. 521, 15 Jur. 101.

7. Issue under Prior Agreement. — In *In re Bagnalstown, etc.*, R. Co., 4 Ir. R. Eq. 505, the B. railway company, which was not authorized to borrow money until a certain portion of its line should be open for traffic, entered into an agreement with another railway company, that if the latter would advance it money to enable it to complete that portion of the line, it would, when its borrowing powers should arise, issue to the other company a sufficient amount of debentures to repay the sum which should be so advanced. In pursuance of the agreement, the other company paid the contractor's accounts, from time to time, until the portion of the line required to be opened for traffic before the B. company should be authorized to borrow was completed. The B. company afterwards issued and delivered its debentures as agreed to secure that advance. It was held that there was nothing illegal in the contract, and that the debentures were valid to the extent of the sum actually advanced.

Issue in Pursuance of Agreement by Promoters. — In *Howard v. Patent Ivory Mfg. Co.*, 38 Ch. Div. 156, a company was held bound by debentures issued by it in pursuance of arrangements made before it was formed.

8. Authority of Officers. — See the title *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*.

9. *Mowatt v. Castle Steel, etc., Co.*, 34 Ch. Div. 58; *Fountainne v. Carmarthen R. Co.*, L. R. 5 Eq. 316.

As to the formation of a company to pur-

If Consent of the Shareholders is required by the charter or articles of association as a condition precedent, it must be duly given.¹

4. Execution and Delivery. — Debentures must be regularly executed and regularly issued before they can be binding upon the company. They must be properly executed and sealed when a seal is necessary.² And they must be delivered.³

Charter and Statutory Requirements. — In issuing debentures the corporation must comply with all charter or statutory requirements. Failure to do so will ordinarily render the debentures void,⁴ unless there are elements of estoppel, or they have passed into the hands of *bona fide* purchasers for value.⁵

5. Requirement of Registration. — The English Bills of Sale Act, requiring bills of sale and chattel mortgages to be registered, expressly excepts debentures.⁶ These, however, are required by the Companies Act to be entered in

chase a business, and the issue of debentures to creditors of the vendor, see *Seligman v. Prince*, (1895) 2 Ch. 617, 64 L. J. Ch. 745, 73 L. T. 124, 44 W. R. 6, 2 Manson 586, 12 Reports 529.

Personal Liability of Directors. — Directors of a corporation who issue debentures when the borrowing powers of the company have been exhausted may be personally liable on the theory of a warranty of power to issue them. *Weeks v. Propert*, L. R. 8 C. P. 427, 42 L. J. C. P. 129, 21 W. R. 676; *Fairbank v. Humphreys*, 18 Q. B. Div. 54, 56 L. J. Q. B. 57, 56 L. T. 36, 35 W. R. 92.

1. Consent of Shareholders. — In *England* it has been held that, when consent of shareholders is required by statute, debentures issued without such consent are void. *Fountaine v. Carmarthen R. Co.*, L. R. 5 Eq. 316.

But the weight of authority is the other way in so far as *bona fide* holders are concerned. *Royal British Bank v. Turquand*, 6 El. & Bl. 327, 88 E. C. L. 327; *Agar v. Athenæum L. Assur. Soc.*, 3 C. B. N. S. 725, 91 E. C. L. 725.

And see *Landowners West of England, etc., v. Ashford*, 16 Ch. Div. 411.

Persons who take debentures with knowledge of the irregularity in their issue cannot recover on them. *In re Magdalena Steam Nav. Co.*, Johns. 690, 6 Jur. N. S. 975. See the titles CORPORATIONS, vol. 7, p. 620; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; ULTRA VIRES.

2. Execution. — See the titles BONDS, vol. 4, p. 618; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Seal. — See the titles CORPORATIONS, vol. 7, p. 620; SEAL.

Execution and Delivery in Blank. — In *England* it is held that a bond is void if delivered with a blank for the name of the payee, and that the person to whom it is delivered or the holder cannot render it valid by afterwards filling in the blanks, either upon an implied or express parol authority from the obligor, and this rule of course must apply to debenture bonds issued by corporations. *Enthoven v. Hoyle*, 13 C. B. 373, 76 E. C. L. 373. See also *Hibblewhite v. M'Morine*, 6 M. & W. 200.

In *Canada* the doctrine seems to be otherwise. *Toronto Bank v. Cobourg, etc.*, R. Co., 7 Ont. Rep. 1.

In the *United States* some of the courts follow the English doctrine. See *Edelin v. Sanders*, 8 Md. 118; *Wynne v. Governor*, 1 Yerg. (Tenn.) 149, 24 Am. Dec. 448.

Other courts follow an earlier English decision by Lord Mansfield (*Texira v. Evans*, cited in 1 Anstr. 228), and hold that when a bond is issued in blank, with the intention that it shall pass from hand to hand by delivery, the holder may fill the blank and make the bond payable to himself or his order, either on express or implied parol authority. *White v. Vermont, etc.*, R. Co., 21 How. (U. S.) 575.

Further on This Point, see the title BONDS, vol. 4, p. 642.

Payable to Bearer. — Debentures need not be made payable to any particular person or corporation, but may be made payable to the bearer or holder. *Geddes v. Toronto St. R. Co.*, 14 U. C. C. P. 513. And see *infra*, this title, *Rights and Liabilities of Holders — Assignment and Transfer*.

3. Delivery. — In *Mowatt v. Castle Steel, etc., Co.*, 34 Ch. Div. 58, the directors of a company directed the secretary to arrange for the issue of debentures to pay advances made to the company. They were accordingly prepared, being made payable to bearer, and sealed and stamped, and were placed in a box, the key of which was kept by the secretary. The box was deposited in the office of the company, which was also the office of T., one of the directors, who had made large advances to the company. Some of the debentures were given out by the secretary to an agent for him to issue them to the public, which he did not succeed in doing. After the commencement of a winding up of the company the agent returned the debentures to T., and he gave some of them to his own creditors, who took them in the belief that they had been regularly issued. It was held that the debentures had not been issued before the commencement of the winding up, and that the other debenture holders of the company were not estopped from disputing their validity. Whether the company would have been estopped was not decided.

As to estoppel of the company to deny authority on the part of its officers and agents, see the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

4. Consent of Stockholders. — See *supra*, this section, *Authority of Officers*.

5. See *infra*, this title, *Rights and Liabilities of Holders — Negotiability of Debentures; Estoppel of Company*.

6. Exception in Bills of Sale Act. — See *Edmonds v. Blaina Furnaces Co.*, 36 Ch. Div. 215; *In re Asphaltic Wood Pavement Co.*, 49 L. T. 159, 32 W. R. 16; *Levy v. Abercorris Slate,*

a register to be kept by the company issuing them, and a penalty is imposed upon the directors if they knowingly and wilfully fail to register them.¹

Effect of Failure to Register. — Failure of the company to register debentures as required by the act does not affect the rights of innocent holders who are not officers.² But it is otherwise with debentures held by officers who have knowingly and wilfully failed to have them registered. They can claim no priority over general creditors.³

III. RIGHTS AND LIABILITIES OF HOLDERS — **1. Status as Creditors and Not Stockholders.** — Persons who lend money to a corporation and take its debentures therefor, or who purchase its debentures, are in the position of creditors of the company, and not in the position of stockholders, and they assume no liability to other creditors.⁴

Subscribers for Debentures. — And persons who subscribe for debentures to be issued, or agree to lend money to a corporation and receive debentures therefor, are not in a position analogous to that of subscribers to stock so as to be liable to creditors of the corporation for the amount unpaid on such agreement, nor, when the debentures have not been issued to them, are they liable to creditors as debtors of the corporation.⁵

etc., Co., 37 Ch. Div. 260, 58 L. T. 218, 57 L. J. Ch. 202; *In re Standard Mfg. Co.*, (1891) 1 Ch. 627, 60 L. J. Ch. 292, 64 L. T. 487, 39 W. R. 369, 2 Meg. 418, *approving and following* *Read v. Joannon*, 25 Q. B. Div. 300, and *overruling* *Jenkinson v. Bradley Min. Co.*, 19 Q. B. Div. 568.

The exception in the Bills of Sale Act, 1882, applies to the debentures of any incorporated company. *In re Standard Mfg. Co.*, (1891) 1 Ch. 627, 60 L. J. Ch. 292, 64 L. T. 487, 39 W. R. 369, 2 Meg. 418.

1. Registration by Company. — Debentures payable to bearer which are taken in trust for directors are properly registered in the names of the persons to whom they are issued. *In re Dublin Drapery Co.*, 13 L. R. Ir. 174.

If debentures transferable by delivery have been properly registered in the names of the persons to whom they were originally issued, subsequent transfers of them need not be registered; and it seems that the same rule applies to all debentures, whether transferable by delivery or otherwise. *In re Dublin Drapery Co.*, 13 L. R. Ir. 174.

2. Failure to Register in General. — In *In re General South American Co.*, 2 Ch. Div. 337, it was held that the right of debenture holders, not being directors or officers of the company, to priority over general creditors, was not affected by imperfections and omissions in the register of debentures kept by the company. See also *In re General Provident Assur. Co.*, L. R. 14 Eq. 507.

3. Debentures Held by Officers. — *In re Patent Bread Machinery Co.*, L. R. 7 Ch. 289; *In re Wynn Hall Coal Co.*, L. R. 10 Eq. 515; *In re Native Iron Ore Co.*, 2 Ch. Div. 345; *In re Dublin Drapery Co.*, 13 L. R. Ir. 174.

In re Native Iron Ore Co., 2 Ch. Div. 345, the directors of a company advanced money to the company and took as security a debenture, giving a general charge on the undertaking. The debenture was registered, but as the register contained no description of any property as charged, as was required by the statute, it was held that it was invalid as against creditors of the company. *Compare In*

re Globe New Patent Iron, etc., Co., 48 L. J. Ch. 295.

Debentures Held by Partnership. — In *In re South Durham Iron Co.*, 11 Ch. Div. 579, it was held that the rule established in *In re Native Iron Ore Co.*, 2 Ch. Div. 345 (*supra*, this note), did not apply to a case where a mortgage not registered as required by the statute was made to partners, only a part of whom were directors of the company.

Solicitors of a Company who in the performance of their duty have procured a proper register to be made out, but who have no power or authority to make or compel entries in it, are not responsible for non-registration of debentures held by them, nor subject to any equities arising therefrom. *In re Dublin Drapery Co.*, 13 L. R. Ir. 174.

4. Holders Are Creditors. — *Pettibone v. Toledo, etc., R. Co.*, 148 Mass. 411.

5. Subscribers for Debentures Not in Position of Subscribers to Stock. — In *Pettibone v. Toledo, etc., R. Co.*, 148 Mass. 411, a number of railroad mortgage bond holders agreed with the railroad company to lend it money to enable it to pay its debts and complete its road, and to pay the same in specified instalments, and to receive therefor debenture bonds of the company. Partly after and partly before this agreement was made the plaintiffs furnished materials to the company, for which it became indebted to them, and they filed a bill in equity against the company to compel payment to the company by the latter under their agreement, and to reach the moneys so to be paid for the satisfaction of their debts, on the theory that the agreement of the bondholders placed them in a position analogous to that of subscribers for stock, and that they could be compelled in equity to pay the amount due under the agreement as a trust fund for creditors of the corporation. The court held, however, that the position of the bondholders was not analogous to that of subscribers to stock so as to make them liable to creditors of the corporation, but that the agreement was simply one for a loan of money to the corporation, which, when executed, would make them creditors

2. Whether Debentures Give an Interest in Land. — Though there has been some conflict of opinion, by the weight of authority debentures issued by a company owning real property, charging the undertaking with the payment of the debt, are personal property and give the holder no interest in the land owned by the company.¹

3. Lien or Charge — *a.* **IN GENERAL.** — As has been stated, debentures generally, though not necessarily,² give the holders a charge or lien in equity on the property of the company. When they purport to charge the undertaking and property of the company, they are in the nature of equitable mortgages. They do not prevent the company from dealing as it sees fit with the property charged, so long as it is a going concern, and no suit has been brought by the holders, on default, to enforce their rights. But when there has been a default by the company and suit has been brought, or it is being wound up, the debenture holders have a priority in equity over general creditors.³

and entitled to share equally with the other creditors.

No Trust for Creditors. — Nor does such an agreement create a trust in favor of creditors of the corporation who furnish it supplies. *Pettibone v. Toledo, etc., R. Co.,* 148 Mass. 411.

No Liability in Equity as Debtors. — Nor does it, while it is executory, create a debt due the corporation from the subscribers, which the creditors of the corporation can reach under a statute giving a remedy in equity to reach and apply in payment of debts "any property, right, title, or interest, legal or equitable," of the debtor. In the case of *Pettibone v. Toledo, etc., R. Co.,* 148 Mass. 411, referred to above in this note, the plaintiffs also contended that there was a debt due from the subscribers to the corporation which could be thus reached under Pub. Stat. *Massachusetts*, c. 151, § 2, cl. 11, giving a remedy in equity to reach and apply in payment of debts "any property, right, title, or interest, legal or equitable," of the debtor. It was held, however, that the executory agreement of the subscribers was not assignable, and that the statute did not cover choses in action which from their nature could not be assigned by the debtor.

Remedy of Company. — On breach of an agreement to take debentures the remedy of the company is for breach of the contract, and the measure of damages is the loss sustained by the company. An action will not lie for the money agreed to be lent. *South African Territories v. Wallington,* 66 L. J. Q. B. 551, (1897) 1 Q. B. 692, 76 L. T. 520, 45 W. R. 467.

1. Ejectment by Debenture Holder. — The holder of a debenture issued by a corporation owning land, charging the undertaking and property of the company with payment of the debt, does not give him an interest in the land of the company so as to entitle him to maintain ejectment therefor. See *Doe v. St. Helen's, etc., R. Co.,* 2 Q. B. 364, 42 E. C. L. 715.

Right to Sale Money, Rents, and Appointment of Receiver. — A mortgage debenture issued by a railroad company does not give the holder a specific charge on the surplus lands of the company, or the proceeds of a sale of them, so as to entitle him to an order for a receiver of the sale money or interim rents. *Gardner v. London, etc., R. Co.,* L. R. 2 Ch. 201. See

also *Wickham v. New Brunswick, etc., R. Co.,* L. R. 1 P. C. 64, 12 Jur. N. S. 34, 14 L. T. 311.

Mortmain Act. — Though there has been a conflict of opinion among the judges, it may no doubt now be regarded as settled that a debenture charging the undertaking of a company owning land, as a railroad company, waterworks company, etc., does not give the holder an interest in land so as to come within the statutes of mortmain. *Holdsworth v. Davenport,* 3 Ch. Div. 185; *In re Mitchell's Estate,* 6 Ch. Div. 655; *Myers v. Perigal,* 16 Sim. 533; *Walker v. Milne,* 11 Beav. 507. And see *Attree v. Hawe,* 9 Ch. Div. 337, in which, though the point was not decided, it seems to have been considered that debentures are not an interest in land within the mortmain act. See *contra, Ashton v. Langdale,* 4 DeG. & Sm. 402. See also *Chandler v. Howell,* 4 Ch. Div. 651.

Debenture Stock. — That debenture stock created in England under the company clauses act does not give the holder an interest in land within the mortmain act so as to prevent a bequest of it by will for charitable purposes, see *Attree v. Hawe,* 9 Ch. Div. 337. See the titles STOCK; STOCKHOLDERS.

Statute of Frauds. — In *Driver v. Broad,* 4 Reports 411, (1893) 1 Q. B. 744, 63 L. J. Q. B. 12, 69 L. T. 169, 41 W. R. 483, it was held that the sale of debentures creating a floating charge on property of the company, consisting in part of leaseholds, was a contract for a sale of an interest in land within the statute of frauds, but this is doubtful. See the cases cited *supra* in this note; and see the title FRAUDS, STATUTE OF.

2. See *supra*, this title, *Definition and Nature.*

3. Charge on Property in General. — *In re General South American Co.,* 2 Ch. Div. 337; *In re Florence Land, etc., Co.,* 10 Ch. Div. 530; *In re Panama, etc., Mail Co.,* L. R. 5 Ch. 318; *In re Marine Mansions Co.,* L. R. 4 Eq. 601; *In re Colonial Trusts Corp.,* 15 Ch. Div. 465; *Ross v. Army, etc., Hotel Co.,* 34 Ch. Div. 43; *In re Regent's Canal Ironworks Co.,* 3 Ch. Div. 411; *In re Hamilton's Windsor Ironworks,* 12 Ch. Div. 707; *Moor v. Anglo-Italian Bank* 10 Ch. Div. 681; *In re Colonial, etc., Gas Co.,* 23 L. T. 759, 19 W. R. 344; *In re Asphaltic Wood Pavement Co.,* 49 L. T. 159, 32 W. R. 16; *In re Dublin Drapery Co.,* 13 L. R. Ir. 174;

b. MORTGAGE OR PLEDGE NOTWITHSTANDING DEBENTURES. — It follows that outstanding debentures do not prevent the company from mortgaging or pledging its property in the course of its business,¹ unless, as is sometimes the case, there is an express prohibition.²

Robson v. Smith, (1895) 2 Ch. 118, 64 L. J. Ch. 457, 72 L. T. 559, 43 W. R. 632, 2 Manson 422, 13 Reports 529.

When Security Becomes Fixed. — Ordinarily the floating security created by debentures will not become fixed so as to prevent the company from dealing with its property as it sees fit, until default and the commencement of proceedings by the holders, or until the commencement of a winding up. See the cases cited *supra* in this note.

Where a company issues debentures constituting a floating security on its property, subject to a condition that the company may carry on its business until a default shall be made in the payment of interest for three months, or until an order of court for winding up, the mere default for three months in the payment of interest will not convert the floating charge into a fixed security so as to prevent the company from dealing with its property, if there has been no active interference on the part of the debenture holders. *Governments Stock, etc., Invest. Co. v. Manila R. Co.*, 66 L. J. Ch. 102, (1897) App. 81, 75 L. T. 553, 45 W. R. 353, *affirming Governments Stock Invest., etc., Co. v. Manila R. Co.*, 64 L. J. Ch. 740, (1895) 2 Ch. 551, 12 Reports 409, 72 L. T. 886, 44 W. R. 166, 2 Manson 435.

The floating security created by debentures becomes fixed on the commencement of winding-up proceedings. See *infra*, this title, *Remedies of Holders*.

But it has been held that such floating security does not become fixed on the passing by the company of the first only of two special resolutions to wind up, nor on the making of an order in an action by the debenture holders appointing a receiver, subject to his giving security, where such an order is never drawn up or brought to the notice of third persons dealing with the company or asserting rights against it. *In re Roundwood Colliery Co.*, 66 L. J. Ch. 186, (1897) 1 Ch. 373, 75 L. T. 641, 45 W. R. 324.

Winding Up for Reorganization. — A condition in debentures that if the company commenced to "be wound up otherwise than for the purposes of reorganization or reconstruction," the principal should become immediately payable, renders the principal payable if the company proceeds to wind itself up for the purpose of carrying out an agreement for its amalgamation with another existing company that is carrying on business on a larger scale. *Hooper v. Western Counties, etc., Telephone Co.*, 3 Reports 58, 68 L. T. 78, 41 W. R. 84.

Default — Demand. — Where a debenture provides that if default for a certain time shall be made in payment of any interest the principal shall be immediately payable, and that principal and interest shall be paid at one of two places, there is no such default in the payment of interest as to make the principal payable if the debenture holder does not appear at either place at the time named for payment. *Thorn*

v. City Rice Mills, 40 Ch. Div. 357, 58 L. J. Ch. 297, 60 L. T. 359, 37 W. R. 398.

1. Mortgage or Pledge of Specific Property. — Since a debenture charging the property and undertaking of the company with payment of the debt is a charge only on the assets for the time being, and leaves the company at liberty to deal with its property as it sees fit, it does not prevent the company from borrowing money or otherwise contracting debts in the course of its business, and pledging or mortgaging a specific asset as security for its payment, so as to give the pledgee or mortgagee, as to that asset, priority over the debenture holder. See *In re Hamilton's Windsor Ironworks*, 12 Ch. Div. 707; *Moor v. Anglo-Italian Bank*, 10 Ch. Div. 681; *English, etc., Mercantile Invest. Co. v. Brunton*, 4 Reports 58, (1892) 2 Q. B. 700, 62 L. J. Q. B. 136, 67 L. T. 406, 41 W. R. 133.

In *Wheatley v. Silkstone, etc., Coal Co.*, 29 Ch. Div. 715, the directors of a company issued debentures purporting to charge the undertaking and effects of the company with the payment of the sums mentioned therein, and declared therein that they should rank equally as a first charge. Afterwards, in consideration of money advanced and applied to the purposes of the company, they deposited with the plaintiff the title deeds of property of the company, and by a written agreement charged the property comprised in the deeds with the payment of the money. It was held that the mortgage to the plaintiff had priority over the debentures.

As to the Lien of the Solicitor of the company as against the rights of debenture holders, see *In re Snell*, 6 Ch. Div. 105; *Brunton v. Electrical Engineering Corp.*, (1892) 1 Ch. 434, 61 L. J. Ch. 256, 65 L. T. 745.

2. Provision Against Mortgage, Pledge, or Lien. — Debentures may expressly prohibit the company from mortgaging or pledging the property on which they constitute a charge, though leaving the company free to sell, lease, or otherwise deal with it in the course of its business. Such a provision is binding on the company, and it can neither mortgage directly nor raise money and create a lien therefor by a pretended sale, however much the money may be necessary for carrying on its business. *In re Old Bushmills Distillery Co.*, (1896) 1 Ir. R. 301. Compare *In re Old Bushmills Distillery Co.*, (1897) 1 Ir. R. 488.

With respect to liens acquired without notice of such a prohibition in the debentures, and their priority over the debentures, and as to what constitutes constructive notice, see *English, etc., Mercantile Invest. Co. v. Brunton*, 4 Reports 58 (1892) 2 Q. B. 700, 62 L. J. Q. B. 136, 67 L. T. 406, 41 W. R. 133, *affirming* (1892) 2 Q. B. 1, 66 L. T. 767.

In *Robson v. Smith*, (1895) 2 Ch. 118, 64 L. J. Ch. 457, 72 L. T. 559, 43 W. R. 632, 2 Manson 422, 13 Reports 529, it was held that a prohibition in debentures against the creation of

c. SALE OF PROPERTY AND PAYMENT OF DEBTS. — Nor do they prevent a sale of its property in the course of its business¹ or the payment of its debts.²

d. EXECUTION BY OTHER CREDITORS. — But the rights of debenture holders are superior to those of creditors subsequently issuing execution³ or issuing a distress under a power afterwards conferred.⁴

Other Consequences of debentures being a mere floating security until default and proceedings by the holders, or winding-up proceedings, are shown in the note below.⁵

c. AGREEMENT TO CHARGE. — An instrument by which a company creates or acknowledges a debt and agrees to give a charge on its property is a charge in equity.⁶ But the agreement, to have this effect, must be sufficiently

any mortgage or charge upon the property in priority to the debenture did not prohibit a creditor of the company from garnishing its debtor, as garnishee proceedings, being only a form of execution, do not lead to any "charge," in the true sense, being created by the company on the debt garnished. The word "charge," it was held, in a provision of this character is construed strictly.

1. Sale of Property. — This proposition was recognized in *In re Horne*, 29 Ch. Div. 736, though it was held in that case that where the debentures are by their terms to constitute a mere floating security only until default by the company, one who has agreed to purchase property from the company has a right, before completing the purchase, to reasonable evidence that there has been no default.

Sale "in Course of Business." — A sale to be authorized must be in the course of the company's business. See *In re Old Bushmills Distillery Co.*, (1897) 1 Ir. R. 488. In this case a distillery company, which was allowed by its debentures to use, sell, or otherwise deal with its property in the course of its business, and was prohibited from mortgaging the same, being in want of money to carry on its business, and being unable to borrow because of such prohibition, entered into an arrangement by which a syndicate representing certain creditors of the company should purchase a certain amount of whiskey from the company at a certain price, and the money paid therefor should be applied in full satisfaction of the trade debts and other pressing liabilities of the company. None of the members of the syndicate, nor the creditors represented by them, were engaged in the whiskey trade. It was held, in view of the position in which the company was placed, that the sale was one made in the course of its business. Compare *In re Old Bushmills Distillery Co.*, (1896) 1 Ir. R. 301.

2. Payment of Debts. — See *Willmott v. London Celluloid Co.*, 55 L. T. 696.

3. Unsecured Execution Creditors. — *In re Opera*, (1891) 3 Ch. 260, 60 L. J. Ch. 839, 65 L. T. 371, 39 W. R. 705; *Wildy v. Mid-Hants R. Co.*, 18 L. T. N. S. 73, 16 W. R. 409. In the case last cited it was held that the title of the holder of a railway debenture is superior to that of any subsequent judgment creditor who has obtained an *elegit*, and that if his security is in danger of being impaired by the acts of such judgment creditor, he may file a bill to protect his security, although the time fixed for payment of the debenture has not arrived.

So in *Taunton v. Sheriff*, (1895) 1 Ch. 734, 64 L. J. Ch. 497, 72 L. T. 460, 43 W. R. 579, 2 Manson 238, 13 Reports 363, where chattels of a company had been taken in execution and sold, but the proceeds had not been handed over to the execution creditor, it was held that the holder of a debenture which created a charge on the chattels could intervene on behalf of himself and the other debenture holders, and claim the proceeds of sale in priority to the execution creditor, if the amount secured by the debenture was then payable. See also *In re Anglo-American Leather Cloth Co.*, 43 L. T. 43, affirming 42 L. T. 504. Compare *Robson v. Smith*, (1895) 2 Ch. 118, 64 L. J. Ch. 457, 72 L. T. 559, 43 W. R. 632, 2 Manson 422, 13 Reports 529; *Perkins v. Deptford Pier Co.*, 13 Sim. 277.

4. Distress. — But a distress under a power conferred either before the debentures were issued or before the floating security thereby created became fixed, and levied before the security became fixed, is valid as against debenture holders. *In re Roundwood Colliery Co.*, 66 L. J. Ch. 186, (1897) 1 Ch. 373, 75 L. T. 641, 45 W. R. 324.

5. Set-off by Creditors of Company. — Debentures constituting a floating charge on the assets of a company do not operate as an assignment of debts owing to the company at the date of their issue, but at the date of the appointment of a receiver on behalf of the debenture holders; and between these dates creditors of the company, who become such in the course of its ordinary business, may acquire a right of set-off against debts due to the company, though they became creditors with knowledge of the debentures. *Biggerstaff v. Rowatt's Wharf*, 65 L. J. Ch. 536, (1896) 2 Ch. 93, 74 L. T. 473, 44 W. R. 536.

Garnishment by Creditor of Company. — In *Robson v. Smith*, (1895) 2 Ch. 118, 64 L. J. Ch. 457, 72 L. T. 559, 43 W. R. 632, 2 Manson 422, 13 Reports 529, it was held that one who is indebted to a company is justified in paying a judgment creditor of the company under a garnishee order, notwithstanding he has notice of a debenture charging all the assets of the company as a floating security, so long as the company is carrying on its business as a going concern, and that a debenture holder, so long as the company is a going concern, cannot by notice to a debtor of the company single out any particular debt and require that it be paid to him in order to satisfy his debenture.

6. Effect of Agreement to Charge. — In *Levy v. Abercorris Slate, etc., Co.*, 37 Ch. Div. 260, 57 L. J. Ch. 202, 58 L. T. 218, a company which

definite as to the property to be charged and otherwise to be capable of enforcement.¹

f. DEFECTIVE CHARGE. — And where an intention to create a charge is clear, a court of equity will give the instrument such effect, notwithstanding mistakes or defects therein.²

Failure to Register Debentures under an act requiring registration, and the effect on the rights of holders, are treated elsewhere under this title.³

g. INTENTION TO CHARGE AND SUFFICIENCY OF LANGUAGE. — Whether debentures create a charge on the property of the company depends, of course, assuming that the power to charge exists, upon the intention of the parties, to be ascertained by a construction of the language of the instruments, read in the light of the power conferred upon the company and the circumstances surrounding their issue. No particular words are necessary.⁴

had borrowed money agreed to pay the lender the amount with interest, and charged certain hereditaments with the repayment of the same. It further agreed that it would, at any time during the continuance of the security, at the request of the lender, execute a legal mortgage, and would issue debentures to the extent of the amount it had borrowed, charging all the capital stock, goods, chattels, and effects of the company. The agreement was held by Chitty, J., to be a debenture within the saving clause of the Bills of Sale Acts, and he stated that it would constitute a charge in equity. See also *In re New Durham Salt Co.*, 2 Meg. 360; *Dundas v. Desjardins Canal Co.*, 17 Grant's Ch. (U. C.) 27.

1. Sufficiency of Agreement. — Thus, where a company issued a prospectus stating the debenture capital to be a certain amount in first mortgage debentures, of which a large amount had already been applied for and allotted, and the remainder of which was then offered for subscription, but containing no statement as to the property upon which the debentures then offered were to be secured, it was held that one who applied for debentures on the faith of the prospectus and received notice of the acceptance of his offer to subscribe, and paid the amount of his subscription but received no debentures, was not entitled to a charge on the company's property, as there was nothing to show on what security he had advanced his money. *In re New Durham Salt Co.*, 2 Meg. 360.

2. Defects and Mistakes. — The charge will be enforced in equity in such a case, under the old and well-established rule thus expressed by Turner, L. J., in *Matter of Strand Music Hall Co.*, 3 DeG. J. & S. 158, namely, that "where this court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it." The doctrine was applied to debentures by Kay, J. (his judgment being *affirmed*), in *Ross v. Army, etc., Hotel Co.*, 34 Ch. Div. 43. In this case debentures were issued by a company with a provision that the holders were entitled *pari passu* to the benefit of a certain indenture previously executed, whereby the property of the company, and any other property that might be substituted therefor, was vested in trustees to secure the payment of all moneys payable on

such debenture bonds. The "covering," or indenture referred to, was not registered under the Bills of Sale Acts. Afterwards the directors caused a new debenture to be issued, which was stated to be supplemental to the original bond of the holder to whom it was given, and purported to charge the amount due on the debenture upon the "undertaking [of the company], and all its property, both real and personal, present and future, subject * * * to any subsisting mortgages." It was held that, assuming the covering deed to be invalid for want of registration under the Bills of Sale Acts, the intention to give the debenture holders a charge on the property comprised in that deed was manifest on the face of the debentures, read in conjunction with the annexed condition, and amounted to an equitable contract which would be carried into effect to give a charge upon all the property of the company; and accordingly, that the chattels intended to be charged with the money due on the original debentures were subject to an equitable charge in favor of the holders of those debentures.

See also *In re Queensland Land, etc., Co.*, 8 Reports 476, (1894) 3 Ch. 181, 63 L. J. Ch. 810, 71 L. T. 115, 42 W. R. 600, wherein it was held that where a company agrees for a valuable consideration to issue debentures, and issues them without naming the obligees, the holders, though the instruments are not valid debentures, are entitled to stand in the same position as if valid debentures had been issued.

3. See *supra*, this title, *Issue of Debentures — Requirement of Registration.*

4. What Constitutes a Charge. — See *In re Florence Land, etc., Co.*, 10 Ch. Div. 530.

Illustrations. — A charge is created by an instrument termed an "obligation," or "bond," and reciting that the company "bind themselves, their successors, assigns, and all their estate, property, and effects." *In re Florence Land, etc., Co.*, 10 Ch. Div. 530. In this case the articles of a company incorporated for the purpose of acquiring land and building thereon, and selling, mortgaging, or leasing the same, empowered the directors to borrow money by mortgage of any part of the company's property, or by "bonds, debentures, or mortgage debentures," which should entitle the holders to be paid out of the moneys, property, and effects of the company *pari passu*. The company issued instruments called "obligations," which were expressed to be

h. **EXTENT OF CHARGE.** — The same is true when questions arise as to the extent of the charge. It depends upon the language of the particular instrument, to be construed as stated above,¹ and subject, of course, to any limitations there may be on the power of the company.²

Property Afterwards Acquired by a company is charged by debentures binding "the undertaking and all sums of money arising therefrom," or the undertaking and all the property of the company.³ The same is true of a debenture in terms binding the company "and their successors and their real and personal estate."⁴

Unpaid Capital of a company, even when there is power to charge it,⁵ must be clearly included in the charge. It has been held not bound by debentures charging the "real and personal estate" of the company,⁶ or the "undertaking" and "property" and "all the receipts and revenues,"⁷ or its "funds," "capital," and "property,"⁸ or "all the lands, tenements, and estate of the

made under the power of their articles, by which they bound "themselves, their successors, assigns, and all their estate, property, and effects," to repay the sums mentioned therein at a future date, with power to redeem a certain portion of the obligations at intermediate times. It was held that, reading the obligations with reference to the articles of association, they constituted a charge on the property of the company, subject to the power of the directors to dispose of any part of such property in the ordinary course of their business. *Explaining Norton v. Florence Land, etc., Co.*, 7 Ch. Div. 332, 26 W. R. 123, which is apparently to the contrary.

1. Extent of Charge in General. — See *In re Panama, etc., Mail Co.*, L. R. 5 Ch. 318; *In re Marine Mansions Co.*, L. R. 4 Eq. 601; *In re Colonial Trusts Corp.*, 15 Ch. Div. 465; Matter of Joint Stock Companies Winding-Up Acts, 4 DeG. J. & S. 407; *Gardner v. London, etc., R. Co.*, L. R. 2 Ch. 201.

2. See *supra*, this title, *Issue of Debentures — Power of Company to Issue*.

A Trustee for an Insolvent Company, operating mines for it under a lease, is entitled to the proceeds of the sale of fixtures upon the premises, both to repay him sums which he has already been compelled to pay to the lessor for rent and to answer similar future liabilities, in priority to the holders of debentures issued subsequently to the commencement of the trust. *In re Exhall Coal Co.*, 12 Jur. N. S. 757, 14 L. T. N. S. 280, 14 W. R. 599.

3. Property Afterwards Acquired. — *In re Panama, etc., Royal Mail Co.*, L. R. 5 Ch. 318; *In re Marine Mansions Co.*, L. R. 4 Eq. 601. Compare *In re New Clydach Sheet, etc., Iron Co.*, L. R. 6 Eq. 514.

4. In *In re Colonial Trusts Corp.*, 15 Ch. Div. 465, a company formed for the purchase and management of land, and authorized to borrow money for the purposes of the company, issued debentures whereby they bound "themselves and their successors and their real and personal estate" for the payment of the sums advanced, with a proviso that the holders of the debentures should be entitled to be paid the principal and interest secured to them respectively *pari passu*. On proceedings to wind up the company, it was held that the debentures were a charge on the real and personal estate of the company as it

existed at the commencement of the winding up, but not including the then uncalled capital.

In *In re Dublin Drapery Co.*, 13 L. R. Ir. 174, debentures charging the undertaking, stock in trade, land, premises, and plant, and the property and effects, present and future, of the company, were held to charge the after-acquired stock in trade and other property of the company in priority to its general creditors.

5. Unpaid Capital. — See *supra*, this title, *Issue of Debentures — Power of Company to Issue*.

6. *In re Colonial Trusts Corp.*, 15 Ch. Div. 465. "No one," said Jessel, M. R., in this case, "would treat the word 'property' or the word 'estate' which is used here, when applied to a partnership, as including the liability of the individual partners to make good a deficiency of that very estate to pay the creditors in full. It is a totally different thing. When we speak of the property of a partnership, or the estate and effects of a partnership, we speak of that which belongs to the firm. If it happens to be deficient there is a personal liability in each of the partners, according to the English law, to contribute to the extent of his whole fortune to make up the deficiency, but that liability cannot in any proper sense of the term be treated as the estate or the real and personal estate of the firm. It does not belong to the firm, though the creditors of the firm may compel the partners to pay by suing them. There is no distinction in this respect between an ordinary common-law partnership and an incorporated trading company. The fact is, the property of a corporation does not include the liability of its members to contribute."

7. *In re Marine Mansions Co.*, L. R. 4 Eq. 601. See also *Hulme v. Drachenfels Banket Gold Min. Syndicate*, 2 Manson 146, 13 Reports 345.

8. In Matter of Joint-Stock Companies Winding-Up Acts, 4 DeG. J. & S. 407, the directors of a company authorized to borrow on the security of the funds or property of the company moneys not exceeding in amount a moiety of the capital subscribed for at the time of the loan, and to cause the funds or property of the company to be assigned, transferred, conveyed, or surrendered, as the case might require, by way of mortgage to the lender, issued a debenture assigning to a lender as his security all and singular the capital stock,

company and all their undertaking." ¹ But authority may be given to charge unpaid capital, and when it appears that there was an intention to charge it, in such a case it will be bound notwithstanding a reservation of the right by the company to make calls and receive payment thereof. ²

The Word "Pledge" will be sufficient to charge real as well as personal property, if the other language shows such an intention. ³

Debentures of Railroad and Other Quasi-Public Companies — In *England* a distinction is made between debentures issued by ordinary companies and those issued by railroad and other *quasi*-public companies. A charge in the latter of the "undertaking" of the company is a charge on the tolls and earnings only, and not on the capital or permanent property necessary in carrying on the undertaking. ⁴

4. Right to Interest. — Interest is generally expressly provided for in the instrument, and the agreement to pay the same is evidenced by interest coupons. ⁵

After Maturity. — The holders of debentures are entitled to interest on the principal, if not paid at maturity, notwithstanding all the interest coupons have been paid, without express provision therefor. ⁶

5. Priority as Between Debentures. — Whether the holders of the several debentures issued in a series on the same day are to rank *pari passu*, or

moneys, securities for money, estate, and effects of the company whatsoever and where-soever, and whether in hand or afloat. On a winding up of the company it was held that the debenture did not extend to unpaid capital of the company.

1. *King v. Marshall*, 33 Beav. 565.

2. Debentures Charging Unpaid Capital. — In *In re Streatham*, etc., Estates Co., 66 L. J. Ch. 57, (1897) 1 Ch. 15, 75 L. T. 574, 45 W. R. 105, it was held that a debenture by a company having power to charge its uncalled capital, whereby the company charged the "undertaking and all its property whatsoever and where-soever, both present and future," was sufficient to include uncalled capital got in before liquidation, but not to include uncalled capital got in during liquidation. See also *In re Colonial*, etc., Gas Co., 23 L. T. 759, 19 W. R. 344; Page v. International Agency, etc., Trust, 3 Reports 596, 62 L. J. Ch. 610, 68 L. T. 435; *Hulme v. Drachenfels Banket Gold Min. Syndicate*, 2 Manson 146, 13 Reports 345.

In *In re Opera*, (1891) 3 Ch. 260, 60 L. J. Ch. 839, 65 L. T. 371, 39 W. R. 705, where a company borrowed money to be repaid in five years or on the company being wound up, on the security of debentures charging its uncalled capital and containing a condition that the company should be at liberty from time to time to make and receive payment of any calls, it was held that the debentures constituted a valid charge as against the company on the uncalled capital from the time they were issued, and that the condition did not affect the holder's right to have any money that might be called up appropriated to the debt; and further, that creditors who obtained judgments against the company subsequently to the issue of the debentures, but before the principal became payable, were not secured creditors ranking in priority to the holder of the debentures, on calls made by the company.

3. "Pledge" May Include Real Property. — *In re Marine Mansions Co.*, L. R. 4 Eq. 601.

4. Railroad Companies. — In *Gardner v. Lon-*

don, etc., R. Co., L. R. 2 Ch. 201, which is a leading case, it was held that a mortgage debenture made by a railway company in the form given in Schedule C of the Companies Clauses Consolidation Act 1845, did not give the debenture holder a specific charge upon the surplus lands of the company, or the proceeds of the sale of them, so as to entitle him to an order for a receiver of the sale moneys or interim rents; that the "undertaking" of a railway company, which was pledged in such a mortgage, was the going concern created by the act, which could not be broken up or interfered with by the mortgagee; and that the "sums of money" were moneys *ejusdem generis*, as the tolls, the earnings of the undertaking, which might be made available to satisfy the mortgage. See also *Wickham v. New Brunswick*, etc., R. Co., L. R. 1 P. C. 64, 12 Jur. N. S. 34, 14 L. T. 311; *Hart v. Eastern Union R. Co.*, 7 Exch. 246; *Marshall v. South Staffordshire Tramways Co.*, (1895) 2 Ch. 36, 64 L. J. Ch. 481, 72 L. T. 542, 43 W. R. 469, 2 Manson 292, 12 Reports 275; *In re Hull*, etc., R. Co., 40 Ch. Div. 119, 58 L. J. Ch. 205, 59 L. T. 877, 37 W. R. 145. Compare *Bartlett v. West Metropolitan Tramways Co.*, (1893) 3 Ch. 437, 63 L. J. Ch. 208, 69 L. T. 560.

Charge on Gross Traffic Receipts of Railway Company. — As to the lien of railway company debentures on the gross traffic receipts, and the right of the company to apply such receipts to payment of working expenses, see *Proffit v. Wye Valley R. Co.*, 64 L. T. 660.

5. Coupons. — See generally the title COUPONS, *ante*.

6. Interest After Maturity. — *Price v. Great Western R. Co.*, 16 M. & W. 244.

After Recovery of Judgment by a debenture holder the debt is merged in the judgment, and he is only entitled to interest after that time on the judgment at the rate fixed by statute with respect to judgments. He cannot recover a greater rate provided for in the debenture. *In re European Cent. R. Co.*, 35 L. T. 583, 25 W. R. 92.

whether some of them are to rank in priority to others, depends upon the intention of the parties, to be gathered from the instruments and the mode of issuing them.¹ And the same is true of the question of priority as between different series of debentures, though they rank ordinarily in the order in which they are issued.²

6. Power of Majority of Holders to Bind Minority. — Sometimes debentures, or covering deeds securing them, provide that a majority of the holders at a general meeting may agree to any modification or compromise of the rights of the debenture holders. Such a proviso is binding upon all, and when the majority agree to a modification or compromise, the minority not only cannot refuse their consent, but they cannot surrender their debentures and claim as simple contract creditors.³ The minority, however, have a right to enforce their security strictly in accordance with the terms of their contract, notwithstanding opposition by the majority.⁴

7. Assignment and Transfer — *a.* IN GENERAL. — A debenture is a chose in action, assignable and transferable like other choses in action.⁵ Assignments

1. Priority Between Debentures. — In *Gartside v. Silkstone, etc., Coal, etc., Co.*, 21 Ch. Div. 762, Fry, J. said: "I think the law stands in this way, that when two deeds are executed on the same day, the court must inquire which was in fact executed first, but that if there is anything in the deeds themselves to show an intention either that they shall take effect *pari passu*, or even that the later deed shall take effect in priority to the earlier, in that case the court will presume that the deeds were executed in such order as to give effect to the manifest intention of the parties." In this case one hundred and fifty debentures of a company, numbered from 501 to 650, and for £100 each, were all sealed on the same day. Each of the first hundred provided that it and all other debentures of the company to the amount of £10,000, the amount to be borrowed, or such of them as should for the time being be due and unpaid, should be all taken and considered, as between the company and the several holders thereof, as one debenture, and should not be entitled to any preference or priority by reason of priority of date or otherwise, but should be paid *pari passu* out of the funds of the company. Each of the other fifty debentures contained a similar provision, substituting the sum of £5,000 for £10,000. There was evidence that the company's seal was affixed to the debentures in the order of their numbers, beginning with the earliest. It was held that the holders of the first one hundred debentures were entitled to priority over the holders of the other fifty.

2. Successive Series. — In *Lister v. Lister*, 3 Reports 363, 62 L. J. Ch. 568, 68 L. T. 826, 41 W. R. 330, a company issued a series of debentures charging all its property, each subject to the condition that "the debenture is one of a series issued or about to be issued * * * for securing to the holders ratably and equally *inter se*, and without any preference or priority one over another." Afterwards another series was issued in similar form to the first, except that the conditions stated that they were "subject and in subordination to the debentures which have already been issued by the company * * * or such of them as are now outstanding." Some of the second series were issued before some of

the first series had been reissued. It was held that the words "debentures already issued" meant the series of and not the particular debentures already issued, and that the words "or such of them as are now outstanding" meant such of them as had been issued, but had not been paid, and that all the debentures of the second series therefore were postponed to all those of the first, whenever issued, except those reissued.

3. Power of Majority of Debenture Holders. — See *Finlay v. Mexican Invest. Corp.*, 66 L. J. Q. B. 151, (1897) 1 Q. B. 517, 76 L. T. 257; *Sneath v. Valley Gold Co.*, 2 Reports 292, (1893) 1 Ch. 477, 68 L. T. 602; *Mercantile Invest., etc., Co. v. International Co.*, (1893) 1 Ch. 484, note 2, 68 L. T. 603, note.

Thus, where there is such a provision as this, and a majority of the debenture holders consent to surrender the rights of debenture holders under the debentures, and to receive debenture stock in lieu thereof, the minority are bound by such an arrangement. They cannot refuse to accept such stock and assert rights against the company as simple contract creditors, by recovery of judgment and issue of execution. *Potteries, etc., R. Co. v. Minor*, L. R. 6 Ch. 621.

So, under such a provision, they are bound by a resolution of the majority allowing the company to borrow money and agreeing that the loan shall take priority over the existing debentures and be a first charge on the property of the company. *Folliott v. Eddystone Granite Quarries*, (1892) 3 Ch. 75, 61 L. J. Ch. 567, 40 W. R. 667.

4. See *Collingham v. Sloper*, 3 Reports 272, (1893) 2 Ch. 66, 62 L. J. Ch. 416, 69 L. T. 39, 41 W. R. 550.

5. Assignment and Transfer. — *In re Pryce*, 4 Ch. Div. 685. See the title ASSIGNMENTS, vol. 2, p. 1016 *et seq.*

Consideration. — That there must be a consideration for the assignment, see *Gott v. Gott*, 9 Grant's Ch. (U. C.) 165.

Statute of Frauds. — It has been held that a contract for the sale of debentures constituting a floating charge on the property of a company owning land was for the sale of an interest in land within the statute of frauds. *Driver v. Broad*, 4 Reports 411, (1893) 1 Q. B. 744, 63 L.

and transfers are governed by the same rules that govern the assignment and transfer of other similar choses in action. Sometimes, however, they are governed by special charter or statutory provisions, and these must be observed.¹

Registration of Transfers. — The Companies Act, requiring debentures to be entered in a register to be kept by the company, does not require transfers to be registered.²

b. NEGOTIABILITY OF DEBENTURES — (1) *In England and Canada* —

Whether Promissory Notes. — Debentures issued by a company and made payable to bearer, or to the order of a person, have been regarded by some of the judges as promissory notes, though under the corporate seal.³ But whether this is so is not clear.⁴

Negotiable Though Not Promissory Notes. — By the weight of authority, even if they cannot be regarded as promissory notes, so as to be within the law merchant, they are to be regarded as negotiable instruments as far as the company is concerned, if from their terms and the mode in which they were issued and put upon the market it appears that they were intended to have such effect; and in such a case purchasers for value and without notice will take them free from equities between the company and the original holders.⁵

J. Q. B. 12, 69 L. T. 169, 41 W. R. 483. But this is doubtful. See *supra*, this section, *Whether Debentures Give an Interest in Land*. And see the title **FRAUDS, STATUTE OF**.

1. Regulations by Operation of Law. — Special requirements as to the transfer of debentures do not apply to transfers by operation of law. In *Lane v. Smith*, 14 Beav. 49, 15 Jur. 735, an Act of Parliament required transfers of debentures to be by indorsement by deed, and in a given form, and to be entered in the books of the company, and "after such entry made, but not till then," the assignee was to be entitled to the benefit. It was held that this did not apply to a transfer by act of law, as in the case of bankruptcy.

2. Registration. — *In re Dublin Drapery Co.*, 13 L. R. Ir. 174.

3. Debentures as Promissory Notes. — *In re Imperial Land Co.*, L. R. 11 Eq. 478, *per* Sir R. Malins, V. C.; *In re General Estates Co.*, L. R. 3 Ch. 758.

4. Compare with the preceding note, *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374.

5. Debentures Payable to Bearer. — In *In re Blakely Ordnance Co.*, L. R. 3 Ch. 154, B. and D. agreed in writing with the promoter of a company to sell their business to the company when formed, part of the purchase money to be paid in debentures of the company payable to bearer. The articles of association having adopted this agreement, and directed it to be carried into effect, the directors gave to B. and D. debentures under the seal of the company, by which the company covenanted to pay the sum therein mentioned to "B. and D., their executors, administrators, or assigns, or to the bearer hereof." Some of these debentures were passed by delivery to a *bona fide* holder for value, and it was held on the winding up of the company that he could prove on them in his own name, without being subject to any equities existing between the company and B. and D.

In *In re Imperial Land Co.*, L. R. 11 Eq. 478, the instruments in question were in these

words: "The Imperial Land Company of Marseilles, Limited, hereby bind themselves and their successors to pay to the bearer the principal sum of £20 on the 31st day of March, 1872, such payment to be made at the National Bank, No. 13 Old Broad street, in the city of London." Following this was a promise in similar language to pay interest. At the top of the instruments were the words "Debenture Bond," and they were under the corporate seal. Sir R. Malins thought that this was a promissory note, but held that, even if it was not, it was a negotiable instrument, and free from equities in the hands of purchasers for value and without notice.

Debentures Payable to the Order of a Person. — In *In re General Estates Co.*, L. R. 3 Ch. 758, the instruments were called "debentures," and were under the corporate seal. They recited that the company "hereby undertake to pay to the order of the said J. C. Hodges, Esq., on 1st July, 1867, the said sum of £1,000, with interest thereon, after the rate of £5 per cent per annum, half-yearly, on the 1st day of January and the 1st day of July in each year, on presentation of the annexed interest warrants." Annexed to the instruments were interest warrants. It was held that the instruments, even if not promissory notes, were negotiable, and that *bona fide* holders for value and without notice held free from equities. Lord Justice Wood said: "The better opinion seems to me to be that this is a promissory note, but if it be not so, the authorities go to this, that where there is a distinct promise held out by a company, informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own." See also *In re Northern Assam Tea Co.*, L. R. 10 Eq. 458; *In re Colonial, etc., Gas Co.*, 23 L. T. 40; *In re Hercules Ins. Co.*, L. R. 19 Eq. 302; *Webb v. Herne Bay*, L. R. 5 Q. B. 642; *In re Romford Canal Co.*, 24 Ch. Div. 85; *In re South Essex Gas-Light, etc., Co.*, 2 Johns. & H. 306, 8 Jur. N. S. 357. And see *Aslatt v. Farquharson*, 10 W. R. 458.

Ground of Negotiability. — The negotiability, it has been held, does not depend upon the law merchant, but upon the contract of the company and the fact that by the terms of the instrument and the mode of putting it in circulation an intention is shown to make it negotiable.¹

Form and Terms of Instrument. — A debenture cannot be a promissory note, nor, it seems, negotiable, if it is not in the form and terms of a negotiable instrument; if, for example, there are conditions as to payment rendering the time of payment uncertain.² To be negotiable it need not contain the words "value received," nor otherwise state a consideration.³

Purchase After Resolution to Wind Up Company. — It has been held that the right of purchasers of debentures to recover thereon free from equities between the company and the original holders is not affected by the fact that they purchased after the passing of resolutions to wind up the company, if they purchased without notice of the resolutions.⁴

(2) *In the United States.* — The rule is well settled in the United States that bonds of a corporation payable to bearer, or to the order of a person, are

Cases Holding Assignment Subject to Equities. — There are some cases in *England* holding that debentures, at least if not payable to bearer and transferable by delivery, are mere choses in action, and that the assignee takes them subject to equities, including a right of the company to a set-off against the assignor. See *In re Magdalena Steam Nav. Co.*, Johns. 690, 6 Jur. N. S. 975; *In re Pooley Hall Colliery Co.*, 18 W. R. 201, 21 L. T. N. S. 690; *In re China Steamship Co.*, L. R. 7 Eq. 240.

Lord Cairns's Decision on this question in *In re Natal Invest. Co.*, L. R. 3 Ch. 355, is apparently against the negotiability of such instruments. In this case the instrument was payable to the holder, "his executors, administrators, or transferees, or to the holder for the time being." Lord Cairns held that the instrument was not negotiable. He thought that it did not appear that the company intended it to have this effect.

In *In re Imperial Land Co.*, L. R. 11 Eq. 478, cited *supra* in this note, Sir R. Malins, V. C., in commenting upon this decision of Lord Cairns, said that he was unable to see any distinction between "payable to bearer" and "to the holder for the time being," because the bearer is the holder for the time being; and that he felt himself bound by the decision in *In re General Estates Co.*, L. R. 3 Ch. 758, cited *supra* in this note, and that he thought Lord Cairns might with great propriety have decided the other way.

Effect at Law. — The cases above cited were in equity. It seems clear, however, though some doubt has been expressed (*In re Blakely Ordnance Co.*, L. R. 3 Ch. 154), that the rule stated in the text applies at law as well as in equity. See *Higgs v. Northern Assam Tea Co.*, L. R. 4 Exch. 387. Compare *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374, *questioned* in *Goodwin v. Roberts*, L. R. 10 Exch. 337.

No Injustice to Shareholders. — It has been objected that to hold debentures negotiable would often result in injustice to shareholders. In reply to this objection Sir R. Malins, V. C., said: "If shareholders commit their interests to a body of directors unknown to them, of whose capacity for business and integrity they are ignorant, and are unfortunate in selecting men incapable or dishonest (and here the alle-

gation is that they have been unfortunate in selecting those that were dishonest), on whom ought the loss to fall? On those who have selected such persons, or those who, dealing with the company, have no opportunity of knowing the facts? I have no hesitation in coming to a conclusion, upon general principles, that between two such parties the loss ought to fall upon the shareholders, and not upon purchasers who honestly and fairly buy articles or commodities which were intended to be marketable, and were issued with the marks which entitle them to be so treated." *In re Imperial Land Co.*, L. R. 11 Eq. 478.

In Canada there are conflicting cases on this point. In *Geddes v. Toronto St. R. Co.*, 14 U. C. C. P. 513, it was said in effect that a debenture payable to the holder was not negotiable. In other cases, however, it has been said that they are negotiable. See *Toronto Bank v. Cobourg, etc.*, R. Co., 7 Ont. Rep. 1; *Macfarlane v. St. Cesaire*, 2 Montreal L. Rep. Q. B. 160, 9 Leg. N. (Quebec) 202, *affirmed* in 14 Can. Sup. Ct. Rep. 738; *Jones v. Albert*, 21 New Bruns. 200.

Power to Issue Negotiable Instruments. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 620.

1. Ground of Negotiability. — See *In re Blakely Ordnance Co.*, L. R. 3 Ch. 160, *per* Sir John Bolt, L. J.; *Morris Canal, etc.*, Co. v. Lewis, 12 N. J. Eq. 323.

In *In re Agra, etc.*, Bank, L. R. 2 Ch. 391, it was held that the rule which makes assignments of choses in action subject to the equities existing between the original parties to the contract must yield when a contrary intention appears from the nature or terms of the contract. And this statement has since been repeated and approved. *In re Imperial Land Co.*, L. R. 11 Eq. 493, *per* Sir R. Malins, V. C.

2. Form and Terms of Debenture. — See *Crouch v. Credit Foncier*, L. R. 8 Q. B. 374.

3. In re Imperial Land Co., L. R. 11 Eq. 478.

4. Purchase After Winding-up Resolution. — *In re Imperial Land Co.*, L. R. 11 Eq. 478.

An advertisement of such resolutions in a newspaper is not constructive notice. It is notice only to those who see it. *In re Imperial Land Co.*, L. R. 11 Eq. 478. Compare *In re China Steamship Co.*, L. R. 7 Eq. 240.

negotiable if so intended.¹ And calling them debenture bonds certainly cannot take them out of the rule.

c. ESTOPPEL OF COMPANY.—A company may be estopped, as against a purchaser of its debentures, to set up equities existing between it and the original holders,² or to avoid them on the ground that they were illegally issued,³ even if the instruments be not regarded as negotiable.

IV. REMEDIES OF HOLDERS—1. **Enforcement of Charge on Winding Up.**—Debenture holders may always wait until the company is being wound up, and

1. **Negotiability in the United States.**—*Mercer County v. Hackett*, 1 Wall. (U. S.) 83; *White v. Vermont, etc.*, R. Co., 21 How. (U. S.) 575; *Murray v. Lardner*, 2 Wall. (U. S.) 110; *New Albany, etc., Plank-road Co. v. Smith*, 23 Ind. 353; *Morris Canal, etc., Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423; *Morris Canal, etc., Co. v. Lewis*, 12 N. J. Eq. 323; *Brainerd v. New York, etc., R. Co.*, 25 N. Y. 496; *Connecticut Mut. L. Ins. Co. v. Cleveland, etc., R. Co.*, 41 Barb. (N. Y.) 9; *Langston v. South Carolina R. Co.*, 2 S. Car. 248.

"This species of bonds," said Mr. Justice Grier, in *Mercer County v. Hackett*, 1 Wall. (U. S.) 95, "is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by states and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanctions of judicial recognition, not only in this court, but of nearly every state in the Union, is well known and admitted."

2. **Estoppel of Company to Set Up Equities.**—In *In re Hercules Ins. Co.*, L. R. 19 Eq. 302, an insurance company had issued a bond conditioned to be void on payment to the obligee, his executors, administrators, and assigns, of a certain sum on a future day. The bond was assigned, for value, and notice of the assignment was given to the company and accepted, but the assignment was never registered. No inquiry was made as to the validity of the instrument before the assignment. The company having gone into liquidation, it was held, on an application by the assignee's executors to prove against

the company, that the company, by having accepted notice of the assignment, was estopped from setting up against the assignee equities between it and the original obligor attaching to the instrument itself.

In re Colonial, etc., Gas Co., 23 L. T. 40, was another case of estoppel. In this case debentures of a company payable to the obligee or his registered assigns were transferred by him at a time when he was indebted to the company to a larger amount than the sum secured by the debentures. The company kept no books for registering transfers, and when the obligee and his assignee applied to the secretary for registration, he told them it was unnecessary, and made no mention of the company's claim against the obligee. On the winding up of the company it was held that the assignee was entitled to prove as a creditor in respect of the debentures.

For other cases of estoppel to set up equities, see *In re Northern Assam Tea Co.*, L. R. 10 Eq. 458; *Higgs v. Northern Assam Tea Co.*, L. R. 4 Exch. 387; *In re Romford Canal Co.*, 24 Ch. Div. 85; *In re South Essex Gas-Light, etc., Co.*, 8 Jur. N. S. 357.

3. **Estoppel to Set Up Illegality in Issue.**—In *Webb v. Herne Bay*, L. R. 5 Q. B. 642, commissioners were incorporated to improve a town, and empowered to levy rates and to borrow money, and in order to secure the payment of loans to issue debentures capable of assignment, and any person being commissioner was forbidden under a penalty to accept any contract for carrying out the objects of the statute. The commissioners bought goods for the purposes of the act from one of the commissioners, and issued to him debentures in the prescribed form, which were duly registered as required by the act. He assigned them for value to the plaintiffs, who took them without notice of the circumstances under which they were issued. It was held that, even if the transaction was illegal, as the commissioners had issued the debentures knowing that they might be assigned, they were estopped from setting up such illegality to escape liability thereon. See also *In re Romford Canal Co.*, 24 Ch. Div. 85; *Toronto Bank v. Cobourg, etc., R. Co.*, 7 Ont. Rep. 1; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548. And see the title *ULTRA VIRES*.

Protecting Clause in Articles of Company.—Where it is provided in the articles of a company that debentures bearing its common seal, sold and issued for a valuable consideration, shall be binding on the company notwithstanding irregularity touching the authority of the officers to issue the same, this protects a *bona fide* holder of a debenture for value, where the seal was affixed at a meeting of directors

then assert their right to a preference over general creditors.¹ On the commencement of winding-up proceedings their claim becomes due and their security fixed.²

2. Actions by Holders and Appointment of Receiver. — They need not wait, however, for the winding up of the company to assert their rights and enforce their equitable lien. They may do so before then, on default by the company, by filing a bill in equity for the appointment of a receiver and the application of the assets charged to the payment of their claims.³

not properly called, or at which no quorum was present, and though the resolution to issue the same was passed by the vote of a director who was disqualified by reason of interest. *Davies v. Bolton*, 8 Reports 685, (1894) 3 Ch. 678, 63 L. J. Ch. 743, 71 L. T. 336, 43 W. R. 171, 1 Manson 445.

1. Rights on Winding Up of Company. — *In re Panama, etc.*, Mail Co., L. R. 5 Ch. 318; *In re Florence Land, etc., Co.*, 10 Ch. Div. 530; *In re Colonial Trusts Corp.*, 15 Ch. Div. 465.

2. As soon as a winding up of the company is commenced the rights of debenture holders become fixed, though the time fixed for payment may not have arrived. See the cases referred to in next note *supra*.

In *Hodson v. Tea Co.*, 14 Ch. Div. 859, the debentures contained a covenant to pay the principal at a future date, with interest in the meantime, an assignment of all the stock, chattels, and effects which might from time to time be held by the company, and a charge of the same as security for the payment of principal and interest, and provided that until default in payment of principal or interest for twenty-one days, the company might receive and apply all of its assets for its own purposes. Before default as to either principal or interest the company went into liquidation. It was held that as soon as the winding up commenced the money secured by the debentures became due, and that the debenture was a security enforceable upon all the assets of the company as they existed at that time.

The security does not become fixed on the passing by the company of the first only of two special resolutions to wind up. *In re Roundwood Colliery Co.*, 66 L. J. Ch. 186, (1897) 1 Ch. 373, 75 L. T. 641, 45 W. R. 324.

See further, as to when the security becomes fixed, *supra*, this title, *Rights and Liabilities of Holders — Lien or Charge*.

Withdrawal of Securities Deposited in Land Registry. — The Mortgage Debenture Acts of 1865 and 1870 provided for the deposit of securities in the land registry. It has been held that where securities have been deposited under the act, the court has no jurisdiction to require their delivery to the company, or to a receiver in a debenture holder's action, except where provision for withdrawal is made in the act. And it can make no difference that the withdrawal will be more convenient or save expense, or that the company is being wound up. *Somerset v. Land Securities Co.*, 7 Reports 564, (1894) 3 Ch. 464, 63 L. J. Ch. 880, 71 L. T. 512, 43 W. R. 132. It seems, however, from this case, that the court has jurisdiction to require delivery to a purchaser from a receiver appointed under the acts.

3. Action and Appointment of Receiver Before Winding Up. — *In re Panama, etc.*, Mail Co.,

L. R. 5 Ch. 318; *Ross v. Army, etc.*, Hotel Co., 34 Ch. Div. 43; *Bowen v. Brecon R. Co.*, L. R. 3 Eq. 541; *Makin v. Ibotson*, (1891) 1 Ch. 133, 60 L. J. Ch. 614, 63 L. T. 515, 39 W. R. 73, 2 Meg. 371.

Rights as Judgment Creditors. — In an action by debenture holders in which a receiver has been appointed, they are entitled to a personal judgment against the company, and the right to stand in the position of ordinary judgment creditors as to any property of the company that may not be covered by the debentures. *Hope v. Croydon, etc., Tramways Co.*, 34 Ch. Div. 730, 56 L. J. Ch. 760, 56 L. T. 822, 35 W. R. 594.

Recovery of Judgment. — As to the necessity for recovery of judgment and issue of execution at law, see *Imperial Mercantile Credit Assoc. v. Newry, etc.*, R. Co., 2 Ir. R. Eq. 524.

Appointing Receiver or Manager of Railroad, etc. — In *England* the court cannot appoint a manager of a railway company or other quasi-public company, or sell its property, at the instance of debenture holders, though it may appoint a receiver of the tolls, etc., charged with payment of the debentures. *Gardner v. London, etc., R. Co.*, L. R. 2 Ch. 201. And see *Marshall v. South Staffordshire Tramways Co.*, (1895) 2 Ch. 36, 64 L. J. Ch. 481, 72 L. T. 542, 43 W. R. 469, 2 Manson 292, 12 Reports 275.

Receiver and Manager of Tramway. — A receiver and manager of the undertaking of a tramway company has been appointed, the court holding that it was not governed by the rule relating to railroad companies. *Bartlett v. West Metropolitan Tramways Co.*, (1893) 3 Ch. 437, 63 L. J. Ch. 208, 69 L. T. 560, *distinguishing* *Gardner v. London, etc., R. Co.*, L. R. 2 Ch. 201.

In *Marshall v. South Staffordshire Tramways Co.*, (1895) 2 Ch. 36, 64 L. J. Ch. 481, 72 L. T. 542, 43 W. R. 469, 2 Manson 292, 12 Reports 275, however, a tramway company was held to be like a railway company in this respect.

As to the Powers and Liabilities of Receivers and Managers appointed in a debenture holder's action, and their relation to the company and others, see *In re Marriage*, 65 L. J. Ch. 839, (1896) 2 Ch. 663, 75 L. T. 169, 45 W. R. 42, 60 J. P. 805; *Paterson Gas Light, etc., Co.*, 65 L. J. Ch. 709, (1896) 2 Ch. 476, 74 L. T. 640, 45 W. R. 39, 60 J. P. 532; *De Grelle v. Bull*, 10 Reports 97, 1 Manson 118; *Strapp v. Bull*, (1895) 2 Ch. 1, 64 L. J. Ch. 658, 72 L. T. 514, 43 W. R. 641, 2 Manson 441, 12 Reports 387; *Burt v. Bull*, (1895) 1 Q. B. 276, 64 L. J. Q. B. 232, 71 L. T. 810, 43 W. R. 180, 2 Manson 94, 14 Reports 65; *Davies v. Evesham Preserves*, 73 L. T. 150, 43 W. R. 646. And see generally the title **RECEIVERS**.

Protection of Security Before Default. — And they are entitled to the appointment of a receiver and manager, even before default by the company, when for some reason the security is in jeopardy, as by reason of the company's insolvency.¹

Appointment of Receiver by Debenture Holders or Trustees. — Sometimes debentures or a trust deed securing them give to the debenture holders themselves or to the trustees the power to appoint a receiver on default by the company.²

Effect of Winding-up Proceedings. — The mere fact that proceedings have been instituted or even that an order has been made and a liquidator appointed for winding up the company does not prevent debenture holders from suing or continuing a suit to protect or enforce their rights and for the appointment or continuance of a receiver.³

Borrowing of Money by Receiver. — The court may authorize a receiver appointed in a debenture holder's action to borrow money and to make a first charge on the assets of the company to secure the same, when the money is essential for the preservation of the property of the company. *Greenwood v. Algesiras R. Co.*, 7 Reports 620, (1894) 2 Ch. 205, 63 L. J. Ch. 670, 71 L. T. 133, 1 Manson 455.

That receivers and managers appointed in a debenture holder's action who have borrowed money, in pursuance of orders of the court, to carry on the business of the company, making such loans a first charge upon the assets, are entitled to be paid their costs, charges, and expenses, and indemnified from all liabilities properly incurred by them, in priority to such loans, see *Strapp v. Bull*, (1895) 2 Ch. 1, 64 L. J. Ch. 658, 72 L. T. 514, 43 W. R. 641, 2 Manson 441, 12 Reports 387.

As to the right of persons lending money to receivers to priority, see *Lathom v. Greenwich Ferry Co.*, 72 L. T. 790, 2 Manson 408, 13 Reports 503.

Costs of Realizing Security. — As to what constitutes such costs, and the right to priority, see *Lathom v. Greenwich Ferry Co.*, 72 L. T. 790, 2 Manson 408, 13 Reports 503; *In re Barned's Banking Co.*, L. R. 6 Ch. 388, 40 L. J. Ch. 590.

"Working Expenses." — See *In re Regent's Canal Ironworks Co.*, 3 Ch. Div. 411 (*varying* 34 L. T. 310); *Great Eastern R. Co. v. East London R. Co.*, 41 L. T. 903.

That a Mortgagee who has allowed the mortgagor to remain in possession cannot claim back rents in the hands of a receiver in a debenture holder's action to which the mortgagee is a stranger, see *In re Land Securities Co.*, 13 Reports 48.

As to Receivers Generally, see the title RECEIVERS.

Foreclosure. — Where debentures have become a fixed charge on the property and undertaking of the company, the holder of the whole series is entitled to foreclose the holders of a subsequent series of the debentures and the company. *Sadler v. Worley*, 8 Reports 194, (1894) 2 Ch. 170, 63 L. J. Ch. 551, 70 L. T. 494, 42 W. R. 476.

But a foreclosure, it has been held, will not be made in an ordinary debenture holder's action unless the holders of all the debentures concur. *In re Continental Oxygen Co.*, 66 L. J. Ch. 273, (1897) 1 Ch. 511, 76 L. T. 229, 45 W. R. 313.

Debenture Holders Liable for Uncalled Capital. — As to the effect in a debenture holder's action of a liability on the part of the plaintiff as a shareholder for unpaid capital, see *Madeley v. Ross*, 66 L. J. Ch. 233, (1897) 1 Ch. 505, 76 L. T. 321.

1. Appointment of Receiver Before Default. — *McMahon v. North Kent Ironworks Co.*, (1891) 2 Ch. 148, 60 L. J. Ch. 372, 64 L. T. 317, 39 W. R. 349; *Thorn v. Nine Reefs*, 67 L. T. 93; *Edwards v. Standard Rolling Stock Syndicate*, 3 Reports 226, (1893) 1 Ch. 574, 62 L. J. Ch. 605, 68 L. T. 194, 41 W. R. 343. See *Wildy v. Mid-Hants R. Co.*, 16 W. R. 409.

The court will appoint a receiver and manager of a company in an action by debenture holders before anything has become actually due upon the debentures, where a winding-up petition has been presented but no order for winding up has been made, if it is probable that the property charged by the debentures will have to be sold in the near future. *In re Victoria Steamboats*, 66 L. J. Ch. 21, (1897) 1 Ch. 158, 75 L. T. 374, 45 W. R. 135.

The holder of a debenture has the right to sue for the enforcement of his security and the appointment of a receiver for that purpose, if the company parts with the whole or substantially the whole of the undertaking and assets otherwise than in the ordinary course of business, and ceases to be a going concern. *Hubbuck v. Helms*, 56 L. J. Ch. 536, 56 L. T. 232, 35 W. R. 574.

2. Appointment of Receiver by Debenture Holders. — See *In re Pound*, 42 Ch. Div. 402.

Appointment of Receiver and Manager by Trustees. — As to the liability of the trustees as principals of a receiver and manager appointed by them, see *Gosling v. Gaskell*, 66 L. J. Q. B. 848, (1897) App. 575, 77 L. T. 314; *Gaskell v. Gosling*, 65 L. J. Q. B. 435, (1896) 1 Q. B. 669, 74 L. T. 674.

As to the personal liability of the person so appointed, see *Owen v. Cronk*, (1895) 1 Q. B. 265, 64 L. J. Q. B. 288, 2 Manson 115, 14 Reports 229.

3. Effect of Winding-up Proceedings. — *In re Victoria Steamboats*, 66 L. J. Ch. 21, (1897) 1 Ch. 158, 75 L. T. 374, 45 W. R. 135; *In re Stubbs*, (1891) 1 Ch. 475, 60 L. J. Ch. 190, 64 L. T. 306, 39 W. R. 617, *affirming* (1891) 1 Ch. 187, 63 L. T. 619, 39 W. R. 200; *Strong v. Carlyle Press*, 2 Reports 283; (1893) 1 Ch. 268, 62 L. J. Ch. 541, 68 L. T. 396, 41 W. R. 401. *Compare Day v. Sykes*, 55 L. T. 763.

Action by Debenture Holder After Winding Up

3. Petition by Holders to Wind Up Company. — It seems that the fact that a statute gives debenture holders, on default by the company, a remedy by appointment of a receiver, and priority over other creditors, does not prevent a debenture holder, when unable to obtain payment by resorting to this remedy, from proceeding as an unpaid judgment creditor by a petition for a winding up of the company and sale of the undertaking.¹

4. Execution. — One debenture holder cannot, by recovery of judgment and issue of execution after the appointment of a receiver, obtain a preference or advantage over others entitled to share *pari passu* with him in the assets of the company.²

5. Protection of Security. — Debenture holders may file a bill to protect their security as against unauthorized acts of the company or acts of unsecured

Order. — In *In re Longdendale Cotton Spinning Co.*, 8 Ch. Div. 150, it was held that the mere fact that an order had been made for winding up a company did not prevent a debenture holder from bringing a suit to realize on his security.

Right to Receiver After Petition for Winding Up. — In *Wilmott v. London Celluloid Co.*, 52 L. T. 642, a motion for a receiver in an action by a debenture holder came on for hearing on the same day as a creditor's winding-up petition. The court made the winding-up order, but declined to appoint a receiver, on the ground that the appointment of a liquidator would be a sufficient protection to the debenture holders. It was held, on appeal, that the debenture holders were entitled to special protection, and the official liquidator was appointed receiver.

In *British Linen Co. v. South American, etc.*, Co., 7 Reports 64, (1894) 1 Ch. 108, 63 L. J. Ch. 169, 69 L. T. 693, 42 W. R. 181, 1 Manson 92, the court appointed a receiver on behalf of the debenture holders in respect of particular securities, and left the official liquidator in winding-up proceedings to be receiver of the rest of the assets, where the securities were of such a character that they could not be easily and conveniently realized by a mere official of the court.

Receiver and Manager Appointed by Debenture Holders. — Where a receiver and manager is appointed by debenture holders in pursuance of a power expressly conferred by the debentures, he is entitled to possession of the company's undertaking and property, notwithstanding the appointment of an official liquidator in winding-up proceedings. *In re Pound*, 42 Ch. Div. 402, 58 L. J. Ch. 792, 38 W. R. 18, 1 Meg. 363, *reversing* 61 L. T. 207, 37 W. R. 726, 1 Meg. 279.

Appointment of Liquidator as Receiver. — Under ordinary circumstances, where an application is made by debenture holders for a receiver, and an application is also made to appoint a liquidator, the same person ought to be appointed receiver and liquidator. *In re Stubbs*, (1891) 1 Ch. 475, 60 L. J. Ch. 190, 64 L. T. 306, 39 W. R. 617, *affirming* (1891) 1 Ch. 187, 63 L. T. 619, 39 W. R. 200.

Right of the Liquidator to Documents. — In *Engel v. South Metropolitan Brewing, etc.*, Co., (1892) 1 Ch. 442, 61 L. J. Ch. 369, 66 L. T. 155, 40 W. R. 282, the official receiver, who had been appointed permanent liquidator in the

winding up of a company, was held entitled to possession of the documents belonging to the company, as against a receiver and manager appointed in a debenture holder's action, to whom they had been delivered by a previous order in the action, where the business of the company had ceased, and the documents did not comprise any actual title deeds.

1. Winding-up Petition by Debenture Holder. — *In re Portsmouth Tramways Co.*, (1892) 2 Ch. 362, 61 L. J. Ch. 462, 66 L. T. 671, 40 W. R. 553. In this case the debentures were a charge on the undertaking of the company as a going concern, and the holders had power to enforce their security by the appointment of a receiver. On default by the company, a debenture holder brought an action on behalf of himself and all the other debenture holders, and obtained judgment and the appointment of a receiver, but he was unable to obtain payment of his debt, and presented a petition to wind up the company. It was held that the special remedy which he had to enforce his security upon the undertaking by the appointment of a receiver did not deprive him of his ordinary rights as an unpaid judgment creditor, and that he was entitled to an order.

Earlier decisions were to the contrary. See *In re Herne Bay Waterworks Co.*, 10 Ch. Div. 42; *In re Exmouth Docks Co.*, 43 L. J. Ch. 110, L. R. 17 Eq. 181.

In the case first cited it was held that where the only remedy given by the statute to debenture holders on default by the company is the appointment of a receiver and priority over other creditors, they are not entitled to a winding up of the company and sale of the undertaking, even though the profits of the concern may be insufficient to keep down the interest on the debentures.

2. Issue of Execution. — *Bowen v. Brecon R. Co.*, L. R. 3 Eq. 541. See *Russell v. East Anglian R. Co.*, 3 Macn. & G. 104.

Debenture holders are bound by the statute under which the debentures are issued, and where by such statute a majority of them are allowed to consent to a scheme of arrangement by which they surrender their rights under the debentures and receive debenture stock in lieu, one of them cannot, after such consent of the majority, refuse to accept debenture stock, and recover judgment against the company as a simple contract creditor, and issue execution thereon. *Potteries, etc., R. Co. v. Minor, L. R. 6 Ch. 621.*

execution creditors.¹ It has already been shown that the rights of debenture holders are superior to those of creditors of the company subsequently issuing execution.

6. Ejectment. — They have not such an interest in the land charged with payment of the debt as will enable them to maintain ejectment.²

1. Suit to Protect Security. — And he may do so though the time fixed for payment of the debenture has not arrived. *Wildy v. Mid-Hants R. Co.* 16 W. R. 409.

See *supra*, this section, *Actions by Holders and Appointment of Receiver.*

Rights as Against Execution Creditors. See *supra*, this title, *Rights and Liabilities of Holders — Lien or Charge.*

2. Right to Maintain Ejectment. — *Doe v. St. Helen's, etc., R. Co.*, 2 Q. B. 364, 42 E. C. L. 715.

DEBT.

BY THOMAS JOHNSON MICHIE.

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CROSS-REFERENCES.

- See *CLAIM*, vol. 6, p. 97; *CREDITOR*, ante, p. 238; *DUE*; *INDEBTEDNESS*; *LOAN*; and see the titles *ASSIGNMENTS FOR BENEFIT OF CREDITORS*, vol. 3, p. 1; *ATTACHMENT*, vol. 3, pp. 189, 191; *DEBTS OF DECEDENTS*, post; *GARNISHMENT*; *INSOLVENCY AND BANKRUPTCY*; *LIMITATION OF ACTIONS*; *MARSHALING ASSETS*; *NOVATION*; *PLEDGE AND COLLATERAL SECURITY*; *SET-OFF, RECOUPMENT, AND COUNTERCLAIM*; *SUBROGATION*.
- As to *Mutual Debts*, see *MUTUAL*, and see the title *SET-OFF, RECOUPMENT, AND COUNTERCLAIM*.
- As to the *Debt of Another*, see the title *LIMITATION OF ACTIONS*.
- As to *Bona Fide Debts*, see *BONA FIDE*, vol. 4, p. 615, and references there given.
- As to *Debts Created by Fraud*, see the titles *FRAUD*; *INSOLVENCY AND BANKRUPTCY*.
- As to *Community Debts*, see the title *COMMUNITY PROPERTY*, vol. 6, p. 293.
- As to *Individual Debts*, see *INDIVIDUALS*.
- As to *Book Debts*, see *BOOK*, vol. 4, pp. 704, 705, and see the title *DOCUMENTARY EVIDENCE*.
- As to *Absconding Debtor*, see *ABSCONDING DEBTOR*, vol. 1, p. 201, and the title *ATTACHMENT*, vol. 3, p. 199.
- As to the *Action of Debt*, see the title *DEBT*, 5 ENCYC. OF PLEADING AND PRACTICE, p. 89.
- As the relation of debtor and creditor depends upon the existence of a debt, reference should always be had to the title *CREDITOR*, ante, p. 238.

I. GENERAL DEFINITIONS. — In common parlance the word "debt" is sometimes used to denote any kind of a just demand, and has been differently defined, owing to the subject-matter of the statutes in which it has been used; and while ordinarily it imports a sum of money arising upon a contract, express or implied, in its more general sense it means that which one person is bound to pay or to perform to another.¹

1. *Barber v. East Dallas*, 83 Tex. 150, citing 5 AM. AND ENG. ENCYC. OF LAW, 175. See also *El Paso Nat. Bank v. Fuchs*, 89 Tex. 197; *Cole v. Aune*, 40 Minn. 80.

Blackstone defines debt to be "a sum of money due by certain and express agreement." 3 Bl. Com. 54. Yet the same author, in treating of the implied original contract to submit to the rules of the community whereof we are members, says that, whatever the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge. 3 Bl. Com. 158, quoted in *Dryden v. Kellogg*, 2 Mo. App. 94; *Equitable L. Ins. Co. v. Board of Equalization*, 74 Iowa 181; *Hyatt v. Vaneck*, 82 Md. 465; *McElfresh v. Kirkendall*, 36 Iowa 226; *Bowen v. Hoxie*, 137 Mass. 527; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Matter of Denny*, 2 Hill (N. Y.) 223; *Wing v. Slater*, 19 R. I. 597.

In *Rodman v. Munson*, 13 Barb. (N. Y.) 77, it is said: "Sir William Blackstone defines a debt to be a contract 'whereby a certain sum of money is mutually acquired and lost; any contract, in short, whereby a determinate sum of money becomes due to a person, and is not paid, but remains in action merely, is a contract of debt.' (2 Black. Com. 464.) To constitute a debt there must be a contract, either express or implied; but it is not indispensable that the liability created by the contract should extend so far as to subject the person of the debtor, or all his property, to be seized upon the final process of the courts issued to coerce its payment and satisfaction." *Affirmed*, *Newell v. People*, 7 N. Y. 9.

Bouvier's Definition. — So Bouvier defines a debt to be "a sum of money, due by certain and express agreement." Bouv. Law Dict., quoted in *Milliken v. Sloat*, 1 Nev. 589; *Burnham v. Milwaukee*, (Wis. 1897) 73 N. W. Rep. 1019; *Parker v. Savage*, 6 Lea (Tenn.) 408; *Haas v. Misner*, 1 Idaho 177; *Davenport v. Kleinschmidt*, 6 Mont. 502. And in an enlarged sense, he says that the term denotes any kind of just demand. Bouv. Law Dict., quoted in *Equitable L. Ins. Co. v. Board of Equalization*, 74 Iowa 181. He further says: "Debts arise or are proved by matter of record, as judgment debts; by bonds or specialties; and by simple contracts, where the quantity is fixed and specified, and does not depend on any future valuation to settle it." Bouv. Law Dict., quoted in *Milliken v. Sloat*, 1 Nev. 589.

Anderson's Definition. — In legal acceptance the word "debt" signifies a liquidated demand; a sum of money due by certain and express agreement; a sum of money due by contract. *Finch v. Armstrong*, 9 S. Dak. 255, quoting *Anderson's Law Dict.*

Rapalje and Lawrence's Definition of debt is as follows: "In the strict sense of the word, a debt exists when a certain sum of money is

owing from one person, the debtor, to another, the creditor. Hence debt is properly opposed (1) to unliquidated damages; (2) to liability, when used in the sense of an inchoate or contingent debt; and (3) to certain obligations not enforceable by ordinary process. Debts denote not only the obligation of the debtor to pay, but also the rights of the creditor to receive and enforce payment." Quoted in *Davenport v. Kleinschmidt*, 6 Mont. 502. See also *State v. Hawes*, 112 Ind. 326; *Shane v. Francis*, 30 Ind. 92.

Burrill's and Coke's Definitions. — In *New Jersey Ins. Co. v. Meeker*, 37 N. J. L. 301, it is said: "The word 'debt,' says Burrill, in his Law Dictionary, 'is of large import, including not only debts of record or judgment, and debts by specialty, but also obligations arising under simple contract, to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise.' And Sir Edward Coke, in commenting on the word *debitum*, in the statute of Merton, c. 5, says: '*Debitum* significeth not only debt, for which an action of debt doth lie, but here in this ancient act of parliament it significeth generally any duty to be yielded or paid.' The same extent of meaning is ascribed to this term by Chief Justice Tilghman, in *Frazer v. Tunis*, 1 Binn. (Pa.) 254; and the judgment in the recent case of *Bide v. Harrison*, L. R. 17 Eq. 76, is to the same effect, it being there held that a bequest of 'all and every sum or sums of money due to me at my decease' included damages recovered in an action by the executor for a breach of covenant committed in the lifetime of the testator." See also *Milliken v. Sloat*, 1 Nev. 590.

Jacob's Definition. — In *Appeal Tax Ct. v. Rice*, 50 Md. 316, it is said: "In common parlance a debt is a sum of money due from one person to another; and in its legal acceptance the term means a sum of money due by certain and express agreement, as by bond for a determinate sum, a bill, or note, a special bargain, or rent reserved on a lease, where the quantity is fixed and specific, and does not depend on any subsequent valuation to determine it. 1 Jac. Law Dict. 197, 198."

It has also been said by Jacob that, whatever the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge. *Matter of Denny*, 2 Hill (N. Y.) 220.

Definition of Century Dictionary. — "Debt" is defined by the Century Dictionary as that which is due from one person to another, whether money, goods, or services. *State v. Georgia Co.*, 112 N. Car. 37.

Webster's Definition. — A debt has been defined as that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to an-

Debt Distinguished from Demand. — In ordinary legal usage the words "debt" and "demand" are of kindred meaning, but the latter word is a term of much

other, or to perform for his benefit; that for which payment is liable to be exacted; due; obligation; liability. Webster's Dictionary, quoted in *Cook v. Bartholomew*, 60 Conn. 26; *Equitable L. Ins. Co. v. Board of Equalization*, 74 Iowa 178; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 63.

For Other Definitions of the term, see:

United States. — *Thompson v. Riggs*, 6 D. C. 109; *Fisher v. Consequa*, 2 Wash. (U. S.) 385.

Alabama. — *Allen v. Dickson*, Minor (Ala.) 120.

California. — Const. of Cal., art. 8; *Perry v. Washburn*, 20 Cal. 350; *Dunsmoor v. Furstenfeldt*, 88 Cal. 520, 22 Am. St. Rep. 331.

Indiana. — *Turner v. Wilson*, 49 Ind. 584.

Massachusetts. — *Gray v. Bennett*, 3 Met. (Mass.) 526.

Mississippi. — *Coulter v. Robertson*, 24 Miss. 330, 57 Am. Dec. 168.

Pennsylvania. — *Brooke v. Philadelphia*, 162 Pa. St. 128; *Fisher v. Consequa*, 2 Browne (Pa.) 35, appendix.

Rhode Island. — *Wing v. Slater*, 19 R. I. 597.

Utah. — *Anthony v. Savage*, 3 Utah 277.

Virginia. — *Whiteacre v. Rector*, 29 Gratt. (Va.) 714, 26 Am. Rep. 420.

Action of Debt. — A debt is a sum of money due by express agreement, either in writing or by parol, where the quantity is fixed and does not depend on future calculation. The non-payment or nonperformance is an injury for which an action of debt may be brought. *Respublica v. Le Caze*, 1 Yeates (Pa.) 70. And to the same effect see *U. S. v. Colt, Pet.* (C. C.) 146. See also ENCYC. OF PL. AND PR., title DEBT, vol. 5, p. 894.

Same—Debt and Damages. — Where, in an action of debt upon a single bill, verdict was rendered for a certain sum as damages, instead of "debt and damages," it was held that the error was merely clerical, and did not affect the validity of the verdict. *Downs v. Ladd*, 4 How. (Miss.) 40.

Debt or Assumpsit. — The term "debt" has been held to include any demand for which the action of debt or assumpsit would lie. *Dowling v. Stewart*, 4 Ill. 193.

Implied Contract. — That debt may arise from implied contract, see *U. S. v. Colt, Pet.* (C. C.) 146; *Kimpton v. Bronson*, 45 Barb. (N. Y.) 618.

Broad Meaning. — The word "debts" in an insolvent statute was contended by counsel "not to be understood in its strict technical sense, but to be understood in its popular meaning, as extending to all legal demands actually due, and which may be ascertained without the intervention of a jury," and this construction was apparently admitted by the court to be correct in *Atlas Bank v. Nahant Bank*, 3 Met. (Mass.) 582.

As used in a statute prohibiting the imprisonment of a person for debts without a mittimus the court in construing the word "debts," said that the word "still remains to be satisfied with a fair and reasonable construction. * * * Suppose the language to be, that in an action for debt no person shall be impris-

oned without a mittimus. This would comprehend all actions of debt in a proper and technical sense; of course it would comprehend the claim in the action under consideration. But this, I apprehend, is too narrow a construction. The true meaning is such as to include all actions by attachment, by which any debt or damage is sought to be recovered, and which, by legal process, may be reduced into debt or damage." *Palmer v. Allen*, 5 Day (Conn.) 193.

Same—Set-offs. (See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.) — A statute allowed discounts and set-offs when a suit was brought for a debt due by judgment, bond, bill, or otherwise. The court said: "The word 'debt' in this statute is used in a general sense to denote any sort of promise or obligation to pay money, such as open accounts, notes, bills, bonds, judgments, and the like." *Duncan v. Magette*, 25 Tex. 256.

Consideration. (See also the title CONSIDERATION, vol. 6, p. 667.) — "It is essential to the idea of a debt that an obligation must have arisen out of a contract, express or implied, in favor of some one occupying the relation of creditor, which entitles the latter to receive a sum of money, which obligation, by possibility, might or ought to be enforced against another. The mere delivery of a piece of paper which imports an obligation to pay money, but which is in fact no evidence of an actual existing debt, does not constitute the contracting of a debt. * * * Where, therefore, as is the case here, paper purporting to be the obligation of a township has been issued without any consideration whatever, nothing having been given or received therefor, the holder of such paper, whether he be the payee named therein or an assignee, has no right of action under the Act of 1883, because the trustee has not, in any legal or equitable sense, contracted a debt. Such paper creates no obligation against any one; it is void." *State v. Hawes*, 112 Ind. 326.

In *Pettibone v. Toledo*, etc., R. Co., 148 Mass. 411, it is said: "The word 'debt,' even in its broadest signification, implies that the consideration of the obligation of the debtor has been executed on the part of the creditor, and the payment of the debt discharges the obligation. The execution of the agreement described in the bill did not make the defendants debtors of the railroad company. The obligations created by the agreement were executory on both sides, and were mutual."

Moral Obligation—Wills. — A will provided that whereas the testatrix's brother was indebted individually to the estate of her husband, such individual indebtedness should be paid for him out of her estate, so that he might be wholly released from the same. It was held that this provision extended to the indebtedness which her brother was not legally liable but morally bound to pay. The court said: "The words 'debt' and 'indebtedness' are not always used in the same sense; that is, they do not always import a legal obligation on the part of one to pay another something due him. They often imply a mere moral or

more comprehensive signification than the former. The term "debt" imports a sum of money owing upon a contract, express or implied; while the term "demand" embraces rightful claims, whether founded upon a contract, a tort, or a superior right of property.¹

equitable obligation, as well as a strictly legal one." *Scott v. Neeves*, 77 Wis. 310. But generally the term applies only to legally enforceable debts. *State v. Hawes*, 112 Ind. 323; *Cooke v. Saratoga Springs*, 23 Hun (N. Y.) 55.

Same—Statute of Limitations. (See also the title LIMITATION OF ACTIONS.)—Obligations barred by the statute are not debts. *Bever v. Park*, 88 N. Car. 459; *People v. Halsey*, 53 Barb. (N. Y.) 554, *affirmed* 37 N. Y. 344; *Roosevelt v. Mark*, 6 Johns. Ch. (N. Y.) 266; *Burke v. Jones*, 2 Ves. & B. 275; *Peck v. Botsford*, 7 Conn. 172, 18 Am. Dec. 92; *Rogers v. Rogers*, 3 Wend. (N. Y.) 517, 20 Am. Dec. 716; *Smith v. Porter*, 1 Binn. (Pa.) 209. And see the title WILLS.

Right of Creditor.—Debt denotes not only the obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. *Burnham v. Milwaukee*, (Wis. 1897) 73 N. W. Rep. 1019; *Monroe County v. Harrell*, 147 Ind. 500. But in *Baltimore v. Gill*, 31 Md. 390, it is said: "A debt is money due upon a contract, without reference to the question of the remedy for its collection. It is not essential to the creation of a debt that the borrower should be liable to be sued therefor. No suit can be maintained against the state by one of its citizens, and yet debts are created by the state which it is bound in good faith to pay."

Choses in Action. (See also CHOSSES IN ACTION, vol. 6, p. 2.)—A debt is a chose in action. *Webb v. Edwards*, 46 Ala. 29.

Funded Debt. (See also FUNDED DEBT.)—A funded debt is a debt for the payment of the principal or interest, for which some fund has been appropriated. *Ketchum v. Buffalo*, 14 N. Y. 356.

Floating Debt. (See also FLOATING DEBT.)—In *People v. Wood*, 71 N. Y. 374, it is said: "By the term 'floating debt' is meant that mass of lawful and valid claims against the corporation, for the payment of which there is no money in the corporate treasury specifically designed, nor any taxation or other means of providing money to pay, particularly provided."

Public Debt. (See the title MUNICIPAL SECURITIES.)—In *Morgan v. Cree*, 46 Vt. 786, 14 Am. Rep. 640, it is said: "The terms 'public debt' and 'public securities,' used in legislation, are terms generally applied to national or state obligations and dues, and would rarely if ever be construed to include town debts or obligations; nor would the term 'public revenue' ordinarily be applied to funds arising from town taxes."

Liquidated Debt. (See also the title LIQUIDATED DAMAGES.)—In *Bartee v. Andrews*, 18 Ga. 410, it is said: "A debt is liquidated when it is rendered certain what is due, and how much is due: *cum certum est an et quantum debeatur*. That, certainly, need not be contemporaneous with the agreement out of which it results."

Labor Debt.—See LABOR; and see Matter of

Smith Middlings Purifier Co., 83 Mich. 517, 100 Mich. 448.

Ad Damnum. (See *ante*, DAMNUM.)—The "debt or damages demanded" in a statute regulating the jurisdiction of municipal courts in civil actions was held to be the *ad damnum* in the writ, without regard to the amount claimed in the declaration or proved at the trial. *Clay v. Barlow*, 123 Mass. 378.

Distinguished from Contract.—In *Milliken v. Sloat*, 1 Nev. 590, it is said: "Burrill gives Mr. Stephens as authority for the proposition that a debt is not a contract, 'but the result of a contract.' He further says: 'The word "debt" is of large import, including not only debts of record or judgments and debts by specialty, but also obligations arising under simple contract to a very wide extent.' These are the technical and correct definitions of debt."

Debt—Duty. (See also DUTY.)—A debt is a legal liability to pay a specific sum of money; a duty is a legal obligation to perform some act. *Allen v. Dickson*, Minor (Ala.) 120.

Debt and Claim.—In *Stokes v. Mason*, 10 R. I. 261, "debt" as used in a bankruptcy statute was held equivalent to "claim." And see also *Berson v. Ewing*, 84 Cal. 89; *Baltzer v. State*, 104 N. Car. 275. The terms, however, are not synonymous. See CLAIM, vol. 6, pp. 97, 100, and compare the definitions there given with the definitions of "debt" given above. And see *infra*, For Tort.

Correlative of Credit. (See also CREDIT, *ante*, p. 230.)—The terms "credit" and "debts" are used as correlative. *Libby v. Hopkins*, 104 U. S. 309.

Debts and Credits.—"Debts" in an assignment for the benefit of creditors was held to mean "credits." The court said: "The direction to pay 'the debts' of the creditors of the assignor is in equivocal terms. The debts of a person may be such as are due to him, although the more usual signification is those owing by him. It is not a palpable violation of the literal meaning of the words to apply them to the debts due to the persons designated, and we are therefore authorized to look to the scope of the entire instrument for their interpretation. The manifest design is to pay the debts to the creditors, and that must control the construction of the doubtful phrase." *Pine v. Rikert*, 21 Barb. (N. Y.) 475.

1. *U. S. Rolling Stock Co. v. Clark*, 95 Ala. 323; *Matter of Denny*, 2 Hill (N. Y.) 220; *Cable v. McCune*, 26 Mo. 382, 72 Am. Dec. 214; *Heacock v. Sherman*, 14 Wend. (N. Y.) 58; *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 432; *Drews v. Coles*, 2 Tyrw. 510. See *infra*, For Tort; and see the title DEMAND.

Debt and Demand.—The words "any debt or demand" "are sufficiently comprehensive to include every species of action, whether founded on contract or tort." *White v. Hunt*, 6 N. J. L. 415. See *infra*, For Tort.

A Weekly Sum Ordered to Be Paid by the overseers of a parish for the maintenance of an

Debt and Liability Distinguished.—The words "debt" and "liability" are not synonymous, and they are not commonly so understood. As applied to the pecuniary relations of parties, "liability" is a term of broader significance than "debt." The legal acceptance of "debt" is a sum of money due by certain and express agreement. Liability is responsibility; the state of one who is bound in law and justice to do something which may be enforced by action. This liability may arise from contracts either express or implied, or in consequence of torts committed.¹

Debt of Record.—A debt of record is a sum of money which appears to be due by the evidence of a court of record. Thus, where a specific sum is adjudged to be due from the defendant to the plaintiff, in an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature.²

Debts of Specialty.—Debts of specialty are those whereby a sum of money becomes or is acknowledged to be due by deed or instrument under seal, such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation.³

Debtor.—A debtor is one who owes a debt; he who may be constrained to pay what he owes.⁴ In a more liberal sense, a debtor is one who owes another anything, or who is under any obligations, arising from express agreement, implication of law, or from the principles of natural justice, to render and pay a sum of money to another.⁵

nsane person is a "debt, claim, or demand" due under 22 & 23 Vict., c. 49, § 1. Counsel "endeavored to argue that this must be applied only to things arising on contract; but the words 'claim or demand' would cover everything." *Reg. v. Stepney Union*, L. R., 9 Q. B. 383.

1. *McElfresh v. Kirkendall*, 36 Iowa 227; *White v. Greene*, (Iowa 1897) 70 N. W. Rep. 184; *Pittsburgh, etc., R. Co. v. Clarke*, 29 Pa. St. 146. See also **LIABILITY**.

But a debt is a liability, and is included in that term. *Ferguson v. Smith*, 10 Kan. 403.

2. **Debt of Record.** (See also the titles **BAIL** (IN CIVIL CASES), vol. 3, p. 587; **BAIL AND RECOGNIZANCE**, vol. 3, p. 651; **JUDGMENTS; RECORDS; REFEREES AND REFERENCES.**)—2 Bl. Com. 465, *quoted in* *Davies v. Pettit*, 11 Ark. 355; *Carver v. Braintree Mfg. Co.*, 2 Story (U. S.) 450; *Roberts v. Cocke*, 28 Gratt. (Va.) 207; *Ratcliffe v. Anderson*, 31 Gratt. (Va.) 112, 31 Am. Rep. 716.

A Judgment is a debt of record. *Burnes v. Simpson*, 9 Kan. 664. See *infra*, **Obligations Which Have Been Held to Be or Not to Be Debts**.

Debt of Record—United States. (See generally the title **UNITED STATES.**)—In *Reeside v. U. S.*, 1 Dev. Ct. of Cl. 222, it is said: "But the general liability of the United States to be sued is not a question before us. It is enough to say that when the United States voluntarily submit themselves to the jurisdiction of a court which is governed in its adjudications by the laws of a particular state, and those laws provide that a balance found by a verdict of a jury against the plaintiff shall be a 'debt of record,' we can conceive of no process of logical reasoning which could induce us to consider a judgment upon such a verdict as anything but a 'debt of record,' which the United States are bound to pay."

3. 2 Bl. Com., p. 465; *Probate Ct. v. Child*, 51 Vt. 86; *Davis v. Smith*, 5 Ga. 285, 48 Am. Dec. 279; *January v. Goodman*, 1 Dall. (U. S.)

208. See generally the titles **BONDS**, vol. 4, p. 618; **CONTRACTS**, vol. 7, p. 92; **COVENANTS, ante**; and see **SPECIALTY**.

A Mortgage has been defined as a debt by specialty. *Matter of Lambie*, 94 Mich. 491. See *infra*, **Obligations Which Have Been Held to Be or Not to Be Debts**. And see generally the title **MORTGAGES**.

Debt of Record and Specialty Distinguished.—The term "specialty" does not embrace a judgment. Says Blackstone: "A debt of record is a sum of money which appears to be due by the evidence of a court of record." "Debts by specialty, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due, by deed or instrument under seal." 2 Black. Com. 465; *Kimball v. Whitney*, 15 Ind. 282. See also *Tyler v. Winslow*, 15 Ohio St. 366.

4. *Bouv. Law Dict., quoted in* *Scott v. Davenport*, 34 Iowa 213.

5. *Stanly v. Ogden*, 2 Root (Conn.) 262.

"Debtor" Was Construed in a Bankruptcy Statute to mean any person against whom a demand existed in favor of the assignees of a bankrupt. The court in that case construed the word as coextensive with the other words used in that section, viz., "debt, duty, or demand." *Barstow v. Adams*, 2 Day (Conn.) 98.

The Relation of Debtor and Creditor may arise by direct agreement or breach of duty between the parties. The legal acceptance of a debt is a sum of money due by certain and express agreement; it is a precise sum not dependent upon any future valuation to ascertain it. A debt is properly opposed to unliquidated damages and liability for use in the sense of an inchoate or contingent debt. *Commercial Nat. Bank v. Taylor*, 64 Hun (N. Y.) 502, *citing* 5 AM. AND ENG. ENCYC. OF LAW (1st ed.), pp. 143, 150 180. See also **CREDITOR, ante**.

Witnesses.—The words "debtor" and "creditor" in a statute as to the admissibility

II. TIME OF PAYMENT. — A debt is no less a debt because it has not yet matured, if it will certainly become payable in the future.¹

III. CONTINGENT LIABILITIES. — A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency has happened.²

of parties as witnesses are "intended as a *designatio personarum* merely, and not as indicating a present existing relation between the parties. They are meant to signify the parties to the original contract alleged to be usurious, or 'the original debtor and creditor.'" *Gifford v. Whitcomb*, 9 Cush. (Mass.) 482. See *CREDITOR, ante*. And see the title **WITNESSES**.

Terre Tenant. — A *terre tenant* has been held not to be a debtor within an exemption law. *Eberhart's Appeal*, 39 Pa. St. 511, 80 Am. Dec. 536.

Married Woman. — An insolvency statute provided that "any debtor" who should become insolvent might make an assignment for the benefit of his creditors. It was held that under this statute a married woman might make an assignment without her husband joining with her. *Kinney v. Sharvey*, 48 Minn. 93. See generally the titles **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, vol. 3, p. 22; **HUSBAND AND WIFE**; **INSOLVENCY AND BANKRUPTCY**; **SEPARATE PROPERTY OF MARRIED WOMEN**.

Personal Representative. — In *Chester, etc., R. Co. v. Marshall*, 40 S. Car. 59, it was held that the word "debtor," in a statute providing for the revival of a judgment against a deceased judgment debtor in the phrase "by the service of summons on the debtor," included the personal representative. See generally the title **EXECUTORS AND ADMINISTRATORS**.

1. *Equitable L. Ins. Co. v. Board of Equalization*, 74 Iowa 180; *People v. Arguello*, 37 Cal. 526; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Ex p. Torrie*, 1 N. Y. Leg. Obs. 8; *Ex p. King*, 1 N. Y. Leg. Obs. 276; *Erie's Appeal*, 91 Pa. St. 402. See *infra*, *Obligations Which Have Been Held to Be or Not to Be Debts*. And see **DUE**.

Stock Transfers. (See also the title **STOCK**.) — A provision in the articles of a banking association that the shares of its stock shall not be transferable until the shareholder shall discharge "all debts due" by him to the association, includes liabilities of the shareholder which have not matured. *Leggett v. Sing Sing Bank*, 24 N. Y. 283, on appeal from 25 Barb. (N. Y.) 326.

Owing and Accruing. — "When the words accruing or owing" are used, as they plainly are, to designate two classes of debts, they can receive each a distinct meaning only by taking one as denoting debts which are not yet payable, and the other as denoting those which are. The phrase *debitum in presenti, solvendum in futuro*, is one well known and understood in our law." *Dresser v. Johns*, 6 C. B. N. S. 435, 95 E. C. L. 435, in which it was held that a verdict in an action of contract for unliquidated damages was not a "debt owing or accruing," so as to be attachable under the Common Law Procedure Act. See also *Jones v. Thompson*, El. Bl. & El. 63, 96 E. C. L. 63.

Limitation of Indebtedness. — In *Spilman v. Parkersburg*, 35 W. Va. 615, it is said: "By the term 'indebtedness,' as here used, is meant the state of being by voluntary obligation, express or implied, under legal liability to pay in the present or at some future time for something already received, or for something yet to be furnished or rendered. This includes every kind of indebtedness, no matter in what manner created, or voluntarily brought about, or for what purpose. Whether it be for municipal self-preservation or not; whether for pure air, pure water, good light, clean and convenient and safe streets and sidewalks; whether it be payable now or hereafter, payable quarterly or annually, or at any date running on for thirty-four years; whether for current expenses, or fixed and definite debts or charges; whether for personal property or real property, leasehold or freehold; it is none the less indebtedness, created in some manner and for some purpose, and is within the purview and the bar of the constitution."

Now Due. — In an Assignment of "all debts now due" to the assignor, it was held that all debts due and payable to the donor at the date of the deed passed, but not such debts as, though contracted, had not become payable at the date of the deed. *Collins v. Janey*, 3 Leigh (Va.) 389.

Confined to Debts Due. — Where a manufacturing corporation appointed a general agent and attorney, agreeing to pay him an annual salary, but no time was fixed when the salary was to become due and payable, though the beginning of the year was fixed, it was held there was no "debt, existing or contracted." The court said: "The statute speaks of 'debts' existing or contracted, not of liabilities which may ultimately ripen into debts." *Oviatt v. Hughes*, 41 Barb. (N. Y.) 541. And see *Jones v. Barlow*, 62 N. Y. 202.

2. **Contingent Liabilities.** (See *infra*, *Liability for Unliquidated Damages*.) — *People v. Arguello*, 37 Cal. 524; *Frothingham v. Haley*, 3 Mass. 68; *Howell v. Metropolitan Dist. R. Co.*, 19 Ch. Div. 508; *Richardson v. Elmit*, 2 C. P. Div. 9.

In *Wentworth v. Whittemore*, 1 Mass. 471, it is held that whenever it is uncertain whether anything will ever be due, it cannot be called a debt.

Garnishment. — A "debt due or accruing" to a judgment debtor capable of being attached by a garnishee order under Rules of Court 1875, order xlv., rule 3, must be an absolute and not merely a conditional debt. *Howell v. Metropolitan Dist. R. Co.*, 19 Ch. Div. 508. See generally the title **GARNISHMENT**.

Annexed Territory. — A provision in a statute that the detached portions of a county shall be liable for its *pro rata* share of the debts of the county from which it was taken, does not subject them to a proportionate liability for "contingent liabilities arising out of a breach of duty." *Askew v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730. See generally the title

Indorsers, Sureties, etc. — It has been accordingly held in a number of cases that the liability of a surety or an indorser is not a debt.¹ But in other cases the

COUNTIES, vol. 7, p. 912; MUNICIPAL CORPORATIONS; TOWNS AND TOWNSHIPS.

Insolvency — Liability of Stockholders. — The qualified liability of a member of a manufacturing corporation for the debts of the corporation is not a debt that can be proved against the estate of an insolvent debtor. *Kelton v. Phillips*, 3 Met. (Mass.) 61. See also *James v. Atlantic Delaine Co.*, 11 Nat. Bank Reg. 390. And see generally the title STOCKHOLDERS.

Share of Profits. — A contract between the shippers of a cargo and the owners of the ship, that the latter should receive a share of the profits, does not create a debt from the former to the latter until the termination of the voyage. *Davis v. Ham*, 3 Mass. 33; *Frothingham v. Haley*, 3 Mass. 68.

Rent. — A claim for rent after a lessor had taken possession of the premises under a provision in the lease that in case the premises became vacant the lessor might take possession and re-let them, was held to be not within the phrase "debts and liabilities" as used in an assignment by the lessee of all his property to pay "all the debts and liabilities now due." The court said: "Such liability was uncertain in extent, and whether there would, at the end of the term, be any, or what amount, for which he would be liable, could not until then be definitely determined. That liability, such as it was, was not a 'debt,' within the meaning applicable to that term in the assignment. *Matter of Adams*, 15 Abb. N. Cas. (N. Y. C. Pl.) 61. It is difficult to see, in its relation to the subject, that the word 'liabilities' was intended to have any more comprehensive meaning than is applicable to the word 'debts.'" *Matter of Hevenor*, 70 Hun (N. Y.) 56. And that rent not yet due is not a debt, see *Jones v. Thompson*, El. Bl. & El. 63, 96 E. C. L. 63; *Wood v. Partridge*, 11 Mass. 488. Compare *Mitchell v. Lee*, 8 B. & S. 92.

Covenant to Pay Rent. — A covenant to pay rent quarterly creates no debt until it becomes due, for before that time the lessee may quit with the consent of the lessor, or he may assign his term with his consent, or he may be evicted by a title paramount to that of the lessor. *Wood v. Partridge*, 11 Mass. 488. See *infra*, *Obligations Which Have Been Held to Be or Not to Be Debts*.

Sailor's Wages. — It has been held that the wages of a sailor, being contingent upon the arrival of the ship, are not a debt until the ship has arrived, and until then are not attachable. *Wentworth v. Whittemore*, 1 Mass. 471.

Assignment for the Benefit of Creditors — Contingent Liability. — In *Matter of Hevenor*, 144 N. Y. 271, it was held that a provision in an assignment for the benefit of creditors directing the application of the assets to the payment by the assignee of all the assignor's debts and liabilities now due or to grow due, applied only to such debts and liabilities as could be ascertained or fixed when the assignment was made, and did not include a contingent liability the amount of which, if it should ever arise, could only thereafter be definitely fixed and ascertained.

Contingent Liability — Bond of Indemnity. — In *Johnson v. Diamond*, 11 Exch. 73, it was held that money that might become due under a bond of indemnity was not a debt within the *English* garnishment statute.

Limitation of Indebtedness. — That a limitation upon the power of the state to contract debts includes contingent debts, see *State v. Medbery*, 7 Ohio St. 535.

In *Davenport v. Kleinschmidt*, 6 Mont. 537, it was held that a debt payable upon a contingency was a debt within a limitation upon the power of a municipality to contract debts. And see the titles COUNTIES, vol. 7, p. 898; MUNICIPAL CORPORATIONS.

Contingent Debt — Bankruptcy. — The United States bankrupt law extended to contingent debts and liabilities. In construing this statute, the court, in *Sayre v. Glenn*, 87 Ala. 632, said: "The phrase 'contingent debt' has been construed to mean, not a demand whose existence depended on a contingency, but an existing demand the cause of action upon which depends on a contingency." *French v. Morse*, 2 Gray (Mass.) 111; *Woodard v. Herbert*, 24 Me. 358. See also CONTINGENT, vol. 7, p. 81.

1. Indorser of Promissory Note. — The contingent liability of an indorser of a promissory note has been held not a debt. *May v. Hammond*, 144 Mass. 151. See also *Matter of Morse*, 17 Blatchf. (U. S.) 75.

In *Frost v. Carter*, 1 Johns. Cas. (N. Y.) 73, it was held that a contingent debt, *i. e.*, the liability of an indorser of a promissory note to pay it upon failure of the maker, was not a debt within an insolvent act providing that a discharge in bankruptcy should be a bar to a recovery of any debt of the maker, and therefore that where the indorser paid the note after the maker had been discharged under the insolvent act, he might still recover the amount from the maker. To the same effect see *Mechanics*, etc., *Bank v. Capron*, 15 Johns. (N. Y.) 467.

Accommodation Bills. — The plaintiff accepted two accommodation bills for one C., and C., to secure him, indorsed to him a warehouse receipt from the defendants. It was held, reversing the judgment of common pleas, *Cockburn v. Sylvester*, 27 U. C. C. P. 34, which follows *In re Coleman*, 36 U. C. Q. B. 559, that the plaintiff could not recover, as there was no debt contracted from C. to the plaintiff; the liability incurred by C. to indemnify the plaintiff against these acceptances not constituting a debt until default made by C. The court commented upon the language of the vice-chancellor in *Macnee v. Gorst*, L. R. 4 Eq. 315. *Cockburn v. Sylvester*, 1 Ont. App. 471.

Suretyship. (See also the title SURETYSHIP.) — The liability of sureties on an official bond is not a debt for which, under the attachment law, a receiver is authorized to sue in his own name. *State v. Gambs*, 68 Mo. 289.

The liability of the sureties in the official bond of an officer for a failure on his part to pay over money collected by him under an

surety's liability has been held a debt.¹

IV. LIABILITY FOR UNLIQUIDATED DAMAGES — 1. For Breach of Contract —
α. IN GENERAL. — It follows from the general definition of "debt" given above, that in its primary sense the term does not include a demand for unliquidated damages arising out of a breach of contract.² But in many cases the courts, having regard to the context and subject-matter, have given to "debt" its more extensive meaning, and have held the term to include liability for breach of covenant or contract.³

execution is not such a liability as will constitute them debtors of the plaintiff in such execution, so as to subject them to garnishment process as his debtors. *Eddy v. Heath*, 31 Mo. 141.

1. Liability as Surety Held a Debt. — But a surety upon an official bond as well as his principal has been held a debtor after default, within a statute providing that judgments on bonds payable to the state should bind the real estate of debtors from the commencement of the action. *Shane v. Francis*, 30 Ind. 93.

And a devise to executors, with authority to sell the real estate of the testator for the payment of his debts, has been held to apply as well to a joint and several bond, executed by him as surety for his co-obligor, as to any other debts. *Berg v. Radcliff*, 6 Johns. Ch. (N. Y.) 302.

So a surety in a note, who executes a mortgage to the payee for securing payment of the note, is a debtor entitled to have the value of the mortgage deducted from the whole debt. *Lanckton v. Wolcott*, 6 Met. (Mass.) 305.

Obligor in Bond to Secure Performance of a Continuing Trust. — In *State v. Darby*, 11 Mo. App. 530, it is said: "The term 'debtor' is an apt word to define the principal obligor in a bill of exchange, in a promissory note, or in a bond given merely to secure the payment of so much money. But it is not so aptly applied to the principal in a bond given to secure the performance of a continuing trust. We do not, however, lay much stress upon the use of this word, for it is not an apt word when used to designate the principal in a bond given to secure the delivery of property. Besides, when a judgment is rendered on a bond, all the parties thereto against whom it has been rendered may be aptly designated as debtors, and the principal in the bond as a principal debtor."

Indemnity Contract. — An affidavit in a chattel mortgage was held sufficient, which stated that the mortgage was made "for the purpose of securing the debt specified in the condition thereof," where the condition showed that the mortgage was given to secure the mortgagee against liability as an indorser for the mortgagor. *Gilbert v. Vail*, 60 Vt. 266.

2. Strict Construction. — *Stanley v. Ogden*, 2 Root (Conn.) 265; *Day v. Bennett*, 18 N. J. L. 288; *Jeffery v. Wooley*, 10 N. J. L. 123; *Jackson v. Bell*, 31 N. J. Eq. 558; *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 351, 8 Am. Dec. 513.

Breach of Contract — Insolvency. — A claim for damages for breach of a contract by the assignors, whereby the claimants lost possible profits accruing from the assignment, was held not provable as a debt against the estate of an insolvent, assigned for the benefit of his

creditors. *Matter of Adams*, 15 Abb. N. Cas. (N. Y. C. Pl.) 61.

Novation. (See also the title *NOVATION*.) — In *Rietzloff v. Glover*, 91 Wis. 65, it was held, within the law of novation which allows the substitution of a new debtor for an old one, that an oral promise by a lessor, to pay the wages of a farm hand employed by the lessee, did not create the relationship of debtor and creditor, although it was agreed upon in the lease that the lessor should furnish the lessee with money to carry on the farm.

3. Liberal Construction. — In *Frazer v. Tunis*, 1 Binn. (Pa.) 254, it was held that a claim against an intestate's estate for damages on account of the breach of articles of agreement under seal, was a debt by specialty within the meaning of a statute.

Breach of a Covenant — Incumbrances. — In *New Jersey Ins. Co. v. Meeker*, 37 N. J. L. 282, it was held that an action of covenant would by the force of the statute of *New Jersey* lie against the heirs and devisees for the breach of a covenant against incumbrances contained in a conveyance of the ancestor, although the counsel for the defendant argued that the act, in terms, gave nothing more than an action in favor of a creditor against the heirs and devisees of a debtor, and that by the use of these expressions debts strictly so called were contemplated, and not damages for the breach of covenants.

Same — Warranty. — The liability for a breach of covenant of warranty is a debt. See *Cheney v. Straube*, 35 Neb. 521; *Dryden v. Kellogg*, 2 Mo. App. 87.

Breach of Contract — Survival. — In *Dryden v. Kellogg*, 2 Mo. App. 93, it is said that by some authorities it seems to be considered that any cause of action which may be assigned, or which will survive for or against the legal representatives after death, is properly called a debt.

Limitation of Actions. — In *Walter A. Wood Mowing, etc., Mach. Co. v. Hancock*, 4 Tex. Civ. App. 302, it was held that a claim for damages for the loss of a crop of oats, caused by the failure of a harvesting machine to do the work as the seller represented it, was a debt such as would be barred by limitation if suit were not commenced in two years after the cause of action accrued. The court cited *Robinson v. Varnell*, 16 Tex. 382; *Stiff v. Fisher*, 2 Tex. Civ. App. 346. See generally the title *LIMITATION OF ACTIONS*.

Tort. — The fact that an action sounds in tort does not make it less a debt where the obligation is for a specific liquidated amount, growing out of a direct agreement or breach of duty. *Commercial Nat. Bank v. Taylor*, 64 Hun (N. Y.) 500.

b. ATTACHMENT, GARNISHMENT, ETC. — The questions upon what claims attachment¹ may be brought, and what demands are subject to garnishment,² are treated at length under their appropriate titles. Here are given only a few cases in which the term "debt," as used in this connection, has been expressly construed.³

c. LIABILITY OF STOCKHOLDERS AND OFFICERS OF CORPORATIONS. — Within statutes providing that in certain cases the stockholders and officers of corporations shall be individually liable for the debts of the corporation, the term "debts" has been held to include unliquidated claims for damages arising *ex contractu*.⁴ But other cases have held that "debts" within such statutes did not include unliquidated damages for breach of contract.⁵

Breach of Promise of Marriage. (See generally the titles BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 882; HOMESTEAD.) — A good cause of action for breach of promise of marriage has been held not a debt within a homestead exemption act. The court said: "Is such a cause of action a debt within the meaning of that provision? It seems to me clearly that it is not. Although the action is founded on contract, so far as form is concerned, yet it is substantially an action of tort. It is purely a personal wrong, as much so as an action for assault and battery or slander. The damages are not assessed as damages growing out of a loss of property, but rather as a compensation for a personal wrong. They are frequently vindictive as well as compensatory. In fine, in every particular, except in the mere form of pleading, it follows the analogy of an action of tort." *Cook v. Newman*, 8 How. Pr. (N. Y. Supreme Ct.) 524.

Same — Imprisonment for Debt. — But in *Perry v. Orr*, 35 N. J. L. 295, it was held that a defendant could not be arrested in an action for breach of promise of marriage, without proof of fraud. See generally the title IMPRISONMENT FOR DEBT.

1. See the title ATTACHMENT, vol. 3, p. 188.

2. See the title GARNISHMENT.

3. Unliquidated Damages — Breach of Contract. — Proceedings by way of attachment were held not to lie upon a claim for unliquidated damages. *Hoover v. Hathaway*, 20 D. C. 591. See also *Wilson v. Wilson*, 8 Gill (Md.) 192, 50 Am. Dec. 685; *Clark v. Wilson*, 3 Wash. (U. S.) 560.

But in *New Haven Steam Saw-mill Co. v. Fowler*, 28 Conn. 108, it was held that damages due for breach of contract were a debt within an attachment statute.

In *Cheney v. Straube*, 35 Neb. 522, it is said: "It requires no argument to prove that an action under the code for the breach of an undertaking in a deed to warrant and defend the title conveyed, is for a debt arising upon a contract within the meaning of the statutes governing attachments."

An action upon an undertaking for an attachment is one arising upon contract and may be maintained by attachment against the property of a nonresident. The fact that the damages are unliquidated does not change the character of the action. *Withers v. Brittain*, 35 Neb. 436. But the statute under construction in that case used both the words, "debt" and "demand."

Breach of Contract of Sale. — A statute of *Pennsylvania* provided that foreign attach-

ments might lie in case of debts. In construing this statute, the court, in *Fisher v. Consequa*, 2 Wash. (U. S.) 385, said: "Surely an inhabitant of Pennsylvania is not less injured by the want of a remedy to recover what is due to him by a foreigner, upon a sale of property, where no price was stipulated, than he would be if a fixed price had been agreed on. In the latter case, the defendant is indebted to the plaintiff in a precise sum; and in the former, a sum equal to the value of the property sold, not then, it is true, liquidated, but depending upon the value to be fixed at the trial. The uncertainty of the sum due does not, in the common understanding of mankind, render it less a debt. A promise, whether express or implied, to pay as much as certain goods or labor are worth, or as much as the same kind of goods may sell for on a certain day or at a certain market, or to pay the difference between the value of one kind of goods and another, creates, in common parlance, a debt; and the person entitled to performance does not speak of his claim as for damages, but for a debt, to the amount which he considers himself entitled to."

Breach of Contract to Deliver Cattle. — In *Stiff v. Fisher*, 2 Tex. Civ. App. 346, it was held that the liability resulting from the breach of a contract to deliver cattle was a debt within an attachment law. To the same effect see *Stiff v. Stevens*, (Tex. Civ. App. 1893) 21 S. W. Rep. 295.

4. Liability of Stockholders and Officers. (See the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; STOCKHOLDERS.) — *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Haynes v. Brown*, 36 N. H. 545.

Breach of Warranty. — In *Dryden v. Kellogg*, 2 Mo. App. 87, it was held that the liability upon a breach of warranty was a debt within the meaning of the statute providing for the liability of stockholders in a corporation.

1. Breach of Contract of Employment. — An unliquidated claim for a breach of contract of employment was held a debt within a statute providing for the liability of officers of a corporation where the corporation failed to publish its annual report. *Green v. Easton*, 74 Hun (N. Y.) 329.

In *Brand v. Godwin*, 15 Daly (N. Y.) 456, affirming (City Ct.) 3 N. Y. Supp. 807, it was held that an obligation to pay a singer employed for a specified time by the corporation, at a certain salary, was a debt of the corporation from the time the contract went into effect.

5. Victory Webb Printing, etc., Co. v.

d. **LIABILITY ON A POLICY OF INSURANCE.** — The term "debts" has been held to include an unliquidated claim for a loss on a policy of insurance.¹

2. For Tort — *a.* **IN GENERAL.** — Before it is reduced to judgment a claim for tort is not a debt within the technical meaning of that term.²

Insolvency. — So the word "debts" as used in bankruptcy and insolvency statutes has been held not to include liabilities for torts.³

Beecher, 26 Hun (N. Y.) 48; Cady v. Sanford, 53 Vt. 632.

Stockholder's Liability. — Under a contract between the plaintiff and a corporation, that the former should deliver and the latter receive and pay for personal property at a future day, it was held that a debt, within the meaning of the statute rendering stockholders liable for the debts of corporations, did not arise until the delivery of the property. *Garrison v. Howe*, 17 N. Y. 458. See also *Jones v. Barlow*, 62 N. Y. 202.

Debt Contracted. — The indebtedness of a corporation upon a judgment in a *scire facias*, it having been factorized in a suit brought against its creditors, is not a "debt contracted" within the meaning of a personal liability statute. The court said: "There cannot be a 'debt contracted' without two or more contracting parties, one of whom in this case must be the corporation. The phrase therefore necessarily implies some act on the part of the corporation with some party dealing with it, whereby an obligation is incurred, the company receiving and the other party giving credit on the faith of their solvency and proper organization as a corporation." *Armstrong v. Cowles*, 44 Conn. 44.

Original Debt. — The "debt" for which the trustee of a manufacturing corporation may become liable is "the original debt contracted by the corporation, and not the judgment which the creditor may have recovered against the corporation." *McHarg v. Eastman*, 35 How. Pr. (N. Y. Super. Ct.) 207; *Jones v. Barlow*, 62 N. Y. 202.

1. Policy of Insurance. — See generally the titles **FIRE INSURANCE**; **INSURANCE**; **LIFE INSURANCE**; **MARINE INSURANCE**.

Liability of Stockholders. — In *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 406, it was held that upon the dissolution of a life insurance company, damages due to policy holders for breach of contract became debts within the meaning of statutory or constitutional provisions subjecting the stockholders to liability for the debts due by the company.

Attachment. — In *Knox v. Protection Ins. Co.*, 9 Conn. 430, 25 Am. Dec. 33, it was held that an unadjusted claim for damages, for a loss on a policy of insurance, might be attached in a suit against the holder of the policy, under a statute authorizing debts due from any person to an absent or absconding debtor to be attached. In that decision the word "debts" was held to include the unliquidated claim for a loss on a policy of insurance. But in *Randall v. Lithgow*, 12 Q. B. Div. 525, it was held that a claim on a fire policy for unliquidated damages was not a debt "owing or accruing," attachable under a garnishee order.

2. Torts — *United States*. — *Powell v. Oregonian R. Co.*, 36 Fed. Rep. 730; *Maysville*

St. R., etc., *Co. v. Wilson*, 16 U. S. App. 240.

Alabama. — *Cook v. Walthall*, 20 Ala. 334.

Connecticut. — *Stanly v. Ogden*, 2 Root (Conn.) 265.

Georgia. — *Gamble v. Central R., etc., Co.*, 80 Ga. 595, 12 Am. St. Rep. 276.

Iowa. — *Victor v. Hartford F. Ins. Co.*, 33 Iowa 212; *McElfresh v. Kirkendall*, 36 Iowa 224.

Michigan. — *Hill v. Bowman*, 35 Mich. 191; *Detroit Post, etc., Co. v. Reilly*, 46 Mich. 459.

Minnesota. — *Cole v. Aune*, 40 Minn. 80.

Missouri. — *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214.

Nebraska. — *Doolittle v. Marsh*, 11 Neb. 243.

New Hampshire. — *Getchell v. Chase*, 37 N. H. 106; *Foster v. Dudley*, 30 N. H. 463.

New York. — *Esmond v. Bullard*, 16 Hun (N. Y.) 65.

Virginia. — *Dunlop v. Keith*, 1 Leigh (Va.) 430, 19 Am. Dec. 755.

Tort — Demand. — In *Cable v. McCune*, 26 Mo. 382, 72 Am. Dec. 214, the court refused to construe "debt" as equivalent to "demand," or as including a claim for damages for a tort. See *supra*, the paragraph *Debt Distinguished from Demand*.

Homestead. (See generally the title **HOME-STEAD**.) — In *Parker v. Savage*, 6 Lea (Tenn.) 406, it was held that a tort was not a debt; but this construction was in favor of the homestead exemption, the constitution having provided that nothing therein should impair the validity of any debts under contract. And compare *Smith v. Omans*, 17 Wis. 305, where it was held that "debt" might include a judgment for tort, within a statute providing that the homestead should be exempt from forced sales for debts.

3. Insolvency. (See the title **INSOLVENCY AND BANKRUPTCY**.) — In *Strong v. White*, 9 Johns. (N. Y.) 161, it was held that an insolvent debtor's act did not extend to actions for libel or other torts.

Same — Trover. — In *Kennedy v. Strong*, 10 Johns. (N. Y.) 289, it was held that a discharge under the *New York Insolvent Act of 1811*, was no bar to an action of trover. See also *Kip v. New York Bank*, 10 Johns. (N. Y.) 63.

Same — Trespass. — In *Kellogg v. Schuyler*, 2 Den. (N. Y.) 73, it was held that a claim for damages for a trespass was not a debt within the bankrupt act, and therefore was not affected by the bankrupt's discharge.

And that a discharge in bankruptcy does not relieve the bankrupt from his liability for tort, see *Crouch v. Gridley*, 6 Hill (N. Y.) 252.

Same — Slander and Malicious Prosecution. — In *Zimmer v. Schleeauf*, 115 Mass. 52, it was held that a claim for damages for slander and malicious prosecution was not a debt or liability contracted by a bankrupt, and was therefore not affected by a discharge of the bankrupt under the act of 1867.

Imprisonment for Debt. — A constitutional provision which abolishes imprisonment for debt does not prohibit the legislature from passing a law providing for imprisonment on judgments founded on torts.¹ But the term "debt" has been frequently extended to include a liability for tort where such a construction was necessary to conform to the clear intention of the instrument.²

Bankrupt's Assignment. — But in *Sullivan v. Bridge*, 1 Mass. 511, it was held that the right of action which a bankrupt had against a sheriff for not collecting the contents of an execution was transferred to the assignee in bankruptcy.

1. Imprisonment for Debt. (See the title IMPRISONMENT FOR DEBT.) — *Turner v. Wilson*, 49 Ind. 584; *Lower v. Wallick*, 25 Ind. 68; *State v. Hamilton*, 33 Ind. 502; *Ex p. Voltz*, 37 Ind. 237; *Ex p. Teague*, 41 Ind. 278; *Reynolds v. Lamont*, 45 Ind. 308; *McCool v. State*, 23 Ind. 127.

Imprisonment — Judgment for Tort. — A judgment for damages for the wrongful and fraudulent misapplication and conversion of school-land certificates deposited as security for a loan, is not a "debt arising out of or founded on a contract, expressed or implied," for which a person is entitled to exemption from imprisonment. *Matter of Mowry*, 12 Wis. 52. The court said: "The language of the constitution, taken in its broad and popular sense, indicates a right accruing — a sum of money or other thing due or deliverable, by virtue of a contract expressed between the parties or implied from their acts and circumstances, or on account of a breach of it in respect to some matter provided for or contemplated by them when it was made; something springing out of the contract and for the enforcement of which resort must be had to it; and seems not to include damages for those wrongful acts which either party may possibly do, and which when done are remotely connected with it, but were not anticipated by them at the time of making of it." This case was approved in *Cotton v. Sharpstein*, 14 Wis. 228, 80 Am. Dec. 774, where it is said "The question of liability to arrest seems to me to depend entirely, in such cases, upon the one whether the party is liable to an action of trover or tort. If he is, then all the incidents to and results of such an action would seem necessarily to follow."

Same — Admiralty Practice. — In *Hanson v. Fowle*, 1 Sawy. (U. S.) 497, 11 Fed. Cas. No. 6,041, it was held that an action for damages for injury to the person was not an action to recover a debt within the meaning of the term "debt" as used in the admiralty rule abolishing imprisonment for debt. This case was followed in *Bolden v. Jensen*, 69 Fed. Rep. 745, which disapproves *The Carolina*, 14 Fed. Rep. 424, and *Chiesa v. Conover*, 36 Fed. Rep. 334, and *The Bremena v. Card*, 38 Fed. Rep. 144.

Bastardy — Imprisonment for Debt. — In *Turner v. Wilson*, 49 Ind. 584, it was held that a judgment for the support of a bastard child was not a debt. To the same effect is *Musser v. Stewart*, 21 Ohio St. 353; *Matter of Wheeler*, 34 Kan. 96. See also *In re Cotton*, 2 N. Y. Leg. Obs. 370.

Penalties — Proceedings in Bastardy — Imprisonment for Debt. — In *State v. Brewer*, 38 S. Car. 263, 37 Am. St. Rep. 752, the court, after

saying that it regarded a charge of bastardy as a criminal proceeding, said: "So regarding a proceeding in a case of bastardy, we think it clear that the penalty which one convicted of that offense incurs cannot be regarded as a debt, in the sense of that term as used in section 20, article 1, of the constitution. See the authorities collected in 5 AM. AND ENG. ENCYC. OF LAW, p. 143 *et seq.*, as well as in volume 10 of the same valuable work, at page 212 *et seq.* In the case of *State v. Mace*, 5 Md. 337, where it was held that a fine imposed for the violation of a statute is not a debt, within the constitutional provision forbidding imprisonment for debt, the court said, substantially, that the constitution ought to receive a common sense interpretation, — that is to say, the sense in which it was understood by those who adopted it; and, if it be so construed, the term 'debt' is to be understood as an obligation arising otherwise than from the sentence of a court for the breach of the public peace, or commission of other crime. The people who adopted it evidently so understood it. 'They regarded it, as it was intended, a protection to the unfortunate, and not an immunity to the criminal.' * * * This, we think, is the true view of the matter. And so it was held in the case of *Matter of Wheeler*, 34 Kan. 96, that the charge against the father of a bastard child, for its maintenance, is not a debt, within the terms of the constitutional provision forbidding imprisonment for debt except in cases of fraud. To same effect, see *Musser v. Stewart*, 21 Ohio St. 353, and *Ex p. Cottrell*, 13 Neb. 193. See also *Ex p. Robertson*, 27 Tex. App. 628, 11 Am. St. Rep. 207."

2. Stokes v. Mason, 10 R. I. 261; *Barber v. East Dallas*, 83 Tex. 147; *Kalamazoo Nat. Bank v. Stephens*, (Tex. Civ. App. 1897) 40 S. W. Rep. 143.

Debt or Demand. (See also DEMAND.) — The phrase "any debt or demand," in a statute allowing costs, has been held to include a claim arising *ex delicto*. *White v. Hunt*, 6 N. J. L. 415.

Fraudulent Conveyances. (See also the title FRAUDULENT SALES AND CONVEYANCES.) — In *Westmoreland v. Powell*, 59 Ga. 256, it was held that a liability for tort was a debt so far as to bring the injured party within the protection of the statutes for the prevention of conveyances and transfers of property by debtors in fraud of creditors. This case was distinguished in *Gamble v. Central R., etc., Co.*, 80 Ga. 595, 12 Am. St. Rep. 276.

Partnership. (See generally the title PARTNERSHIP.) — A statute provided that a partner authorized to act in liquidation might collect, compromise, or release any debts due to the partnership and pay or compromise any claims or debts against it. It was held that "debt" in this statute included a demand for damages arising from a tort. *Berson v. Ewing*, 84 Cal. 89.

False Pretenses. — The liability of a person who has obtained money from another by false representations or pretenses has been held a debt in some cases.¹

Annexation of Territory. — Where upon the annexation or division of municipalities the legislature provides for an apportionment of debts, the term "debts" includes claims for tort.²

b. ATTACHMENT, GARNISHMENT, ETC. — Within statutes providing for attachment for or garnishment of debts, the word "debts" has been frequently held not to include demands *ex delicto*.³

c. LIABILITY OF STOCKHOLDERS AND OFFICERS OF CORPORATIONS. — Under statutes providing in certain cases for the individual liability of stockholders or officers of a corporation, for the debts of the corporation, it has been generally held that a claim of tort against the corporation is not a debt of the company for which the stockholders or officers are liable.⁴ And this

Assignment for Benefit of Creditors. — An insolvent firm made an assignment for the benefit of their creditors, conveying all that they had in satisfaction of their debts, and all debts due to them. It was held that the assignment included a demand pending against certain railroad companies for damages to the firm's property. *Mayo v. Snead*, 78 Ky. 637.

Claim Against Government. — Under the words in a deed of "all debts due the grantor," a claim the grantor had on a foreign government for the detention of his ship was held to pass. *Griffin v. Macaulay*, 7 Gratt. (Va.) 476.

Large Sense of the Term — Public Lands. — A *United States* statute provided that public lands acquired under its provisions should not be liable for any debt contracted prior to issuing of the patent therefor. It was held that the words "debt contracted" were not to be confined to debts or obligations incurred by an agreement of the parties. *State v. O'Neil*, 7 Oregon 142.

1. *Finch v. Armstrong*, 9 S. Dak. 255; *Stanhope v. Swafford*, 77 Iowa 596; *McDole v. Purdy*, 23 Iowa 277. But compare *Zinn v. Ritterman*, 2 Abb. Pr. N. S. (N. Y. Super. Ct.) 262.

Homestead. — The liability of a person who obtained money from another by reason of false and fraudulent representations, in the sale of a patent right, has been held a debt within the meaning of the word as used in a homestead exemption statute. *Warner v. Cammack*, 37 Iowa 642. The court said: "We hold that it was a debt; and this, because the plaintiff in that action might have waived the tort, and brought his action for money paid to the use of the defendant therein." See generally the title **HOMESTEAD**.

New Note for Old. — A new debt is incurred by the giving of a new bill in renewal of an old one, and such new debt is a "debt or liability," within the meaning of the subsection of the Debtors' Act, 1869, with regard to the "false pretenses by means of which the prisoner incurred a 'debt or liability.'" *R. v. Pierce*, 56 L. J. M. C. 85.

2. Tort — Annexation of Territory. (See also **COUNTIES**, vol. 7, p. 912; **MUNICIPAL CORPORATIONS**; **TOWNS AND TOWNSHIPS**.) — In *Barber v. East Dallas*, 83 Tex. 147, it was held that the word "debts," in an act annexing subordinate territory to a city, included all obliga-

tions to pay money arising from contract or implied by law, as a compensation for damages for property taken, damaged, etc., under the right of eminent domain. *Citing* 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1257.

Division of Municipality. — In *Hunter v. Windsor*, 24 Vt. 327, it was held that the term "debt now due," under an act dividing the town of Windsor into Windsor and West Windsor, was synonymous with the word "liabilities" whether arising *ex contractu* or *ex delicto*.

3. Attachment, Garnishment, etc. (See also the titles **ATTACHMENT**, vol. 3, p. 101; **GARNISHMENT**.) — *Fisher v. Consequa*, 2 Wash. (U. S.) 382; *Holcomb v. Winchester*, 52 Conn. 447, 52 Am. Rep. 609; *Raver v. Webster*, 3 Iowa 511; *McDonald v. Forsyth*, 13 Mo. 549.

A *Texas* statute allowing attachments, in every instance in which a cause of action was mentioned denominated it a debt. It was held that attachment did not lie for tort. *El Paso Nat. Bank v. Fuchs*, 89 Tex. 197.

Libel. — A recovery for libel was held not to furnish an indebtedness which could be garnished until judgment was entered on the verdict. *Detroit Post, etc., Co. v. Reilly*, 46 Mich. 459. See also *Hill v. Bowman*, 35 Mich. 191.

Conversion. — In *Sunday Mirror Co. v. Galvin*, 55 Mo. App. 412, it was held that the conversion of money, though fraudulent on the part of the tortfeasors, would not constitute a fraudulent contraction of a debt within the purview of a statute defining the grounds or the attachment. See also *Finlay v. Bryson*, 84 Mo. 666.

Official Neglect. — A claim arising out of official neglect of the county court clerk was held not to be a debt within the meaning of a statute authorizing an attachment for debt. *Dunlop v. Keith*, 1 Leigh (Va.) 430, 19 Am. Dec. 755.

Malicious Prosecution. — An action to recover damages for a vexatious suit has been held not an action to recover a debt, within an attachment statute. *Stanly v. Ogden*, 2 Root (Conn.) 262.

4. Liability of Stockholders and Officers of Corporations. (See also the titles **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**; **STOCKHOLDERS**.) — *Child v. Boston, etc., Iron Works*, 137 Mass. 516, 50 Am. Rep. 328; *Bohn v. Brown*, 33 Mich. 257; *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214; *Doolittle v. Marsh*,

is true, even though the original cause of action has been reduced to judgment.¹

d. VERDICT AND JUDGMENT. — Even where the damages have been actually liquidated by a verdict in an action for a tort, the claim does not become a debt until judgment has been rendered upon the verdict.² But when judgment has been entered upon a verdict recovered in an action for a tort, the judgment is as much a debt as if recovered in an action *ex contractu*.³ It should

11 Neb. 243; *Esmond v. Bullard*, 16 Hun (N. Y.) 65; *Losee v. Bullard*, 79 N. Y. 404; *Heacock v. Sherman*, 14 Wend. (N. Y.) 58; *Archer v. Rose*, 3 Brews. (Pa.) 265; *Leighton v. Campbell*, 17 R. I. 51.

Negligence of Servants. — A demand against a corporation for damages for the loss of a steamboat through the negligence of its agents is not a debt of the corporation within the meaning of an act making the stockholders liable for all the "existing debts" of the corporation. *Cable v. McCune*, 26 Mo. 381, 72 Am. Dec. 214, *affirmed* in *Cable v. Gaty*, 34 Mo. 573, 86 Am. Dec. 126.

In *Bohn v. Brown*, 33 Mich. 257, it was held that the claim of a passenger who had been injured by the negligence of the agents of a corporation carrier was not one which, after judgment against the company and execution returned unsatisfied, afforded a ground of action against the stockholders.

Bridge Out of Repair. — A stockholder was held not liable for damages for injuries caused by a bridge belonging to the company being out of repair. *Heacock v. Sherman*, 14 Wend. (N. Y.) 58.

Infringement of Patents. — The liability of a corporation for the infringement of letters patent is not before judgment a debt for which the officers are liable. *Child v. Boston*, etc., *Iron Works*, 137 Mass. 516, 50 Am. Rep. 328.

Personal Injuries. — In *Leighton v. Campbell*, 17 R. I. 51, it was held that a claim for unliquidated damages for personal injuries was not a debt within the meaning of a statute providing for the individual liability of officers of a corporation in certain cases. The court criticised the cases of *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417, and *Carver v. Braintree Mfg. Co.*, 2 Story (U. S.) 432.

Contra. — In *Carver v. Braintree Mfg. Co.*, 2 Story (U. S.) 432, it was held that the *Massachusetts* statute of 1821, relating to the individual liabilities of stockholders, was to be construed as a remedial statute, and that the phrase "debts contracted," as employed therein, meant not only debts in the strict sense of the term, but any liabilities incurred by the corporation. Story, J., said: "If, on the other hand, we should construe the statute broadly as a remedial statute, and give to the word 'debts' a meaning not unusual as equivalent to 'dues,' and to the word 'contracted' a meaning which, though more remote, is still legitimate, as equivalent to 'incurred,' so that the phrase 'debts contracted,' in this sense, would be equivalent to 'dues owing' or 'liabilities incurred,' the statute would attain all the objects for which it seems designed." That case was one of damages arising from torts to property. And in *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 455, it was held

that the term "debts" in the same connection included a claim for unliquidated damages arising from breach of contract.

In *Child v. Boston*, etc., *Iron Works*, 137 Mass. 516, 50 Am. Rep. 328, the court says, in criticism of *Carver v. Braintree Mfg. Co.*, 2 Story (U. S.) 432, cited above: "There are no cases decided by the courts of the commonwealth in which a stockholder has been held liable for a tort of the corporation, and the decision of Mr. Justice Story stands unsupported by any direct authority either before or since." *Carver v. Braintree Mfg. Co.*, 2 Story (U. S.) 432, is also criticised in *Leighton v. Campbell*, 17 R. I. 51.

1. Judgment. (See *infra*, *Obligations Which Have Been Held to Be or Not to Be Debts.*) — *Leighton v. Campbell*, 17 R. I. 51; *Chase v. Curtis*, 113 U. S. 464; *McHarg v. Eastman*, 35 How. Pr. (N. Y. Super. Ct.) 208; *Stanton v. Wilkeson*, 8 Ben. (U. S.) 357; *Bohn v. Brown*, 33 Mich. 257. This is contrary to the general doctrine that a judgment is a debt notwithstanding the cause of action for which it was recovered. See the next subdivision, *Verdict and Judgment*.

2. Thayer v. Southwick, 8 Gray (Mass.) 229, *Zimmer v. Schleeauf*, 115 Mass. 52; *Kellogg v. Schuyler*, 2 Den. (N. Y.) 73; *Crouch v. Gridley*, 6 Hill (N. Y.) 250.

Garnishment. — Within the *English* garnishment statute, damages have been held not a debt until judgment, even after verdict. *Jones v. Thompson*, El., Bl. & El. 63, 96 E. C. L. 63. See generally the title GARNISHMENT.

Discharge in Bankruptcy. — An insolvent's discharge, after verdict and before judgment in an action of trespass, does not protect a debtor from imprisonment. The court said: "The verdict in this case was not a debt at the time of the granting of the discharge, which therefore does not protect the defendant." *Hodges v. Chace*, 2 Wend. (N. Y.) 248.

3. Judgments. (See the title JUDGMENTS.) — *Robinson v. Vale*, 2 B. & C. 762, 9 E. C. L. 236; *Johnson v. Butler*, 2 Iowa 545; *Lane v. Baker*, 2 Grant's Cas. (Pa.) 424; *Powell v. Oregonian R. Co.*, 36 Fed. Rep. 730.

Bankruptcy. (See generally the title INSOLVENCY and BANKRUPTCY.) — A judgment of a court in a civil action between individuals existing against a bankrupt at the time the petition in bankruptcy is filed, is a debt provable against the bankrupt's estate, whether the cause of action on which such judgment was founded arose out of a tort or on a contract. *Howland v. Carson*, 28 Ohio St. 625.

In *Matter of Comstock*, 22 Vt. 642, it was said: "There is no distinction under the bankrupt law, between a judgment in an action arising *ex delicto* and a judgment in an action arising *ex contractu*. They are both debts within the meaning of the law, and

be borne in mind, however, that a judgment in an action for tort, against a corporation, has been held not to constitute a debt for which stockholders of a corporation may be held individually liable.¹

V. OBLIGATIONS WHICH HAVE BEEN HELD TO BE OR NOT TO BE DEBTS —

1. Taxes. — A tax, in its essential characteristics, is not a debt. A tax is an impost levied by authority of government upon its citizens or subjects, for the support of the state. It is not founded on contract or agreement. It operates *in invitum*. A debt is a sum of money due by certain and expressed agreement. It originates in and is founded upon contracts express or implied.²

both provable against the estate of the bankrupt." See also *In re Book*, 3 McLean (U. S.) 317.

Homestead. (See the title HOMESTEAD.) — A homestead is exempt from an execution issued upon a judgment rendered in an action sounding in tort, commenced before the right accrued, the judgment being rendered after. *Parker v. Savage*, 6 Lea (Tenn.) 406. And see *Smith v. Omans*, 17 Wis. 395. But see *Lathrop v. Singer*, 39 Barb. (N. Y.) 396; *Schouton v. Kilmer*, 8 How. Pr. (N. Y. Supreme Ct.) 527.

In *Dellinger v. Tweed*, 66 N. Car. 206, it was held that a homestead could not be sold under execution issued upon a judgment rendered in an action *ex delicto*. The provision under construction in that case was that the homestead should be exempt from sale under execution obtained on any debt. It was held that "debt" must be read "judgment." *Pearson, C. J., dissenting*, said: "The ordinary meaning of the word 'debt' is a sum of money due to another by contract. The relation of debtor and creditor implies, as of course, that the one has given credit to, that is, trusted, the other, in a contract."

Debt Contracted. — Though a judgment in tort is technically a debt, it is held not to be a debt contracted. *Leighton v. Campbell*, 17 R. I. 51. See also *Chase v. Curtis*, 113 U. S. 452; *Bohn v. Brown*, 33 Mich. 257; *Cable v. Gaty*, 34 Mo. 573, 86 Am. Dec. 126.

But in *Robinson v. Vale*, 2 B. & C. 762, 9 E. C. L. 236, the court says: "The judgment, even in an action of tort, is a debt contracted."

Debt by Contract. — It was decided, in the case of *Louisiana v. New Orleans*, 109 U. S. 285, that a liability for a tort, created by statute, although reduced to judgment by a recovery for the damages suffered, did not thereby become a debt by contract, in the sense of the Constitution of the United States, forbidding state legislation impairing its obligation, for the reason that "the term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence." See also *Chase v. Curtis*, 113 U. S. 464.

1. See the subdivision preceding.

2. Taxes. (See also the title TAXATION.) — *United States v. In re Duryee*, 2 Fed. Rep. 68; *Crabtree v. Madden*, 54 Fed. Rep. 426; *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *Meriwether v. Garrett*, 102 U. S. 472.

California. — *People v. Shearer*, 30 Cal. 645; *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 647; *Perry v. Washburn*, 20 Cal. 350; *San Francisco v. Liverpool, etc., Ins. Co.*, 74 Cal. 115, 5 Am. St. Rep. 425.

Florida. — *Finnegan v. Fernandina*, 15 Fla. 379, 21 Am. Rep. 292.

Illinois. — *Jack v. Weienett*, 115 Ill. 105, 56 Am. Rep. 129; *Dunlap v. Gallatin County*, 15 Ill. 7; *Dennis v. Maynard*, 15 Ill. 477.

Indiana. — *Richards v. Stogsdel*, 21 Ind. 74; *De Pauw v. New Albany*, 22 Ind. 204.

Iowa. — *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 60.

Kentucky. — *Slaughter v. Louisville*, 89 Ky. 112; *Louisville, etc., R. Co. v. Com.*, 89 Ky. 531.

Louisiana. — *Geren v. Gruber*, 26 La. Ann. 694; *Shreveport v. Gregg*, 28 La. Ann. 836; *Morris v. Lalaurie*, 39 La. Ann. 47.

Maine. — *Augusta v. North*, 57 Me. 392, 2 Am. Rep. 55; *Packard v. Tisdale*, 50 Me. 376.

Maryland. — *Dugan v. Baltimore*, 1 Gill & J. (Md.) 499; *Gould v. Baltimore*, 59 Md. 378; *Bonaparte v. State*, 63 Md. 465.

Massachusetts. — *Andover, etc., Turnpike Corp. v. Gould*, 6 Mass. 44, 4 Am. Dec. 80; *Peirce v. Boston*, 3 Met. (Mass.) 520; *Crapo v. Stetson*, 8 Met. (Mass.) 393.

Mississippi. — *Daily v. Swope*, 47 Miss. 367.

Missouri. — *Carondelet v. Picot*, 38 Mo. 125.

Nevada. — *Young v. Clute*, 12 Nev. 31; *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220.

New Hampshire. — *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 442.

New Jersey. — *Camden v. Allen*, 26 N. J. L. 398.

Ohio. — *Dreake v. Beasley*, 26 Ohio St. 315.

Oregon. — *Whiteaker v. Haley*, 2 Oregon 128.

Pennsylvania. — *McCall v. Lorimer*, 4 Watts (Pa.) 351; *McKeesport v. Fidler*, 147 Pa. St. 540; *Miller v. Hale*, 26 Pa. St. 432.

Tennessee. — *Jonesboro v. M'Kee*, 2 Verg. (Tenn.) 167.

Vermont. — *Johnson v. Howard*, 41 Vt. 122, 98 Am. Dec. 568; *Webster v. Seymour*, 8 Vt. 135; *Shaw v. Peckett*, 26 Vt. 482; *St. Albans v. National Car Co.*, 57 Vt. 84.

West Virginia. — Board of Education v. Old Dominion Iron Min., etc., Co., 18 W. Va. 441; *Hinchman v. Morris*, 29 W. Va. 684; *State v. Baltimore, etc., R. Co.*, 41 W. Va. 81, citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 149.

Special Assessment. — That a special assessment is not a debt, see *McKeesport v. Fidler*, 147 Pa. St. 532. And see the title SPECIAL ASSESSMENTS.

Set-off. (See also the titles SET-OFF, RECOUPMENT AND COUNTERCLAIM; TAXATION.) — In *Hibbard v. Clark*, 56 N. H. 157, 22 Am. Rep. 432, taxes are held not to come within the meaning of the words "debts or demands" in a statute regulating set-off. See also *Peirce v. Boston*, 3 Met. (Mass.) 520.

In *Galting v. Carteret County*, 92 N. Car. 536, 53 Am. Rep. 432, it was held that in an

Legal Tender. — Thus, in the legal tender acts, which provide that United States treasury notes shall be legal tender for all debts, it has been held that the term "debts" did not include taxes.¹

Tax a Debt. — On the other hand, in a large number of cases, a tax has been held to constitute a debt due the state.²

Assessment and Deduction of Indebtedness. — A number of statutes provide for the taxation of debts, and for the deduction of debts from credits for the purpose of assessment for taxation. In the note will be found a number of cases in which the term "debt" in this connection has been expressly construed. The subject will be treated at length under its appropriate title.³

action by a municipal corporation to enforce a tax the defendant could not set-off debts due him from the corporation.

But in *U. S. v. Pacific R. Co.*, 4 Dill. (U. S.) 66, where a bill in equity was brought by the United States to recover the amount of certain taxes, and the defendant claimed a set-off for a sum exceeding this amount, it is said: "A good deal of argument on both sides has been presented to us upon the question whether an action to recover taxes is an action of debt, and whether an obligation to pay taxes to the government is a debt. There is considerable conflict of authority on that subject. Not only is there such conflict in the courts other than those of the United States, but the Supreme Court of the United States, in at least two cases, has given what might appear to be conflicting decisions upon the subject. [Citing *Lane County v. Oregon*, 7 Wall. (U. S.) 79, quoted *infra*.] On the other hand, in a later case [*Dollar Sav. Bank v. U. S.*, quoted *infra*], found in 19 Wall. (U. S.) 227, coming up from Pennsylvania, where the United States brought an action at law for some internal revenue taxes, a recovery was stoutly resisted on the ground that a tax was not a debt, and as it was not a debt within the common-law meaning of the phrase, that it could not be so collected. In this case the Supreme Court held that, for the purposes of that collection, and in some senses, it was a debt; that the tax — which, I presume, was the same kind of a tax as this is — could be so collected. Whenever the proper officers themselves ascertained their earnings for that particular year, the law applied and made the assessment; it could be neither more nor less than that amount, and no assessment by the officers of the government was necessary to ascertain the amount; therefore it is a debt collectible by suit. I state these things merely to show the difference of opinion that has existed upon the subject, as also to show the fact that the Supreme Court has, under one set of circumstances, recognized that a tax is a debt, while under another that it was not a debt. In the view that all of us here take, I think, however, that this discussion is immaterial. It is immaterial what you call the obligation of a citizen to pay his taxes; it is very clearly an obligation which may be enforced by the courts." The set-off was not allowed in this case, as not growing out of the contract.

1. *Perry v. Washburn*, 20 Cal. 351. See, to the same effect, *Lane County v. Oregon*, 7 Wall. (U. S.) 79; *Kimpton v. Bronson*, 45 Barb. (N. Y.) 625. And see the titles **LEGAL TENDER**; **TAXATION**.

2. Taxes Held to Be Debts. — *Atty.-Gen. v. —*, Anstr. 558; *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227; *U. S. v. Lyman*, 1 Mason (U. S.) 482; *Haas v. Misner*, 1 Idaho 170; *Rhodes v. O'Farrell*, 2 Nev. 60; *State v. Georgia Co.*, 112 N. Car. 34.

Priority. — A claim against the estate in insolvency of the collector of taxes of a town for taxes collected and unaccounted for by him, is one entitled to priority as a debt due to the town, within the *Massachusetts* statute. *Bent v. Hubbardston*, 138 Mass. 99.

Liability of Officers of Corporation. — In *Felker v. Standard Yarn Co.*, 148 Mass. 226, a tax was held a debt within the meaning of the *Massachusetts* statute making the officers of a corporation liable for its debts in certain cases. See generally the title **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**.

Statute of Limitations — Street Improvement Certificate. (See also the title **LIMITATION OF ACTIONS**.) — The sum due on a street improvement certificate, issued by a city against an abutting lot owner, has been held a debt within a statute providing that actions of debt, not evidenced by written contract, should be brought within two years. *O'Connor v. Koch*, 9 Tex. Civ. App. 586. See also *Lewis v. Houston*, 11 Tex. 648; *Mellinger v. Houston*, 63 Tex. 37.

Action of Debt — Revenue Laws. — In *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 239, it was held that an action of debt lay to recover certain internal revenue taxes due to the government.

Jurisdiction. — In *Bowe v. Jenkins*, 69 Hun (N. Y.) 458, it was held that a tax, properly assessed, was a debt on contract implied, as that phrase is used within a statute conferring jurisdiction upon a court.

Attachment. — In *Davie v. Blackburn*, 117 N. Car. 383, it is said: "It is true this court has decided that when a tax is imposed the taxpayer becomes a debtor, and what he owes is a debt, in the higher sense of that word, as embracing any kind of a just demand. *State v. Georgia Co.*, 112 N. Car. 34. But such a debt does not arise out of contract, and is not liable to the incidents of simple contract between individuals."

3. Assessment. — See the title **TAXATION**.

Deductions — Stock. — The value of stock in a national bank, owned by a taxpayer, is a part of the "debts due or to become due him" from which he is entitled under a statute to deduct the amount of his *bona fide* and unconditional indebtedness in listing his property for taxation. *Ruggles v. Fond du Lac*, 53 Wis. 436.

¹ In *Equitable L. Ins. Co. v. Board of Equal-*

2. Fines and Penalties. — Fines and penalties, like taxes, not having their origin in contract, have been held not to fall within the term "debts."¹ But this construction has not been always followed, and cases are not wanting where a more liberal interpretation was adopted, and "debt" was held to include a fine or penalty.²

3. Costs. — A judgment for costs has been held a debt in a number of cases.³

ization, 74 Iowa 178, it was held that a life insurance company is entitled to deduct from its credits the amounts which its stockholders would be entitled to receive upon a present distribution of the money and credits of the corporation.

Same — Reinsurance. — A fire insurance company, in the return of its property for taxation, included as debts to be deducted from the amount of its claims and demands, an item for reinsurance, the amount of which item was fifty per cent. of all the premiums received and policies not then expired. It was held that the item returned as reinsurance was not a legal *bona fide* debt, within the section of the tax law providing for deduction of such debts. *Amazon Ins. Co. v. Cappellar*, 38 Ohio St. 570.

Nonresidents. — A statute imposed a tax on debts owing from resident to nonresident creditors. In construing this statute the court said: "The term 'debts,' in the statute, is to be understood in its usual legal sense, and means nothing more nor less than sums of money due from inhabitants of the state to the nonresidents mentioned, by certain and express agreements or judicial sentence, and for the purchase of real estate. Primarily, it looks to the relation of vendor and purchaser, by contract valid in law, and to no other relation. A mere assignee of a contract is in no legal sense the debtor to the vendor, unless he has expressly undertaken to pay the debt by some valid instrument or promise. In the latter case he may, legally speaking, be regarded as the debtor of the vendor for the purchase of real estate. This, of course, must be understood to embrace cases only where the assignment is authorized and valid, of itself, or is rendered valid by some subsequent act or assent of the vendor, binding in law." *People v. Halsey*, 53 Barb. (N. Y.) 554.

1. Fines and Penalties. (See also the titles FINES; PENALTIES.) — *Spalding v. People*, 7 Hill (N. Y.) 301, 4 How. (U. S.) 21; *In re Sutherland*, 3 Nat. Bank. Reg. 314; *State v. Mace*, 5 Md. 337; *Clarke v. Tyler*, 30 Gratt. (Va.) 139.

Imprisonment for Debt. (See generally the title IMPRISONMENT FOR DEBT.) — In *Ex p. Robertson*, 27 Tex. App. 628, 11 Am. St. Rep. 207, it was held that a fine imposed for civil contempt was not a debt within the meaning of the *Texas* constitution declaring that no person should ever be imprisoned for debt. And see the title CONTEMPT, vol. 25, p. 39.

An executor who refuses to perform an order of the probate court directing him to pay monthly sums for the maintenance of the testator's widow and children may be imprisoned therefor. The court said: "The executor is not ordered to pay a debt, but to perform an administrative act respecting the assets of the estate to which they are subjected by law. The order upon him to pay this

allowance no more creates a debt against him than does the customary order made by the court to pay the claims allowed by commissioners." *Leach v. Peabody*, 58 Vt. 485.

Same — Bastardy. — In *State v. Brewer*, 38 S. Car. 263, 37 Am. St. Rep. 752, it was held that the penalty incurred by one convicted of bastardy was not a debt within the constitutional provision forbidding imprisonment for debt. See *supra*, this title, *Liability for Unliquidated Damages — For Tort*.

Tollgate. (See generally the title TURNPIKES.) — A judgment for a penalty provided by statute for running by a tollgate to avoid paying toll is not a "debt growing out of or founded upon a contract, express or implied," under the exemption laws. *Keller v. McMahan*, 77 Ind. 62.

2. Fine a Debt. — *In re Shaner*, 39 Fed. Rep. 869.

Homestead. (See generally the title HOMESTEAD.) — A statute exempted a homestead from sale under execution or other process "issued on any demand for any debt contracted." It was held that a homestead could not be claimed under a fine due the commonwealth. *Whiteacre v. Rector*, 29 Gratt. (Va.) 714, 26 Am. Rep. 420.

By-law. — A fine or penalty incurred by the breach of a by-law is a debt, and recoverable as such. *Ex p. Reed*, 4 Cranch (C. C.) 582. And see 1 Bish. Crim. Proc., § 1304, where it is stated: "Very generally in this country, by statutes or under the common law, the fine is thus treated as a sort of judgment debt."

Judicial Sale. — In *Walsh v. Ringer*, 2 Ohio 333, it was held that judgments for pecuniary fines were debts due the state within the meaning of the law authorizing in such cases the sale of the debtor's lands without valuation.

3. Costs. — *Andrews v. Murray*, 9 Abb. Pr. (N. Y. C. Pl.) 14; *Lathrop v. Singer*, 39 Barb. (N. Y.) 396; *Lane v. Baker*, 2 Grant's Cas. (Pa.) 424.

In *Graham v. Pierson*, 6 Hill (N. Y.) 247, it was held that a judgment for costs recovered by a sheriff in an action on the case against him, for not returning an execution, was a debt provable under the *New York* Insolvency Act, and was therefore barred by a discharge in bankruptcy.

Contra. — A party in execution for the costs of an ejectment is not a person in execution upon a judgment for "debt or damages" so as to be entitled to be discharged from custody after twelve months' confinement. "The object of a party instituting such a proceeding is to recover the possession of land, and not any debt or damages." *Doe v. Reynolds*, 10 B. & C. 481, 21 E. C. L. 120.

Same — Imprisonment for Debt. (See the title IMPRISONMENT FOR DEBT.) — In *Moigan v. State*, 47 Ala. 34, a decision on the meaning of the word in the provision of the constitution

4. Miscellaneous Examples. — An Equitable Obligation or Demand has in some cases been held to fall within the term "debt,"¹ while in others a contrary decision has been reached.²

Trusts. — Money in the hands of trustees does not constitute a debt.³

abolishing imprisonment for debt, the court said: "In criminal cases the cost is no more a debt than the fine, and, accurately speaking, not as much so, for the fine is a sum certain *in numero*, and the cost is not."

To the same effect is *Caldwell v. State*, 55 Ala. 133. But see, *contra*, *Thompson v. State*, 16 Ind. 516, where it was held that the costs in a criminal case were matters of private right, and constituted a debt, for which, in the absence of fraud, a defendant could not be imprisoned. This was, however, expressly overruled in *McCool v. State*, 23 Ind. 132. See also *Smith v. State*, 23 Ind. 132.

Exemption. — Costs adjudged in a civil suit constitute a debt within the provisions of an act "to regulate property exempted from sale for payment of debts." *Clingman v. Kemp*, 57 Ala. 195. See the title EXEMPTION (FROM EXECUTION).

Homestead. — The *New York Homestead Exemption Act* (Laws 1850, p. 499), does not exempt the homestead of a householder from sale on execution, except for debts contracted after the passage of that law. Therefore it was held that where judgment was obtained against the plaintiff, for costs, in an action of tort, his homestead was not exempt from levy and sale on execution under that act. *Schouton v. Kilmer*, 8 How. Pr. (N. Y. Supreme Ct.) 527. See generally the title HOMESTEAD.

Costs of Execution. — Costs of execution have been held not a part of the debt owing, within the *English Bankruptcy Act* of 1883. *Salisbury v. Ray*, 8 C. B. N. S. 193, 98 E. C. L. 193. *In re Long*, 20 Q. B. Div. 316.

1. Equitable Demands. — *Longworth v. Mitchell*, 26 Ohio St. 343.

A Direction in a Will to pay debts has been held to apply to equitable debts. *Thompson v. Thompson*, 4 Ohio St. 351.

Debts of Decedents. — The term "debt" as used in the statute relating to the estates of deceased persons has been held to include equitable debts. *Sellis's Case*, 4 Abb. Pr. (N. Y. Surrogate Ct.) 272.

Same — Balance Due from Deceased Partner of a Firm to Surviving Copartners. — In *Babcock v. Lillis*, 4 Bradf. (N. Y.) 218, it was held that the balance due from a deceased partner of a firm to a surviving copartner, on account of the partnership's transaction, was a debt due from the estate of the decedent within the statutes relating to the estates of deceased persons. See also *Payne v. Matthews*, 6 Paige (N. Y.) 19, 29 Am. Dec. 738; *Dakin v. Demming*, 6 Paige (N. Y.) 98. And see the title DEBTS OF DECEDENTS, *post*.

2. People v. Halsey, 53 Barb. (N. Y.) 554, affirmed 37 N. Y. 344.

Garnishment. (See generally the title GARNISHMENT.) — An equitable obligation has been held a debt within the *English garnishment statute*. *Webb v. Stenton*, 11 Q. B. Div. 518. But an equitable claim was held not to be a debt within the *California garnishment statute*, in *Redondo Beach v. Brewer*, 101 Cal. 325;

Hassie v. God Is With Us Congregation, 35 Cal. 385.

3. Trusts. (See generally the title TRUSTS AND TRUSTEES.) — In *Pease v. Folger*, 14 Mass. 266, it was held that until payment is demanded the liability of one who has received money to the use of another is not a debt within the meaning of a statute discharging insolvent debtors from all debts.

Garnishment. (See generally the title GARNISHMENT.) — Trust income in the hands of the trustees has been held not a debt within the *English garnishment statute*. *Webb v. Stenton*, 11 Q. B. Div. 518.

An order having been made for the attachment of the surplus of a bankrupt's estate against the official assignee of the court of bankruptcy as garnishee, under the Common Law Procedure Act, 1854, it was held that such order was invalid, there being no debt that could be attached within the meaning of the act. *Bovill, C. J.*, said: "There is no 'debt' here; the garnishee has no doubt certain sums of money vested in him, which may or may not be payable to the bankrupt in the event; but which can only be so payable by means of an order of the court of bankruptcy." *Hunter v. Greensill*, L. R. 8 C. P. 24. See *Thomson v. Harding*, 3 C. B. N. S. 254, 91 E. C. L. 254, as to an order against the shareholder in a bank.

In *Dolphin v. Layton*, 4 C. P. Div. 130, money in the hands of a registrar of an English County Court was held not a debt within the *English garnishment act*; and under the same statute, money in the hand of a clerk of the peace was held not a debt. *D'Arcy v. Carragher*, 18 L. R. Ir. 317. So of money in the hands of the police. *Jervis v. Peel*, 1 Times Rep. 206. Or the trustee in bankruptcy. *Boyse v. Simpson*, 8 Ir. C. L. Rep. 523; *Hunter v. Greensill*, L. R. 8 C. P. 24. Or the liquidator. *Mack v. Ward*, W. N. (84) 16. And the surplus of a sale of mortgaged property in the hands of a mortgagee is not a debt within this statute. *Chatterton v. Watney*, 17 Ch. Div. 259.

Where money is in the hands of a clerk of the court, deposited under an order of the court by the assignee of an insolvent, pending litigation as to the proper distribution thereof among the creditors, and an order of distribution is made by the court, the sum found due each creditor is a debt due the creditor from the clerk, and may be attached in his hands by a creditor of the creditor. *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 22 Am. St. Rep. 331.

Same — Dividend — Bankruptcy — Money in Hands of Officer. — A dividend payable under the division in bankruptcy of the estate of a person dying insolvent, to a creditor of the estate, was held not a debt liable to be attached. *Prout v. Gregory*, 24 Q. B. Div. 281.

Same — Factor. — A factor having in his possession goods consigned to him for sale is not liable to be garnished as a debtor of the owner. *Pratt v. Scott*, 19 Mo. 625.

Eminent Domain. — Damages to which a landowner is entitled, as compensation, for the taking of his land under the right of eminent domain, are not a debt until they have been assessed; ¹ after assessment they become a debt. ²

Advancements — Gifts. — Advancements or gifts are not included in the term "debt." ³

Interest. — The word "debt" embraces the interest as well as the principal. ⁴

Alimony. — It has been held that the obligation to pay alimony is not a debt. ⁵

Judgment. — As has been seen, all causes of action become debts, after judgment. ⁶

Mortgages. — A mortgage is a debt by specialty, and therefore falls within the term "debt." ⁷

Other Examples. — In the note will be found a large number of cases in which

1. Eminent Domain. (See generally the title EMINENT DOMAIN.) — In *Lowell v. Boston St. Com'rs*, 106 Mass. 540, it was held that damages to which a landowner was entitled for the taking of his land for the alteration of a highway were not a debt for which he was taxable until they had become fixed and receivable. Ames, J., said: "The claim for compensation for land damages, upon which this tax was laid, was uncertain in amount. It is to be submitted to a jury, which may increase or diminish the amount awarded by the city; and for this reason, as well as from its special character, it is not a debt technically, or in the sense of that term as used in pleading and in legal proceedings." *Fellows v. Duncan*, 13 Met. (Mass.) 332."

2. In *State v. Beackmo*, 8 Blackf. (Ind.) 250, it is said, with regard to damages assessed for injuries done to real estate: "It will not be disputed that when they are so assessed they become a debt in the constitutional sense of the word, and being so, the Constitution of the United States restrains the state from enforcing their payment in anything but gold and silver."

3. Advancements — Gifts. (See generally the titles ADVANCEMENTS, vol. I, p. 760; GIFTS.) — In *Matter of Roberts*, 111 N. Y. 372, it was held that advancements to children did not fall within the meaning of "debts" in a will.

In *Matter of McClintock*, 58 Mich. 152, it was held that advancements in a proceeding to determine the rights of legatees need not be treated as debts, but as gifts to apply as legacies.

Debts Distinguished from Gifts — Collation. (See COLLATION, vol. 6, p. 206, and see the title HOTCHPOT) — In *Meyer's Succession*, 44 La. Ann. 871, it was held that there was a distinction between gifts and debts by the law of collation.

4. Interest. (See generally the title INTEREST.) — *Brown v. Lamb*, 6 Met. (Mass.) 210; *Ex p. Charman*, W. N. (87) 184; *Birmingham v. Burke*, 9 Ir. Eq. Rep. 86.

A statute provided that one-half the fine imposed upon a mortgagor of personalty as a punishment for fraudulently selling the mortgaged property should be paid over to the holder of the mortgage, and the payment should extinguish the debt to secure which the mortgage was executed. It was held that "debt" as used in this section embraced interest as well as principal. *Conley v. Maher*, 93 Ga. 784.

Release. — A discharge of all "debts, dues, and demands" was held to cut off a special promise to pay the interest upon an assigned note. *Howell v. Seaman*, 1 Root (Conn.) 383. See generally the title RELEASE.

Wills. — A legacy of a debt will include the interest due. *Hepp v. Lafonta*, 2 Martin N. S. (La.) 446. See generally the title WILLS.

5. Alimony — Insolvency. (See generally the title ALIMONY, vol. 2, p. 91.) — Future weekly or monthly payments of alimony, payable by a husband by virtue of an order of the divorce court, are not a "debt or liability" within the meaning of the Bankruptcy Act, 1883. *Linton v. Linton*, 15 Q. B. Div. 239. It is there said: "A liability within that section must be something the value of which is capable of being estimated in some way or other. The value of these future payments is certainly not capable of being estimated."

Same — Arrest. — An execution to enforce a decree for alimony was held not to be for debt or damages in the sense of the *Massachusetts* statute forbidding arrest upon execution issued for debt or damages in a civil action, except in actions for tort. *Chase v. Ingalls*, 97 Mass. 524. See generally the titles ARREST, vol. I, p. 832; IMPRISONMENT FOR DEBT.

6. Judgments. (See *supra*, *Liability for Unliquidated Damages — For Tort*.) — *Powell v. Oregonian R. Co.*, 36 Fed. Rep. 726; *Dunsmoor v. Furstenfeldt*, 88 Cal. 529, 22 Am. St. Rep. 331; *Sullivan v. Bridge*, 1 Mass. 514; *State v. Georgia Co.*, 112 N. Car. 37; *Dellinger v. Tweed*, 66 N. Car. 206. See generally the title JUDGMENTS.

7. Mortgage Debts. — In *Turner v. Laird*, 68 Conn. 198, it was held that in a provision by a testator, directing his executor to pay all his just debts, the word "debts" included mortgage debts. See also *Bishop v. Howarth*, 59 Conn. 455.

In *Matter of Lambie*, 94 Mich. 489, a mortgage upon land belonging to the estate of a deceased person, not given by the decedent, and not, therefore, a personal debt, was held a debt against the estate within the meaning of the *Michigan* statute which authorizes the probate court to empower an executor to borrow money for the purpose of paying the debts against the estate.

Mortgage with Condition for the Support of a Person. — A mortgage debt with the condition for the support of a person for life was held a debt in *Cook v. Bartholomew*, 60 Conn. 26.

the term "debt" has been construed as used in various connections.¹

VI. LEGAL TENDER. — Under the legal tender acts declaring that United States notes shall be legal tender for all debts, it has been said that a debt

1. Partnership. (See also the title PARTNERSHIP.) — The plaintiff sold the defendant an undivided half interest in a partnership then existing between the plaintiff and another, provided the plaintiff could buy the interest of his partner. It was held that the sum falling due from the defendant to the plaintiff under such agreement was a debt. *Draper v. Hollings*, 163 Mass. 127.

The disbursements of a partner for his personal expenses cannot, with any propriety, be considered a "debt or engagement" for which he had covenanted to be liable to the firm. *Withers v. Withers*, 8 Pet. (U. S.) 358.

In *Curtis v. Hollingshead*, 14 N. J. L. 409, it is said: "I am not prepared to sustain the doctrine that each partner is a debtor to the whole amount of a partnership debt, in such a sense that a creditor of the firm may proceed against one partner by attachment, for a partnership debt, if the rest of the partners are in this state. In the case of partnerships, the firm is the contracting party, not the individuals composing the firm; the credit is given to the firm; the partnership, the ideal person formed by the union of interest, is the legal debtor."

Joint Debt. — In *Macdonald v. Tacquah Gold Mines Co.*, 13 Q. B. Div. 535, it was held that a debt, to be the subject of garnishment within the *English* statute, must be due to the judgment debtor alone and not joined with some other person.

Debts of Decedents—Executors and Administrators. (See also the titles DEBTS OF DECEDENTS, *post*; EXECUTORS AND ADMINISTRATORS.) — Fees given by an administrator, for professional services retained for the vindication of his intestate's good name on the trial of a person who had killed him for alleged dishonorable conduct, were held not a debt of the intestate. *Woodard v. Woodard*, 36 S. Car. 118; *Severs v. Dodson*, 53 N. J. Eq. 633.

In *Snyder v. State*, (Wyoming 1895) 40 Pac. Rep. 441, it is said: "We cannot approve of the proposition that under our statute the executor or administrator of a decedent becomes liable with his sureties only for such liabilities as are 'fixed and certain' at the time of decedent's death. The following is a better statement of the law: 'The term "debts," as used in the statutes relating to the estates of deceased persons, is not limited to such as are strictly legal debts, but manifestly includes every claim and demand by a creditor, whether recoverable at law or in equity.' 5 AM. AND ENG. ENCYC. OF LAW, p. 143."

The word "debts," as used in the *New York* Code of Civil Procedure, relating to the sale of a decedent's lands for the payment of his debts, includes any claim or demand upon which a judgment for a sum of money, or directing the payment of money, can be recovered in an action, and the word "creditor" includes any person having such a claim or demand. *Wilcox's Estate*, 11 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 115.

Same—Costs of Settling Estate. — In the con-

dition of a bond, the words "all lawful debts, dues, demands, and claims now due, or to grow due hereafter," from an estate, were held to include legal costs and charges against the estate afterwards incurred in the settlement thereof. *Springsteen v. Samson*, 32 N. Y. 703.

A statute made a decedent's lands liable for his debts. It was held that "debts" as thus used included the costs and expenses of settling the estate of the decedent. *Personette v. Johnson*, 40 N. J. Eq. 179.

Same—Charges Arising After Testatrix's Death. — In *Nash v. Ober*, 2 App. Cas. (D. C.) 304, it was held, where a testatrix provided that her debts should be charged upon special legacies, that the term "debts," without explanatory words extending its meaning, did not include liabilities arising after the testatrix's death, or charges imposed by law.

Same.—Taxes and Funeral Charges are not debts due from the deceased, on the insufficiency of assets to pay which the debts due the United States are preferred. The expenses of last illness are such debts. *U. S. v. Eggleston*, 4 Sawy. (U. S.) 199.

Same—Compensation of Representative. — In the provision in the *Mississippi* Code, that the lands, tenements, and hereditaments of a decedent shall also stand chargeable for the debts over and above what the personal estate may be sufficient to pay, the term "debts" does not embrace commissions and compensation to the administrator for his trouble in administering the estate. *Hollman v. Bennett*, 44 Miss. 322.

Same—Allowance to Widow and Minor Children. — In *Watts v. Watts*, 38 Ohio St. 480, it was held that the year's allowance from the estate of a decedent to his widow and minor children was a debt of the estate. See also *Allen v. Allen*, 18 Ohio St. 234; *Dorah v. Dorah*, 4 Ohio St. 293. See the title ALLOWANCES, vol. 2, p. 156.

Wills—Bills of Exchange—Cash Balance. (See also the title WILLS.) — Under a bequest of "whatever debts might be due to [the testator]," a bill of exchange at a banker's not yet payable, and likewise a cash balance due the testator on his banker's account, were held to pass. *Carr v. Carr*, 1 Meriv. 547, note.

Same—Bonds. — Under a bequest of "all debts due and owing to [the testator] at the time of his death," a bond conditioned for replacing a sum of stock sold by the testator after the date of the will, and lent by him to the obligor, was held to pass. *Essington v. Vashon*, 3 Meriv. 434.

Same—Debt Due. — Where a testator directs that a "debt due" from a legatee shall be discharged, what comes under this denomination is to be determined by the meaning which he saw fit to attach to the word, if that can be ascertained; whether a particular sum is technically a debt or not, and whether an action can be maintained by the executors to recover it, are not necessarily decisive of the question. *Bradlee v. Andrews*, 137 Mass. 59.

Same—Legacies. — A clause beginning a

imports any obligation by contract, express or implied, which may be discharged by money, through the voluntary action of the party bound. Whenever the party owing the obligation is at liberty to perform it by the payment of

will, "First, I will and direct that all my legal debts, legacies, and funeral expenses shall be fully paid," is not sufficient alone to charge legacies on real estate specifically devised. *Kightley v. Kightley*, 2 Ves. Jr. 328.

In *Stebbins v. Stebbins*, 86 Mich. 482, it was held that where a testator, after providing for the payment of his debts and funeral expenses and for certain legacies, directed that after all debts and expenses were paid the balance of his estate should be disposed of in a certain manner, the word "debt" included a legacy. See generally the title LEGACIES AND DEVISES.

Same — Residuary Estate. — A testatrix being entitled to her son's residuary estate (the amount of which was unascertained at her death) bequeathed as follows: "If any debts due to me at my decease, I request my executors will collect and pay into the hands of my children." It was held that the son's residue passed by the bequest. *Bainbridge v. Bainbridge*, 9 Sim. 16.

Pension. — A superannuation allowance awarded to a retired civil servant is not a debt attachable under the Common Law Procedure Act, 1854. "It is not a debt at all, but a mere gratuity." *Innes v. East India Co.*, 17 C. B. 351, 84 E. C. L. 351. See generally the titles GARNISHMENT; PENSIONS.

Attachment — Promissory Note. — A promissory note, though not due, has been held a debt within the meaning of an attachment law. *Day v. Zimmerman*, 68 Pa. St. 74, 8 Am. Rep. 157.

Bankruptcy — Debt Equivalent to Amount upon Which Dividend Is to Be Computed. — Matter of *Bigelow*, 2 Ben. (U. S.) 483, 3 Fed. Cas. No. 1396, it was said that the word "debt" as used in the twenty-second section of the *United States Bankruptcy Act* meant the amount upon which the dividend is to be computed, and the phrase "prove his debt" is equivalent to the phrase, "share in the distribution of the assets." See generally the title INSOLVENCY AND BANKRUPTCY.

Personal Liability — Lien upon Land. — In *People v. Mayhew*, 26 Cal. 661, it is said: "The error in the argument of the learned counsel for the appellant consists in assuming — tacitly, perhaps, — that in order to be a debt there must be a personal liability for the payment of the sum in question. A charge upon a specific parcel of a person's property for the payment of a sum of money constitutes a debt as fully as a demand which is or may be made a charge upon all his property, both present and future; and it makes no difference, in this respect, whether the lien is acquired by express agreement or by operation of law."

Same — Married Woman. (See also the title SEPARATE PROPERTY OF MARRIED WOMEN.) — A judgment debt, with execution limited to the separate property of a married woman under the *Married Woman's Property Act*, is not a "debt due" under which she can be imprisoned under the *Debtors' Act*. *Scott v. Morley*, 57 L. J. Q. B. 43. "It would be

straining language to hold that a debt payable out of a woman's separate property is a debt due from her. It is only due from her *sub modo*."

Creation of New Judicial Circuit. — In *McDonald v. State*, 80 Wis. 407, it was held that a statute creating a new judicial circuit and providing for the election of a judge thereof was not a law which created a debt or charge within the meaning of the constitutional provision which requires that the yeas and nays shall be taken and entered on the journal upon the passage of such law. The court said that the term "debt or charge" as here used manifestly referred to the contract of a public debt for extraordinary expenditures, and had no reference to the salaries of public officers. See generally the title STATUTES.

Stockholders — Calls. — Calls made on a shareholder in 1862 to pay money in respect of debts of a joint-stock company for which he had previously, in 1849, incurred liability, do not themselves constitute debts "contracted after the passing of [the act of 1861]," but amount merely to an enforcement of the liability incurred when he became a shareholder. *Williams v. Harding*, L. R. 1 H. L. 9. See also the title STOCKHOLDERS.

Imprisonment for Debt. — Under an act "for the discharge of debtors in execution for small debts from imprisonment in certain cases," a sum ordered to be paid in a suit for subtraction of tithes is not a "debt." *Ex p. Kaye*, 1 B. & Ad. 652, 20 E. C. L. 461. It is there said: "The sum decreed to be paid in this case is not, strictly speaking, a debt. The act contemplates cases where there might be proceedings against the property of the debtor. Here there could be no proceedings against the property of the party liable to pay the tithe." See generally the title IMPRISONMENT FOR DEBT.

Liability for Support of Family. — An act prohibiting the arrest of soldiers for any debt under the sum of twenty dollars contracted before enlistment, or for any debt contracted after enlistment, does not extend to a soldier committed by an alderman for want of security to appear at the mayor's court on a charge of having deserted his wife and family, and left them a charge on the guardians of the poor. *Com. v. Jail Keeper*, 4 S. & R. (Pa.) 505. See also *Fisher v. Consequa*, 2 Wash. (U. S.) 385. See generally HUSBAND AND WIFE.

Warehouse Receipt. — In *Daniels v. Palmer*, 41 Minn. 116, it was held that the holder of a wheat ticket or receipt issued by a warehouseman who had become insolvent, was a creditor within the spirit and meaning of the insolvency law.

Obligations of State or United States. — In *Matter of Tilden*, 44 Hun (N. Y.) 444, it is said: "There is no meaning of the word 'debt' which excludes the interest-bearing obligations of the United States or of the state. They were part and parcel of the public debt, and recognized as such by the statutes of the United States in reference thereto. The bonds of the United States were as much of a

a specific sum of money, he is subject to what in these statutes is termed a debt.¹

VII. LIMITATION OF MUNICIPAL INDEBTEDNESS. — The capacity of states, municipal corporations, counties and towns, to contract indebtedness, is frequently limited by constitutional and statutory provisions enacting that the debts of such political bodies shall not exceed a certain sum. These provisions will be treated in full under their appropriate titles.²

DEBTOR. — See the title DEBT, *ante*.

debt as the bonds of any corporation which issued its obligations for the payment of money, or as the obligations of any individual who issued his commercial paper payable at a future day."

1. **Legal Tender.** (See the title LEGAL TENDER.) — *Kimpton v. Bronson*, 45 Barb. (N. Y.) 618, *affirmed* 34 How. Pr. (N. Y.) 630, note.

The provision applied to debts contracted before as well as after the enactment. *Hepburn v. Griswold*, 8 Wall. (U. S.) 603.

A Voluntary Payment is also a debt. "Under these adjudications, it is useless to contend that the legal tender acts apply only to 'debt' in the strict technical sense of that term, and do not apply to a voluntary or optional payment as in the present case." *Longworth v. Mitchell*, 26 Ohio St. 343.

A Claim for Freight is a debt. *Wilson v. Morgan*, 4 Robt. (N. Y.) 58.

Bank Deposit — Certificates. — The Act of Congress making the United States treasury notes legal tender, applied to all debts. In *Thompson v. Riggs*, 6 D. C. 109, it was held that the relation of a banker to his depositor was that of a debtor to a creditor. And that certificates of deposit are debts, see *Hargroves v. Chambers*, 30 Ga. 580. And see the title CERTIFICATES OF DEPOSIT, vol. 5, p. 801.

An Express Contract to Pay Coined Dollars can only be satisfied by the payment of coined dollars. It is not a debt which may be satisfied by the tender of United States notes. *Bronson v. Rodes*, 7 Wall. (U. S.) 254. To the same effect see *Butler v. Horwitz*, 7 Wall. (U. S.) 258; *McGoon v. Shirk*, 54 Ill. 408, 5 Am. Rep. 122; *Dutton v. Pailaret*, 52 Pa. St. 109, 91 Am. Dec. 135. See, *contra*, *Wilson v. Morgan*, 4 Robt. (N. Y.) 58; *Milliken v. Sloat*, 1 Nev. 573; *Wilson v. Morgan*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 174. And see the title PAYMENT.

2. See the titles COUNTIES, vol. 7, p. 898; MUNICIPAL CORPORATIONS; MUNICIPAL SECURITIES; STATES; TOWNS AND TOWNSHIPS. And see INDEBTEDNESS.

Floating Debt. — The restriction upon indebtedness embraces a floating debt, evidenced by warrants as well as bonded indebtedness. *State v. Hickman*, 11 Mont. 551; *People v. May*, 9 Colo. 80; *Law v. People*, 87 Ill. 385; *Erie's Appeal*, 91 Pa. St. 398; *Council Bluffs v. Stewart*, 51 Iowa 389.

In *Erie's Appeal*, 91 Pa. St. 398, the court said: "A debt means a fixed and certain obligation to pay money, or some other valuable thing or things, either in the present or in the future. * * * It is idle to urge that the restriction includes only a bonded indebtedness, for such is neither the constitutional letter nor spirit. A floating debt usually ends in a bonded debt, and the former is just as obligatory as the latter."

Moral Obligation. — A moral duty by the state

to pay is a debt within the limitation of indebtedness. *Rodman v. Munson*, 13 Barb. (N. Y.) 188, *affirmed* *Newell v. People*, 7 N. Y. 9.

Local Improvements. — A constitutional provision limiting the indebtedness of cities was held not to prevent a city which had reached the limit, from passing an ordinance providing for local improvements, the cost to be paid in part by general taxation and in part by assessment on abutting property, there being no provision for a credit or loan. *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562.

Payment Restricted to a Particular Fund. — Within the constitutional provision limiting the right of a state to contract indebtedness to a certain amount, the term "debt" includes money borrowed, although payment is restricted to a particular fund. *Rodman v. Munson*, 13 Barb. (N. Y.) 77, 188, *affirmed* *Newell v. People*, 7 N. Y. 9.

Expected Profit. — The issue of bonds by a city for the purpose of raising money to erect improvements, from which it is expected that the city will derive a revenue, is an indebtedness within the meaning of the constitutional clause. *Scott v. Davenport*, 34 Iowa 208, *distinguishing* *Dively v. Cedar Falls*, 27 Iowa 227.

Sinking Fund. — Under section 8, article 9 of the constitution, which declares that "the debt of any city shall never exceed seven per cent of the assessed value of the property therein," the debt of a city is properly ascertained by subtracting from its total indebtedness the amount of the certificates of the funded debt of the city held in the sinking fund. *Brooke v. Philadelphia*, 162 Pa. St. 123.

Special Assessments. — In *Davis v. Des Moines*, 71 Iowa 500, it was held that a contract for the building of a sewer, whereby the contractor agreed to accept in full satisfaction for the work certificates of assessment made upon the property adjacent to the sewer, did not create a debt.

Security. — Under a clause in the constitution that "no debt shall be created by the mayor and city council," an ordinance providing for the raising of a sum of money by the hypothecation of a number of railroad shares owned by the city, and the investing the same in bonds, to be secured by mortgage, is null and void. *Baltimore v. Gill*, 31 Md. 390.

Payment in Future. — In *Rome v. McWilliams*, 67 Ga. 118, it was held that an obligation arising under a contract on the part of a municipal corporation to pay for work when and as it shall be performed in the future, does not constitute or ripen into an indebtedness, within the meaning of the constitution, until at least the performance of the work. See also *Cleburne v. Cleburne Water, etc., Co.*, (Tex. Civ. App. 1896) 37 S. W. Rep. 656; *McNeal v. Waco*, 89 Tex. 83; *Smith v. Dedham*, 144 Mass. 177.

DEBTS OF DECEDENTS.

BY BRISCOE B. CLARK.

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I. WHAT CONSTITUTE CLAIMS AGAINST DECEDENT'S ESTATE — 1. Claims Based on Contracts of Decedent — a. IN GENERAL. — The death of a party to a contract does not extinguish the contract if it is capable of being fulfilled by his representatives, but as a general rule all contractual obligations continue as claims against the estate of the deceased obligor, and this is the rule irrespective of whether the contract be implied or express, or for the payment of money, or the performance of some act not personal.¹ And the executor is bound

1. Estate Bound by Contracts of Decedent. — *Bradbury v. Morgan*, 1 H. & C. 249; *Batthyany v. Walford*, 36 Ch. Div. 269; *Wheatly v. Lane*, 1 Saund. 216a, note 1; *Sollers v. Lawrence*, Willes 421; *Bond v. Orndorf*, 77 Ind. 583; *Browne v. McDonald*, 129 Mass. 66; *Hegeman v. Moon*, 60 Hun (N. Y.) 412; *State University v. Baxter*, 43 Vt. 645.

Illustrations. — A contract with the mother for the support of the promisor's illegitimate child is binding on his executors. *Stumpf's Appeal*, 116 Pa. St. 33.

Necessaries. — The estate of a lunatic is liable for necessities furnished him. *La Rue v. Gilkyson*, 4 Pa. St. 375, 45 Am. Dec. 700.

Money Paid for Benefit of Decedent. — Payment of money for the use and benefit of a person, and with his knowledge and consent, creates a valid claim against his estate, though made without his direction. *Wilson v. Hotchkiss*, 81 Mich. 172.

Money Had and Received. — Where money is intrusted to a person for investment, his estate is liable therefor. *Frank v. Morley*, 106 Mich. 635.

Building Contract. — A contract for the construction of a building for a decedent entitles the contractor to an action for damages against the decedent's estate, on refusal of the administrator to allow him to complete the contract. *Cooper v. Jarman*, L. R. 3 Eq. 98. See also *Hall v. Bennett*, 48 N. Y. Super. Ct. 302; *Quick v. Ludborrow*, 3 Bulst. 30.

And the contractor may recover for work performed after the decedent's death, though the administrator directed him not to continue the work. *Ferguson v. Wills*, 88 Va. 136.

A claim for the contract price for erecting a building on the land of the deceased survives against his executor and does not merely constitute a lien upon the land. *Taylor v. Taylor*, 3 Bradf. (N. Y.) 54.

Goods Ordered. — The administrator must receive and pay for goods ordered by his decedent. *Wentworth v. Cock*, 10 Ad. & El. 42, 37 E. C. L. 33. See, however, *Dickinson v. Calahan*, 19 Pa. St. 227.

Unauthorized Agent. — The executor of an unauthorized agent is liable on the implied contract of the agent as to his authority. *Colten v. Wright*, 7 El. & Bl. 301, 90 E. C. L. 301, affirmed 8 El. & Bl. 647, 92 E. C. L. 647.

Express Contracts for the Payment of Money. — A promise to give a certain sum towards the payment for property to be purchased by the promisee creates a valid claim against the estate of the promisor, if the purchase is made on the faith of such promise. *Skidmore v. Bradford*, L. R. 8 Eq. 134; *Steele v. Steele*, 75 Md. 477.

Promissory Note. — The estate is liable on the note of the decedent. *State University v. Baxter*, 43 Vt. 645.

Contract to Pay Annuity. — The estate is liable on the contract of the decedent to pay an annuity. *Cox v. Maxwell*, 151 Mass. 336.

whether he is named in the contract or not,¹ and a promise by the decedent that his executor shall pay creates equally a valid indebtedness against his estate.²

Under a Contract of Employment for a specified time, the employee may recover from the personal representative of the employer as such for the whole term, though part of the services were rendered after the employer's death.³

Liability Created After Death under Contract Terminable at Will. — The estate, however, is not held for a liability created after the decedent's death, under a contract which was to continue in operation at his will and which made no provision for a continued operation after his death.⁴

Unenforceable Contracts. — In order, however, that a contract of a decedent may create a claim against his estate, it must have been one which was binding upon the decedent; for instance, an unperfected gift will create no liability against the estate of the donor;⁵ nor will the voidable contract of an infant or other person *non sui juris*.⁶

Attorney Fees — Stipulation in Note. — A stipulation in a note for payment of attorney fees in case of collection by action is binding against the estate of the maker. *Bond v. Orndorf*, 77 Ind. 583; *Jewett v. Hurrell*, 121 Ind. 404.

A Contract for the Payment of a Royalty in the grant of a patent and a covenant that the royalty shall not be less than a certain amount may be enforced against the promisor's estate for royalties accruing after his death. *Empire Paving, etc., Co. v. Prather*, 58 Mo. App. 487.

Personal Liability of Executor. — The personal liability of an executor for payment of a legacy continues as a claim against his estate. *Smith v. Moore*, 4 N. J. Eq. 485; *Windsor v. Bell*, 61 Ga. 671.

Contract to Purchase Land. — A vendor can enforce against the estate of the vendee his claim for the unpaid purchase money. *Riegelman's Estate*, 174 Pa. St. 476; *Chapman v. Merritt*, 45 Mo. App. 179.

In *Smith v. Goodrich*, 167 Ill. 46, reversing 67 Ill. App. 418, it was held that a note given for the purchase price of land was enforceable against the estate of the maker like any other personal debt.

Election of Remedies. — In *In re Polsgrove*, 5 Pa. St. 500, it was held that where the vendor has brought ejectment to enforce payment of the purchase money, he cannot afterwards claim payment of the purchase price from the personal estate of the vendee.

Statute — Power of Court to Disallow Claim for Purchase Price. — In *Miskimen v. Culbertson*, 162 Ill. 236, it was held, under the *Illinois Administration Act*, § 111, providing that where the estate of the vendee is unable to pay with advantage the balance of the purchase price the land may be sold, but if the estate is solvent the purchase price shall be paid, that the court may disallow a claim for unpaid purchase money when the purchase cannot be completed with advantage to the estate.

1. Executor Not Named in Contract. — The executors of every person are implied in himself and bound without naming. *Bradbury v. Morgan*, 1 H. & C. 255, *per* Bramwell, B. See also *Harwood v. Hilliard*, 2 Mod. 268; *Cavan v. Pulteney*, 2 Ves. Jr. 544; *Taylor v. Taylor*, 3 Bradf. (N. Y.) 54; *Shultz v. Johnson*, 5 B. Mon. (Ky.) 500; *Drummond v. Crane*, 159 Mass. 577, 38 Am. St. Rep. 460.

And this is so though the heir alone is named. *Williams v. Burrell*, 1 C. B. 417, 50 E. C. L. 417.

In *Earle v. Dickson*, 1 Dev. L. (12 N. Car.) 16, however, it was held that a covenant to convey land not expressly binding the executors, etc., of the covenantor, created no liability against his executors.

2. Contract for Payment by Executor creates a debt as much as if the testator had promised to pay. *Ex p. Tindal*, 8 Bing. 402, 21 E. C. L. 337; *Plumer v. Marchant*, 3 Burr. 1380; *Powell v. Graham*, 7 Taunt. 580, 2 E. C. L. 580; *Milbourn v. Ewart*, 5 T. R. 381; *Harrison v. Vreeland*, 38 N. J. L. 366; *Hegeman v. Moon*, 60 Hun (N. Y.) 412. See, however, *Perrot v. Austin*, Cro. Eliz. 232.

A Note Payable After the Death of the Maker is a valid claim against his estate. *Toller*, 463; *Hegeman v. Moon*, 60 Hun (N. Y.) 412. See also *Parker v. Coburn*, 10 Allen (Mass.) 82.

3. McDaniel v. Parks, 19 Ark. 671.

4. Contracts Terminable at Will of Decedent. — In *Browne v. McDonald*, 129 Mass. 66, a promise to pay for the tuition of a third person, the duration of the contract not being fixed, was held to be terminated by the death of the promisor, irrespective of notice to the promisee, and to create no obligation against the promisor's estate for tuition furnished after the promisor's death.

5. Unperfected Gifts. — *Ward v. Audland*, 8 Beav. 201; *Weale v. Ollive*, 17 Beav. 252; *Callaghan v. Callaghan*, 8 Cl. & F. 374; *Cotten v. Missing*, 1 Madd. 174; *Dillon v. Coppin*, 4 Myl. & C. 647; *Searle v. Law*, 15 Sim. 95.

6. Married Woman. — A note charged on her separate estate by a married woman creates no obligation enforceable against her personal representatives, but only a cause of action against the property alone. *Boatmen's Sav. Bank v. McMenamy*, 35 Mo. App. 198; *Davis v. Smith*, 75 Mo. 224; *Sawtelle's Appeal*, 84 Pa. St. 306. Compare *Oswalt v. Moore*, 19 Ark. 257.

The estate of a married woman is not liable for necessities furnished the household. *Rodgers v. Brazeale*, 34 Ala. 512; *Harmon v. Siler*, 99 Ala. 306. Nor is her estate liable for the expenses of her last illness. *Matter of Werlinger*, 100 Cal. 345.

Infant's Promissory Note. — An infant's estate is not liable on a note not given for necessa-

Contracts Not Enforceable at Law. — A contract may create a claim against the estate of one of the contracting parties, though the contract was not enforceable at law on account of the relationship of the parties.¹

b. PERSONAL CONTRACTS. — Where the contract is personal to the decedent, that is, where it involves the exercise of his personal skill or taste, no liability for the performance thereof attaches to his executor or administrator.²

Agency Contract. — The death of the principal will, as a general rule, terminate the authority of an agent.³

Promises of Marriage. — And all liability of the decedent upon his promise of

ries, though the infant, after coming to full age, directs in his will that all his "just debts" be paid. *Smith v. Mayo*, 9 Mass. 62, 6 Am. Dec. 28. See also *Hussey v. Jewett*, 9 Mass. 100.

1. Husband and Wife — Contracts Between. — *Oliver v. Hammond*, 85 Ga. 323; *Collins v. Collins*, 72 Iowa 104; *Todd v. Terry*, 26 Mo. App. 598; *Burkholder's Appeal*, 105 Pa. St. 31.

Money Loaned Husband. — The wife has a valid claim against the deceased husband's estate for moneys loaned to him out of her separate estate. *Whitford v. Daggett*, 84 Ill. 144; *Passmore v. Passmore*, 50 Mich. 626, 45 Am. Rep. 62; *Personette v. Personette*, 35 N. J. Eq. 472; *Drost v. Corle*, 41 N. J. Eq. 45; *Rusling v. Rusling*, 47 N. J. L. 1; *Huber v. Huber*, 10 Ohio 371; *Heffner's Estate*, 134 Pa. St. 436; *Wormley's Estate*, 137 Pa. St. 101.

The wife is entitled to interest during the husband's life, on a note given to her by her deceased husband, and payable with interest from date. *Reber's Estate*, 143 Pa. St. 308.

Quantum of Proof as Against Creditors. — A wife's claim, however, must be clearly proven. *Hamill's Appeal*, 83 Pa. St. 363.

2. Personal Contracts. — *Hyde v. Windsor*, Cro. Eliz. 552; *Siboni v. Kirkman*, 1 M. & W. 478; *White v. Com.*, 39 Pa. St. 167.

In *Pollock on Contracts*, 374, the principle is thus stated: "All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death."

Illustrations. — In *Marvel v. Phillips*, 162 Mass. 399, 44 Am. St. Rep. 370, it was held that an agreement by the assignee of a patent right to manage personally the business of manufacturing the patented articles, supplying all necessary funds, and to do all things which a wise and energetic owner of such patent rights ought to do, was personal and did not survive against his executors.

Apprentice — Instruction. — In *Baxter v. Burfield*, 2 Stra. 1266, it was held that an apprentice was not bound to serve the executor of his master.

And in *Wadsworth v. Guy*, 1 Keb. 820, an agreement to instruct an apprentice was held not binding on the executor of the master. See also *Whincup v. Hughes*, L. R. 6 C. P. 78; *Com. v. King*, 4 S. & R. (Pa.) 109.

Contract by Musician. — In *Robinson v. Davison*, L. R. 6 Exch. 269, a contract to play the piano was held to be personal, and to create no liability against the estate of the musician.

Contract by Author. — A contract by an author to write a book is terminated by his death and creates no liability against his estate. *Marshall v. Broadhurst*, 1 Tyrw. 349.

Personal Services. — In *Siler v. Gray*, 86 N. Car. 566, it was held that an agreement by a son to administer to the comfort of his parents created no liability against the estate of the son for breach after his death.

In *Grant v. Johnson*, 5 Nova Scotia 493, it was held that an agreement for the rendition of services for a term of years as clerk to a bookseller was personal, and was therefore terminated by the death of the employer.

In *Farrow v. Wilson*, L. R. 4 C. P. 744, it was held that the death of the employee dissolved a contract to serve another as farm bailiff.

Agreement Not to Carry on a Trade. — An agreement not to carry on a certain trade in consideration of certain payments to the promisor, his executors, etc., is not binding on his executor. *Cooke v. Colcraft*, 2 W. Bl. 856.

Sale of Lumber to Be Sawed by Decedent. — In *Dickinson v. Calahan*, 19 Pa. St. 229, it was held that a contract for the sale of the lumber sawed at the seller's mill was personal, and terminated on the death of the buyer or seller.

Sale of Crop Raised by Decedent. — In *Shultz v. Johnson*, 5 B. Mon. (Ky.) 497, it was held that a contract for the sale by decedent of all the hemp "of his own raising" on certain land was personal, and terminated on his death before the lapse of the time specified.

Maintenance of Partition Fence. — In *Bland v. Umstead*, 23 Pa. St. 316, an agreement between adjoining landowners for the joint maintenance of a partition fence was held not to create any liability against the administrator of either.

Repair of Carriage. — In *Robson v. Drummond*, 2 B. & Ad. 303, 22 E. C. L. 81, a contract to keep in repair a carriage was held personal.

Ground Rent Covenant. — A ground rent covenant does not survive against the representatives of the covenantor, except as to rents accruing in the lifetime of the covenantor. *Quain's Appeal*, 22 Pa. St. 510.

3. Agency Contract. — In *Campanari v. Woodburn*, 15 C. B. 400, 80 E. C. L. 400, an agreement with an agent for the sale of a picture creates no liability against the estate of the principal in case of his death before a sale is effected.

Letter of Credit. — In *Michigan State Bank v. Leavenworth*, 28 Vt. 209, it was held that the liability of a maker of a letter of credit terminated on his death, irrespective of any notice. See also the title AGENCY, vol. 1, p. 1222.

marriage, even though the breach occurred in his lifetime, is terminated by his death.¹

c. JOINT CONTRACTS — (1) In General. — At common law, on the death of one of two or more joint promisors, his estate was at law discharged from liability on the contract and the action survived against the survivor or survivors alone.²

Judgments. — This rule applies to joint judgments also,³ but where the liability on which the judgment was recovered was contractual and several, it was permissible to go back to the original obligation for the purpose of protecting the equitable rights connected with the original relations of the parties.⁴

(2) Remedy in Equity. — If the survivor of several joint obligors is unable to discharge the indebtedness, the creditor has, as a general rule, the right to proceed in equity against the estate of the deceased obligor.⁵

1. Breach of Promise of Marriage. — Action for breach of promise of marriage does not survive the death of the defendant. *Finlay v. Chirney*, 20 Q. B. Div. 494; *Chamberlain v. Williamson*, 2 M. & S. 408; *Hovey v. Page*, 55 Me. 142; *Stebbins v. Palmer*, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; *Chase v. Fitz*, 132 Mass. 359; *Kelley v. Riley*, 106 Mass. 339; *Lattimore v. Simmons*, 13 S. & R. (Pa.) 183.

Arresting Judgment. — In *Davy v. Myers*, 1 Taylor (U. C.) 111, it was held that a judgment on a verdict against executors for a breach of promise of marriage would not be arrested on the ground that such an action would not lie against the executors.

Statutory Modification. — In *Shuler v. Millsaps*, 71 N. Car. 297, it was held that an action for a breach during the decedent's life survived against his estate under Bat. Rev., c. 45, § 113, providing that upon the death of any person all demands whatsoever and rights to prosecute and defend an action or special proceeding existing in favor of or against such person, except as thereafter provided, should survive to and against his executor, the action for breach of promise of marriage not being included in the exceptions.

"Action upon Contract." — The provision of the N. Y. Rev. Stat., providing that "all * * * actions upon contract" may be maintained against executors, does not authorize the maintenance of an action for breach of a promise of marriage, though the breach occurred in the lifetime of the decedent. *Wade v. Kalbfleisch*, 58 N. Y. 282, 17 Am. Rep. 250. See also *Grubb v. Sult*, 32 Gratt. (Va.) 203.

Damage to the "Person." — Action for breach of promise of marriage does not survive as an action for "damage to the person" (Act 1842, c. 89, § 1). *Smith v. Sherman*, 4 Cush. (Mass.) 408.

"Property." — Nor does it survive as an action for a wrong done to "property, rights, or interests." *Wade v. Kalbfleisch*, 58 N. Y. 282, 17 Am. Rep. 250.

2. Survival of Joint Contracts — England. — *Richardson v. Horton*, 6 Beav. 185; *Rawstone v. Parr*, 3 Russ. 424, 539; *Towers v. Moor*, 2 Vern. 98; *Cloyne v. Young*, 2 Ves. 91; *Simpson v. Vaughan*, 2 Atk. 31; *Primrose v. Bromley*, 1 Atk. 90.

Connecticut. — *Bundy v. Williams*, 1 Root (Conn.) 543.

Indiana. — *Braxton v. State*, 25 Ind. 82; *Hayes v. Crutcher*, 54 Ind. 260.

Kentucky. — *Godson v. Good*, 2 Marsh 299, 1 E. C. L. 492.

Massachusetts. — *Foster v. Hooper*, 2 Mass. 572; *Burnside v. Merrick*, 4 Met. (Mass.) 544.

New York. — *Gere v. Clarke*, 6 Hill (N. Y.) 350.

Pennsylvania. — *Kennedy v. Carpenter*, 2 Whart. (Pa.) 361.

Virginia. — *Atwell v. Milton*, 4 Hen. & M. (Va.) 253; *Richardson v. Johnson*, 2 Call (Va.) 527; *Harrison v. Field*, 2 Wash. (Va.) 136.

Statement of Rule. — In *Rice*, Appellant, 7 Allen (Mass.) 114, Bigelow, C. J., said: "At common law the death of one of two joint contractors severs the promise and renders the survivor liable thereon, as on his several promise. In such case the survivor only can be sued on the contract, and the executor or administrator of the deceased party, if sued, may plead the survivorship in bar or give it in evidence on a trial of the merits."

Joint Covenant. — This rule applies to a joint covenant. *Rowan v. Woodward*, 2 A. K. Marsh. (Ky.) 140.

Joint Note. — Or a joint note. *Thompson v. Johnson*, 40 N. J. L. 220.

Partnership Debt. — And to a debt due from a partnership. *Grant v. Shurter*, 1 Wend. (N. Y.) 148.

Suretyship Contract. — A joint suretyship contract survives against the surviving obligor alone. See *infra*, *Contracts of Suretyship*.

3. Judgments. — *Wade v. Potter*, 14 N. J. L. 278; *Hammond v. Hoffman*, 2 Redf. (N. Y.) 92.

4. Recourse to Original Obligation. — *Hammond v. Hoffman*, 2 Redf. (N. Y.) 92.

Judgment on Tort. — The rule permitting in case of a joint judgment recourse to the original obligation does not apply to judgments recovered on torts. *Hammond v. Hoffman*, 2 Redf. (N. Y.) 92.

5. Relief in Equity Against Estate of Joint Obligor. — *Ex p. Kendall*, 17 Ves. Jr. 519; *Camp v. Grant*, 21 Conn. 41, 54 Am. Dec. 321; *Fillyau v. Laverty*, 3 Fla. 72; *Bennett v. Woolfolk*, 15 Ga. 213; *Burnside v. Merrick*, 4 Met. (Mass.) 544; *Kennedy v. Carpenter*, 2 Whart. (Pa.) 361.

Massachusetts Rev. Stat., c. 66, § 27, providing that the representatives of a deceased joint contractor shall be liable to the same extent as if the contract had been several, gives an adequate remedy at law against such representatives and deprives equity of jurisdiction on the ground that the death of the contractor

Partnership Debts. — This is especially true in the case of contracts entered into by a partnership. Courts of equity treat such contracts almost universally as joint and several, and permit the creditor to enforce them, though joint in fact, against the estate of a deceased partner.¹ But where the estate of the deceased partner derives no benefit from the contract, and no obligation

released his estate at law. *Curtis v. Mansfield*, 11 Cush. (Mass.) 152. But see *contra*, *Waldron v. Simmons*, 28 Ala. 629.

Executors Carrying on Their Testator's Business are subject to the rule continuing against the estate of a decedent the liability on his joint contracts. *Liverpool Borough Bank v. Walker*, 4 De G. & J. 24.

1. Partnership Debts — *England*. — *Lane v. Williams*, 2 Vern. 292; *Ex p. Kendall*, 17 Ves. Jr. 514; *Vulliamy v. Noble*, 3 Meriv. 619; *Stephenson v. Chiswell*, 3 Ves. Jr., 566; *Winter v. Innes*, 4 Myl & C. 101; *New Sombbrero Phosphate Co. v. Erlanger*, 5 Ch. Div. 73.

Alabama. — *Waldron v. Simmons*, 28 Ala. 629.

Arkansas. — *McLain v. Carson*, 4 Ark. 164, 37 Am. Dec. 777.

Colorado. — *Beaton v. Wade*, 14 Colo. 4.

Connecticut. — *Camp v. Grant* 21 Conn. 41, 54 Am. Dec. 321.

Florida. — *Fillyau v. Laverty*, 3 Fla. 72.

Georgia. — *Bennett v. Woolfolk*, 15 Ga. 213.

Illinois. — *Doggett v. Dill*, 108 Ill. 560, 48 Am. Rep. 565. See also *People v. Lott*, 36 Ill. 447.

Kentucky. — *McGill v. McGill*, 2 Metc. (Ky.) 258; *Southard v. Lewis*, 4 Dana (Ky.) 148.

Louisiana. — *Morgan v. His Creditors*, 8 Martin N. S. (La.) 599, 20 Am. Dec. 262.

Massachusetts. — *Sampson v. Shaw*, 101 Mass. 145, 3 Am. Rep. 327.

Mississippi. — *Dahlgren v. Duncan*, 7 Smed. & M. (Miss.) 280.

New Jersey. — *Howell v. Teel*, 29 N. J. Eq. 490.

New York. — *Chittenango First Nat. Bank v. Morgan*, 73 N. Y. 593; *Stahl v. Stahl*, 2 Lans. (N. Y.) 60; *Butts v. Genung*, 5 Paige (N. Y.) 254; *Hamersley v. Lambert*, 2 Johns. Ch. (N. Y.) 509; *Atkins v. Kinnan*, 20 Wend. (N. Y.) 241, 32 Am. Dec. 534.

Pennsylvania. — *Cope v. Warner*, 13 S. & R. (Pa.) 411.

Rhode Island. — *Pearce v. Cooke*, 13 R. I. 184.

Tennessee. — *Simpson v. Young*, 2 Humph. (Tenn.) 514.

Virginia. — *Linney v. Dare*, 2 Leigh (Va.) 588; *Jackson v. King*, 8 Leigh (Va.) 689.

See also the title **PARTNERSHIP**.

Secret Partner. — This rule applies to the estate of a secret partner as well as to that of an active partner. *Cocke v. Upshaw*, 6 Munf. (Va.) 464.

In *Kendall v. Hamilton*, L. R. 4 App. 504, however, relief against the estate of a deceased secret partner was refused, where the claim had been allowed in bankruptcy proceedings against the surviving partner.

Particular Contracts. — A joint bond given for money loaned a partnership has been held enforceable in equity against the estate of a deceased partner. *Bishop v. Church*, 3 Atk. 691.

And so, also, a joint note given for a part-

nership debt. *Lane v. Williams*, 2 Vern. 277, 292; *Jacomb v. Harwood*, 2 Ves. 265.

Insolvency of Surviving Partner authorizes relief in equity against the estate of the deceased partner. *Storer v. Hinkley*, Kirby (Conn.) 147; *Anderson v. Pollard*, 62 Ga. 46; *Southard v. Lewis*, 4 Dana (Ky.) 148; *Hamersley v. Lambert*, 2 Johns. Ch. (N. Y.) 508; *Horsey v. Heath*, 5 Ohio 353; *Wiesenfeld v. Byrd*, 17 S. Car. 106; *Wardlaw v. Gray*, Dudley Eq. (S. Car.) 85.

Proof of Insolvency of Surviving Partner. — Return of execution unsatisfied against the surviving partner is sufficient proof of his insolvency. *Stahl v. Stahl*, 2 Lans. (N. Y.) 60; *Lawrence v. Leake*, etc., *Orphan House*, 2 Den. (N. Y.) 577.

Discharge in Bankruptcy of Surviving Partner will authorize the enforcement of the partnership debts against the estate of the deceased partner. *Lang v. Keppele*, 1 Binn. (Pa.) 123. See, however, *Kendall v. Hamilton*, 3 C. P. Div. 407.

Under the *Georgia Code*, § 1907, making the surviving partner primarily liable for partnership debts, it is error to render judgment against the deceased partner alone, unless it appears that the partnership assets have been exhausted and that some good reason exists for not embracing the surviving partner in the judgment. The mere fact that he has come into insolvency without a discharge is insufficient. *Pullen v. Whitfield*, 55 Ga. 176.

Insolvency of Surviving Partner and Exhaustion of Firm Assets will also authorize such relief. *Buckingham v. Ludlum*, 37 N. J. Eq. 137.

Insolvency of Partnership authorizes relief in equity against the representatives of the deceased partner. *Anderson v. Pollard*, 62 Ga. 46 (*dicta*).

Laches on the part of the creditor in prosecuting his claim against the surviving partner will not, in case of the subsequent insolvency of such parties, release the equitable liability of the estate of the deceased partner. *Hamersley v. Lambert*, 2 Johns. Ch. (N. Y.) 508; *Eads v. Mason*, 16 Ill. App. 545; *Silverman v. Chase*, 90 Ill. 37; *Mason v. Tiffany*, 45 Ill. 392.

Priority Between Partnership and Individual Debts. — The individual debts of the deceased partner have priority over the debts of the partnership in the distribution of the individual estate of the deceased partner. *McCulloh v. Dashiell*, 1 Har. & G. (Md.) 96, 18 Am. Dec. 271; *Wilder v. Keeler*, 3 Paige (N. Y.) 167, 23 Am. Dec. 781; *Gray v. Chiswell*, 9 Ves. Jr. 118.

In *Dahlgren v. Duncan*, 7 Smed. & M. (Miss.) 280, it was held, under a statute making partnership contracts "joint and several," that there was no priority between the individual and the partnership debts. See also *Higgins v. Rector*, 47 Tex. 361; *Hundley v. Farris*, (Mo. 1890) 13 S. W. Rep. 392. See *infra*, this title, *Order of Payment of Debts*.

exists independently of the contract, it has been held that equity will not enforce it against his estate, but will leave the creditor to his legal remedy against the survivors.¹

Whether Estate of Deceased Partner Primarily Liable. — It is now held in *England* and in some of the *United States* that the creditor may proceed in the first instance against the estate of the deceased partner without even attempting to exhaust his remedy against the surviving partners.² The courts, however, in some of the states still hold that the creditor must exhaust his remedy against the surviving partners before seeking any remedy in equity against the estate of the deceased partner.³

(3) *Statutory Liability.* — It is expressly provided by statute in a great number of the states that the representatives of one jointly bound with another for the payment of a debt or for the performance or forbearance of any act or for any other thing, and dying in the lifetime of the latter, may be charged by virtue of such contract in the same manner that such representa-

1. **Indemnity Covenant.** — A joint covenant by surviving partners to indemnify the estate of a deceased partner from partnership liabilities will not be enforced in equity against the estate of one of the covenantees, but equity will leave the covenantee to his legal remedy against the surviving obligor. *Sumner v. Powell*, 2 Meriv. 30.

A **Joint Lease by Partners** creates no liability in equity against the estate of one of the lessees for rents accruing after his death. *Clarke v. Bickers*, 14 Sim. 639, 9 Jur. 678.

2. **Primary Liability of Estate** — *England.* — *Devaynes v. Noble*, 1 Meriv. 529; *Wilkinson v. Henderson*, 1 Myl. & K. 582; *Stephenson v. Chiswell*, 3 Ves. Jr. 566; *In re Hodgson*, 31 Ch. Div. 177; *Kendall v. Hamilton*, 3 C. P. Div. 407; *Brown v. Gordon*, 16 Beav. 310; *Ridgway v. Clare*, 19 Beav. 111.

United States. — *Nelson v. Hill*, 5 How. (U. S.) 127. See, however, *Van Reimsdyk v. Kane*, 1 Gall. (U. S.) 371.

Arkansas. — *McLain v. Carson*, 4 Ark. 164, 37 Am. Dec. 777.

Connecticut. — *Camp v. Grant*, 21 Conn. 41, 54 Am. Dec. 321. See, however, *Pendleton v. Phelps*, 4 Day (Conn.) 476; *Sturges v. Beach*, 1 Conn. 509; *Alsop v. Mather*, 8 Conn. 584, 21 Am. Dec. 703.

Florida. — *Fillyau v. Lavery*, 3 Fla. 72.

Illinois. — *Eads v. Mason*, 16 Ill. App. 545; *Silverman v. Chase*, 90 Ill. 37; *Mason v. Tiffany*, 45 Ill. 393.

Indiana. — *Ralston v. Moore*, 105 Ind. 243; *Braxton v. State*, 25 Ind. 82.

Iowa. — *Postlewait v. Howes*, 3 Iowa 381.

Mississippi. — *Freeman v. Stewart*, 41 Miss. 138; *Irby v. Graham*, 46 Miss. 425.

South Carolina. — *Wiesenfeld v. Byrd*, 17 S. Car. 106.

Texas. — *Gaut v. Reed*, 24 Tex. 46, 76 Am. Dec. 94.

See also *Ross v. Everett*, 12 Ga. 30.

Basis of Doctrine. — In *Irby v. Graham*, 46 Miss. 425, Simrall, J., said: "This redress in chancery of permitting resort against the administrator of the decedent, before exhausting legal remedy against the survivor, does not rest upon the promise that an additional charge or responsibility is thrown upon the

estate; such is not the case, for, if the firm's assets are able to respond to all the joint debts, the administrator, upon account taken between him and the survivor, would be fully refunded. The effect is to give a freer remedy to creditors, not to enlarge the ultimate liability of either party, or to change the relative rights of the survivor and the administrator as respects the several estates over which they preside."

Under the *Pennsylvania* Act of 1848, April 11, § 4, providing that in suits against the representatives of a deceased partner on a firm indebtedness, it shall not be necessary to prove the insolvency of the surviving partner, the estate of the deceased partner is liable therefor in the first instance. *Blair v. Wood*, 108 Pa. St. 278; *Moore's Appeals*, 34 Pa. St. 411.

Recovery of Judgment against the insolvent surviving partner is not necessary before resort may be had in equity against the estate of the deceased partner. *Vance v. Cowing*, 13 Ind. 460.

Effect of Recovery of Judgment Against Surviving Partner. — The recovery of judgment against the surviving partner will not preclude an action against the representative of the deceased partner. *Liverpool Borough Bank v. Walker*, 4 DeG. & J. 24; *Jacomb v. Harwood*, 2 Ves. 265.

3. *New York.* — *Voorhis v. Childs*, 17 N. Y. 354; *Dubois's Case*, 3 Abb. Pr. (N. Y. Surrogate Ct.) 177; *Lawrence v. Leake*, etc., *Orphan House*, 2 Den. (N. Y.) 577; *Grant v. Shurter*, 1 Wend. (N. Y.) 148. See, however, *Yorks v. Peck*, 14 Barb. (N. Y.) 644.

Ohio. — *Hubble v. Perrin*, 3 Ohio 287.

Pennsylvania. — *Caldwell v. Stileman*, 1 Rawle (Pa.) 212; *Lang v. Keppele*, 1 Binn. (Pa.) 123.

Exhaustion of Partnership Assets. — In *Hubble v. Perrin*, 3 Ohio 287, it was held that the creditor must exhaust the partnership assets before proceeding in equity against the estate of the deceased partner.

Exhaustion of Remedy Against Surety. — The creditor must also exhaust his remedy against the surety on the indebtedness before he can enforce liability against the estate of the deceased partner. *Linney v. Dare*, 2 Leigh (Va.) 588.

tives might have been charged if the parties had been bound severally as well as jointly.¹

Whether Joint Action Maintainable Against Survivor and Representative. — And it has been held that such a statute authorized a joint action against the surviving obligor and the personal representatives of the deceased obligor;² the contrary doctrine, however, seems to be the better.³

d. CONTRACTS OF SURETYSHIP — (1) *In General.* — The contract of suretyship is not as a general rule terminated by the death of the surety, and where the contract is a continuing one, and where the consideration is entire, the estate of the surety will be liable thereon for defaults occurring after the death of the surety, whether the contract is made expressly binding on the executors, administrators, and heirs of the surety, or not.⁴

1. Statutory Liability. — *Braxton v. State*, 25 Ind. 82; *Hays v. Crutcher*, 54 Ind. 260; *Maxey v. Averill*, 2 B. Mon. (Ky.) 107; *Curtis v. Mansfield*, 11 Cush. (Mass.) 152; *Sampson v. Shaw*, 101 Mass. 145, 3 Am. Rep. 327; *Manning v. Williams*, 2 Mich. 105. See also *Ross v. Everett*, 12 Ga. 30; *Cowley v. Patch*, 120 Mass. 137.

New Jersey Rev. Laws 305, § 4, providing that the representatives of one jointly bound with another for the payment of any debt, etc., should be charged in the same manner as such representatives might have been charged if the "obligors" had been bound severally also, applies to simple contract debts as well as specialties. *Thompson v. Johnson*, 40 N. J. L. 220. See, however, *Wade v. Potter*, 14 N. J. L. 278.

A similar statute has also been held to apply to partnership indebtedness on a note executed in the firm's name. *Maxey v. Averill*, 2 B. Mon. (Ky.) 107.

The Several Liability of the Survivor is not affected by Gen. Stat. Mass., c. 97, § 20, providing that where two or more persons are indebted on a joint contract and either of them dies, his estate shall be liable therefor as if the contract had been joint and several. *Rice, Appellant*, 7 Allen (Mass.) 112.

2. Joinder of Parties Allowed. — *Simpson v. Young*, 2 Humph. (Tenn.) 514; *Taylor v. Taylor*, 5 Humph. (Tenn.) 110. See also *Anderson v. Pollard*, 62 Ga. 46, wherein it was held that, under a statutory provision giving a court jurisdiction to mould verdicts so as to afford equitable relief, the surviving partner and the representatives of the deceased partner could be joined as defendants at law when their joinder in equity was authorized.

3. Joinder Not Allowed. — *Cochrane v. Cushing*, 124 Mass. 219; *Poole v. McLeod*, 1 Smed. & M. (Miss.) 391; *Richter v. Poppenhausen*, 42 N. Y. 373; *Grymes v. Pendleton*, 4 Call (Va.) 130; *Watkins v. Tate*, 3 Call (Va.) 521. See also *New Haven, etc., R. Co. v. Hayden*, 110 Mass. 361.

4. Contracts of Suretyship. — In *Knotts v. Butler*, 10 Rich. Eq. (S. Car.) 143, wherein an estate of a surety was held liable for a default occurring four years after the death of the surety, *Wardlaw, Ch.*, said: "What obstructs one from indemnifying against the consequences of an event which may not happen for more than four years after his death, more than giving his promissory note, which may not reach maturity for more than four years

from his death? It is asked, how long shall such a guaranty continue in force? and the answer is, until it be ended according to its terms."

In *White v. Com.*, 39 Pa. St. 167, *Thompson, J.*, said: "A contract to pay money, although it falls due after the decease of the obligor, does survive; and what is the difference between an agreement to pay at a future period or on a future contingency? The contract is to be completed, not by any personal performance, but by the payment of money."

Guarantee of Fidelity of Employee. — The estate of the guarantor of the fidelity of a collector or clerk is liable for defaults occurring after the death of the surety. *Calvert v. Gordon*, 3 M. & R. 124.

Guaranty by Wife of Husband's Debt. — Though in a mortgage by a wife, of her estate for the debt of her husband, she is merely a surety, her death does not release her estate from the mortgage lien. *Miner v. Graham*, 24 Pa. St. 491.

Guaranty by Partnership. — Guaranty by partnership is not terminated by the death of the sole surviving partner. *Kernochan v. Murray*, 111 N. Y. 306, 7 Am. St. Rep. 744.

Surety on Administrator's Bond. — The estate of a surety on an administrator's bond is liable for a default occurring after the death of the surety. *Hightower v. Moore*, 46 Ala. 387; *Mundorff v. Wangler*, 44 N. Y. Super. Ct. 495.

The Surety on a Trustee's Bond is also liable. *White v. Com.*, 39 Pa. St. 167.

Guardian's Bond. — And also the surety on a guardian's bond. *Moore v. Wallis*, 18 Ala. 458.

Bond of Insurance Agent. — The estate of the surety on the bond of an insurance agent which expressly binds the surety, his executors, etc., is liable for funds coming to the hands of the agent after the death of the surety. *Royal Ins. Co. v. Davies*, 40 Iowa 469, 20 Am. Rep. 581; *Rapp v. Phoenix Ins. Co.*, 113 Ill. 390, 55 Am. Rep. 427. And also though the contract does not expressly bind the executors, etc., of the surety. *Lloyd's v. Harper*, 16 Ch. Div. 290.

Bond of Bank Cashier. — A surety on the bond of a bank cashier is not discharged by death from liability for subsequent breaches. *Exchange Bank v. Springer*, 7 Ont. Rep. 309.

Bond of Deputy Sheriff. — The liability of the surety in a bond conditioned for the official good conduct of a deputy sheriff extends to defaults committed after the death of the surety. *Green v. Young*, 8 Me. 14, 22 Am. Dec. 218.

Entire and Divisible Contracts of Suretyship Distinguished. — A distinction is to be made between contracts of suretyship or guaranty, where the consideration is entire, and those where the consideration passes at different times, and the contract is therefore separate and divisible. In the latter case the liability of the estate of the surety or guarantor is terminated by his death, and notice of that event,¹ but not by the death of the surety without notice.²

(2) *Joint Contract* — (a) **In General.** — In case of a joint contract of suretyship or guaranty, the estate of a deceased surety is discharged in law from liability, the survivor alone being responsible, and a court of equity will not as a general rule enforce the obligation against the representatives of the deceased obligor.³

The estate of the surety is bound, irrespective of whether his executors, etc., are named therein or not. *White v. Com.*, 39 Pa. St. 167.

Several Sureties. — Where the contract to the sureties is several, it may be enforced against the estate of a decedent surety. *Desore v. Potter*, 12 S. & R. (Pa.) 154.

1. **Divisible Contracts of Suretyship.** — Guaranty of the paper of a third person, to be discounted by a bank in the future, is several and is terminated by the death of the guarantor, and notice of that event. *National Eagle Bank v. Hunt*, 16 R. I. 148.

A continuing guaranty for payment of subsequent advances is terminated by notice of the death of the guarantor. *Coulthart v. Clementson*, 5 Q. B. Div. 42.

And this is so, though the guaranty provides that it shall continue in force six months after notice by the guarantor of its termination. *Harris v. Fawcett*, L. R. 15 Eq. 311.

2. **Death of Surety — Bond for Repayment of Advances.** — The estate of the surety on a bond for repayment of advances is liable for advances made after the death of the surety and before notice is given of the termination of the liability of the surety, especially when the surety binds himself, his executors, etc. *Hecht v. Weaver*, 34 Fed. Rep. 111.

Continuing Guaranty for the Payment of goods to be sold in the future is not terminated merely by the death of the guarantor. *Bradbury v. Morgan*, 1 H. & C. 249.

3. **Joint Contracts of Suretyship — England.** — *Richardson v. Horton*, 6 Beav. 185; *Simpson v. Field*, 2 Ch. Cas. 225; *Jones v. Beach*, 2 De G. M. & G. 886; *Wilmer v. Currey*, 2 De G. & Sm. 347; *Other v. Ivison*, 3 Drew. 177; *Sumner v. Powell*, 2 Meriv. 30, on appeal, 1 T. & R. 423; *Wilkinson v. Henderson*, 1 Myl. & K. 582; *Rawstone v. Parr*, 3 Russ. 539.

United States. — *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, 1 Pet. (U. S.) 16.

Maryland. — *Waters v. Riley*, 2 Har. & G. (Md.) 311.

New Jersey. — *Dixon v. Vandenberg*, 35 N. J. Eq. 47.

New York. — *Bradley v. Burwell*, 3 Den. (N. Y.) 61; *Getty v. Binsse*, 49 N. Y. 385, 10 Am. Rep. 379; *Risley v. Brown*, 67 N. Y. 160; *Hauck v. Craighead*, 67 N. Y. 432; *McNulty v. Hurd*, 72 N. Y. 523; *Davis v. Van Buren*, 72 N. Y. 589; *Richardson v. Draper*, 87 N. Y. 344, 23 Hun (N. Y.) 183.

Pennsylvania. — *Weaver v. Shryock*, 6 S. & R. (Pa.) 262; *Kennedy v. Carpenter*, 2 Whart. (Pa.) 344.

Texas. — *Glasscock v. Hamilton*, 62 Tex. 143.

Virginia. — *Harrison v. Field*, 2 Wash. (Va.) 136.

In *Smith v. Martin*, 4 Desaus. (S. Car.) 148, the estate of the surety on a joint bond was held liable. From the opinion, however, it does not appear that the relation of the decedent as surety was taken into consideration, and the English cases cited in support are only cases of joint obligors receiving part of the consideration.

In *Texas*, under Act Feb. 5, 1840, § 5, the liability of a joint surety was extended against his estate. *Mays v. Cockrum*, 57 Tex. 352; *Bergstroem v. State*, 58 Tex. 92.

This act, however, ceased to be in effect after the adoption of the Revised Statutes. *Glasscock v. Hamilton*, 62 Tex. 143.

In *Indiana* the common-law rule as to the discharge of a joint surety by death has never been in force. *Hudelson v. Armstrong*, 70 Ind. 99.

United States as Obligee. — The general rule as to the discharge of a joint surety applies though the United States is the obligee. *U. S. v. Archer*, 1 Wall. Jr. (C. C.) 173.

Joint Judgment against surety and principal will not affect the discharge of the estate of the surety by his death. *U. S. v. Price*, 9 How. (U. S.) 83.

In *Smith v. Kibbe*, 31 Hun (N. Y.) 390, however, it was held that the recovery of a sole judgment against a joint accommodation maker of a note would prevent the discharge of his liability by death.

Several Contract of Suretyship — Effect of Recovery of Joint Judgment. — In *U. S. v. Cushman*, 2 Sumn. (U. S.) 426, it was held that the recovery of a joint judgment against sureties who were severally liable did not prevent, in equity, the enforcement of liability against the estate of one of such sureties. See also *Baskin v. Andrews*, 53 Hun (N. Y.) 95. See, however, *U. S. v. Archer*, 1 Wall. Jr. (C. C.) 173, wherein *U. S. v. Cushman*, 2 Sumn. (U. S.) 426, is expressly disapproved.

Injunction Bond. — The obligee in an injunction bond cannot pursue the estate of a deceased joint surety, though the surviving surety is insolvent. *Pickersgill v. Lahens*, 15 Wall. (U. S.) 141.

Appeal Bond. — And the same is true as regards the liability of a joint surety on an appeal bond. *Wood v. Fisk*, 63 N. Y. 245, reversing 4 Hun (N. Y.) 525; *Comins v. Pottle*, 22 Hun (N. Y.) 287.

Qualification.—Where by fraud or mistake the contract was made joint instead of several,¹ or where there was a previous equity which gave the promisee a right to a several indemnity from each of the obligors, as in case of money loaned to both of them,² a court of equity will enforce the obligation against the representatives of the deceased surety though the contract be joint and not several.

Exhaustion of Remedy Against Principal.—Before the estate of the surety can be subjected to the payment of the indebtedness, the property of the principal should be first exhausted.³

(b) **Contribution Between Sureties.**—The liability of sureties for contribution is distinct from their liability to the obligee, and arises from an implied agreement among the sureties that as between themselves they will contribute ratably towards discharging any liability they may incur in consequence of becoming such sureties, and such liability is binding on the representatives of any of the sureties who may die.⁴

(c) **Indemnity of Surety.**—Sureties who have been compelled to pay the indebtedness of their principal have a legal demand for reimbursement, which is, of course, enforceable against the estate of the principal after his death.⁵

(d) **Statutory Provisions.**—In a number of states the distinction between joint and several contracts has been abolished by statute, and the estate of a joint debtor is made liable to the same extent that the debtor was liable. Such statutes, of course, apply equally to the liability of joint sureties.⁶

e. COVENANTS—(1) *In General.*—As a general rule the covenants of a decedent bind his executors and administrators to the extent of the assets in their hands, and the covenantee may maintain an action thereon against the representatives of the covenantor.⁷ And the estate is liable even though the

Bail Bonds.—The rule also applies to bail bonds. *Davis v. Van Buren*, 6 Daly (N. Y.) 391.

The surety is discharged though the contract is made expressly binding upon the obligors, their executors, etc. *Pecker v. Julius*, 2 Browne (Pa.) 31.

1. Mistake as Ground for Equitable Relief Against Estate of Joint Surety.—Where by mistake the bond is made joint instead of several, equity will grant relief against the estate of a deceased surety. *U. S. v. Cushman*, 2 Sumn. (U. S.) 434, *per Story*, J.; *Olmsted v. Olmsted*, 38 Conn. 309.

In *Powell v. Kettelle*, 6 Ill. 491, it was held that where a joint note is taken in payment of school lands, instead of a several note as required by statute, equity would treat the note as several so as to enforce it against the estate of a deceased surety.

2. Note for Money Loaned to Both Surety and Principal, though joint, will be enforced against the estate of the surety. *Simpson v. Vaughan*, 2 Atk. 32.

Note Given in Discharge of Prior Debt.—In *Boyd v. Bell*, 69 Tex. 735, it was held that the fact that the obligation was given for the discharge of a prior obligation on which the surety was liable, was sufficient to render his estate liable in equity.

Benefit Inuring to Surety.—In *Richardson v. Draper*, 87 N. Y. 337, W., one of the chief promoters and stockholders in a corporation, in consideration of the donation of land for a site for a rolling mill and a loan of \$150,000 on the bonds of the corporation, guaranteed the bonds jointly with the other promoters. It was held that W. received a benefit from the loan, so as

to render his estate liable in equity on the guaranty.

3. Exhaustion of Remedy Against Principal.—*Jones v. Degge*, 84 Va. 685.

4. Contribution Between Sureties.—*Ramskill v. Edwards*, 31 Ch. Div. 100; *Bradley v. Burwell*, 3 Den. (N. Y.) 61; *Knotts v. Butler*, 10 Rich. Eq. (S. Car.) 143. See also the title CONTRIBUTION AND EXONERATION, vol. 7, p. 332. See, however, *Waters v. Riley*, 2 Har. & G. (Md.) 305, wherein it was said that a surety paying the debts of his principal acquires no rights against any persons other than the principal that the creditor did not have, and therefore could not compel the estate of a joint co-surety to contribute.

5. Indemnity of Surety.—*Matter of Hill*, 67 Cal. 238.

The fact that the surety paid the indebtedness out of the proceeds of stock given by the principal to the surety does not deprive the surety of the right to be repaid from the estate of the principal. *Kern's Estate*, 171 Pa. St. 55.

6. Statutes Rendering Joint Contracts Joint and Several.—N. Y. Code Civ. Pro., § 758; Rev. Stat. Ill. 1874, c. 76, § 3; 2 Rev. Stat. Ind. 1876, p. 518; Md. Rev. Code, art. 64, § 51. See also the statutes of the other states.

Retroactive Effect of Statute.—The *New York* Code of Civ. Pro., § 758, providing that the estate of one jointly liable should not be discharged by his death, does not apply to contracts entered into before its passage, so as to render liable the estate of a joint surety. *Randall v. Sackett*, 77 N. Y. 480.

7. Covenants.—*Thurseden v. Warthen*, 2 Bulst. 158; *Harwood v. Hilliard*, 2 Mod. 268; *Macartney v. Blundell*, 2 Ridgw. P. C. 113.

executors or representatives of the covenantor are not named in the covenant.¹

Particular Covenants. — The following covenants have been held binding on the representatives of the covenantor: a personal covenant by a mortgagor for payment of the mortgage debt;² a covenant for quiet enjoyment;³ a covenant of warranty;⁴ a covenant against incumbrances;⁵ and covenants in leases for payment of rents, etc.⁶ In *Pennsylvania*, however, it has been held that a ground rent covenant did not survive against the representatives of the covenantor except as to rent falling due in the lifetime of the decedent, though the covenant is expressly made binding upon the covenantor, his executors, heirs, etc.⁷

(2) *Covenants in Law.* — The rule that the estate is liable on the covenants of the decedent does not, however, apply in case of covenants in law; that is,

1. Failure to Name Executor in Covenant. — *Lee v. Cooke*, 1 Wash. (Va.) 306; *Harrison v. Sampson*, 2 Wash. (Va.) 155; *Comyns's Dig.*, tit. Covenant, (C); *Bac. Abr.*, tit. Covenants, (E) 1.

And the same is true where the heir is named without naming the executor. *Williams v. Burrell*, 1 C. B. 418, 50 E. C. L. 418; *McClure v. Gamble*, 27 Pa. St. 288.

2. Personal Covenant by Mortgagor. — *Dennis v. Sharer*, 56 Mich. 224.

3. Covenant for Quiet Enjoyment. — *Wells v. Fydeall*, 10 East 315; *Noble v. King*, 1 H. Bl. 34; *Hovey v. Newton*, 11 Pick. (Mass.) 421; *Harrison v. Sampson*, 2 Wash. (Va.) 155.

4. Covenant of Warranty. — *Chapman v. Holmes*, 10 N. J. L. 20; *Townsend v. Morris*, 6 Cow. (N. Y.) 123; *McClure v. Gamble*, 27 Pa. St. 288; *Lee v. Cooke*, 1 Wash. (Va.) 306.

Warrant and Defend. — In *Tabb v. Binford*, 4 Leigh (Va.) 132, 26 Am. Dec. 317, it was held that an action might be brought against the personal representatives of a grantor or his covenant to warrant and defend.

5. Covenant Against Incumbrances. — *Large v. McClain*, (Pa. 1856) 5 Cent. Rep. 761; *Harrison v. Sampson*, 2 Wash. (Va.) 155.

6. Covenant to Pay Rent. — *Montague v. Smith*, 13 Mass. 405; *Greenleaf v. Allen*, 127 Mass. 248; *Alsop v. Banks*, 68 Miss. 664, 24 Am. St. Rep. 294; *Traylor v. Cabanne*, 8 Mo. App. 131.

A several covenant to pay rent has been held binding on the representatives of a deceased lessee though the lease is joint so that the term passes to the survivor. *Enys v. Donnithorne*, 2 Burr. 1190.

Non-entry by Executor. — A covenant to pay rent is binding on the representatives of the deceased lessee even though his representative does not enter. *Howard v. Heinerschit*, 16 Hun (N. Y.) 177.

Effect of Assignment of Lease. — The executor of the lessee is liable on the express covenant of his testator to pay rent even after an assignment by him of the term. *Brett v. Cumberland, Cro. Jac.* 521; *Scott v. Lunt*, 7 Pet. (U. S.) 596; *Pate v. Oliver*, 104 N. Car. 458.

Covenant by Lessor to Rebuild. — *Chamberlain v. Dunlop*, 126 N. Y. 45, 22 Am. St. Rep. 807.

Covenant by Lessee to Repair. — *Sleap v. Newman*, 12 C. B. N. S. 116, 104 E. C. L. 116, 6 L. T. 386.

In *Kershaw v. Supplee*, 1 Rawle (Pa.) 131, however, a covenant on the part of a lessor and

"his heirs" to keep in repair a mill dam on the land of the lessor (which was used in the operation of a mill erected by the lessee) ran with the land, and did not bind the executor of the lessor.

Covenant to Renew Lease. — *Phillips v. Everard*, 5 Sim. 102; *Stephens v. Hotham*, 1 Kay & J. 571.

Grant in Fee — Rent Reserved. — The executor is liable for rent reserved upon a grant in fee, accruing after the death of the lessee. *Van Rensselaer v. Platner*, 2 Johns. Cas. (N. Y.) 17. See also *Scott v. Lunt*, 7 Pet. (U. S.) 596, wherein the administrator of the covenantor was held liable in such a covenant after an assignment, though the remedy against the assignee was adequate.

7. Ground Rent. — In *Quain's Appeal*, 22 Pa. St. 510, *Lowrie, J.*, in speaking of the effect of a ground-rent covenant, said: "It is a perpetual covenant, and it is totally impracticable to require it to be performed by executors and administrators; for their office is not perpetual. If we retain the perpetuity of the covenant as against them, even with the restriction that they are to be liable only when the resort to the land is ineffectual, we still prevent all distribution of the estate in their hands; and, as all the lands of the decedent are assets for the payment of debts, we constructively charge the rent of a single lot upon all his lands. Nor will it do to hold them liable until the final settlement of the estate. If that suggestion means until all other matters are ready to be settled, then it takes away at once the character of perpetuity belonging to the covenant, and makes its duration, as against the personal estate, to depend upon the accident of the administrator's diligence, or of the involved or simple nature of the estate. If it means until the final settlement of the whole estate, then this perpetual covenant postpones it forever. This cannot be; for the law intends the office of executor or administrator to terminate as soon as possible; it cannot be prolonged on account of perpetual covenants."

In *Williams's Appeal*, 47 Pa. St. 283, *Quain's Appeal*, 22 Pa. St. 510, holding that a covenant for ground rent was not binding on the executor of the covenantor, was affirmed, but it was also held that such executor was a proper party to an action, for rent accruing after the covenantor's death, the judgment to be restricted, however, to the land out of which the rent issued. See also *Gardiner v. Painter*, 3 Phila. (Pa.) 365.

those which are implied from the use of certain words in conveyances or leases. For instance, a covenant for quiet enjoyment is implied by law from the use of the word "demise," and still the representatives are not liable on such a covenant for a breach after the death of the lessor.¹

(3) *Covenants Involving Personal Qualifications.* — Nor does the rule apply to covenants the performance of which involves the personal qualifications of the covenantor, such as a covenant under the old feudal system to pay quit rent,² or to instruct an apprentice,³ or a covenant not to pursue a certain trade.⁴

f. LEASES. — An ordinary contract of lease is not such a personal contract as will be discharged by the death of the lessee, but survives against his personal representatives, so as to entitle the lessor to recover, to the extent of the assets in the hands of the representative, rent accruing after the death of the lessee.⁵

g. AGREEMENTS TO MAKE WILL — (1) *In General.* — A person may for a valuable consideration renounce the absolute right to dispose of his estate at pleasure, and bind himself by contract to dispose of it by will to a particular person.⁶ It is essential, however, in such cases that the promises of the decedent to make a testamentary provision be in terms a contract and not

1. *Covenants in Law.* — *Adams v. Gibney*, 6 Bing. 656, 19 E. C. L. 194; *Williams v. Burrell*, 1 C. B. 402, 50 E. C. L. 402.

2. *Quit Rent.* — In *Ingerly v. Hyde*, 2 Dyer 114a, a covenant for the payment of quit rent, which was a nominal rent reserved as a feudal acknowledgment of tenure, was held not to survive against the representatives of the lessor.

3. *Instruction of Apprentice.* — *Wadsworth v. Guy*, 1 Keb. 761, 820.

4. *Cooke v. Colcraft*, 2 W. Bl. 856. See also cases cited *supra*, this section, subdivision *Personal Contracts*.

5. *Leases.* — *Coghill v. Free love*, 3 Mod. 325; *Hellier v. Casbard*, 1 Sid. 266; *Howse v. Webster*, 1 Yelv. 103; *Hunter v. Frost*, 47 Minn. 1; *Traylor v. Cabanne*, 8 Mo. App. 131; *Alsop v. Banks*, 68 Miss. 664, 24 Am. St. Rep. 294; *Wilcox v. Alexander*, (Tex. Civ. App. 1895) 32 S. W. Rep. 561.

In *Pugsley v. Aikin*, 11 N. Y. 494, it was held that an executor who failed to terminate the lease, but continued to occupy the premises from year to year, was liable in his representative capacity for rent accruing during his occupancy.

As to Liability on Covenants in Lease, see *supra*, this section, *Covenants*.

6. *Agreements to Make Wills Are Valid* — *England.* — *Fortescue v. Hennah*, 19 Ves. Jr. 69; *Randall v. Willis*, 5 Ves. Jr. 266; *Logan v. Wienholt*, 1 Cl. & F. 611; *Needham v. Smith*, 4 Russ. 318; *Lester v. Foxcroft*, Colles's P. C. 108; *Walpole v. Orford*, 3 Ves. Jr. 402; *Goilmer v. Battison*, 1 Vern. 48; *Jones v. Martin*, 3 Anstr. 882; *Stockley v. Stockley*, 1 Ves. & B. 30. See also *Maddison v. Alderson*, L. R. 8 App. 467, affirming 7 Q. B. Div. 174, which reversed 5 Exch. Div. 293.

Canada. — *Halleran v. Moon*, 28 Grant's Ch. (U. C.) 319; *Roberts v. Hall*, 1 Ont. Rep. 388.

Alabama. — *Bolman v. Overall*, 80 Ala. 451, 60 Am. Rep. 107; *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46.

Delaware. — *Carlisle v. Fleming*, 1 Harr. (Del.) 421.

Georgia. — *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535.

Indiana. — *Watson v. Mahan*, 20 Ind. 223; *Caviness v. Rushton*, 101 Ind. 500, 51 Am. Rep. 759. Compare *Stafford v. Bartholomew*, 2 Ind. 153.

Maryland. — *Mundorff v. Kilbourn*, 4 Md. 459; *Frisby v. Parkhurst*, 29 Md. 58, 96 Am. Dec. 503.

Michigan. — *Bird v. Pope*, 73 Mich. 483; *Carmichael v. Carmichael*, 72 Mich. 76, 16 Am. St. Rep. 528; *De Moss v. Robinson*, 46 Mich. 62, 41 Am. Rep. 144; *Faxton v. Faxon*, 28 Mich. 159; *Mundy v. Foster*, 31 Mich. 313; *Sword v. Keith*, 31 Mich. 247; *Wright v. Wright*, 31 Mich. 380.

Missouri. — *Gupton v. Gupton*, 47 Mo. 37; *Sutton v. Hayden*, 62 Mo. 101; *Wright v. Tinsley*, 30 Mo. 389; *Hiatt v. Williams*, 72 Mo. 214, 37 Am. Rep. 438.

New Jersey. — *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773; *Van Duyne v. Vreeland*, 12 N. J. Eq. 142; *Davison v. Davison*, 13 N. J. Eq. 246; *Schutt v. Missionary Soc.*, 41 N. J. Eq. 115.

New York. — *Parsell v. Stryker*, 41 N. Y. 487; *Stephens v. Reynolds*, 6 N. Y. 454; *Matter of Sunderlin*, 74 Hun (N. Y.) 219; *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279; *Shakespeare v. Markham*, 10 Hun (N. Y.) 311; *Heath v. Heath*, 18 Misc. Rep. (N. Y. Supreme Ct.) 521. Compare *Harder v. Harder*, 2 Sandf. Ch. (N. Y.) 17.

Pennsylvania. — *Brinker v. Brinker*, 7 Pa. St. 53; *Logan v. McGinnis*, 12 Pa. St. 27. Compare *Rowan's Appeal*, 25 Pa. St. 292.

South Carolina. — *Rivers v. Rivers*, 3 Desaus. (S. Car.) 190, 4 Am. Dec. 609; *Gardner v. Gardner*, 49 S. Car. 62; *Izard v. Middleton*, 1 Desaus. (S. Car.) 116.

Tennessee. — *Green v. Broyles*, 3 Humph. (Tenn.) 167.

In *Bell v. Hewitt*, 24 Ind. 280, an agreement to give a legacy of \$500 in consideration of services was held valid. See also *Purviance v. Shultz*, 16 Ind. App. 94.

merely voluntary revocable promises; ¹ and that the contract be definitely and conclusively proven. ²

(2) *Requisites of Agreement* — (a) *Consideration*. — An agreement to make a will in favor of a particular person must, of course, as in case of all other executory contracts, be supported by a valuable consideration. ³

(b) *Certainty of Contract*. — And the contract must be definite and certain; for instance, a promise to leave a claimant "as much as any relation he had on earth" has been held too indefinite and uncertain; ⁴ on the other hand, promises to leave a claimant enough "so that she need not to work," ⁵ and to leave her "independently rich," have been held sufficiently certain. ⁶

(c) *Statute of Frauds* — *aa. IN GENERAL*. — *Agreements for Compensation for Services* by provisions in a will are not within the statute of frauds requiring agreements not to be performed within a year to be in writing. ⁷

But an *Agreement to Devise Specific Lands* in consideration of services to be rendered is within the statute of frauds requiring agreements for the sale of land to be in writing. ⁸

Agreement for Compensation for Services rendered a decedent, by the devise of specific land, is binding upon the representatives of the decedent. *Koch v. Hebel*, 32 Mo. App. 103; *Quackenbush v. Ehle*, 5 Barb. (N. Y.) 469.

Agreement to Make Mutual Wills is also valid. *Dufour v. Pereira*, Dick. 419, 3 Ves. Jr. 416; *Croft v. Layton*, 68 Conn. 91.

Agreement Not to Revoke Will is also valid. *Robinson v. Ommeney*, 23 Ch. Div. 285.

Construction of Agreement — *After-acquired Property*. — In *Kleeberg v. Schrader*, (Minn. 1897) 72 N. W. Rep. 59, it was held, under an agreement to give or bequeath all of the promisor's estate remaining at her death, that personal property to which she became entitled by inheritance after the making of such agreement would pass, though such property had not been distributed at the time of her death, and was not in contemplation of the parties when the agreement was made.

1. *McKinnon v. McKinnon*, 46 Fed. Rep. 717, citing 5 AM. AND ENG. ENCYC. OF LAW (1st ed.) 313; *Wilmer v. Borer*, 4 Kan. App. 109; *Pleasanton's Estate*, 6 Pa. Dist. Rep. 5, 19 Pa. Co. Ct. Rep. 205.

2. *Contract Must Be Clearly Proved*. — *Williams v. Shipley*, 67 Md. 373; *McTague v. Finnegan*, 54 N. J. Eq. 454; *Bowen v. Bowen*, 2 Bradf. (N. Y.) 336; *Graham v. Graham*, 34 Pa. St. 481; *Neal v. Gilmore* 79 Pa. St. 427. See also *Maddison v. Alderson*, L. R. 8 App. 467, affirming 7 Q. B. Div. 174, which reversed 5 Exch. Div. 293; *Carlisle v. Fleming*, 1 Harr. (Del.) 421.

3. *Consideration Essential*. — *Moore v. Stephens*, 97 Ind. 271; *Pleasanton's Estate*, 6 Pa. Dist. Rep. 5, 19 Pa. Co. Ct. Rep. 205.

Past Services — In *Snyder v. Castor*, 4 Yeates (Pa.) 353, a promise to compensate after death for past services was held valid. See also *Thompson v. Stevens*, 71 Pa. St. 161.

4. *Uncertainty*. — *Graham v. Graham*, 34 Pa. St. 475.

In *Walker v. Boughner*, 18 Ont. Rep. 448, an agreement by a grandfather to make the same provision for a grandchild that he did for his own children, whom he made residuary legatees, was held too indefinite and uncertain to be specifically enforced.

5. *Certainty*. — *Thompson v. Stevens*, 71 Pa. St. 161, where the promise of the deceased was

that if the plaintiff would stay with him as long as he lived, he would provide and give her full and plenty after he was gone, so that she need not to work.

6. *Cottrell's Estate*, 2 W. N. C. (Pa.) 83. Here the promise proved was that the decedent would leave his nurse "independently rich," and that "he would take care of her and leave her in good circumstances after his death."

Other Illustrations of Certainty. — An uncle's promise to his niece, that she should have a good home as long as he lived, and that at his death he would provide for her so that she should never want so long as she lived, was held not sufficiently definite. *Walls' Appeal*, 111 Pa. St. 460.

A promise to make the claimant his "heir" is sufficiently definite. *Gary v. James*, 4 Desaus. (S. Car.) 185.

An agreement to make an "adequate" provision for the decedent's wife in consideration of her renunciation of all claims to his estate has been held sufficiently definite. *Rivers v. Rivers*, 3 Desaus. (S. Car.) 190, 4 Am. Dec. 609.

An agreement to give a person all the property the promisor should have at his death is sufficiently certain. *Van Duyne v. Vreeland*, 12 N. J. Eq. 146.

7. *Not Agreements Not to Be Performed Within a Year*. — *Ridley v. Ridley*, 34 Beav. 478; *Fenton v. Emblers*, 3 Burr. 1278; *Bell v. Hewitt*, 24 Ind. 280; *Wellington v. Aphorpe*, 145 Mass. 69; *Udpike v. Ten Broeck*, 32 N. J. L. 116; *Quackenbush v. Ehle*, 5 Barb. (N. Y.) 469; *Kent v. Kent*, 62 N. Y. 560, 20 Am. Rep. 502; *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100.

This is in accordance with the elementary rule that the statute does not include agreements which may or may not be performed within one year from the making, but merely those which within their terms, and consistent with the rights of the parties, cannot be performed within that time. *Kent v. Kent*, 62 N. Y. 560, 20 Am. Rep. 502. See, however, *Izard v. Middleton*, 1 Desaus. (S. Car.) 116, wherein an agreement to make mutual wills was held within this provision of the statute. This case is opposed to the great weight of authority. See generally the title *FRAUDS, STATUTE OF*.

8. *Contracts for Sale of Land*. — *Manning v.*
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Agreement to Bequeath Personal Property. — And it has been held that an agreement to bequeath personal property exceeding in value fifty dollars was also within the provision requiring contracts for the sale of personalty exceeding fifty dollars in value to be in writing.¹

Recovery on Quantum Meruit. — The fact, however, that the agreement is within the statute of frauds will not prevent a recovery on *quantum meruit* for the services rendered, as in such a case the law implies a promise to pay therefor.²

bb. PART PERFORMANCE. — Where the consideration for the promise of a decedent is the future rendition of personal services by the claimant to the decedent, the rendition of the services, especially where the services are of such a peculiar character that it is impossible to estimate their value by a pecuniary standard, has been held such a part performance as will take the agreement out of the statute of frauds.³

Acts Must Be Referable to Contract. — The acts relied upon as a part performance of the contract must have been in pursuance of it, and must have been referable exclusively to it.⁴

(3) **Enforcement of Agreement** — (a) **Action at Law** — *aa. IN GENERAL.* — For a breach of an agreement to make a will, an action at law for damages will lie against the personal representatives of the decedent.⁵

bb. MEASURE OF DAMAGES. — Of course where the provision for compensation is made by the testator as contemplated, no claim for additional compensation can be enforced against the estate,⁶ but where the provision made in the will is less than that agreed upon, the difference may be recovered against the estate.⁷

Where the Decedent Has Entirely Failed to Perform His Agreement, the general rule is that the measure of damages is the value of the land or other property agreed

Pippen, 86 Ala. 357, 11 Am. St. Rep. 46; Baxter v. Kitch, 37 Ind. 554; Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222; Ham v. Goodrich, 37 N. H. 185; Smith v. Smith, 28 N. J. L. 208, 78 Am. Dec. 49; Lisk v. Sherman, 25 Barb. (N. Y.) 433; Harder v. Harder, 2 Sandf. Ch. (N. Y.) 17; Shahan v. Swan, 48 Ohio St. 25. See, however, Jack v. McKee, 9 Pa. St. 235. See generally the title FRAUDS, STATUTE OF.

1. **Contract for Sale of Merchandise.** — Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222.

2. **Recovery on Quantum Meruit.** — Jack v. McKee, 9 Pa. St. 235; Burlingame v. Burlingame, 7 Cow. (N. Y.) 92; Smith v. Smith, 28 N. J. L. 216, 78 Am. Dec. 49. See also the title FRAUDS, STATUTE OF.

3. **Part Performance — Rendition of Services.** — Gupton v. Gupton, 47 Mo. 37; Sutton v. Hayden, 62 Mo. 101; Davison v. Davison, 13 N. J. Eq. 246; Rhodes v. Rhodes, 3 Sandf. Ch. (N. Y.) 279. See generally the title FRAUDS, STATUTE OF.

In accordance with the view stated in the text, it has been held that where a decedent agreed to adopt a minor, and to leave her his property upon his death, the fact that the minor continued to reside with the decedent as his adopted child and paid her wages to him, and that he received her services and wages, has been held a sufficient part performance of the agreement to take the case out of the statute of frauds. Sharkey v. McDermott, 91 Mo. 647, 60 Am. Rep. 270. See also Van Dyne v. Vreeland, 11 N. J. Eq. 370; Heath v. Heath, 18 Misc. Rep. (N. Y. Supreme Ct.) 521; Roberts v. Hall, 1 Ont. Rep. 388.

Other courts, however, adopt a stricter rule and require a surrender of possession of the

property in order to take the case out of the statute. Campbell v. McKerricher, 6 Ont. Rep. 85; Pond v. Sheean, 132 Ill. 312; Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222. See generally the title FRAUDS, STATUTE OF.

Possession given of the land agreed to be devised, and performances of the services, is in any case a sufficient part performance. Mauck v. Melton, 64 Ind. 414; Brown v. Sutton, 129 U. S. 238. See also Lee v. Carter, 52 Ind. 342, explained in Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222.

The Making of Lasting Improvements, together with possession of the land and rendition of services, is sufficient part performance. McDowell v. Lucas, 97 Ill. 489; Smith v. Yocum, 110 Ill. 145; Watson v. Mahan, 20 Ind. 223; Young v. Young, 45 N. J. Eq. 27.

4. **Performance in Pursuance of Contract Essential.** — Maddison v. Alderson, L. R. 8 App. 467, affirming 7 Q. B. Div. 174, which reversed 5 Exch. Div. 293; Carlisle v. Fleming, 1 Harr. (Del.) 421; Franklin v. Tuckerman, 68 Iowa 572; Shahan v. Swan, 48 Ohio St. 25.

5. **Action at Law.** — Lisle v. Tribble, 92 Ky. 304; Logan v. McGinnis, 12 Pa. St. 27; Moore v. Bryant, 10 Tex. Civ. App. 131.

Where services have been rendered to one in consideration of the conveyance of property by the party receiving the services, at his death, and the contract cannot be enforced because of the statute of frauds, an action may be maintained upon a *quantum meruit* for the value of the services. Wallace v. Long, 105 Ind. 522, 55 Am. Rep. 222.

6. Eaton v. Benton, 2 Hill (N. Y.) 576.

7. Porter v. Dunn, 131 N. Y. 314.

to be given.¹ And it has been held that this is so, even though the agreement is invalid as within the statute of frauds,² yet the better opinion seems to be that the measure of damages in such a case is the value of the services rendered.³

cc. STATUTE OF LIMITATIONS. — The statute of limitations does not begin to run against an action for breach of a contract to make a will, until after the death of the promisor, as there could be no breach during his life.⁴

(b) **Specific Performance.** — Where the agreement of the decedent is to devise land, a bill in the nature of specific performance will lie against his heirs, devisees, or representatives.⁵ To warrant the court, however, in decreeing specific performance of such an agreement, the contract to devise must have been certain,⁶ and must be clearly and satisfactorily proven,⁷ and supported

1. **Value of Property as Measure of Damages.** — *Benge v. Hiatt*, 82 Ky. 666, 56 Am. Rep. 912; *Koch v. Hebel*, 32 Mo. App. 103; *Lisk v. Sherman*, 25 Barb. (N. Y.) 433; *Matter of Mallory*, 13 Misc. Rep. (N. Y. Surrogate Ct.) 595; *Porter v. Dunn*, 131 N. Y. 314; *Bash v. Bash*, 9 Pa. St. 260; *Jack v. McKee*, 9 Pa. St. 235; *Graham v. Graham*, 34 Pa. St. 475; *Logan v. McGinnis*, 12 Pa. St. 27; *Rohr v. Kindt*, 3 W. & S. (Pa.) 563, 39 Am. Dec. 53.

2. **Agreement Within Statute of Frauds.** — *Hopkins v. Lee*, 6 Wheat. (U. S.) 109; *Hudson v. Hudson*, 87 Ga. 678; *Burlingame v. Burlingame*, 7 Cow. (N. Y.) 92; *King v. Brown*, 2 Hill (N. Y.) 485; *Lisk v. Sherman*, 25 Barb. (N. Y.) 433; *Jack v. McKee*, 9 Pa. St. 235; *Bash v. Bash*, 9 Pa. St. 260; *Malaun v. Ammon*, 1 Grant's Cas. (Pa.) 123; *McDowell v. Oyer*, 21 Pa. St. 417.

3. In *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222, *overruling Frost v. Tarr*, 53 Ind. 390, it was held that where services have been performed in consideration of land to be devised and the contract is within the statute of frauds, the measure of damage is the value of the services and not the value of the land. See also *Ham v. Goodrich*, 37 N. H. 185; *Hertzog v. Hertzog*, 34 Pa. St. 418; *Erben v. Lorillard*, 19 N. Y. 299; *Purviance v. Shultz*, 16 Ind. App. 94.

4. **Statute of Limitations.** — *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46.

A contract with one since deceased to care for him as long as he lived, in consideration of the devise of his farm, is a continuing contract, and a claim for services thereunder is not stale because not made until after the death of the deceased. *Avery v. Moore*, 34 Ill. App. 115.

5. **Specific Performance** — *England*. — *Bookweather v. Young*, 4 Drew. 1.

United States. — *Brown v. Sutton*, 129 U. S. 238.

Alabama. — *Bolman v. Overall*, 80 Ala. 451, 60 Am. Rep. 107.

Georgia. — *Maddox v. Rowe*, 23 Ga. 431, 68 Am. Dec. 535.

Maryland. — *Mundorff v. Kilbourn*, 4 Md. 459.

Michigan. — *Bird v. Pope*, 73 Mich. 483.

Missouri. — *Koch v. Hebel*, 32 Mo. App. 103; *Hiatt v. Williams*, 72 Mo. 214, 37 Am. Rep. 438.

New Jersey. — *Davison v. Davison*, 13 N. J. Eq. 252; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370.

New York. — *Parsell v. Stryker*, 41 N. Y. 480;

Rhodes v. Rhodes, 3 Sandf. Ch. (N. Y.) 279; *Shakespeare v. Markham*, 10 Hun (N. Y.) 322; *Heath v. Heath*, 8 Misc. Rep. (N. Y. Supreme Ct.) 521.

Pennsylvania. — *Logan v. McGinnis*, 12 Pa. St. 27; *Brinker v. Brinker*, 7 Pa. St. 53.

South Carolina. — *Fogle v. St. Michael Church*, 48 S. Car. 86.

In *Sutton v. Hayden*, 62 Mo. 101, an agreement to devise property in consideration of future services in nursing the decedent was enforced, the court stating that "the law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of the contract."

Reasons for Doctrine. — "The principle upon which courts of equity undertake to enforce the execution of such agreements is referable to its jurisdiction over the subject of specific performance. It is not claimed, of course, that any court has the power to compel a person to execute a last will and testament carrying out his agreement to bequeath a legacy, for this can be done only in the lifetime of the testator, and no breach of the agreement can be assumed so long as he lives. And after his death he is no longer capable of doing the thing agreed by him to be done. But the theory on which the courts proceed is to construe such an agreement, unless void under the statute of frauds or for other reason, to bind the property of the testator or intestate so far as to fasten a trust on it in favor of the promisee, and to enforce such trust against the heirs and personal representatives of the deceased, or others holding under them charged with notice of the trust." *Bolman v. Overall*, 80 Ala. 451, 60 Am. Rep. 107.

6. **Contract Must Be Certain.** — *Mundorff v. Kilbourn*, 4 Md. 459; *Sprinkle v. Hayworth*, 26 Gratt. (Va.) 384.

In *Stanton v. Miller*, 58 N. Y. 192, an agreement to insure to the claimant the use of the decedent's home for life, the title to be conveyed to some member of the decedent's family, was held too indefinite to warrant specific performance, for failure to designate the person to whom the title was to be conveyed.

A promise to leave a claimant one hundred acres of land, without specifying in any manner the value or the location of the land, is too indefinite. *Sherman v. Kitsmiller*, 17 S. & R. (Pa.) 45.

7. **Quantum of Proof.** — *Carlisle v. Fleming*, 1

by a valuable consideration,¹ and the person seeking such relief must have complied with his part of the agreement.²

The Contract Must Have Been Fair and equitable.³

h. SERVICES RENDERED DECEDENT—(1) *In General*—**Implied Contract for Compensation.**—Where services are rendered a decedent under the expectation and mutual understanding that compensation will be made therefor by way of a legacy, or otherwise, but without any special agreement to that effect, the person rendering such services may recover from the estate of the decedent the reasonable value of the services,⁴ and irrespective of whether the remuneration, in the mode contemplated, was prevented by accident or design;⁵ and as in other contracts, the consideration for the decedent's promise may move to a third person, instead of directly to the decedent.⁶

Express Contract.—Where the services are rendered under an express contract, the claimant is limited in his recovery to the contract price, however inadequate it may be.⁷

Services Rendered in Expectation of Legacy.—Where the services are performed gratuitously in the mere expectation or hope of a legacy, the determination whether there shall be any compensation being left to the volition of the decedent, no claim therefor can be enforced against his estate on his failure to make compensation.⁸ A distinction is to be made between the case where

Harr. (Del.) 421; *Wallace v. Rappleye*, 103 Ill. 249; *Shaw v. Schoonover*, 130 Ill. 448; *Wright v. Wright*, 31 Mich. 380; *Lamb v. Hinman*, 46 Mich. 112; *Izard v. Middleton*, 1 Desaus. (S. Car.) 116; *Cox v. Cox*, 26 Gratt. (Va.) 305.

Proof must be "clear and unequivocal." *Franklin v. Tuckerman*, 68 Iowa 572.

Such proof must be "clear and satisfactory." *Ackerman v. Ackerman*, 24 N. J. Eq. 315.

1. Consideration Essential.—*Woods v. Evans*, 113 Ill. 186, wherein an agreement to educate an orphan and leave her a child's part of the decedent's estate, in consideration of her services, was held not to be based on a sufficient consideration.

An agreement by a natural father to make his illegitimate child his heir, must be supported by a valuable consideration. The surrender of the possession of the child to the father is insufficient. *Wallace v. Rappleye*, 103 Ill. 229. See, however, *Benge v. Hiatt*, 82 Ky. 666, 56 Am. Rep. 912.

Erection of Improvements.—In *McClure v. McClure*, 1 Pa. St. 378, it was held that the fact that the son, on the faith of a bare promise by his father to devise him certain land, made improvements thereon, was not a sufficient consideration to authorize a decree for specific performance.

2. Failure of Plaintiff to Perform Agreement.—*Weingaertner v. Pabst*, 115 Ill. 412.

In *Cox v. Cox*, 26 Gratt. (Va.) 305, it was held that, where a father agreed to devise land to his son in consideration that the son live with him upon the land and take care of him, and instead the son, after taking care of the father for some time, left the land and entered the army, where he was killed, specific performance would not be decreed.

Death of Beneficiary.—Where, by the death of the beneficiary, the performance of the agreement to devise land as intended by the parties is rendered impossible, equity will not decree specific performance thereof in favor of

the heirs of the beneficiary. *Snyder v. Snyder*, 77 Wis. 95. See also *Walters v. Walters*, 132 Ill. 467.

Defendant's Conduct Preventing Performance.—The defendant, by his own conduct, may prevent the plaintiff from performing certain terms of the contract, and in such case the plaintiff is not required to show full performance. *Fry on Specific Performance*, (3d Am. ed.), § 904; *Pomeroy's Specific Performance*, § 326. See the title SPECIFIC PERFORMANCE.

3. Unfairness—To Defeat Specific Performance.—In *Wallace v. Rappleye*, 103 Ill. 229, an agreement by a man to make an illegitimate child an heir, to the exclusion of his legitimate children, was held to be too inequitable to authorize specific performance. See also *Woods v. Evans*, 113 Ill. 186.

4. Services Rendered Decedent.—*Walker v. Boughner*, 18 Ont. Rep. 448; *Starkey's Appeal*, 61 Conn. 199; *Harrison v. Lindley*, 104 Ill. 245; *Martin v. Wright*, 13 Wend. (N. Y.) 460, 28 Am. Dec. 468. See also *supra*, this section, *Agreements to Make Will*.

5. McRae v. McRae, 3 Bradf. (N. Y.) 199.

6. Services and money expended by a son in taking care of his mother and her minor children at the request of his uncle, and on his promise, constitute a valid claim against the uncle's estate. *Grimm v. Taylor*, 96 Mich. 5. See also *Waldron v. Alexander*, 133 Ill. 30.

7. Brose's Estate, 155 Pa. St. 619; *Wortman's Estate*, 19 Pa. Co. Ct. Rep. 143.

Services Rendered to a Person as Nurse during his illness may constitute a claim against his estate, although there is no direct evidence that such services were rendered at his express request. Circumstances surrounding the transaction, or a request by the family or physician of the sick person, may be equivalent to his direct request. *Todd v. Martin*, (Cal. 1894) 37 Pac. Rep. 872.

8. Expectation of Legacy—England.—*Osborn v. Guy's Hospital*, 2 Stra. 728; *Le Sage v. Coussmaker*, 1 Esp. N. P. 189.

services are rendered in the first instance merely in the expectation of a legacy, and the case where after the services are rendered the claimant refrains from presenting his claim to the decedent in the expectation of a legacy. In the latter case the claimant may still recover from the estate the value of his services.¹

Direction or Intention to Pay. — A direction on the part of a decedent to his executors to pay for services voluntarily rendered to the decedent will not create a claim against the estate,² nor will the expression by the decedent of an intention to pay therefor.³

(2) *Services Between Members of Same Family* — **Presumptions.** — Where services are rendered or support furnished by members of the same family, living together, the law will imply no contract for compensation, but will presume that the services were gratuitous.⁴

Maryland. — *Lee v. Lee*, 6 Gill & J. (Md.) 316; *Bantz v. Bantz*, 52 Md. 693.

New York. — *McRae v. McRae*, 3 Bradf. (N. Y.) 199; *Clark v. Todd*, (Supreme Ct.) 16 N. Y. Supp. 491.

Pennsylvania. — *Little v. Dawson*, 4 Dall. (Pa.) 111; *Moffett's Estate*, 11 Phila. (Pa.) 79; *Thompson v. Stevens*, 71 Pa. St. 161; *Miller's Estate*, 136 Pa. St. 239.

See also the title AGENCY, vol. 1, p. 1098.

1. Expectation of Legacy After Rendition of Services. — *Baxter v. Gray*, 3 M. & G. 771, 42 E. C. L. 402. To the same effect are *Robeson v. Niles*, 18 D. C. 182; *Roberts v. Swift*, 1 Yeates (Pa.) 209, 1 Am. Dec. 295.

In *Shallcross v. Wright*, 12 Beav. 558, where it appeared that a physician had attended the testator for many years, but had received no remuneration, he stating "that the testator had promised to pay him for his services or leave him an equivalent," it was held that the physician had no claim against the estate, and a payment made to him by the executor was disallowed.

2. *Stone v. Gerrish*, 1 Allen (Mass.) 175; *Gallagher v. Brewster*, 1 N. Y. App. Div. 65.

3. *Clawson v. Moore*, 29 Ill. App. 296; *Clark's Estate*, 12 Phila. (Pa.) 147.

4. See the title AGENCY, vol. 1, p. 1099.

Propinquity of Kindred of Parties Not Decisive. — The doctrine rests upon the idea of the mutual dependence of those who are members of one immediate family, and such a family may exist, though composed of remote relations or even of persons between whom there is no tie of blood. The application of the rule is not limited by a mere propinquity of kindred. *Disbrow v. Durand*, 54 N. J. L. 343.

Services Rendered by Child to Parent. — There is no presumption of an implied contract to pay for services of a married daughter who continues after her marriage to keep house for her father. *Houck v. Houck*, 99 Pa. St. 552. Nor does any presumption of an implied contract for compensation arise in case of the support of an infirm father by his daughter. *Wright v. Senn*, 85 Mich. 191; *Hallock v. Teller*, 2 Dem. (N. Y.) 206. An emancipated daughter living with her father cannot recover for domestic services, in the absence of any agreement. *Ridgway v. English*, 22 N. J. L. 499; *Gardner v. Schooley*, 25 N. J. Eq. 150. Nor can a son on an implied contract for services rendered to his father. *Hess's Estate*, 13 Phila. (Pa.) 285. Nor for support furnished to

his mother. *Comstock v. Comstock*, 57 Barb. (N. Y.) 453.

Parent to Child. — A mother cannot recover on an implied contract for nursing her adult daughter, who lived with her. *Hatch v. Hatch*, 60 Vt. 160. Maintenance in his home of a crippled son by his mother does not create an implied contract for compensation. *Malone v. Malone*, 106 Ala. 567.

Persons in Loco Parentis. — The same rule that there is no presumption of promise of compensation applies in all cases where one of the parties stands to the other *in loco parentis*. *Cousty's Estate*, 12 Phila. (Pa.) 98, 100; *Brown v. Yaryan*, 74 Ind. 305; *Marquess v. La Baw*, 82 Ind. 550; *Wright v. McLarinan*, 92 Ind. 103.

Grandparent and Grandchild. — No presumption of an implied contract arises in case of the support of a grandchild by her grandmother, especially where the child was without means and payment is sought out of a fund recovered for her death caused by the wrongful act of another. *Shepherd v. Young*, 8 Gray (Mass.) 152, 69 Am. Dec. 242. Nor is a grandchild who lives with and keeps house for her grandfather entitled to compensation, without proof of an express contract. *Barhite's Appeal*, 126 Pa. St. 404. See also *Dodson v. Severs*, 54 N. J. Eq. 305.

Services by or to Uncles and Aunts. — Where a niece who has lived with her uncle from the time she was eleven years of age, continues to live with him after becoming of age, there is no implied contract for compensation for her services. *Larkin's Estate*, 17 Phila. (Pa.) 503. So also in a similar case of services rendered by a niece by marriage. *Heathcote's Estate*, 16 Phila. (Pa.) 389, *affirmed sub nom. Wall's Appeal*, 111 Pa. St. 460. And in a similar case for services rendered by a grandniece. *Kelly's Estate*, 16 Phila. (Pa.) 285. Where a nephew lived with his aunt, regularly paying board, there is no presumption of an implied contract for additional compensation for nursing, etc. *Clark's Estate*, 12 Phila. (Pa.) 147. See also *McHugh's Estate*, 152 Pa. St. 442.

Services Between Brothers and Sisters. — No implied contract for compensation arises where one sister nurses another, when the two were living together. *Keller v. Stuck*, 4 Redf. (N. Y.) 294. There is no presumption of an implied contract to pay for board furnished by a sister to her invalid brother, who came from a distance to her home where he died. *O'Brien's Estate*, 17 Phila. (Pa.) 456. There is no pre-

Presumption Rebuttable. — The presumption of gratuitous service which arises between members of the same family may be rebutted by proof of an express contract or a contract implied in fact, that is, established by facts and circumstances which show that, at the time the services were rendered, both parties contemplated or intended a pecuniary compensation therefor.¹

Presumption Weaker Between Distant Relatives. — And the more distant the relationship between the parties, the weaker, it has been held, becomes the pre-

sumption of an implied contract for compensation for the domestic services of a widowed and destitute sister rendered to her brother with whom she lived at his request. *Robinson v. Cushman*, 2 Den. (N. Y.) 149.

Step-father and Step-son. — There is no presumption of an implied contract for compensation for maintenance of a step-son by his step-father. *Oliver v. Hammond*, 85 Ga. 323.

Services by or to Father-in-law. — No presumption of an implied contract for compensation arises where a son-in-law nurses his father-in-law in his last illness. *Williams v. Stonestreet*, 3 Rand. (Va.) 559. There is no presumption of an implied promise for compensation for services of a daughter-in-law living in the family of her father-in-law. *Ginders v. Ginders*, 21 Ill. App. 522.

Minor Taken into Family as Mere Servant. — Where a minor not related is taken into a decedent's family and treated as a servant instead of a member of the family, she may recover for her services though there was no express agreement for compensation. *Lockwood v. Robbins*, 125 Ind. 398.

1. Presumption Rebuttable — *Canada* — *Walker v. Boughner*, 18 Ont. Rep. 448.

Florida. — *Mills v. Joiner*, 20 Fla. 479.

Illinois. — *Switzer v. Kee*, 146 Ill. 577; *Killpatrick v. Helston*, 25 Ill. App. 127; *Ginders v. Ginders*, 21 Ill. App. 522. See also *Heffron v. Brown*, 155 Ill. 322.

Iowa. — *Scully v. Scully*, 28 Iowa 548.

Massachusetts. — *Guild v. Guild*, 15 Pick. (Mass.) 129.

Michigan. — *Dickerson v. Dickerson*, 50 Mich. 37.

Minnesota. — *Schwab v. Pierro*, 43 Minn. 520.

Missouri. — *Koch v. Hebel*, 32 Mo. App. 103; *Hart v. Hess*, 41 Mo. 441.

New Jersey. — *Udpike v. Ten Broeck*, 32 N. J. L. 115.

New York. — *Matter of Pföhl*, 20 Misc. Rep. (N. Y. Surrogate Ct.) 627; *Matter of Strickland*, 2 Connolly (N. Y.) 10; *Jacobson v. La Grange*, 3 Johns. (N. Y.) 199; *McRae v. McRae*, 3 Bradf. (N. Y.) 199; *In re Merchant's Estate*, (Supreme Ct.) 6 N. Y. Supp. 875; *Green v. Roberts*, 47 Barb. (N. Y.) 521; *Patterson v. Patterson*, 13 Johns. (N. Y.) 379.

Oregon. — *Wilkes v. Cornelius*, 21 Oregon 341.

Pennsylvania. — *In re Bushley's Estate*, 20 Pa. Co. Ct. Rep. 188; *Smith v. Milligan*, 43 Pa. St. 107; *Silver's Estate*, 6 Pa. Dist. Rep. 267.

Wisconsin. — *Pellage v. Pellage*, 32 Wis. 136; *Tyler v. Burrington*, 39 Wis. 376.

Illustrations. — In *De Camp v. Wilson*, 31 N. J. Eq. 656, a daughter was permitted to recover for necessary services rendered her invalid mother, the court holding that the plain-

tiff's right to recover was to be decided by the intention of the parties, that both parties intended and expected that compensation should be given for the services, and that "the services were of such a character, and rendered under such circumstances, as to raise a presumption that there was a contract to pay for them."

In *Hughes v. Patterson*, 91 Va. 664, a father was allowed compensation for the care of the children of his daughter. In this case the daughter held the bond of her father, and prior to her death she requested the father to keep her children for the debt. The bond was found among the father's papers after his death.

In *Chapman v. Barnes*, 29 Ill. App. 184, a recovery was allowed for indispensable services to the aunt of claimant's wife during her last illness.

In *Valentine v. Valentine*, 4 Redf. (N. Y.) 265, a mother was permitted to recover for board furnished her daughter. In this case it appeared that the other members of the family were charged and paid board, and that the daughter had promised to pay board also.

Rebuttal by Express or Implied Contract. — In some of the cases, it is declared that, in order to rebut the presumption that services between members of the same family are gratuitous, it is necessary to prove an express contract. *Lynn v. Lynn*, 29 Pa. St. 369; *Pellage v. Pellage*, 32 Wis. 136. While in others, it is held that the presumption may be rebutted either by an express or implied contract. *Heffron v. Brown*, 155 Ill. 322. But these apparently conflicting statements are merely differences in form of expression resulting from the ambiguous meaning of the term "implied contract." See the title CONTRACTS, vol. 7, p. 91. No real conflict of doctrine is involved. Thus, in *Kessler's Estate*, 87 Wis. 660, 41 Am. St. Rep. 74, it is said that an express contract is necessary, but that "an express contract to compensate a relative for services rendered may be established as fairly and fully by circumstantial evidence as by that which is direct." And in those cases where an implied contract is declared to be sufficient, the term "implied contract" is used to refer to contracts implied in fact, that is, contracts evidenced by circumstances or conduct. See *Heffron v. Brown*, 155 Ill. 322, where many cases are discussed.

Regular Professional Services Rendered by Near Relative. — There appears to be no place for the presumption of gratuitous service, where services in the usual course of business, such, for example, as that of professional men, are rendered by one near relative to another. *Valentine v. Valentine*, 4 Redf. (N. Y.) 265. See also *Moffett's Estate*, 11 Phila. (Pa.) 79. There is nothing in these cases to show that the parties were regularly members of one household.

sumption that the services were gratuitous.¹

Proof of Claim. — A claim for services and attendance upon the deceased, especially where the claimant and the decedent were nearly related, must be clearly and satisfactorily proven.²

2. Funeral Expenses — *a. IN GENERAL.* — **General Rule.** — By the great weight of authority, the reasonable costs and charges of the funeral constitute a claim against the estate, or more properly a charge upon the estate for which the executor or administrator is liable as such to the extent of the assets in his hands; in such cases the law implies a promise to pay therefor.³

1. *Quigly v. Harold*, 22 Ill. App. 269.

Sister-in-Law. — In the case of services rendered by a sister-in-law as housekeeper, it has been held that there was no presumption from the relation merely that the services were gratuitous. *McCarty's Estate*, 9 Phila. (Pa.) 318.

2. Quantum of Proof. — *Raynor v. Robinson*, 36 Barb. (N. Y.) 128; *Clark's Estate*, 12 Phila. (Pa.) 147.

3. Estate Liable for Funeral Expenses — *England.* — *Green v. Salmon*, 2 Jur. 567, 8 Ad. & El. 348, 35 E. C. L. 404; *Tugwell v. Heyman*, 3 Campb. 298; *Brice v. Wilson*, 3 N. & M. 512, 28 E. C. L. 407; *Rogers v. Price*, 3 Y. & J. 28; *Arlot v. Churchland*, cited in *Rogers v. Price*, 3 Y. & J. 32. Compare *Corner v. Shew*, 3 M. & W. 350.

Alabama. — *Hatchett v. Curbow*, 59 Ala. 516.

California. — *Matter of Weringer*, 100 Cal. 345.

Colorado. — *Hulbert v. Walley*, 3 Colo. App. 250.

Maine. — *Phillips v. Phillips*, 87 Me. 324; *Fogg v. Holbrook*, 88 Me. 169.

Massachusetts. — *Luscomb v. Ballard*, 5 Gray (Mass.) 403, 66 Am. Dec. 374; *Hapgood v. Houghton*, 10 Pick. (Mass.) 156; *Adams v. Butts*, 16 Pick. (Mass.) 343; *Sweeney v. Muldoon*, 139 Mass. 304, 52 Am. Rep. 708; *Constantinides v. Walsh*, 146 Mass. 281, 4 Am. St. Rep. 311.

Minnesota. — *McNally v. Weld*, 30 Minn. 209; *Dampier v. St. Paul Trust Co.*, 46 Minn. 526.

Missouri. — *Hayden v. Maher*, 67 Mo. App. 434.

New Jersey. — *Sullivan v. Horner*, 41 N. J. Eq. 299.

North Carolina. — *Parker v. Lewis*, 2 Dev. L. (13 N. Car.) 22; *Ray v. Honeycutt*, 119 N. Car. 510. See, however, *Gregory v. Hooker*, 1 Hawks (8 N. Car.) 394, wherein it was held that an action would not lie against the executor or administrator as such for the funeral expenses of the decedent. In the later case of *Parker v. Lewis*, 2 Dev. L. (13 N. Car.) 22, *Henderson, J.*, distinguished the case of *Gregory v. Hooker*, 1 Hawks (8 N. Car.) 394, stating that the decision therein was based on the ground that notice was not given the administrator of the charge for funeral expenses.

Ohio. — *McClellan v. Filson*, 44 Ohio St. 187, 58 Am. Rep. 814.

Pennsylvania. — *Scott's Estate*, 15 Pa. Co. Ct. Rep. 316; *France's Estate*, 75 Pa. St. 220.

Rhode Island. — *Buxton v. Barrett*, 14 R. I. 41; *Johnson, Petitioner*, 15 R. I. 438.

Wisconsin. — *McLaughlin v. Winner*, 63 Wis. 129, 53 Am. Rep. 273.

New York. — This appears to be practically the view of the *New York* courts, as represented by later decisions; see *infra*, this section, note 4, p. 1025.

A Widow of a Member of a Beneficial Order, receiving from such order funds to defray the funeral expenses of her husband, has no claim against the estate for such expenses. *Griffiths's Estate*, 1 Lack. Leg. N. (Pa.) 311.

Liability of Married Women's Estate. — The estate of a married woman is liable for the expenses of her funeral. *Matter of Weringer*, 100 Cal. 345; *Constantinides v. Walsh*, 146 Mass. 281, 4 Am. St. Rep. 311; *Matter of Smith*, 18 Misc. Rep. (N. Y. Surrogate Ct.) 139; *McClellan v. Filson*, 44 Ohio St. 184, 58 Am. Rep. 814; *Johnson, Petitioner*, 15 R. I. 438; *Buxton v. Barrett*, 14 R. I. 41.

In *Pennsylvania*, it has been held that the estate of a deceased wife is liable for her funeral expenses where the husband is insolvent. *Scott's Estate*, 15 Pa. Co. Ct. Rep. 316.

And, in *Ohio* the statute expressly authorizes the executor of a deceased wife to pay the funeral expenses though she leaves surviving a husband. *McClellan v. Filson*, 44 Ohio St. 184, 58 Am. Rep. 814.

A married woman's estate is not relieved from liability for her funeral expenses by the fact that judgment has been recovered therefor against her husband. *Johnson, Petitioner* 15 R. I. 438.

Infant's Estate. — An infant's estate is liable for the expenses of the infant's funeral. *Matter of Butler*, 1 Connoly. (N. Y.) 58.

Liability of Stranger Paying Out Funds of Decedent for Funeral Expenses. — In *Shaw v. Hallihan*, 46 Vt. 389, 14 Am. Rep. 628, it was held that a person taking possession of money of the deceased was not entitled in an action therefor by the administrator to set off the funeral expenses paid out of the money. See also *Walton v. Hall*, 66 Vt. 455.

Assent of Administrator Before Appointment — Effect. — The assent of a person to the correctness of the funeral expenses ordered by another renders him liable therefor as administrator when he subsequently takes out administration. *Lucy v. Walrond*, 3 Bing. N. Cas. 841, 32 E. C. L. 349.

Attempt to Distinguish Between Liability of Executors and of Administrators. — An unsuccessful attempt has been made to distinguish and discriminate between executors and administrators in respect to the rule as to their liability for funeral expenses. See *Dampier v. St. Paul Trust Co.*, 46 Minn. 526.

Right of Executor to Be Consulted in regard to Funeral. — Where there is an executor he has the right to direct in what way the funeral is

Express Promise by Executor. — The estate is not, however, liable on an express promise by the executor to pay therefor, where one would not be implied by law, or upon one different from that which would be implied.¹

Where Credit Is Given to the Person Who Orders the Funeral without the assent of the executor, the estate is not directly liable to the person furnishing the funeral.²

Estate Only Secondarily Liable. — In some instances the estate of the decedent is only secondarily liable, the primary liability being cast upon another person on account of his or her relationship to the decedent.³

View that Estate Not Liable for Funeral Expenses. — In a few jurisdictions, however, the courts have refused to depart from the rule that the contracts of the executor or administrator create no liability against the estate, even as regards the funeral expenses, and hold that the estate is not liable therefor, but that the remedy is against the executor or administrator personally.⁴

b. WHAT CONSTITUTE FUNERAL EXPENSES. — The funeral expenses include not only the solemnization of the interment, but also the ceremonies and accompaniments attending the same, to be determined to some extent as to form by the religious faith and sentiments of the friends of the deceased, and as to extent and magnitude by the condition of the estate and the station in life, political or social, occupied by the decedent.⁵

to be conducted and who is to attend to it, and to provide what is necessary, and therefore he must, if accessible, be consulted. *Hewett v. Bronson*, 5 Daly (N. Y.) 1.

1. *Durkin v. Langley*, 167 Mass. 577; *Hapgood v. Houghton*, 10 Pick. (Mass.) 154.

2. **Credit Extended to Third Person.** — In *Brice v. Wilson*, 3 N. & M. 512, 28 E. C. L. 407, *Patteson, J.*, said: "There is no case which goes the length of deciding that if the funeral be ordered by a person to whom credit is given, the executor is liable." In the later case of *Green v. Salmon*, 8 Ad. & El. 348, 35 E. C. L. 404, he limits the expression, saying: "The judgment there probably means that the executor, where credit has been given to another person, is not liable to the undertaker; if it lays down more, the law stated is extra-judicial." See also *Sears v. Giddey*, 41 Mich. 590, 32 Am. Rep. 168.

3. **Funeral Expenses of Wife — Husband's Liability.** — In *Wheeler's Estate*, 4 Pa. Dist. Rep. 265, it was held that the husband was primarily liable for the funeral expenses of his wife, and therefore could not claim to be reimbursed therefor as against creditors of the wife.

Except as against creditors, however, it has been held that the husband is entitled to be reimbursed from the estate of his wife for her funeral expenses. *McCue v. Garvey*, 14 Hun (N. Y.) 562; *Kessler v. Hessen*, 19 Abb. N. Cas. (N. Y. City Ct.) 86; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Jackson v. Westerfield*, 61 How. Pr. (N. Y. Supreme Ct.) 399. See also *Gregory v. Lockyer*, 6 Madd. 90; *Constantinides v. Walsh*, 146 Mass. 281, 4 Am. St. Rep. 311.

There are decisions, however, which deny the husband the right to reimbursement, where he was in an financial position to bury his wife in a suitable manner. *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598; *Lott v. Graves*, 67 Ala. 40. See also *Dalrymple v. Arnold*, 21 Hun (N. Y.) 110.

4. **New York.** — In *Ferrin v. Myrick*, 41 N. Y. 315, it was held that the executor, and not the estate, was liable on all contracts for the

funeral expenses of the decedent, and therefore that on the removal of the executor at whose request the funeral expenses were incurred, no action was maintainable therefor against his successor as representing the estate. The court cited in support of its decision, *Myer v. Cole*, 12 Johns. (N. Y.) 349; *Demott v. Fields*, 7 Cow. (N. Y.) 58. See also *Tracy v. Frost*, (Supreme Ct.) 11 N. Y. Supp. 561; *Murphy v. Naughton*, 68 Hun (N. Y.) 424.

In the later case of *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384, the court, while recognizing the decision of *Ferrin v. Myrick*, 41 N. Y. 315, held that under 2 Rev. Stat. 385, § 24, a judgment against the personal representative in his representative capacity for the funeral expenses was proper. See also *Benedict v. Ferguson*, 15 N. Y. App. Div. 96.

In the lower New York courts there are, however, a great many decisions which hold the estate itself primarily liable for the funeral expenses. *Hewett v. Bronson*, 5 Daly (N. Y.) 1; *Laird v. Arnold*, 25 Hun (N. Y.) 4, 42 Hun (N. Y.) 136; *Rappelyea v. Russell*, 1 Daly (N. Y.) 214; *Lucas v. Hessen*, 13 Daly (N. Y.) 347; *Kessell v. Hapen*, (City Ct.) 8 N. Y. St. Rep. 352; *Kessler v. Hessen*, 19 Abb. N. Cas. (N. Y. City Ct.) 86; *Kittle v. Huntley*, 67 Hun (N. Y.) 617; *Dalrymple v. Arnold*, 21 Hun (N. Y.) 110; *Koons v. Wilkin*, 2 N. Y. App. Div. 15, opinion by Adams, J.; *Matter of Smith*, 18 Misc. Rep. (N. Y. Surrogate Ct.) 139.

Virginia. — In *Fitzhugh v. Fitzhugh*, 11 Gratt. (Va.) 300, 62 Am. Dec. 653, the court was inclined to the opinion that an action would not lie against the personal representative, as such, for the funeral expenses of his intestate.

5. **What Constitute Funeral Expenses.** — *Edwards v. Edwards*, 2 C. & M. 612; *Tugwell v. Heyman*, 3 Campb. 298; *Rogers v. Price*, 3 Y. & J. 28; *Matter of Weringer*, 100 Cal. 345; *Fogg v. Holbrook*, 88 Me. 169; *Hewett v. Bronson*, 5 Daly (N. Y.) 1.

In *Brice v. Wilson*, 3 N. & M. 512, 28 E. C. L. 407, the claim for funeral expenses enforced against the executor included items for per-

Services Rendered by Friends, etc. — But for services rendered by the friends or relations of the decedent, which from their nature are generally gratuitous, the estate is not liable.¹

Distinction Between Expenses Allowable to Representative and Expenses Constituting Claims Against Estate. — A distinction is to be drawn between items constituting funeral expenses where the question arises as to the right of the executor or administrator to an allowance therefor in his accounting, and such items when the claim is sought to be enforced against the estate; great liberality has been shown when the question arises as to the right of the executor or administrator to a credit for expenses incurred.²

Illustration Showing Distinction. — The cost of erecting a tombstone for the decedent is generally held a legitimate part of the funeral expenses, as affects the right of the executor or administrator to a credit therefor in his accounting,³ and this has been held to be true even though the estate is insolvent.⁴ But such cost is not a part of the funeral expenses so as to constitute it a claim or charge against the estate.⁵

sonal services of the undertaker and his servants, his horses, coaches, hearse, etc., used in conducting the funeral.

Coffin, and Personal Services of Undertaker. — In *Hapgood v. Houghton*, 10 Pick. (Mass.) 156, it was held that the estate was liable for the coffin and other necessary charges of the funeral. See also *Fogg v. Holbrook*, 88 Me. 169; *Dampier v. St. Paul Trust Co.*, 46 Minn. 526.

The fact that the decedent expressed a wish to be buried in an expensive coffin does not authorize a person to furnish a coffin not suited to the pecuniary condition of the estate. *Barbee v. Green*, 92 N. Car. 471.

Graveclothes and Services of Undertaker. — In *France's Estate*, 75 Pa. St. 220, the widow was allowed to recover the amount expended for graveclothes and for the services of the undertaker.

Transportation of Decedent's Corpse. — A decedent died away from home, and a claim for the cost of the transportation of his body to his home, together with the expense of a person to accompany the body, were allowed against the estate as funeral expenses. *Sullivan v. Horner*, 41 N. J. Eq. 299.

Post-mortem Examination. — The expense of a post-mortem examination is not chargeable against the estate as a part of the funeral expenses. *Smith v. McLaughlin*, 77 Ill. 596.

1. Use of House for Funeral Expenses. — A claim by a friend of the deceased, for the use of his house for the funeral ceremony, the decedent having died while away from home, should not be allowed as funeral expenses. *Hewett v. Bronson*, 5 Daly (N. Y.) 1. See also *McHugh's Estate*, 152 Pa. St. 442.

Superintendence of Funeral by Friend. — A claim should not be allowed for the services of a friend in superintending the funeral, consisting of the procuring of a clergyman and writing and sending the newspapers notices of the funeral. *Hewett v. Bronson*, 5 Daly (N. Y.) 1.

Friend's Search for Deceased. — Where the deceased died from a sudden attack of illness in the street, the claim of a friend of the deceased for services in searching for him, and recovering his body from the public authorities should not be allowed. *Hewett v. Bronson*, 5 Daly (N. Y.) 1.

2. Mourning Apparel. — A reasonable expenditure for mourning apparel for the widow and minor daughter of a decedent has been held a legitimate part of the funeral expenses. *Allen v. Allen*, 3 Dem. (N. Y.) 524; *Matter of Wachter*, 16 Misc. Rep. (N. Y. Surrogate Ct.) 137. See, however, *Johnson v. Baker*, 2 C. & P. 207, 12 E. C. L. 92. Even where the estate is insolvent. *Woods's Estate*, 1 Ashm. (Pa.) 314. See, however, *Flintham's Appeal*, 11 S. & R. (Pa.) 16.

Wake. — The expense of a banquet at a wake, consisting of cheese, crackers, and tobacco, has been held a proper item of funeral expenses. *Johnson's Estate*, 8 Pa. Co. Ct. Rep. 1.

See generally the title EXECUTORS AND ADMINISTRATORS, for a full discussion of matters allowed to representatives upon accounting.

3. Tombstone — Allowance to Representative Therefor — *Alabama*. — *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469.

California. — *Van Emon v. Superior Ct.*, 76 Cal. 589.

Connecticut. — *Fairman's Appeal*, 30 Conn. 209.

Iowa. — *Crapo v. Armstrong*, 61 Iowa 697.

Mississippi. — *Donald v. McWhorter*, 44 Miss. 124.

New Jersey. — *Griggs v. Veghte*, 47 N. J. Eq. 179.

New York. — *Ferrin v. Myrick*, 41 N. Y. 325; *Wood v. Vandenburg*, 6 Paige (N. Y.) 277; *Cornwell v. Deck*, 2 Redf. (N. Y.) 87; *Owens v. Bloomer*, 14 Hun (N. Y.) 296; *Matter of Howard*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 170; *Matter of Erlacher*, 3 Redf. (N. Y.) 8; *Matter of Mount*, 3 Redf. (N. Y.) 9, note; *Valentine v. Valentine*, 4 Redf. (N. Y.) 265.

Pennsylvania. — *McGlinsey's Appeal*, 14 S. & R. (Pa.) 64.

Consultation with Decedent's Family in Regard to Tombstone — Necessity For. — The executor need not consult the relations of the decedent as to the purchase of a tombstone. *Titlow's Estate*, 5 Pa. Dist. Rep. 40.

4. Insolvent Estate. — *Fairman's Appeal*, 30 Conn. 205; *Crapo v. Armstrong*, 61 Iowa 697.

5. Liability of Estate for Tombstone. — In *Laird v. Arnold*, 42 Hun (N. Y.) 136, it was held that under Laws 1874, c. 267, a claim for

3. Claims Barred by Limitations. — The question how far an executor or administrator is required to plead the statute of limitations, and his authority to waive the bar of the statute, has given rise to conflicting decisions. The question is discussed under another title.¹

4. Torts of Decedent — *a.* IN GENERAL. — The rule of the common law, which is, of course, in force in this country except as changed by statute, is that the right of action for the recovery of damages for a tort, the plea being not guilty, is extinguished by the death of the tortfeasor, and does not survive against his estate.² This rule was expressed by the maxim, *actio personalis moritur cum persona*.³

Benefit Accruing to Tortfeasor's Estate. — Where, however, the proceeds or value of property belonging to another have been appropriated by the decedent and added to his estate, the action, though arising out of a wrongful act, does not die with the tortfeasor, but the person injured may recover, as on an implied contract, to the extent the estate has been benefited.⁴

the price of a monument sold to the personal representative was a debt of the estate for payment of which the land of the decedent could be sold at the instance of the person furnishing the tombstone.

In *Sweeney v. Muldoon*, 139 Mass. 304, 52 Am. Rep. 708, it was held that the *Massachusetts Public Statutes*, c. 135, § 3, cl. 1, giving a preference to the necessary funeral expenses of the decedent, did not make the cost of erecting a tombstone a part of the necessary funeral expenses so as to render it a charge or debt enforceable against the estate. Field, J., delivering the opinion, said: "The purchase of a tombstone cannot be considered as a part of the charges or necessary expenses of the funeral, within the meaning of these provisions of the statutes. It was not intended that any person might erect a tombstone to the deceased and charge the administrator with the cost of it as a debt or a preferred debt against the estate. The necessity for a decent burial arises immediately upon the decease, and the law pledges the credit of the estate for the payment of such reasonable sums of money as are expended for that purpose; but there is no similar necessity for the erection of a tombstone, and, if a tombstone is erected without the authority of the administrator, the statutes have not made the cost of erecting it a debt of the estate."

Compare Hatchett v. Curbow, 59 Ala. 516, and *Lutz v. Gates*, 62 Iowa 513, wherein the estate was held liable to the widow for a gravestone erected by her with the administrator's consent.

The brother of a decedent cannot recover from the estate of the decedent for a monument erected after the appointment of an administrator, though the decedent expressed to him his wish to have the monument erected. *Argo v. Donover*, 80 Iowa 214.

Acquiescence of Administrator in Erection of Tombstone. — And for a tombstone ordered by another person the administrator cannot be held liable, though the administrator with knowledge of its erection made no objections. *Foley v. Bushway*, 71 Ill. 386. See also *Lerch v. Emmett*, 44 Ind. 331.

Family Monument. — The estate of a deceased father is not liable for the erection by his sons of a family monument to the memory of the

father and other members of the family. *Morgan v. Morgan*, 83 Ill. 196. See also *Springsteen v. Samson*, 32 N. Y. 703.

Monument Ordered by Decedent. — The cost of a monument ordered at the expense and request of the decedent, who approved the contract and promised to pay therefor, is a proper charge against the estate. *Cate v. Cate*, (Tenn. 1897) 43 S. W. Rep. 365.

1. See the title EXECUTORS AND ADMINISTRATORS.

2. **Torts of Decedent.** — *Coker v. Crozier*, 5 Ala. 369; *Sturgis v. Slacum*, 18 Pick. (Mass.) 36; *Vittum v. Gilman*, 48 N. H. 416; *Haight v. Hayt*, 19 N. Y. 464. See also the cases cited under *Particular Actions*, *infra*, this section.

3. **Maxim.** — *Lansdowne v. Lansdowne*, 1 Madd. 116; *Moreton v. Hopkins*, 2 Keb. 502; *Phillips v. Homfray*, 24 Ch. Div. 463; *Cravath v. Plympton*, 13 Mass. 454; *Clarke v. McClelland*, 9 Pa. St. 128.

Crown's Liability for Injuries by Servants. — The rule that a personal action dies with the person applies to the liability of the crown for injuries by servants if the crown was liable therefor, and therefore the liability does not extend to the sovereign's successor. *Canterbury v. Atty.-Gen.*, 1 Phil. 306.

4. **Benefit Accruing to Estate.** — *Powell v. Reese*, 7 Ad. & El. 426, 34 E. C. L. 136; *Winchester v. Knight*, 1 P. Wms. 407; *Lansdowne v. Lansdowne*, 1 Madd. 116; *Sherrington's Case*, Sav. 40; *Hambly v. Trott*, 1 Cowp. 376; *Arundel v. Springer*, 71 Pa. St. 398.

Statement of Rule. — In *Hambly v. Trott*, 1 Cowp. 371, Lord Mansfield said: "If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, * * * there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury; but where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor, as, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall."

In *Adair v. Shaw*, 1 Sch. & Lef. 254, Lord Redesdale stated the rule as follows: "If a man become possessed of the property of an-

Incidental Advantage. — Every incidental advantage, however, which may have accrued to the estate of the decedent from the decedent's act will not authorize a recovery against his estate, provided no additional property or value belonging to another was brought into his estate by virtue of such act.¹

b. STATUTORY CHANGES. — On account of the hardship and injustice of the common-law rule as to the survival of actions against the estates of decedents, statutes have been passed, in the several states and in England, authorizing the maintenance of actions against the representatives of a decedent for certain wrongs by the decedent, the effect of which has been of course to change to a great extent the common-law rule.²

Construction of Statute. — Statutes providing for the survival of actions against the estates of decedents are not acts in derogation of the common law, but rather remedial statutes, and are therefore to be liberally construed.³

Exemplary Damages Not Recoverable. — Under statutes providing for the survival of actions for injuries to property, against the estate of the wrongdoer, exemplary damages are not recoverable against the estate.⁴

c. PARTICULAR ACTIONS — (1) *False Imprisonment.* — Though at common law an action for false imprisonment did not survive against the representatives of the wrongdoer, yet it has been held that such an action did survive

other, though he became possessed by wrong, and might during his life be made answerable for the wrong, yet that does not destroy the right which the other party had to the thing itself, or the value of it, and he would have a remedy for anything of that description, after the death of the wrongdoer, against his executors."

Illustrations. — A claim for the actual value of cattle killed and used by a trespasser survives against his estate. *Ferrill v. Mooney*, 33 Tex. 219. See also cases cited *infra*, this section, *Particular Actions*.

1. Incidental Advantage. — "The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which in the lifetime of the wrongdoer could have been recovered from him can be traced after his death to his assets and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby." *Phillips v. Homfray*, 24 Ch. Div. 439.

In this case, where the decedent had mined under the property of another and removed minerals from beneath the property, it was held that claims against the decedent's estate for the minerals taken and their value survived, but that claims for the use of subterranean ways and passages under the property and claims for damages to the farm and the mineral property resulting from the way in which the work under the farm had been carried on did not survive. See also *Leslie v. Calvin*, 9 Ont. Rep. 207.

Libel. — The benefit derived from the publication of a libel does not affect the rule that the action dies with the wrongdoer. *More v. Bennett*, 65 Barb. (N. Y.) 338.

Fouling Stream by Manufacturer. — Nor for the benefit derived by a manufacturer in draining his refuse into a stream to the injury of a riparian owner. *Kirk v. Todd*, 21 Ch. Div. 484.

2. Statutes Changing Common-law Rule. — Under 3 and 4 Wm. IV., c. 42, § 2, enacting "that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executor or administrator of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal," it has been held that an action for permissive waste for non-repair would lie by the remainderman against the representatives of the life tenant. *Woodhouse v. Walker*, 5 Q. B. Div. 404. See also the title *DEATH*, 5 ENCYC. PL. AND PR. 783.

3. Statute Should Be Liberally Construed. — *Fried v. New York Cent. R. Co.*, 25 How. Pr. (Buffalo Super. Ct.) 285; *Whitcomb v. Cook*, 38 Vt. 477. See, however, *Cutting v. Tower*, 14 Gray (Mass.) 183.

Statute Authorizing Revivor — Effect. — It has been held that a statute authorizing the revival of certain actions against the representatives of a decedent authorized the institution of an original action against them. *Butner v. Keelhn*, 6 Jones L. (51 N. Car.) 60.

4. Exemplary Damages — Not Recoverable. — *Ripley v. Miller*, 11 Ired. L. (33 N. Car.) 247.

under a statute providing for the survival of an action for a "bodily hurt or injury."¹

(2) *Libel and Slander*. — An action for libel or slander does not survive against the representatives of the wrongdoer.²

(3) *Criminal Conversation*. — An action for criminal conversation does not survive against the estate of the wrongdoer.³

(4) *Seduction*. — An action by a father for the seduction of his daughter does not survive against the estate of the seducer, even under a statute providing for the survival of actions for injuries to real or personal property.⁴

(5) *Breach of Promise*. — Actions for breach of promise of marriage are rather actions *ex contractu* than *ex delicto*, though the chief element of damages is often for the seduction of the plaintiff. Such actions do not survive against the estate of the decedent, the contract being treated as personal, all liability upon which is terminated by the death of either party.⁵

(6) *Trespass Quare Clausum Fregit*. — Though at common law an action for a trespass to land did not survive against the estate of the wrongdoer, yet where any benefit accrued to his estate by reason of the wrong his estate was liable therefor in assumpsit.⁶

(7) *Trespass for Mesne Profits*. — The legal right of action for mesne profits, being an action of trespass, is, at common law, lost by the death of the defendant.⁷

(8) *Waste*. — At common law an action for waste committed by a decedent

1. False Imprisonment — Statute — Bodily Hurt or Injury. — *Whitcomb v. Cook*, 38 Vt. 477.

2. Libel. — *Walters v. Nettleton*, 5 Cush. (Mass.) 544; *More v. Bennett*, 65 Barb. (N. Y.) 338; *Long v. Hitchcock*, 3 Ohio 274.

Death After Verdict — Appeal. — And such an action abates even after verdict for plaintiff, where the defendant dies after having perfected an appeal. *Long v. Hitchcock*, 3 Ohio 274.

3. Criminal Conversation. — An action for criminal conversation does not survive against the estate of the defendant, being a "wrong done to the person" and therefore within the exception of Act of March 11, 1834. *Clarke v. McClelland*, 9 Pa. St. 128.

4. Seduction. — *McClure v. Miller*, 4 Hawks (11 N. Car.) 133, wherein Hall, J., said: "The present action is one in form brought to recover damages for the loss of the services of the daughter; but it is in substance brought to recover damages for the disgrace and degradation of which the defendant is the author. In this view of it, which I think we must unavoidably take, it does not involve in it a contest respecting either real or personal property; and I think, too, that the damages are, legally speaking, vindictive, for they cannot be measured by any injury which property may have sustained, but are dependent altogether, under the circumstances of the case, upon a sound discretion, intended to make reparation to the injured party as far as human tribunals can do it, for complete reparation in such cases is beyond their reach." See also *Brawner v. Sterdevant*, 9 Ga. 69. Compare *Lince v. Faircloth*, 14 Ont. Pr. Rep. 253.

5. See *supra*, *Personal Contracts*.

6. Mining Coal. — The estate of a decedent is liable in assumpsit for coal taken by the decedent from the land of another in case he has sold it and received the money therefor. *Powell v. Reese*, 7 Ad. & El. 426, 34 E. C. L.

136; *Winchester v. Knight*, 1 P. Wms. 407; *Phillips v. Homfray*, 24 Ch. Div. 439.

Cutting Down Trees. — And likewise for proceeds received from the sale of trees wrongfully cut down by decedent. *Hambly v. Trott*, 1 Cowp. 376; *Lansdowne v. Lansdowne*, 1 Madd. 116; *Sherrington's Case*, Sav. (Eng.) 40.

See also *supra*, this section, *In General*.

7. Pulteney v. Warren, 6 Ves. Jr. 86; *Tooley v. Windham*, Cro. Eliz. 206; *Harker v. Whitaker*, 5 Watts (Pa.) 474; *Means v. Presbyterian Church*, 3 Pa. St. 93. See also *Phillips v. Homfray*, 24 Ch. Div. 458, *per* Bowen, L. J.; *Adams on Ejectment* 383. Compare *Green v. Hamilton*, E. T. 3 Vict., 1 Rob. & J. Ont. Dig. 1213.

An action will not lie against the personal representative of a deceased defendant in ejectment to recover the mesne profits of the land which accrued during the pendency of the action. *Bard v. Nevin*, 9 Watts (Pa.) 328.

In *Arundel v. Springer*, 71 Pa. St. 398, the cases cited above from Pennsylvania were distinguished, and some of the expressions of the judges in them were disapproved, and it was held that, under the Pennsylvania Act of February 24, 1834, the death of the defendant in an action of ejectment did not abate the right of action for mesne profits, but that the action survived against his personal representatives.

Exception — Equitable Relief. — Where, however, the owner of the land is enjoined by a court of equity from bringing ejectment during the decedent's lifetime to recover possession of the land, a bill will lie against the representatives for the recovery of the mesne profits. *Pulteney v. Warren*, 6 Ves. Jr. 73.

Rents Received by Decedent. — In *Monypenny v. Bristow*, 2 Russ. & M. 117, a suit was held maintainable against the executors for rents received during the wrongful continuance in possession of the testator, but the rents seem

would not lie against his executor or administrator, it being a tort which died with the person.¹

Vicarage. — For dilapidations to the house and buildings of their respective vicarages, the executors of incumbents were liable, the common law adopting the rule of the ecclesiastical courts in regard thereto.²

(9) **Conversion.** — Trover would not lie at common law against an executor or administrator for a conversion by his decedent.³ This rule has, however, been generally changed by statute.⁴

(10) **Trespass de Bonis.** — The action of trespass *de bonis asportatis* could not be brought against the personal representatives of the wrongdoer.⁵

(11) **Replevin.** — In replevin, the plaintiff's ground of action is his property, either general or special, in the goods, and a tortious violation of his right of property by the defendant; the defendant is therefore charged with a tort which does not survive against his executor or administrator.⁶

(12) **Neglect of Public Officers.** — An action would not lie at common law against the personal representative of a public officer for misfeasance or malfeasance in office.⁷

(13) **Devastavit.** — The action of debt will not lie against the executor upon a surmise of a devastavit by the first executor, being a personal tort for which an executor cannot be charged.⁸ The statute of 30 Car. II., c. 7, how-

to have been rents which had been actually paid over to the testatrix and fell within the rule as to property taken by the testator. See also *Gardiner v. Fell*, 1 Jac. & W. 22; *Haldane v. Duche*, 2 Dall. (Pa.) 176.

1. **Waste.** — 6 Com. Dig., tit. Waste, (C. 5), p. 518; 2 Rolle Abr. 828, p. 7; 2 Inst. 302; *Greene v. Cole*, 2 Saund. 252a, note 7; *Browne v. Blick*, 3 Murph. (7 N. Car.) 511.

In *Batthyany v. Walford*, 36 Ch. Div. 269, it was held that an action against the estate of a life tenant for permitting the property to deteriorate, being based on his implied promise under the law of the foreign country where the land was situated, and not on a tort analogous to waste, would lie.

2. **Dilapidations.** — *Bunbury v. Hewson*, 3 Exch. 558; *Warren v. Lugg*, 3 Exch. 579; *Bryan v. Clay*, 1 El. & Bl. 38, 72 E. C. L. 38; *Wise v. Metcalfe*, 10 B. & C. 299, 21 E. C. L. 84; *Gleaves v. Parfitt*, 7 C. B. N. S. 838, 97 E. C. L. 838.

Neglect to Cultivate glebe land is not, however, a dilapidation for which the estate of the incumbent is liable. *Bird v. Relph*, 4 B. & Ad. 826, 24 E. C. L. 173; *Huntley v. Russell*, 13 Q. B. 590, 66 E. C. L. 590.

Digging Gravel in the glebe is not a waste for which the representatives of the deceased incumbent are liable. *Ross v. Adcock*, L. R. 3 C. P. 655.

3. **Trover.** — *Barnard v. Harrington*, 3 Mass. 228; *Hambly v. Trott*, 1 Cowp. 371; *Hench v. Metzger*, 6 S. & R. (Pa.) 272; *Cherry v. Hardin*, 4 Heisk. (Tenn.) 199.

Assumpsit. — An action of assumpsit, however, on the implied contract arising from the benefit accruing to the wrongdoer's estate will lie against his representative. *Elrod v. Alexander*, 4 Heisk. (Tenn.) 342.

4. **Statutory Changes.** — See *Nations v. Hawkins*, 11 Ala. 859; *Coleman v. Woodworth*, 25 Cal. 567; *Terhune v. Bray*, 16 N. J. L. 53. See the statutes of the several states.

5. **Trespass de Bonis.** — *Nettles v. Barnett*, 8 Port. (Ala.) 181.

In *Petts v. Ison*, 11 Ga. 151, 56 Am. Dec. 419, it was held that an action of trespass for a direct and forcible injury to the property of the plaintiff could not be revived against the estate of the wrongdoer.

6. **Replevin.** — *Mellen v. Baldwin*, 4 Mass. 480.

7. **Escape of Debtor in Execution.** — The estate of a sheriff is not liable to the judgment creditor for allowing a debtor in execution to escape. *Whitacres v. Onsley*, 3 Dyer 322a; *Anonymous*, 3 Dyer 271a; *Martin v. Beach*, 1 Cai. (N. Y.) 124.

Failure to Levy Execution. — An action against a sheriff for failure to levy an execution does not survive against his estate. *M'Evers v. Pitkin*, 1 Root (Conn.) 216.

False Return. — Nor does an action for making a false return survive. *U. S. v. Daniel*, 6 How. (U. S.) 11. Nor for a false return by his deputy. *People v. Gibbs*, 9 Wend. (N. Y.) 29.

Failure to Levy Attachment. — An action against a constable for failure to levy an attachment does not survive. *Gent v. Gray*, 29 Me. 462. Nor does an action survive against the estate of a deputy sheriff, under stat. 1805, c. 99, § 2, providing for the survival of actions against the representatives of the sheriff for misfeasance or nonfeasance in office. *Cravath v. Plympton*, 13 Mass. 454.

Postmaster — Embezzlement by Clerk. — The liability of a postmaster for moneys embezzled by his clerk does not survive against the postmaster's estate. *Franklin v. Low*, 1 Johns. (N. Y.) 396.

Failure to Pay Over Money Collected. — The estate of the sheriff is, however, liable for his failure to pay over money collected. *Gloucestershire Banking Co. v. Edwards*, 20 Q. B. Div. 107.

8. **Devastavit.** — *Browne v. Collins*, 1 Vent. 292, 2 Lev. 110, 3 Keb. 462; *Sir Brian Tuche's Case*, 3 Leon 241.

In Equity. — In equity, however, the estate of a deceased executor was held liable for a devastavit by the decedent. *Price v. Morgan*, 2 Ch. Cas. 217.

ever, made the estate of an executor liable for a devastavit.¹

(14) *Malpractice*. — An action against a physician for malpractice does not survive against his personal representatives.²

(15) *Neglect of Conventional Duties*. — In some cases actions for breach of conventional duties imposed upon certain persons will survive against their estates, the action being based on the breach of the implied contract on their part to perform their duty.³

(16) *Nuisances*. — At common law actions for damages for maintaining nuisances do not survive against the estate of the wrongdoer.⁴

(17) *Deceit*. — An action for deceit or fraud does not survive against the estate of the wrongdoer.⁵

1. *Coward v. Gregory*, L. R. 2 C. P. 173, wherein Willes, J., in regard to the effect of the statute of 30 Car. II., c. 7, quotes with approval from Williams on Executors (6th ed. 1846), as follows: "In every case where the executor in his lifetime was in any way guilty of any act which amounts in law to a devastavit, such as exhausting the assets by payment of debts of an inferior degree before those of a superior, and the like, an action may be brought against the executor or administrator of such executor, suggesting a devastavit by the former executor."

2. *Malpractice*. — *Boor v. Lowrey*, 103 Ind. 468, 53 Am. Rep. 519; *Vittum v. Gilman*, 48 N. H. 416; *Wolf v. Wall*, 40 Ohio St. 111.

Reasons of Doctrine. — "The primary cause of action is in its nature merely personal, namely, the pain and suffering caused by the want of care and skill of the intestate, and much as in the case of a breach of promise to marry. In principle we are unable to distinguish the two cases, and we think that the loss of time and the ability to labor must be regarded as incidental, and inseparable from the personal injury." *Vittum v. Gilman*, 48 N. H. 419.

3. *Innkeeper*. — In *Morgan v. Ravey*, 6 H. & N. 265, it was held that an action on an implied contract would survive against the executor of an innkeeper for loss of a guest's goods.

Common Carrier. — And also against a common carrier for loss of goods. *Hambly v. Trott*, 1 Cowp. 375, *per* Lord Mansfield; *Powell v. Layton*, 2 B. & P. N. R. 370, *per* Sir J. Mansfield, C. J.

Negligence of Attorney. — An action against an attorney for breach of the implied contract that he would exercise due care and skill in the business of his client survives against his estate. *Tichenor v. Hayes*, 41 N. J. L. 193, 32 Am. Rep. 186; *Knights v. Quarles*, 2 Brod. & B. 102, 6 E. C. L. 55. See also *Wilson v. Tucker*, 3 Stark. 154, 14 E. C. L. 174.

An action for negligence of an attorney in recording a mortgage survives against the estate of the attorney under Act of Feb. 24, 1834, § 28, not being within the exception as to actions for a wrong to the person. *Miller v. Wilson*, 24 Pa. St. 114.

4. *Nuisances*. — *Sloggy v. Dilworth*, 38 Minn. 179.

Fouling Stream. — In *Kirk v. Todd*, 21 Ch. Div. 484, it was held that an action against a manufacturer for fouling a stream did not survive against his estate.

Statute. — Action for maintaining a nuisance so as to damage the plaintiff's land survives under *Rhode Island Rev. Stat.*, c. 176, providing for the survival of actions of trespass and trespass on the case for damages to real estate. *Aldrich v. Howard*, 8 R. I. 125. See also *Sloggy v. Dilworth*, 38 Minn. 179, as to the law in *Minnesota*.

Liability for Injury Caused by Dam. — An action for damages to a mill and land, caused by obstructing a mill-stream by a dam, survives on the ground that it is an injury to such specific property. *Mass. Gen. Stat.*, c. 127, § 1; *Brown v. Dean*, 123 Mass. 254.

Overflowing Lands. — Under a *New Jersey* statute, an action for any "trespass" to the property, real or personal, of another survives the death of the wrongdoer, and it is held that an action for damages to land from an overflow will survive. *Ten Eyck v. Runk*, 31 N. J. L. 428.

5. *Fraudulent Representations.* — An action for fraudulent representations in the sale or the exchange of property does not survive against the administrator of the wrongdoer. *Coker v. Crozier*, 5 Ala. 369; *Newsom v. Jackson*, 29 Ga. 61; *Boyles v. Overby*, 11 Gratt. (Va.) 202.

An action based on fraudulent representations as to the credit of another does not survive. *Henshaw v. Miller*, 17 How. (U. S.) 212; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551.

Fraud Benefiting Decedent's Estate. — Though an action will not lie against the estate of a decedent for a fraud which does not benefit the estate, it will, however, lie for one that does — such as a fraud in performance of a contract. *Troup v. Smith*, 20 Johns. (N. Y.) 33. See also *Hamilton Provident, etc., Soc. v. Cornell*, 4 Ont. Rep. 623.

Construction of Statutory Modifications. — Nor will an action for deceit survive under a statute providing for the survival of actions of trespass or case for damages done to the real or personal estate of the plaintiff. *Read v. Hatch*, 19 Pick. (Mass.) 47.

An action for fraudulent representations in the sale of a slave has, however, been held to survive against the estate of the seller under the *North Carolina Act* of 1799, providing that actions of detinue, trover, or trespass on the case shall survive where property either real or personal is in issue. *Arnold v. Lanier*, 1 Law Repos. (4 N. Car.) 529.

"Trespass." — An action against an attorney for deceit or negligence survives against his estate as an action for a "trespass" to prop-

(18) *Penalties*. — The estate of a decedent is not liable for penalties imposed by statute for acts committed by the decedent and made recoverable in a civil action by the person injured.¹

(19) *Death by Wrongful Act*. — At common law no action lay by the representatives of a decedent for the death of their decedent caused by the wrongful act of another. By statute, however, in most jurisdictions, such an action is authorized against the wrongdoer, for the benefit of the deceased wife, children, or next of kin, or the benefit of his estate in general; but unless expressly so provided in the statute, such an action does not survive the death of the wrongdoer.²

5. *Taxes — Accruing Before Death*. — Taxes upon real estate due at the time of the death of the owner of the land constitute a claim against his estate, and are payable from his personal estate, instead of being merely a lien on the land.³

Taxes, However, Accruing After the Death of the owner do not constitute a debt against his estate, but are to be paid by the devisee, heir, or purchaser of the land.⁴

6. *Breaches of Trust*. — Where a trustee commits a breach of trust, and the consequences of it do not appear until after his death, his estate may be made liable therefor. This rule applies equally where the breach of trust involves activity, as in case of an improper investment, and where the breach of trust arises from his failure to do some act.⁵

erty. *Tichenor v. Hayes*, 41 N. J. L. 193, 32 Am. Rep. 186. See, however, *Read v. Hatch*, 19 Pick. (Mass.) 47.

"Property, Rights, or Interest" — Fraudulent Representations by Mortgagor. — An action for fraudulent representations by the mortgagor as to incumbrances is an injury done to the "property, rights, or interest" (2 Rev. Stat. 448, § 1) of the mortgagee, and therefore, not being within the exceptions of the statute, survives against his estate. *Haight v. Hayt*, 19 N. Y. 464.

1. *Penalties*. — In *Moreton v. Hopkins*, 2 Keb. 502, it was held that the estate of a decedent was not liable under a statute for the treble value of tithes abstracted by the decedent.

Corporate Officers — Liability to Corporate Creditors. — The statutory liability of a director of a corporation to corporate creditors, being a tort, does not survive against his estate. *Moies v. Sprague*, 9 R. I. 541. See also *In re East of England Bank*, L. R. 1 Eq. 219.

2. *Death by Wrongful Act*. — *Hamilton v. Jones*, 125 Ind. 176; *Green v. Thompson*, 26 Minn. 500; *Moriarty v. Bartlett*, 99 N. Y. 651; *Pessini v. Wilkins*, 54 N. Y. Super. Ct. 146; *Russell v. Sunbury*, 37 Ohio St. 372, 41 Am. Rep. 523; *Moe v. Smiley*, 125 Pa. St. 136. See, however, *contra*, *Doedt v. Wiswall*, 15 How. Pr. (N. Y. Supreme Ct.) 128, 16 How. Pr. (N. Y.) 8.

For a Full Treatment of this subject, see the title DEATH BY WRONGFUL ACT, *ante*.

3. *Taxes*. — *Griswold v. Griswold*, 4 Bradf. (N. Y.) 216; *Henderson v. Whiting*, 56 Ind. 131; *Bowers v. Williams*, 34 Miss. 324; *Griswold v. Griswold*, 4 Bradf. (N. Y.) 216.

In *Findley v. Taylor*, 97 Iowa 420, it was held, under an Iowa statute making taxes due a debt of the person taxed, that a purchaser of land from the devisee could enforce payment of the taxes on the land, due at the time of the

testator's death, from the personal assets of the estate.

Assessments. — The estate is also liable for the payment of an assessment for a public improvement. *Parker v. Bernal*, 66 Cal. 113.

But in *Matter of Hun*, 144 N. Y. 472, it was held that Code, § 2719, requiring the executor to pay the debts of the decedent and the taxes assessed against him previous to his death, did not require the payment of an assessment for a public improvement, which was merely a charge against the land, and therefore the devisee took the land subject to the charge.

A Personal Tax assessed prior to the death of the owner is also a debt of the estate, payment of which may be enforced against the estate. *Jefferson's Estate*, 35 Minn. 215; *McMahon v. Beekman*, 65 How. Pr. (N. Y. Supreme Ct.) 427.

Church Rate. — The same has been held true of a church rate. *Williams v. George*, 3 Curteis 343.

4. *Taxes Accruing After Decedent's Death*. — *Shaw v. Camp*, 56 Ill. App. 23; *Henderson v. Whiting*, 56 Ind. 131; *Reading v. Wier*, 29 Kan. 429; *Griswold v. Griswold*, 4 Bradf. (N. Y.) 216; *Henry v. Horstick*, 9 Watts (Pa.) 412; *Piatt v. St. Clair*, 6 Ohio 227. See also *Moody v. Hemphill*, 71 Ala. 169; *Phelps v. Funkhouser*, 39 Ill. 401; *Henderson v. Whiting*, 56 Ind. 131.

5. *Breaches of Trust — Estate Liable*. — *Devaynes v. Robinson*, 24 Beav. 86; *Adair v. Shaw*, 1 Sch. & Lef. 272; *Richardson v. Jenkins*, 17 Jur. 446; *Richardson v. Horton*, 6 Beav. 185; *Montfort v. Cadogan*, 17 Ves. Jr. 489; *Scurfield v. Howes*, 3 Bro. C. C. 90; *Walsham v. Stainton*, 1 DeG. J. & S. 678; *Grayburn v. Clarkson*, L. R. 3 Ch. 605; *Hill v. State*, 23 Ark. 604; *Patterson v. McCann*, 39 Ark. 577; *Purcell v. Carter*, 45 Ark. 299; *Price v. Brown*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 67.

II. ORDER OF PAYMENT OF DEBTS — 1. In General. — The court has no authority to change the order in which the debts of a decedent are to be paid;¹ nor can the decedent do so by any provision in his will or declaration before his death.² And the fact that certain assets of the estate are discovered and made available through the efforts of certain creditors will not entitle them to any preference in the distribution of such assets.³

Foreign Creditors. — Resident or domestic creditors have no preference over nonresident or foreign creditors, in the distribution of the estate of a decedent, but all creditors must share *pari passu*.⁴

Equitable Assets. — In the distribution of equitable assets, the courts of equity, applying the maxim that equality is equity, distribute such assets ratably among all creditors irrespective of the dignity of their debts.⁵ And where a preferred creditor has received a portion of the legal assets, he is not entitled to share in the equitable assets until the inferior creditors have received from the equitable assets an equal portion of their respective debts.⁶

Suit for breach of trust as an executor survives against the personal representative of the executor. *Price v. Brown*, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 67.

In *Devaynes v. Robinson*, 24 Beav. 86, the estate of a trustee was held liable for not selling the land as required by the trust. See also *Grayburn v. Clarkson*, L. R. 3 Ch. 605.

Benefit to Estate — Immaterial. — And it is immaterial whether the breach of trust resulted in any benefit to the estate of the trustee or not. *Adair v. Shaw*, 1 Sch. & Lef. 272; *Montfort v. Cadogan*, 17 Ves. Jr. 489.

Co-trustees. — The fact that there were co-trustees will not prevent a cause of action for a breach by one from surviving against his estate. *Richardson v. Jenkins*, 17 Jur. 446.

1. Authority of Court to Change Order of Payment. — *Tompkins v. Weeks*, 26 Cal. 50; *Jenkins v. Jenkins*, 63 Ind. 120.

2. Authority of Decedent to Change Such Order. — A testator cannot by a bequest of a debt to the creditor entitle it to any preference. *Moore v. Byers*, 65 N. Car. 240.

A declaration by a debtor on his death-bed that a specified debt is sacred, and a request that it shall be paid, will not affect the order of payment. *Mason v. Man*, 3 Desaus. (S. Car.) 116.

3. Assets Made Available by Particular Creditors. — *Colton v. Field*, 131 Ill. 398; *Rains v. Rainey*, 11 Humph. (Tenn.) 261.

In *Gish's Appeal*, 31 Pa. St. 277, it was held, however, where a husband died insolvent leaving debts contracted partly prior to the Act of April 26, 1850, which gave an allowance to the widow and children, and partly after such act, and the claim of the widow was opposed by certain creditors and disallowed, — that such creditors were entitled to the whole fund to the exclusion of the other creditors.

4. Foreign and Domestic Creditors Share *Pari Passu*. — *In re Kloebe*, 28 Ch. Div. 175; *Reynolds v. Lewis*, 29 L. J. Ch. 296; *Miner v. Austin*, 45 Iowa 221, 24 Am. Rep. 763; *Davis v. Estey*, 8 Pick. (Mass.) 475; *Goodall v. Marshall*, 11 N. H. 88, 35 Am. Dec. 472; *Findley v. Gidney*, 75 N. Car. 395; *Churchill v. Boyden*, 17 Vt. 319. See, however, *Williamson v. Furbush*, 31 Ark. 539.

Enunciation of Doctrine. — In *Dawes v. Head*,

3 Pick. (Mass.) 146, *Parker, C. J.*, said: "We cannot think that in any civilized country advantage ought to be taken of the accidental circumstance of property being found within its territory, which may be reduced to possession by the aid of its courts and laws, to sequester the whole for the use of its own subjects or citizens, where it shall be known that all the estate and effects of the deceased are insufficient to pay his just debts. Such a doctrine would be derogatory to the character of any government."

In *Goodall v. Marshall*, 11 N. H. 95, 35 Am. Dec. 472, *Parker, C. J.*, said: "If the creditors of the domicil may pursue the property of the debtor in his lifetime in another government, equally with the citizens of the government where the property is situated, no sound reason suggests itself why they should be debarred of a remedy, and the property be appropriated exclusively, or in the first place, to the satisfaction of the creditors in the latter government on his decease. Even if, by permitting them to come in, the property may be insufficient to pay all, and the creditors in the government where the property is situated be thereby compelled to resort to the principal administration where the debtor had his domicil, or to lose their debts or a portion of them, this result is no other than might have been attained in the lifetime of the debtor by his withdrawal of the property from their jurisdiction."

5. Equitable Assets Distributed Ratably — *England*. — *Plunkett v. Penson*, 2 Atk. 290; *Nash v. Bryant*, 25 Beav. 533; *Morrice v. Bank of England*, Talb. Cas. 218; *Pardo v. Bingham*, L. R. 6 Eq. 485; *Fremoult v. Dedire*, 1 P. Wms. 430; *Deg v. Deg*, 2 P. Wms. 416; *Walker v. Meager*, 2 P. Wms. 550; *Cox's Case*, 3 P. Wms. 341; *Solley v. Gower*, 2 Vern. 62; *Sheppard v. Kent*, 2 Vern. 436; *Anonymus*, 18 Ves. Jr. 258.

United States. — *Law v. Law*, 3 Cranch (C. C.) 324; *Backhouse v. Patton*, 5 Pet. (U. S.) 167.

New York. — *Wilder v. Keeler*, 3 Paige (N. Y.) 167, 23 Am. Dec. 781; *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 129, 7 Am. Dec. 478.

6. Sheppard v. Kent, 2 Vern. 436; *Morrice v. Bank of England*, Talb. Cas. 218; *Wilder v. Keeler*, 3 Paige (N. Y.) 167, 23 Am. Dec. 781.

The distinction, however, between legal and equitable assets has been abolished in a number of the states.¹

Right of Set-off as Affecting Order of Payment. — Mutual debts subsisting at the death of the decedent between himself and another person may be set off the one against the other, and a creditor may in that way, to the extent of his indebtedness to the estate, secure a preference upon a claim due him from the estate to which he would not otherwise be entitled.²

2. Classification of Debts — *a. IN GENERAL* — **Common-law Classification.** — At common law the personal representative was required to pay the claims against the estate of the decedent in the following order: (1) the necessary funeral expenses, the extent of which was fixed by the condition and rank of the decedent;³ (2) the necessary expenses of the administration; (3) debts of record due to the crown; (4) debts of record due to subjects, which included judgments, decrees, statutes, and recognizances;⁴ (5) debts by specialty, founded upon valuable consideration, and debts for rent;⁵ (6) simple contract debts based upon valuable consideration; (7) voluntary bonds or covenants; (8) other voluntary debts.

In the United States the common-law classification of the claims against a decedent's estate has been almost entirely abrogated by the statutes of the several states, some of which have to a great extent abolished such preferences, whereas others have given preferences to other classes of claims. In some states the preferences between debts of record by specialty and simple contract have been abolished, such debts being placed on an equal footing.⁶

1. *Pennsylvania Agricultural, etc., Bank v. Stambaugh*, 13 S. & R. (Pa.) 299; *Ramsey's Appeal*, 4 Watts (Pa.) 74; *Sperry's Estate*, 1 Ashm. (Pa.) 347; *Titterington v. Hooker*, 58 Mo. 593.

2. **Set-off.** — *Austin v. Holmes*, 1 Ired. L. (23 N. Car.) 399.

A creditor of the estate cannot, however, set off his claim, where the estate is insolvent, against his indebtedness to the estate arising out of a transaction with the executor. *Willis v. Loan*, 2 T. B. Mon. (Ky.) 141; *White v. Bannister*, 1 Wash. (Va.) 166.

3. **Funeral Expenses.** — 2 Bl. Com. (Broom & H. ed.) 653; *Rex v. Wade*, 5 Price 627, wherein Richards, C. B., said that a claim for funeral expenses was to be preferred even to a debt due to the crown.

4. **Debts of Record.** — *Fuller v. Redman*, 26 Beav. 600; *Robinson v. Tonge*, 3 P. Wms. 400; *Searle v. Lane*, 2 Vern. 37, 88.

Decrees in Equity stand on the same footing with judgments. *Searle v. Lane*, 2 Freem. 103; *Perry v. Phelps*, 10 Ves. Jr. 34.

A Decree for Accounting, however, does not stand on the footing of a final judgment or decree. *Searle v. Lane*, 2 Freem. 103; *Perry v. Phelps*, 10 Ves. Jr. 34.

A Judgment Quod Computet does not rank as a judgment. *Smith v. Eyles*, 2 Atk. 385; *Searle v. Lane*, 2 Freem. 103.

A Recognizance as of special bail has preference of a debt by specialty. *Moon v. Pasteur*, 4 Leigh (Va.) 35.

5. **Specialty Debts.** — *Greenwood v. Brudnish*, Pre. Ch. 534; *Turner v. Turner*, 1 Jac. & W. 39; *Nosotti v. Jefferson*, 9 Jur. N. S. 656.

Preference Abolished in England. — The preference between debts by specialty and by simple contracts was abolished by 32 & 33 Vict., c. 46, which provides that "all creditors" of decedents, "as well specialty as simple con-

tract, shall be treated as standing in equal degree and be paid accordingly out of the assets" whether legal or equitable.

6. Distinction Between Debts of Record by Specialty and Simple Contract Abolished — *Alabama*. — 1 Civil Code, § 2079.

Arkansas. — Dig. 1894 (Sandels & Hill), c. 1, § 109; except when they constitute liens on the decedent's lands.

Colorado. — Mills's Ann. Stat., § 4780.

Illinois. — Ann. Stat. (Starr & C.), c. 3, § 71.

Indiana. — Stat. 1896 (Horner's Ann. ed.), c. 3, § 71.

Iowa. — McClain's Ann. Code, §§ 3622 *et seq.*

Kentucky. — Stat. 1894, § 3868.

Maine. — Rev. Stat., c. 66, § 1, p. 555.

Massachusetts. — Pub. Stat. 1882, c. 127, § 1.

Michigan. — How. Ann. Stat., § 5923.

Minnesota. — Stat. 1894, § 4529.

Mississippi. — Ann. Code, § 1939.

Montana. — Comp. Stat., § 273.

Nebraska. — Stat. 1881, p. 242, § 249.

New Hampshire. — Pub. Stat., p. 539, § 19 *et seq.*

North Carolina. — Code 1883, § 1416; judgments are preferred only to the extent they are a lien on decedent's lands.

North Dakota. — Rev. Code, § 6417.

Ohio. — Rev. Stat. (Giaque's ed.), § 6090.

Oklahoma. — Stat. 1893, § 1430.

Pennsylvania. — 1 Brightly's Purd. Dig., p. 591, § 109.

Oregon. — Hill's Ann. Laws, § 1183.

Rhode Island. — Gen. Laws 1896, p. 730, § 16.

Tennessee. — Code 1896, § 4065.

Texas. — 1 Sayles's Civ. Stat., art. 2037.

Utah. — Comp. Laws, p. 524, § 4245.

Vermont. — Rev. Laws 1880, § 2190.

Virginia. — Code 1887, § 2660.

West Virginia. — Code 1887, p. 667, § 25.

Wisconsin. — 2 Sanb. & B. Ann. Stat., § 3852.

Other states have preserved the preference as to judgments rendered against a decedent in his lifetime, and mortgages in the order of their date, and abolished otherwise the distinction between debts by specialty and simple contract debts.¹ Other states preserve the preference of judgments, abolishing the distinction between debts by specialty and simple contract debts.²

In **Delaware** the common-law preference between specialty debts and simple contract debts is retained.³

In **Tennessee** all preferences have been abolished.⁴

In **New Mexico** the statutes being silent as to the manner of distributing the assets of insolvent estates of decedents in payment of debts, the order of payment is to be determined by the civil laws of Spain and Mexico, which give no preference to judgments.⁵

b. PARTICULAR CLASSES OF DEBTS—(1) *Funeral Expenses*.—In a great number of the states, as at common law, the first preference is given to the necessary charges for the funeral of the decedent.⁶ In other states the funeral expenses and the costs of administration are placed in the same class,⁷ while in still others they are ranked after the costs of administration.⁸

In **North Carolina** funeral charges are placed after debts constituting liens on the property of the decedent, which are given first place, to the extent of the value of the property.⁹

In **Georgia** the allowance for the support of the family of the decedent is given the first preference, and funeral expenses, second.¹⁰

1. *Arizona*.—Rev. Stat. 1887, par. 1232.
- California*.—Code Civ. Proc., § 1643.
- Idaho*.—Rev. Stat. 1887, § 5606.
- Nevada*.—Gen. Stat., § 2908.
- South Carolina*.—Gen. Stat. 1882, c. 1926.
- Washington*.—Hill's Ann. Stat., § 1075.
2. *District of Columbia*.—Comp. Stat., p. 25, § 103.
- Florida*.—Rev. Stat. 1892, § 1909.
- Kansas*.—Gen. Stat. 1889, § 2864.
- Maryland*.—Gen. Laws, art. 93, p. 1354.
- Missouri*.—Rev. Stat. 1889, § 183, p. 156.
- New Jersey*.—Revision, p. 764, § 58.
- New York*.—1 Rev. Stat. 1887, § 2132.
3. *Delaware*.—Laws, p. 676, § 25.
4. *Tennessee*.—Black v. Planters' Bank, 4 Humph. (Tenn.) 367; Reid v. Huff, 9 Humph. (Tenn.) 345; Mosier v. Zimmerman, 5 Humph. (Tenn.) 62; Dance v. McGregor, 5 Humph. (Tenn.) 428; Rains v. Rainey, 11 Humph. (Tenn.) 261; Gunn v. Boone, 7 Heisk. (Tenn.) 8.
5. *New Mexico*.—Crenshaw v. Delgado, 1 N. Mex. 376.

6. **Funeral Expenses**—*Alabama*.—Civ. Code, § 2099.

- Arizona*.—Rev. Stat. 1887, par. 1232.
- Arkansas*.—Dig. 1894 (S. & H. ed.), c. 1, § 109.
- California*.—Code Civ. Proc., § 1232.
- Colorado*.—Mills Ann. Stat. § 4780.
- Delaware*.—Laws, p. 676, § 25.
- Florida*.—Rev. Stat. 1892, § 1909.
- Idaho*.—Rev. Stat. 1887, § 5606.
- Kansas*.—Gen. Stat. 1889, § 2864.
- Missouri*.—Rev. Stat. 1889, § 183, p. 156.
- Montana*.—Comp. Stat., § 273.
- Nevada*.—Gen. Stat., § 2908.
- Oklahoma*.—Stat. 1893, § 1430.
- Oregon*.—Hill's Ann. Laws, § 1183.
- Texas*.—1 Sayles's Civ. Stat., art. 2037.
- Utah*.—Comp. Laws, p. 524, § 4245.
- Washington*.—Hill's Ann. Stat., § 1075.
7. *Illinois*.—Ann. Stat. (Starr & C. ed.), c. 3, § 71.

- Kentucky*.—Stat. 1894, § 3868.
- Maine*.—Rev. Stat., c. 66, § 1, p. 555.
- Massachusetts*.—Pub. Stat. 1882, c. 127, § 1.
- Mississippi*.—Ann. Code 1839.
- Ohio*.—Rev. Stat. (Giauque's ed.), § 6090.
- South Carolina*.—Gen. Stat. 1882, § 1926.
- Virginia*.—Code 1887, § 2660.
- West Virginia*.—Code 1887, p. 667, § 25.
- Wyoming*.—Rev. Stat. 1887, § 2132.
8. *Indiana*.—Stat. 1896, § 2378.
- Iowa*.—McClain's Code, § 3622.
- Michigan*.—How. Ann. Stat., § 5923.
- Minnesota*.—Stat. 1894, § 4529.
- Nebraska*.—Comp. Stat. 1881, § 249, p. 242.
- New Hampshire*.—Pub. Stat., p. 539, § 19 et seq.

- North Dakota*.—Rev. Code, § 6417.
- Rhode Island*.—Gen. Laws 1896, p. 730, § 16.
- Vermont*.—Rev. Laws 1880, § 2190.
- Wisconsin*.—2 Sanb. & B. Ann. Stat., § 3852.
9. *North Carolina*.—Ray v. Honeycutt, 119 N. Car. 510; Barbee v. Green, 86 N. Car. 158; Parker v. Lewis, 2 Dev. L. (13 N. Car.) 21. See also Ward v. Jones, Busb. L. (44 N. Car.) 127; Code 1883, § 1416.

10. *Georgia*.—Code 1895, § 3424.

Superior to Liens.—Palmer v. Stephens, R. M. Charl. (Ga.) 56, wherein it is held that under a statute placing funeral expenses in the first class, such expenses are superior to all liens. See also Parker v. Lewis, 2 Dev. L. (13 N. Car.) 21; Hatchett v. Curbow, 59 Ala. 516.

And in New Jersey it has been held under Revision, p. 764, § 58, preferring judgment entered of record against the decedent during his lifetime, funeral expenses, and the physician's bill during the last illness, in the order named, that the funeral expenses were superior to the other classes named. Sullivan v. Horner, 41 N. J. Eq. 299.

Kentucky.—In Milward v. Shields, (Ky. 1897) 43 S. W. Rep. 184, it was, however, held under Ky. Stat., § 3868, providing that "if

(2) *Expenses of Administration.*—The expenses of administration are primarily a personal charge against the executor or administrator, instead of against the estate, and therefore are not strictly a claim against the estate; still, however, the executor or administrator is, at common law, entitled to be reimbursed therefor out of the estate in preference to the payment of the debts of the decedent, with the exception of the funeral expenses.¹ In a great number of the states provision is made by statute for the order in which the expenses of the administration shall be paid. In some jurisdictions such expenses are to be first paid from the assets of the estate, or are ranked together with the funeral expenses;² whereas, in other states, they rank after the funeral expenses and certain other claims against the estate.³ In *Arkansas, Arizona, California, Delaware, District of Columbia, Florida, Idaho, Maryland, Missouri, Nevada, North Carolina, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, and Utah*, no provision is made as to the order in which the expenses of the administration shall be paid. In the states in which the statute fixes the rank of such expenses they must, of course, be paid as directed.⁴

the personal estate of a decedent be not sufficient to pay his liabilities, then the burial expenses of such decedent * * * shall be paid in full before any *pro rata* distribution shall be made," that the funeral expenses of a deceased mortgagor were not entitled to priority over the mortgage lien.

1. *People v. Hunter*, 89 Ill. 392; *Nimmo v. Com.*, 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488.

Attorney Fees.—A claim for attorney fees in an action for the benefit of the succession, such as the removal of an administrator, has preference over the debts of the decedent. *Friend v. Graham*, 10 La. 440.

Priority over Specific Liens.—Expenses of administration consisting of counsel fees and expenses in a suit for the sale of lands of a decedent for payment of debts, have no priority over the specific lien of a creditor, unless the suit was instituted at his instance, or was necessary to provide for the payment of his claim. *Shell v. Young*, 32 S. Car. 462.

Charges for Benefit of Lien Holder.—Charges of administration incurred for the benefit of the lien holder have preference over the lien, whether a lien of a vendor or of a mortgagee. *Lauve's Succession*, 18 La. Ann. 721.

Priority over All Claims.—Expenses of administration may be allowed to the personal representative, though the estate is insufficient to pay in full the creditors of the estate. *Matter of Thompson*, 41 Barb. (N. Y.) 237.

Costs Recovered by a Creditor in an action against an administrator to establish a claim, though merged in the judgment recovered on the debt, do not form a part of the debt, but have priority over the general debts of the decedent. *Matter of Randell*, 2 Connolly (N. Y.) 29. See, however, *Shute v. Shute*, 5 Dem. (N. Y.) 1.

New York Rev. Stat., tit. 2, c. 6, part 2, § 28, providing that the recovery of judgment against an administrator shall not entitle the claim to any preference over others of the same class, does not prevent a preference in favor of the costs recovered in the action. *Shields v. Sullivan*, 3 Dem. (N. Y.) 296.

Carrying on Decedent's Business.—Where executors incur expenses in carrying on the testator's business with the assent of creditors,

they are entitled to be reimbursed for their expenditures in preference to the claims of the creditors. *In re Brooke*, (1894) 2 Ch. 600. See also *Dows v. Gorton*, (1891) App. 190, where the business was carried on with the assent of creditors and in accordance with directions in the will.

2. *Illinois.*—Ann. Stat. (Starr & C. ed.), c. 3, § 71.

Indiana.—Stat. 1896, § 2378.

Iowa.—McClain's Code, §§ 3622 et seq.

Kentucky.—Stat. 1894, § 3868.

Maine.—Rev. Stat., c. 66, § 1, p. 555.

Massachusetts.—Pub. Stat. 1882, c. 127, § 1.

Michigan.—How. Ann. Stat., § 5923.

Minnesota.—Stat. 1894, § 4529.

Mississippi.—Ann. Code, § 1939.

Nebraska.—Comp. Stat. 1881, p. 242, § 249.

New Hampshire.—Pub. Stat., p. 539, § 19. et seq.

North Dakota.—Rev. Code, § 6417.

Ohio.—Rev. Stat. (Giaque's ed.), § 6090.

Rhode Island.—Gen. Laws 1896, p. 730, § 16.

South Carolina.—Gen. Stat. 1882, § 1926.

Vermont.—Rev. Laws 1880, § 2190.

Virginia.—Code 1887, p. 667, § 25.

Wisconsin.—2 Sanb. & B. Ann. Stat., § 3852.

Wyoming.—1887, § 2132.

3. *Alabama.*—Civil Code, § 2079.

Colorado.—Mills Ann. Stat., § 4780.

Georgia.—2 Code 1895, § 3424.

Kansas.—Gen. Stat. 1889, 2864.

Texas.—1 Sayles's Civ. Stat., art. 2037.

4. *Mapp v. Long*, 62 Ga. 568; *Sparrow's Succession*, 44 La. Ann. 475.

What Constitute Expenses of Administration—Preservation of Estate—Necessary Expenses.—In *Richardson v. Kennedy*, 74 Tex. 507, ranking in the second class claims for necessary expenses in the preservation of the estate, the court refused to allow as a claim of the second class a payment to a livery stable keeper of about one hundred and eighty-eight dollars for the release of two horses from his liveryman's lien, though their immediate use was necessary for the preservation of the estate, the evidence not showing the value of the horses.

A Judgment for Costs rendered against an administrator as defendant in an action to try title to land has been allowed as "expenses

(3) *Expenses of Last Illness* — (a) *In General*. — At common law the expenses of the last illness of the decedent were not on account of their character as such entitled to any preference in the distribution of the estate of the decedent among his creditors; but in a great number of the states such claims are given a preference by statute, and as a general rule rank after the funeral expenses, the expenses of administration, and the debts due the United States.¹ All claims for expenses of last illness are of equal degree.²

(b) *What Constitute Expenses of Last Illness* — *Meaning of Term "Last Illness."* — The expression "last illness" relates not to the remote but to the proximate cause of death, and a claim for medical attendance during such period cannot be made to cover a long period during which the decedent lingered, partially convalescing, the attendance being broken off during the convalescent period and again renewed on the decedent's relapse.³ However, the expression means more than the period during which the decedent was *in extremis*.⁴

What Expenses Allowable. — No rule can be laid down as to what shall be allowed as the expenses of the last illness. It includes, of course, the necessary medical attendance and nurse-hire; and the degree of attention will vary with the nature of the disease and the situation of the patient.⁵

incurred in the preservation, safe keeping, and management of the estate." *Manning v. Mayes*, 79 Tex. 653.

But not costs paid in a suit by an administrator, on compromise with the debtor, without an order of court. *Patapsco Guano Co. v. Ballard*, 107 Ala. 710.

Fees of Counsel employed by an independent executor should be placed in the second class as expenses of administration. *Callaghan v. Grenet*, 66 Tex. 236.

Mortgage to Pay Debts. — Where the property of an estate is, in accordance with directions in the will, mortgaged to pay debts, such mortgage takes precedence of the debts of the decedent. *Iowa L. & T. Co. v. Holderbaum*, 86 Iowa 1.

Settlement of Estate of Third Person. — Expenses in the settlement of an estate of which the decedent was administrator are not allowable against his estate as administration expenses. *Vansandt v. Weir*, 109 Ala. 104.

For a Full Discussion as to what constitute expenses of administration see the title EXECUTORS AND ADMINISTRATORS.

Expenses of Carrying On Testator's Business. — Debts incurred by the decedent are to be paid out of the assets of the estate in preference to debts incurred in carrying on the decedent's business, even though the will directs that the testator's property shall be liable for debts so incurred. *Morrow v. Morrow*, 2 Tenn. Ch. 540. Compare *Payne v. Dundee Land, etc., Invest. Co.*, (Miss. 1894) 14 So. Rep. 269. See also the title EXECUTORS AND ADMINISTRATORS.

1. *Expenses of Last Illness.* — See the local statutes.

Inferior to Debts Due United States. — A claim for expenses during the last illness, though ranked by the state statutes ahead of claims due the United States, is still inferior to them. *Postmaster-Gen. v. Robbins*, 1 Ware (U. S.) 165; *U. S. v. Eggleston*, 4 Sawy. (U. S.) 199. See *infra*, section *Public Debts* — *Debts Due the United States*.

2. *Bennett v. Ives*, 30 Conn. 329.

3. *Changing Physician when Convalescent.* — In *Reese's Estate*, 2 Pearson (Pa.) 482, it ap-

peared that the decedent received a personal injury and called in a physician to attend him, and after partially recovering so as to attend to his business was again taken ill, and called in another physician, and died. The court held that the claim of the first physician was not entitled to a preference under Act of Feb. 24, 1834, preferring claims for medical attendance during the last illness. In this case the court aptly remarked that, if the statute were construed to cover such a claim, it "might run over a long lifetime, as some persons are never in good health, but linger under the same disease from the cradle to the grave."

4. *Percival v. McVoy*, *Dudley L.* (S. Car.) 337; *McLean v. Crow*, 88 Cal. 644; *Huse v. Brown*, 8 Me. 167.

Statute to Be Liberally Construed. — In *Percival v. McVoy*, *Dudley L.* (S. Car.) 337, *Richardson, J.*, said: "The court can lay down no rule or limitation for the duration of the last sickness of a man. * * * A wounded man may linger a long time in a helpless state, and chronic diseases and some cancers run through more time than a year. The Act concurs with the principles of Christian civilization, and is remedial of a common want and necessity — attention and services during last sickness. We must, therefore, construe it liberally, and let it endure to its proper end, the full relief of the sick and the infirm."

Question for Jury. — In *Huse v. Brown*, 8 Me. 167, wherein a claim was presented for medical attendance rendered a decedent who died of a cancer, the court said that a sickness, however long its duration, which terminated in the death of the decedent, was included in the expression "last illness," and held that the question as to the length of the period for which the claim could be maintained as services rendered in the last illness was for the jury.

5. *Percival v. McVoy*, *Dudley L.* (S. Car.) 337.

Nursing During Last Sickness. — The expenses of nursing the deceased during his last illness are part of the expenses of such illness. *Percival v. McVoy*, *Dudley L.* (S. Car.) 337.

In *Silvius's Estate*, 3 Lack. Leg. N. (Pa.) 84,

(4) *Judgments and Decrees* — (a) *In General* — *aa. JUDGMENTS.* — At common law judgments recovered against a decedent in his lifetime were, because of their superior character as debts of record, given a preference over other claims against the decedent of less dignity, such as debts founded on specialties and on simple contracts.¹

Spanish Law. — Under the Spanish law which is in force in *New Mexico* judgments are given no preference.²

Statutory Modification. — In a number of the states the preference as to judgments has been abolished, and in such states a judgment, unless it constitutes a lien on the property of the decedent, has no right on account of its character as a judgment to any preference in payment.³

What Judgments Entitled to Preference. — All kinds of judgments were included in the rule giving a preference to judgments recovered against the decedent, such as judgments by confession, judgments of inferior courts of record, and dormant judgments,⁴ but not foreign judgments which rank merely as simple contract debts.⁵ The character of the cause of action on which the judgment

it was held that the term "medical attendance" included the services of a professional nurse.

1. **Judgments — Common Law.** — *Robinson v. Tonge*, 3 P. Wms. 398; *Bereblock v. Read*, Cro. Eliz. 734, 822.

2. *Crenshaw v. Delgado*, 1 N. Mex. 376.

3. *Paschall v. Hailman*, 9 Ill. 285; *Turney v. Gates*, 12 Ill. 141; *Clingman v. Hopkie*, 78 Ill. 152; *Prewett v. Goodlett*, 98 Tenn. 82.

4. **What Judgments Have Priority — Judgments by Confession.** — *Erby v. Erby*, 1 Salk. 80.

Judgments of Inferior Courts of Record. — *Searle v. Lane*, 2 Vern. 89.

Judgment of Justice of the Peace. — *State v. Johnson*, 7 Ired. L. (29 N. Car.) 231; *Scott v. Ramsay*, 1 Binn. (Pa.) 221. But see to the contrary *Bettinger v. Ridgway*, 4 Cranch (C. C.) 340; *Sherwood v. Johnson*, 1 Wend. (N. Y.) 445; *Stevenson v. Weissner*, 1 Bradf. (N. Y.) 343.

Dormant Judgment. — The dignity or right of the judgment to preference is not affected by the fact that the judgment was dormant. *Bettinger v. Ridgway*, 4 Cranch (C. C.) 340.

But see *Williams v. Price*, 21 Ga. 507, wherein it was held that a dormant judgment does not rank as a judgment under a statute (Cobb 287) directing judgments to be paid in the order of their date, but only judgments constituting liens on the property of the decedent are included.

A Judgment Becoming Dormant After the Decedent's Death is not entitled to preference as against a later judgment which had not become dormant, the estate not being shown to be insolvent. *Colson v. Kennedy*, 88 Ga. 174.

Settlement of Account by Probate Court. — The settlement of an executor's account by the probate court, showing a balance in his hands, is not a judgment so as to entitle it to preference as such against the executor's estate. *Kehoe's Estate*, Myr. Prob. (Cal.) 127; *Robinson v. Robinson*, 3 Harr. (Del.) 433; *Ramsey's Appeal*, 4 Watts (Pa.) 71.

Waiver of Priority of Judgment. — Action upon the judgment does not waive the preference. *Erby v. Erby*, 1 Salk. 80.

Accepting a mortgage from the executor of the judgment debtor and assigning to the executor the decree, is a waiver of the preference

of the decree against the judgment debtor's estate. *Coates v. Muse*, 1 Brock. (U. S.) 551.

Subrogation. — A joint judgment against a principal and surety is not extinguished in equity by a payment by the surety who took an assignment of the judgment, and in settling the estate of the principal it should have priority as a judgment. *Goodyear v. Watson*, 14 Barb. (N. Y.) 481. See the title SUBROGATION.

Admiralty Stipulation. — A judgment entered after the decedent's death upon a stipulation in admiralty given by him is not entitled to priority. *Bernes v. Weissner*, 2 Bradf. (N. Y.) 212.

Judgments Against Representatives. — A judgment against the representative did not rank as a judgment, but merely entitled the creditor to a preference as against other creditors of the same class as the claim upon which the judgment was recovered. *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Ainslie v. Radcliff*, 7 Paige (N. Y.) 445; *Mount v. Mitchell*, 31 N. Y. 356; *St. John's Estate*, Tuck. (N. Y.) 126; *Parker v. Gainer*, 17 Wend. (N. Y.) 559.

5. **Foreign Judgments.** — *Harris v. Saunders*, 4 B. & C. 411, 10 E. C. L. 373; *Wilson v. Dunsany*, 18 Beav. 293, 18 Jur. 762, 23 L. J. Ch. 492; *Duplex v. De Roven*, 2 Vern. 540.

Priority in Assets Transmitted from Foreign State. — In *Cook v. Gregson*, 2 Drew. 286, 23 L. J. Ch. 734, it was held that where a person died domiciled in Ireland, having property in both England and Ireland, an Irish judgment had priority over simple contract creditors in the administration of Irish property remitted to England for administration.

A Judgment of a Sister State ranks only as a foreign judgment at common law, and is therefore to be placed with simple contract debts. *M'Elmoyle v. Cohen*, 13 Pet. (U. S.) 328; *Ten Eyck v. Ten Eyck*, cited in *M'Elmoyle v. Cohen*, 13 Pet. (U. S.) 329; *Green v. Brooks*, 25 Ark. 318; *Brengle v. McClellan*, 7 Gill & J. (Md.) 434; *Harness v. Green*, 20 Mo. 316; *Gainey v. Sexton*, 29 Mo. 449; *Matter of Cuthbert*, 2 Bradf. (N. Y.) 103; *Cameron v. Wurtz*, 4 McCord L. (S. Car.) 278. See, however, *Bond's Case*, 1 Whart. Dig., p. 371, No. 73; *Colt's Estate*, 4 W. & S. (Pa.) 314; *Rice v. Harbeson*, 63 N. Y. 503.

was recovered was immaterial in determining the priority of the judgment.¹

Requisites of Judgment. — It was not necessary that the judgment should have been entered at the time of the decedent's death, provided it was recovered before his death;² nor was it necessary, under the common law, that the judgment constitute a lien on the decedent's property to entitle it to a preference.³ In some states, however, a preference is only given to judgments which constitute or would have constituted liens on the decedent's land if he had had any.⁴ But to entitle the judgment to preference it was necessary that it should have been a final one.⁵

Formal Defects in the judgment will not defeat its preferential right.⁶

bb. DECREES. — A decree in equity, adjudging that one person shall pay a sum of money to another, is in its form, substance, and effect a judicial sentence, as much so as a judgment of a common-law court, and has always been regarded as standing in the same rank with judgments and possessing equal dignity and entitled to the same preference in the distribution of the assets of the estate of an insolvent decedent.⁷

Finality of Decree. — A decree, as in case of a judgment, must, to entitle it to priority, be a final one.⁸

Power of State to Prefer Its Own Judgments. — A state has power to give a preference to its own judgments over the judgments of other states in the settlement of the estates of decedents. *Harness v. Green*, 20 Mo. 316.

1. *Ainslie v. Radcliff*, 7 Paige (N. Y.) 439.

2. **Necessity for Entry of Judgment Before Death of Decedent.** — The death of a defendant after *nisi prius* and before day in bank does not defeat the right of the judgment to preference. *Burnet v. Holden*, 1 Mod. 6.

Judgment by Confession. — The death of the decedent before end of the term at which the judgment was confessed did not prevent its preference. *Nichols v. Chapman*, 9 Wend. (N. Y.) 452.

A Judgment on a Verdict Entered Against the Decedent was entitled to priority though the judgment was not entered until after his death. *Colebeck v. Peck*, 2 Ld. Raym. 1280; *Mills v. Jones*, 2 Rich. L. (S. Car.) 393; *Dibble v. Taylor*, 2 Spears L. (S. Car.) 308, 42 Am. Dec. 368.

A judgment entered against a decedent after his death, on verdict rendered during his life, is entitled to preference as a judgment "docketed" against the decedent (2 Rev. Stat. 87, § 27, subd. 3). *Matter of Dunn*, 5 Redf. (N. Y.) 27.

Under a statute preferring judgments which constituted liens on the defendant's property (*Purd. Dig.* 421, pl. 85), a judgment entered after his death, but on the same day, is not entitled to a preference. *Patterson's Appeal*, 96 Pa. St. 93. See also *Clark's Case*, 15 Abb. Pr. (N. Y. Supreme Ct.) 227.

3. **Necessity that Judgment Constitute a Lien.** — *Peters v. Holliday*, 40 Mo. 544; *Ainslie v. Radcliff*, 7 Paige (N. Y.) 439; *Galloway v. Bradfield*, 86 N. Car. 163.

Property Fraudulently Assigned. — In *Le Prince v. Guillemot*, 1 Rich. Eq. (S. Car.) 187, it was held, however, that a judgment recovered against a defendant after a fraudulent assignment of his property and before proceedings to set aside the assignment, would not be entitled to any preference as to such property when recovered by the representative of the fraudulent vendor.

4. *Tucker v. Yell*, 25 Ark. 420.

A Delivery Bond Judgment is a lien on the land of the obligor so as to entitle it to a preference. *Eddins v. Graddy*, 28 Ark. 500.

5. **Finality of Judgment Essential.** — *Thomas v. M'Elwee*, 3 Strobb. L. (S. Car.) 131; *McIntosh v. Wright*, Rich. Eq. Cas. (S. Car.) 385, 3 Strobb. L. (S. Car.) 133, note; *Rutledge v. Simpson*, (Mo. 1897) 42 S. W. Rep. 820.

Judgment Quod Computet Does Not Rank as a Judgment. — *Smith v. Eyles*, 2 Atk. 385; *Searle v. Lane*, 2 Freem. 103.

6. *Hardin v. Melton*, 28 S. Car. 38.

7. **Decrees Rank with Judgments.** — *Smith v. Eyles*, 2 Atk. 385; *Shafto v. Powel*, 3 Lev. 355; *Darston v. Orford*, Pre. Ch. 188; *Bishop v. Godfrey*, Pre. Ch. 179; *Robinson v. Tonge*, 3 P. Wms. 401, note *f*; *Astley v. Powis*, 1 Ves. 495; *Mildred v. Robinson*, 19 Ves. Jr. 585; *Ex p. Farrars*, 13 S. Car. 254; *Woddrop v. Ward*, 3 Desaus. (S. Car.) 203; *Cook v. Jennings*, 40 S. Car. 204.

In *Harding v. Edge*, 1 Vern. 143, however, it was held that a decree was to be paid after judgments, but before bonds, etc.

Early Recognition of Rule. — In *Searle v. Lane*, 2 Vern. 37, 88, the court said (p. 89): "Nothing is more frequent in practice or better known than that a decree of this court is equal to a judgment at law."

A Decree Requiring a Defendant to Pay Over Money to a Receiver is entitled to a preference equally with judgments. *Tucker v. Yell*, 25 Ark. 420.

Construction of Statute. — *New Jersey Rev.*, p. 770, § 81, giving "judgments" a preference, includes decrees. *Newark Second Nat. Bank v. Blauvelt*, 44 N. J. Eq. 173.

8. **Decree Must Be Final.** — *Wilson v. Dun-sany*, 18 Beav. 293; *Ex p. Farrars*, 13 S. Car. 254.

Orders. — A decretal order for payment of money on which execution may issue is entitled to preference. *Haskell v. Raoul*, 1 McCord Eq. (S. C. r.) 22.

Decree Quod Computet. — A decree *quod computet* is not entitled to any preference. *Smith v. Eyles*, 2 Atk. 385.

(b) **Priority Between Judgments.** — Mere priority in date of recovery gave no preference in payment, but where two or more judgments had been entered against the same person before his death, neither after the defendant's death was entitled to a preference over the others in the distribution of the defendant's estate, unless such preference had been acquired by levy or some proceeding on the part of the judgment creditor.¹ But the statutes of a number of the states which have not abolished the preferential right of judgments, as a general rule, direct their payment in the order of their date, or according to their priority; and it has been held that where the statute directs the payment of judgments "docketed," and decrees "enrolled," in the order of their priority, their priority is determined by the date of docketing the judgment or enrolling the decree without reference to the date of the recovery.²

(c) **Necessity for Presentation of Judgments.** — In some states a preference is given judgments, and is also given after judgments, to claims presented within a year. In such states a judgment to entitle it to preference must be presented within the year.³

(d) **Abolishing Preferences — Constitutional Law.** — An act abolishing the preferential right of judgments over specialty and simple contract debts does not impair the obligation of contracts, where the judgment debtor died after the passage of the act, as applied to judgments recovered prior to the passage of the act.⁴

(e) **Necessity for Notice to Representative.** — At common law the personal representative was required at his peril to take notice of all judgments of courts of record, rendered against his decedent; and where he paid a debt of inferior dignity, though without notice of the judgment, he was liable therefor to the judgment creditor as for a devastavit.⁵ Owing to the hardship of this rule of the common law, the statute of 4 & 5 W. & M., c. 20, was passed in England, which provided in effect that no judgments in certain courts should have any preference, unless they had been docketed as prescribed by the statute.⁶ This

Foreclosure Decree. — Where a simple decree of foreclosure is rendered against a debtor in his lifetime, but no sale is made thereunder, and no deficiency ascertained to exist until after his death, a claim for a deficiency reported after his death does not rank as a judgment. *Cook v. Jennings*, 40 S. Car. 204. See also *Reinig v. Hartman*, 69 Wis. 28.

1. **No Priority at Common Law Between Judgments.** — *Newark Second Nat. Bank v. Blaauvelt*, 44 N. J. Eq. 173; *Ainslie v. Radcliff*, 7 Paige (N. Y.) 439.

2. *Ainslie v. Radcliff*, 7 Paige (N. Y.) 439; *Matter of Townsend*, 83 Hun (N. Y.) 200. See, however, *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619.

3. *Keith v. Parks*, 31 Ark. 664. See also *Converse v. Sorley*, 39 Tex. 515.

Scire Facias against the administrator for revival of the judgment has been held a sufficient presentation. *Eddins v. Graddy*, 28 Ark. 500. But see *Birdwell v. Kauffman*, 25 Tex. 189.

4. In *Deichman's Appeal*, 2 Whart. (Pa.) 395, 30 Am. Dec. 271, Sergeant, J., in speaking of such an act, said: "The provision is a future one, operating prospectively and not affecting an antecedent right. The rule of distribution is the remedy furnished by the law on the occurrence of uncertain and subsequent events, namely, the death of the party without payment and the incapacity of his estate to discharge his debts. In such case the law steps in to provide a rule founded either on principles of equity or public policy, which the legis-

lature, both of the province and state, have been in the habit of changing from time to time, according to the change of circumstances." See also *Com. v. Lewis*, 6 Binn. (Pa.) 266; *Place v. Oldham*, 10 B. Mon. (Ky.) 400.

5. **Representative Required to Take Notice of Judgments.** — *Fuller v. Redman*, 26 Beav. 600; *Shafto v. Powell*, 3 Lev. 355; *Herbert's Case*, 3 P. Wms. 116; *Hopkirk v. Pendleton*, opinion by Marshall, C. J., cited in *Hutchcraft v. Tilford*, 5 Dana (Ky.) 356; *Lenoir v. Winn*, 4 Desaus. (S. Car.) 65. 6 Am. Dec. 597; *Nimmo v. Com.*, 4 Hen. & M. (Va.) 57, 4 Am. Dec. 488; *Mayo v. Bentley*, 4 Call (Va.) 528. But see *Hutchcraft v. Tilford*, 5 Dana (Ky.) 353; *Harman v. Harman*, 3 Mod. 115; *Hickey v. Hayter*, 6 T. R. 388.

The representative is required to take notice of judgments rendered in the county in which the decedent lived and died. *Hutchcraft v. Tilford*, 5 Dana (Ky.) 353; *Place v. Oldham*, 10 B. Mon. (Ky.) 400.

Inferior Courts. — This rule applies to inferior courts of record as well as to superior courts of record, and it has been said that the representative was required to take notice of a judgment of the court of *piepoudre*. *Searle v. Lane*, 2 Vern. 89.

Decree. — The representative is required to take notice of decrees as well as of judgments. *Searle v. Lane*, 2 Vern. 37; *Shafto v. Powell*, 3 Lev. 355.

6. *Harman v. Harman*, 3 Mod. 115.

In *Hall v. Tapper*, 3 B. & Ad. 655, 23 E. C.

statute was repealed by the statute of 2 & 3 Vict., c. 11, which closed the docket;¹ but the protection given by the former statute to representatives was again restored by 23 & 24 Vict., c. 38, § 3.²

(5) *Specialty Debts* — (a) *In General*. — At common law the debts next in order of payment to debts of record were specialty debts. The distinction, however, between specialty debts and simple contract debts has been abolished in *England*,³ and in nearly all the *United States*; a very few of the states, however, still give a preference to specialty debts on account of their character as such.⁴

(b) *What Constitute Specialty Debts* — *aa. In General*. — A specialty debt is a debt due by deed or other instrument under seal,⁵ and includes all covenants whether for the payment of money, or the performance of some act,⁶ and it

L. 152, it was held that a judgment not docketed, pursuant to 4 & 5 W. & M., c. 20, was not entitled to a preference, though the administrator had notice of it.

1. Fuller v. Redman, 26 Beav. 600.

2. In Waller v. Turner, 10 Jur. N. S. 147, it was held, under 23 & 24 Vict., c. 38, § 3, that where judgments are not registered so as to create a lien on land they have no priority over simple contract debts, and that an executor, even with notice of the judgment debts, is justified in parting with the assets to simple contract creditors.

3. 32 & 33 Vict., c. 46.

4. *Delaware*. — Laws, p. 676, § 25; Robinson v. Robinson, 3 Harr. (Del.) 440.

By the *Georgia Code* 1895, § 3424, specialty debts are classed with liquidated demands.

5. *Specialty Debts* — *England*. — Powdrell v. Jones, 18 Jur. 1048; Eyre v. Monro, 3 Kay & J. 305; Re Dickson, 40 L. J. Ch. 707; Hodgson v. Shaw, 3 Myl. & K. 183; Tanner v. Byne, 1 Sim. 160; Turner v. Wardle, 7 Sim. 80; Greenwood v. Taylor, 14 Sim. 505.

Georgia. — Speer v. Wilkins, 31 Ga. 289.

South Carolina. — M'Dowell v. Caldwell, 2 McCord Eq. (S. Car.) 56, 16 Am. Dec. 635.

Pennsylvania. — Frazer v. Tunis, 1 Binn. (Pa.) 254.

Interest After the Decedent's Death on a preferred bond debt is also preferred. Shultz's Appeal, 11 S. & R. (Pa.) 182.

A Recognizance Not Enrolled ranks as a specialty debt. Bothomly v. Fairfax, 1 P. Wms. 334.

A Recognizance Not Regularly taken also ranks as a specialty debt. Bothomly v. Fairfax, 1 P. Wms. 334.

A Deed of Trust signed by a trustee and containing a covenant for performance of the trust creates a specialty debt in favor of the *cestui que trust*. Richardson v. Jenkins, 17 Jur. 446; Turner v. Wardle, 7 Sim. 80; Benbury v. Benbury, 2 Dev. & B. Eq. (22 N. Car.) 235. See, however, Holland v. Holland, L. R. 4 Ch. 449. But it is otherwise when the trustee does not join in the deed. Adey v. Arnold, 2 DeG. M. & G. 432; Wynch v. Grant, 2 Drew. 312; Holland v. Holland, L. R. 4 Ch. 449; Benbury v. Benbury, 2 Dev. & B. Eq. (22 N. Car.) 235. See also Isaacson v. Harwood, L. R. 3 Ch. 225; Newport v. Bryan, 5 Ir. Ch. Rep. 119.

Devastavit. — The liability of an administrator to the estate for a devastavit, where no proceedings on the administration bond had been instituted prior to his death, does not rank

as a specialty debt. Parker v. Young, 6 Beav. 261. See also Thorne v. Kerr, 2 Kay & J. 54; Rolain v. Darby, 1 McCord Eq. (S. Car.) 472.

The administrator's liability to a bond creditor of the estate arising out of a devastavit is not a specialty debt. Carow v. Mowatt, 2 Edw. Ch. (N. Y.) 57. See, however, Rice v. Cannon, Bailey Eq. (S. Car.) 165; and M'Dowell v. Caldwell, 2 McCord Eq. (S. Car.) 56, 16 Am. Dec. 635, wherein it was held that the balance due to the wards from the guardian, who had given bond, ranked as a specialty debt in the administration of the guardian's estate. And also Gadsden v. Lord, 1 Desaus. (S. Car.) 208, wherein it was held that a claim against the husband of an executrix for funds of the estate misappropriated by him, ranked as a bond debt, the decision being based on the ground that it was the duty of the husband to have executed a bond to the estate for the money, and the principle applied that equity would regard as done what ought to be done.

Bond Due After Decedent's Death. — A bond for unconditional payment of money, though not due till after the decedent's death, ranks equally with those due at that time. Hutchison v. Bates, 1 Bailey L. (S. Car.) 111.

An Award on a Submission Under Seal is not a specialty debt. Talbot v. Shrewsbury, 42 L. J. Ch. 877.

An Agreement Not Under Seal to Execute a Bond does not entitle the promisee to rank as a specialty creditor. Johnson v. Slawson, Bailey Eq. (S. Car.) 463.

6. *Covenants* — *Marriage Settlements*. — Eyre v. Monro, 3 Kay & J. 305; Daves v. Haywood, 2 Dev. & B. Eq. (22 N. Car.) 313.

A Covenant to Pay by "Bills of Exchange" a debt created by the instrument containing the covenant creates, in case the bills of exchange are dishonored, a specialty debt. Copland v. Martin, 9 Sim. 433.

A Covenant for the Payment of an Annuity creates a specialty debt, though the annuity did not become in arrears until after the covenantor's death. Jenkins v. Briant, 6 Sim. 603.

A Covenant for the Payment of Rent is independent of the estate in the property, and a claim for rent due previous to a surrender of the lease ranks as a specialty debt. Atty.-Gen. v. Cox, 3 H. L. Cas. 240.

Covenant for Quiet Enjoyment. — Bath v. Bradford, 2 Ves. 587.

A Covenant for Indemnity against partnership debts creates a specialty debt against the covenantor. Musson v. May, 3 Ves. & B. 194.

was also immaterial as affects the dignity of the demand whether the covenant was broken before the death of the covenantor or not,¹ but until the condition of a bond was broken the representative was not bound to respect it.² The mere acknowledgment under seal of a debt has been held insufficient to render it a specialty debt.³

bb. CLAIM OF SURETY FOR REPAYMENT. — By the early *English* rule a bond or other specialty was not extinguished by the payment thereof by the surety, but was in equity kept alive for his protection. Later, however, the rule was that the security was deemed *ipso facto* extinguished by the act of payment, the claim of the surety being a mere assumpsit for money paid to the use and benefit of the principal. But at present the early rule obtains by force of a statute known as the Mercantile Law Amendment Act. In the *United States*, although there is much conflict upon the question, the decided preponderance of authority is that the security is preserved in equity for the surety's benefit. This entire subject will be found treated under another title in this work.⁴

cc. VOLUNTARY BOND. — A voluntary bond does not rank as a specialty debt, but is postponed to any just debts, though due by simple contract.⁵

dd. PRIORITY BETWEEN SPECIALTIES. — As a general rule all specialty debts are of equal rank; still specialties for the payment of sums certain are to be preferred in the payment of debts to demands on specialties sounding in damages.⁶

(6) *Rent* — (a) *In General*. — The preference given by the common law to claims for rent, which were ranked with specialty debts, has been abolished in *England*,⁷ and also in nearly all of the *United States*. A few of the states, however, still accord to such claims a preference.⁸

Lien for Rent. — The lien of the landlord for rent is not extinguished by the death of the lessee, and thus, though his claim for rent may not be entitled to any preference on account of the character of the debt, yet his lien may be enforced and a preference thus indirectly secured.⁹

1. Breach of Covenant After Death of Covenantor. — *Jenkins v. Briant*, 6 Sim. 603; *Bath v. Bradford*, 2 Ves. 587; *Eyre v. Monro*, 3 Kay & J. 305.

2. *Davis v. Smith*, 5 Ga. 292, 48 Am. Dec. 279.

3. Acknowledgment Under Seal. — *Jackson v. North-Eastern R. Co.*, 47 L. J. Ch. 303; *Lacam v. Mertins*, 1 Ves. 312; *Powell v. White*, 11 Leigh (Va.) 322.

4. See the title SUBROGATION.

5. Voluntary Bond. — *Jones v. Powell*, 1 Eq. Abr. 84; *Ramsden v. Jackson*, 1 Atk. 294; *Boughton v. Boughton*, 9 Mod. 212; *Bedford v. Gibson*, 9 Mod. 412; *Lomas v. Wright*, 2 Myl. & K. 769; *Lechmere v. Carlisle*, 3 P. Wms. 222; *Isenhardt v. Brown*, 2 Edw. Ch. (N. Y.) 341; *Stephens v. Harris*, 6 Ired. Eq. (41 N. Car.) 57.

An Assignee for Value, however, of an equitable interest in money payable under a voluntary bond, is entitled to rank with other specialty creditors of the obligor. *Payne v. Mortimer*, 4 De G. & J. 447.

6. Priority Between Specialties. — *Whitchurch v. Bayntun*, 2 Vern. 272; *Fletcher v. Stone*, 2 Vern. 273.

Statute 3 & 4 Wm. 4, c. 104, gave a preference between specialties in which the heirs of the obligor were bound as against specialties in which they were not. *Richardson v. Jenkins*, 17 Jur. 446. See, however, *Cummins v. Cummins*, 8 Ir. Eq. Rep. 723.

7. *Rent*. — *In re Hastings*, 6 Ch. Div. 610, wherein it was held that the Act 32 & 33 Vict.,

c. 46, providing that no liability of a decedent should be entitled to any preference merely because the same is secured by or under a bond, deed, or other instrument under seal, or "is otherwise made or constituted a specialty debt," abolished the common-law preference given to claims for rent.

8. Statutory Provisions — *Delaware*. — Rents for not exceeding one year are preferred. Laws, p. 676, § 25.

Georgia. — Code 1895, § 3424.

Maryland. — Rents for which distress could be made are preferred. Gen. Laws, Act 93, p. 1354.

New York. — To authorize the payment of rent as a preferred claim it must be for the benefit of the estate. 3 Rev. Stat., p. 174 (5th ed.), § 34; *Cooper v. Felter*, 6 Lans. (N. Y.) 485; *Hovey v. Smith*, 1 Barb. (N. Y.) 372; *Harris v. Meyer*, 3 Redf. (N. Y.) 450.

Rent due for a pew in a church cannot be paid as a preferred debt unless due on a lease for a term of years, as otherwise its payment cannot inure to the benefit of the estate. *Johnson v. Corbett*, 11 Paige (N. Y.) 268.

Pennsylvania. — 1 Bright. Purd. Dig., p. 591, § 109.

South Carolina. — Gen. Stat. 1882, § 1926.

9. Lien for Rent. — *Lillard v. Noble*, 159 Ill. 311, affirming 57 Ill. App. 27.

Waiver of Lien. — Acceptance by the landlord of letters of administration on the estate of the lessee is not a waiver of his lien for rent. *Lillard v. Noble*, 159 Ill. 311.

Presentation and allowance of claim for rent

(b) **What Constitute Claims for Rent.** — To constitute a claim for rent the relation of landlord and tenant must have existed between the claimant and the decedent.¹ However, it is not necessary that the tenancy should have existed at the time of the decedent's death;² nor is it material how the tenancy was created, whether by instrument under seal or by parol agreement.³ A claim for money payable for the privilege of taking coal from a mine is entitled to a preference as rent.⁴ And also when the tenant agrees to pay the taxes on the land or to repair, etc., in addition to the rent, the lessor is entitled to a preference for the amount of the claim arising out of such agreement as a part of the rent.⁵

(c) **Extent of Preference.** — Under a statute preferring claims for rent "provided that such rent shall not exceed one year's rent," the landlord is entitled to have his claim preferred for rent for a year, though that year be not the last year.⁶ And where the statute prefers rent for which distress could be made, rent accruing after the lessee's death is entitled to a preference.⁷ Interest on rent preferred is not allowable as a preferred claim.⁸

(7) **Wages.** — In a number of the states a preference is given by statute, in favor of the claims of the employees of a decedent, for wages.⁹

are not a waiver of the lien. *Lillard v. Noble*, 159 Ill. 311.

Distress for Rent After Administration Granted. — In the states where distress for rent has not been abolished, distress may be made after administration granted. *Hovey v. Smith*, 1 Barb. (N. Y.) 372. See, however, *Lillard v. Noble*, 159 Ill. 311.

Before Administration Granted. — But not before administration granted. *Hughes v. Sebree*, 2 A. K. Marsh. (Ky.) 227.

Landlord Appointed Administrator. — Acceptance by a landlord of letters of administration is a waiver of his right of distress. *Hovey v. Smith*, 1 Barb. (N. Y.) 372.

For a full discussion of the lien of a landlord, see the title LANDLORD AND TENANT.

1. **Agreement to Lease.** — A claim for damages for refusal on the part of the lessee to perform an agreement to lease is not entitled to a preference as a claim for rent. *Talbot v. Shrewsbury*, L. R. 16 Eq. 26.

Entry and payment of rent under and in accordance with an agreement to lease will, however, entitle the lessor to claim a preference for subsequent rents. *Kidd v. Boone*, L. R. 12 Eq. 89.

Use and Occupation. — A distinction is made between a claim for rent and a claim for compensation for use and occupation; the latter is not preferred when the decedent entered under a void lease. *Vincent v. Godson*, 4 De G. M. & G. 546.

2. **Termination of Tenancy Before Death of Lessee** did not defeat the right of preference. *Vincent v. Godson*, 4 De G. M. & G. 551; *Newport v. Godfrey*, 4 Mod. 44.

3. **Parol Lease.** — Rent accruing in the lifetime of the lessee, though reserved on a parol lease, is to be preferred. *Vincent v. Godson*, 4 De G. M. & G. 546; *Newport v. Godfrey*, 4 Mod. 44; *Thompson v. Thompson*, 9 Price 464; *Willett v. Earle*, 1 Vern. 490.

Land in Foreign Country. — In *Vincent v. Godson*, 4 De G. M. & G. 546, it was held that the preference given claims for rent was an incident to tenure and not to contract — that is, to privity of estate, and not to privity of con-

tract — and did not extend to a claim for rent due on a parol lease of lands in a foreign country. See also *Barker v. Damer*, Carth. 182.

Notice to the Representative of the existence of the claim for rent is necessary to charge him for a devastavit in paying an inferior debt. *Clough v. French*, 9 Jur. 1029.

4. **Mining Lease.** — *Greenough's Appeal*, 9 Pa. St. 18.

5. **Covenant for Payment of Taxes.** — *Morgan's Estate*, 1 Pa. Dist. Rep. 402.

A Covenant for Payment of Gas used on the premises renders its payment a part of the rent. *Fernwood Masonic Hall Assoc. v. Jones*, 102 Pa. St. 307.

Agreement to Repair. — The same has been held true as regards a claim arising out of the lessee's agreement to repair. *Kidd v. Boone*, L. R. 12 Eq. 89.

6. **Extent of Preference.** — *Ege v. Ege*, 5 Watts (Pa.) 140; *Richie v. McCauley*, 4 Pa. St. 471; *Parker's Appeal*, 5 Pa. St. 390; *Martin's Appeal*, 33 Pa. St. 395; *Weltner's Appeal*, 63 Pa. St. 302; *Morgan's Estate*, 11 Pa. Co. Ct. Rep. 536.

7. **Rent Accruing After Lessee's Death.** — *Longwell v. Redinger*, 1 Gill (Md.) 57.

8. **Interest on Rent Not Preferred.** — *Vandegriff's Estate*, 3 Pa. Dist. Rep. 421.

9. **Wages.** — See, for example: *Alabama*. — 1 Civil Code, § 2079; *Hullett v. Hood*, 109 Ala. 345.

Arkansas. — Dig. 1894 (S. & H.), c. 1, § 109.

California. — Code Civ. Prac., § 1205.

Delaware. — Laws, p. 676, § 25.

Illinois. — Ann. Stat. (S. & C. ed.), c. 3, § 71.

Indiana. — Stat. 1896, § 2378.

Kansas. — Gen. Stat. 1889, § 2864.

Maryland. — Code Pub. Local Laws, §§ 99-103, providing for the security of claims due employees by mining operators, creates by implication a lien in favor of the employees which survives the death of the employer. *Everett v. Avery*, 19 Md. 136.

Massachusetts. — Pub. Stat. 1882, c. 127, § 1.

Missouri. — Rev. Stat. 1889, § 183, p. 156.

Montana. — Comp. Stat., § 273.

North Carolina. — Code 1883, § 1416.

Who Are Servants. — In some of the statutes the preference is given to debts due to employees, whereas in other statutes it is restricted to wages due servants; and it has been held that the term "servants" was confined to that class of persons who make a part of a man's family, whose employment is about the house or its appurtenances, such as the stable, etc., or who reside in the house, and are at the command of the master, to be employed at his pleasure, either in the house or elsewhere.¹

Term of Employment. — A preference given to wages due servants for not exceeding one year, includes not only wages of servants who were in the employ of the decedent at the time of his death, but also those who had left his service;² and it is not restricted to wages due the last year of the decedent's life.³

Waiver of Preference. — The right of preference given to servants is waived by their acceptance from the deceased of an obligation payable at a future day with interest.⁴

(8) *Fiduciary Debts* — (a) **In General** — **Following Trust Funds.** — A *cestui que trust* may follow and reclaim from the personal representative trust funds, in so far as they can be specifically traced and segregated from the property of the decedent, such rights existing from the fact that such funds do not become any part of the assets of the estate.⁵

Preference of Fiduciary Debts. — But where the trust funds could not be specifically traced or segregated no preference therefor, as against other creditors of the trustee, existed at common law, in favor of the *cestui que trust*.⁶

Ohio. — Rev. Stat. (Giauque's ed.), § 6090.

Oregon. — Hill's Ann. Laws, § 1183.

Pennsylvania. — 1 Bright. Purd. Dig., p. 591, § 109.

1. "Servants," **Meaning of Term.** — *Ex p.* Meason, 5 Binn. (Pa.) 167.

A Person Hired at a Monthly Salary, residing in the house of his employer and assisting in the domestic labors whenever required, is a "servant" (Act Apr. 1894), though he is chiefly engaged in assisting his employer, a victualer, in his market and slaughter-house. *Miller's Estate*, 1 Ashm. (Pa.) 323.

Workmen in an Iron Foundry are not included in the term "servants." *Ex p.* Meason, 5 Binn. (Pa.) 167.

An Overseer on a Plantation is not a "laborer" (Code, § 1895 2793), unless he also works as a common day laborer, so as to give him a lien on the products of the plantation, in the hands of the representative of the employer. *Rust v. Billingslea*, 44 Ga. 306.

A Farm Laborer is not a "servant." *Matter of M'Kim*, 3 Pa. L. J. 502.

A Bookkeeper in a Tavern is included in the term "servants." *Boniface v. Scott*, 3 S. & R. (Pa.) 351.

Clerk in Store. — In *Cawood v. Wolfley*, 56 Kan. 281, however, it was held that a clerk in the decedent's store was included in the term "servant;" the court expressly refused to restrict the meaning of the word to "menial or household servants."

2. **Time of Employment.** — *Martin's Appeal*, 33 Pa. St. 395.

3. In *Martin's Appeal*, 33 Pa. St. 395, under Act Feb. 24, 1834, § 21, preferring "servants' wages for not exceeding one year," it was held that a servant who left the decedent's service eight months before his death was entitled to have preferred her claim for a year's wages, due at the time she left his service.

4. *Silver v. Williams*, 17 S. & R. (Pa.) 292.

5. **Following Trust Funds** — *Colorado.* — *Central City First Nat. Bank v. Hummel*, 14 Colo. 259, 20 Am. St. Rep. 257.

Georgia. — *Howes v. Whipple*, 41 Ga. 322.

Illinois. — *Wilson v. Kirby*, 88 Ill. 566, 98 Ill. 240; *Hay v. Bennett*, 153 Ill. 271; *Bradford v. Bennet*, 48 Ill. App. 145.

Kansas. — Gen. Stat. 1889, par. 2864, providing for the order in which the debts of a decedent shall be paid, does not deprive a *cestui que trust* of the right to follow trust funds in the hand of the representatives of the trustee. *Hubbard v. Alamo Irrigating, etc., Co.*, 53 Kan. 637. See also *Central City First Nat. Bank v. Hummel*, 14 Colo. 259, 20 Am. St. Rep. 257.

Massachusetts. — *Cunningham v. Munroe*, 15 Gray (Mass.) 471.

New Jersey. — *Smith v. Combs*, 49 N. J. Eq. 420.

New York. — *Matter of Van Duzer*, 51 How. Pr. (N. Y. Surrogate Ct.) 410; *Matter of Youngs*, 5 Dem. (N. Y.) 141; *Barlow v. Yeomans*, 50 Barb. (N. Y.) 187.

North Carolina. — *Bateman v. Latham*, 3 Jones Eq. (56 N. Car.) 35.

Pennsylvania. — *Merrick's Estate*, 8 W. & S. (Pa.) 402; *Schneider's Estate*, 11 Phila. (Pa.) 71.

Virginia. — *Spilman v. Payne*, 84 Va. 435.

See also the title EXECUTORS AND ADMINISTRATORS.

6. **Trust Funds** — **Not Earmarked.** — *Pryor v. Davis*, 109 Ala. 117; *Green v. Brooks*, 25 Ark. 318; *Chappell v. Craig*, 96 Iowa 273; *Little v. Chadwick*, 151 Mass. 109; *Barlow v. Yeomans*, 50 Barb. (N. Y.) 187; *Matter of Fox*, 92 N. Y. 93; *Schneider's Estate*, 11 Phila. (Pa.) 71. See, however, *Smith v. Combs*, 49 N. J. Eq. 420.

Negligent Management of Trust. — The claim of a ward against his guardian for negligent

Statutory Provision. — Aside from the right of the *cestui que trust* to follow and recover trust funds, the statutes of a number of the states give a preference in the distribution of the assets of a decedent, to debts arising out of his misappropriation of certain fiduciary funds.¹

Retroactive Effect of Statute. — A statute preferring fiduciary debts is only prospective in its operation, and has no application to the estate of a decedent dying before the passage of the act, though the estate had not been distributed at the time of the passage of the act.²

(b) **What Are Trust Funds.** — It is held that a statute preferring claims for money received by a decedent "in trust for any purpose" includes only a technical trust and not a trust created by implication of law;³ but it does include money received as administrator or executor.⁴

(c) **Who Are Executors, Administrators, etc.** — The preference given to debts due by the decedent as executor, administrator, or guardian, etc., applies not only to cases where the decedent was legally appointed, but also where he acted in such character without legal authority.⁵

Foreign Trustee, Administrator, etc. — Though it has been held in *Illinois* that a statute preferring claims against a decedent for funds held by him "in trust for any purpose" did not apply to claims against foreign trustees, but only to

failure to collect money of the ward has no preference in the distribution of the guardian's estate to the claims of other creditors of the guardian. *Dodson v. McKelvey*, 93 Mich. 263.

1. *Colorado.* — Mills Ann. Stat., § 4780; Central City First Nat. Bank *v.* Hummel, 14 Colo. 259, 20 Am. St. Rep. 257.

Georgia. — 2 Code 1895, § 3424; *Johnson v. Brady*, 24 Ga. 131; *Rust v. Billingslea*, 44 Ga. 306.

Illinois. — Ann. Stat. (S. & C. ed.), c. 5, § 71; *Tracy v. Hadden*, 78 Ill. 30.

Kentucky. — Stat. 1894, § 3868; *White v. Carrico*, 2 Metc. (Ky.) 232.

Virginia. — Code 1887, § 2660; *Tunstall v. Pollard*, 11 Leigh (Va.) 1.

West Virginia. — Code 8887, p. 667, § 25.

2. *Price v. Harrison*, 31 Gratt. (Va.) 114.

3. **Paper Negotiated by Agent.** — Where an agent of a bank received money from the sale of drafts belonging to the bank, and died without accounting therefor, the money so received was not held "in trust for any purpose" (Rev. Stat., c. 3, § 70, cl. 3), so as to entitle the claim of the bank therefor to a preference. *Svanoe v. Jurgens*, 144 Ill. 507.

A claim against an agent for the balance due his principal from the proceeds of notes negotiated by the agent, the proceeds to be used by the agent in fitting up a hotel for his principal, is not preferred. *Shipherd v. Furness*, 153 Ill. 590, *affirming* 46 Ill. App. 319.

Agent Managing Property. — Nor is a claim against an agent arising out of the management of property intrusted to him preferred. *Weer v. Gand*, 88 Ill. 490. See also *Svanoe v. Jurgens*, 144 Ill. 507, *reversing* 44 Ill. App. 277; *Chappell v. Craig*, 96 Iowa 273.

Money Collected by an Attorney is not preferred. *Southern Star Copper Lightning Rod Co. v. Cleghorn*, 59 Ga. 782; *Smith v. Ellington*, 14 Ga. 370.

Agister — Wrongful Sale of Cattle. — Where an agister sells cattle intrusted to him, and appropriates the proceeds, he does not hold such proceeds "in trust" for the owner of the cattle,

so as to entitle his claim therefor to a preference. *Wilson v. Kirby*, 88 Ill. 566.

Embezzled Property does not constitute a trust fund. *Doyle v. Murphy*, 22 Ill. 502, 74 Am. Dec. 165.

A Claim for Money Advanced for the purchase of tobacco, under an agreement that the tobacco shall be delivered to the lender and that he shall have a lien thereon for the money so advanced, is not entitled to a preference in case of the death of the borrower before the delivery of the tobacco purchased to the lender. *Fishback v. Green*, 87 Ky. 107.

See also the title *INSOLVENCY AND BANKRUPTCY* for analogous cases as to what constitute *Fiduciary Debts*.

4. **Money Received as Executor.** — *Fitzsimmons v. Cassell*, 98 Ill. 332.

5. **Administrator de Son Tort.** — *Hay v. Bennett*, 153 Ill. 271.

Husband of Executrix. — In *Davis v. Harkness*, 6 Ill. 173, 41 Am. Dec. 184, the court intimated that a debt due from the husband of an administratrix for property of the estate received by him, though not properly due from him as administrator, would still be given a preference as a debt due from the husband as administrator.

The contrary, however, was held in *Justices v. Turner*, 6 Leigh (Va.) 116, under Rev. Code, c. 104, § 60, p. 389, which provides that the executor of any person who shall have been accountable for the estate of a dead person "committed to their testator * * * by a court of record" shall pay so much as shall be due from the testator to the estate before any proper debt of the testator.

Father Acting as Guardian Without Appointment. — In *Sellers v. People*, 6 Ill. 183, it was held that a claim by infants against their father's estate for funds of theirs received by him would be preferred as a claim due from him as a guardian, though he had never been appointed. See also *Curle v. Curle*, 9 B. Mon. (Ky.) 309.

Guardian Does Not Include Trustee. — A statute preferring debts due as guardian does not

trustees deriving their authority from the laws of that state,¹ in *Virginia*, however, it has been held that a statute preferring debts owing by a decedent as executor, administrator, guardian, or trustee, applies not only to debts due from decedents who were appointed executors, etc., by the state giving such preference, but also to debts owing by a foreign executor.²

(d) **Extent of Preference.** — The preference given to debts due from the decedent in a fiduciary character has been held to override liens on the property of the decedent;³ the preference, however, gives a remedy only against the executors and administrators of trustees, and does not entitle the beneficiary to any preference as against the trustees themselves.⁴

Preference in Proceeds of Land. — The right of preference extends not only to the right of payment from the personalty, but also to payment from the proceeds of the land of the trustee.⁵

Subrogation — Creditors of Beneficiary. — And it has been held that where the claim of a person is entitled to preference on the distribution of a decedent's estate as a fiduciary debt, his creditors or a surety of the decedent who is compelled to pay the claim, may be subrogated to his right, and avail themselves of the preference.⁶

(e) **Waiver of Preference.** — The acceptance by the beneficiary of a note from the executor or trustee in payment of his indebtedness arising out of the trust, is a waiver of the preference, and no preference can be given a note so taken, in the distribution of his estate;⁷ the acceptance of a note or bond, however, does not constitute a waiver of the preference unless it is taken in payment of such indebtedness.⁸

(g) **Public Debts** — (a) **In General.** — At common law, debts due to the crown were to be paid in preference to debts due to subjects.⁹ This preference, however, did not extend to all debts due the crown, but only in cases where the crown and the subject stood in equal degree,¹⁰ and so a debt due to

include a debt due as trustee of infant *cestuis que trustent*. *Price v. Harrison*, 31 Gratt. (Va.) 114.

1. *Caruthers v. Corbin*, 38 Ga. 75; *Harris, J., dissenting*.

2. *Tunstall v. Pollard*, 11 Leigh (Va.) 1.

3. **Judgment Lien.** — In *Watson v. Watson*, 1 Ga. 266, it was held, under Act Feb. 18, 1799, § 5, directing the payment of debts due by a decedent as executor, administrator, or guardian, before any other debts, that such preference overrode judgments recovered against the decedent and constituting liens on his property. See also *Carhart v. Vann*, 46 Ga. 389.

Mortgage Lien. — This preference has also been held to override mortgage liens when the mortgage does not convey the legal title, but merely creates a lien on the property. *Ragland v. Justices*, 10 Ga. 65; *Lathrop v. Brown*, 65 Ga. 312.

4. *Hampton v. Hampton*, 18 Ga. 513; *Salter v. Salter*, 6 Bush (Ky.) 624; *Hemphill v. Lewis*, 7 Bush (Ky.) 214. See also *Stephens v. Stephens*, 89 Ky. 185.

5. **Proceeds of Land.** — *Muldoon v. Crawford*, 14 Bush (Ky.) 125.

6. **Subrogation — Creditor's Right Thereto.** — In *White v. Carrico*, 2 Metc. (Ky.) 232, it was held that the creditors of a ward to the extent of their claims against the ward were entitled to be subrogated to the right of the ward, given by Rev. Stat., c. 37, § 33, to demand from the estate of the guardian payment of claims due the ward from the guardian as such, in preference to other creditors.

Surety's Right Thereto. — A surety on a guardian's bond who is required to pay the indebtedness of the guardian to the ward is entitled to be subrogated to the right of the ward to payment from the estate of the guardian in preference to other creditors. *Muldoon v. Crawford*, 14 Bush (Ky.) 125. See the title SUBROGATION.

7. *Mosley v. Floyd*, 31 Ga. 564; *Coleman v. Davies*, 45 Ga. 489.

The Acceptance of a Note Secured by Mortgage has been held to constitute a waiver. *Lawton v. Fish*, 51 Ga. 647.

Where an Executor Purchases Land of His Testator at His Own Sale, the devisees of the land cannot, after acquiescing in the sale and attempting to enforce the individual liability of the executor for the price and a vendor's lien on the land, claim a preference as to any balance unpaid from the proceeds of a resale of the land. *Brantley v. Cheeley*, 42 Ga. 209.

8. **Note Not Taken in Payment.** — *Latimer v. Sayre*, 45 Ga. 468.

Bond. — *Smith v. Blackwell*, 31 Gratt. (Va.) 291. See also *Hamlin v. Atkinson*, 6 Rand. (Va.) 574, 3 Gratt. (Va.) 482, note; *Yerby v. Lynch*, 3 Gratt. (Va.) 439.

9. **Debts Due to the Crown — Common Law.** — *Bac. Abr.*, tit. *Executors*, (L) 2; *Littleton v. Hibbins*, Cro. Eliz. 793; 2 *Williams Exec.* 855.

10. **Amercements in the king's courts baron;** fines for copyhold estates; purchase price due the king for which strays within the king's manor, liberties, wood, or minerals are sold; arrearsages of rent, whether a fee-farm rent, or

a subject by specialty was preferred to a simple contract debt due to the crown.¹

State's Right of Preference. — The right of the crown to a preference arose from the royal prerogative, and was not incident to the person of the king, but attached to him in his character as the head of the state, and therefore it is held by the better authority that the several states are, in the absence of statute, entitled to a preference to the same extent that the crown was entitled thereto at common law.² But there are authorities holding the contrary view.³ In a number of the states a preference is given by statute in favor of all debts due the state, and they, as a general rule, are ranked after the funeral expenses and the expenses of administration.⁴ In *Pennsylvania*, however, the debts due the state are to be paid last.⁵

(b) **What Constitute Public Debts.** — To constitute a debt a public debt, it should, properly, be a debt due the government in its sovereign capacity.⁶

When State Owns Stock in Corporation. — And therefore when the state creates a corporation for the purpose of commerce or banking, and vests her capital therein without reserving to herself any of the rights or privileges which belong to her in her sovereign capacity, the corporation, though its stock is owned exclusively by the state, occupies the same position in regard to the collection of its debts as other persons; and the debts due such corporation are not debts due the public, so as to give them a preference on account of the ownership by the state of the corporate property.⁷ The legislature may, however, prefer debts due to

rent reserved on a lease for years; property accruing to the king by attainder or authority before office found, are deemed simple debts, and are not entitled to preference over specialty and debts of record due to a subject. *Bac. Abr.*, tit. Executors, (L) 2.

1. *Com. v. Logan*, 1 *Bibb* (Ky.) 529; *Klinck v. Keckley*, 2 *Hill Eq.* (S. Car.) 250; *Commissioners of Public Accounts v. Greenwood*, 1 *Desaus.* (S. Car.) 450.

2. **Preference of States** — *Georgia*. — *Robinson v. Darien Bank*, 18 *Ga.* 65.

Maryland. — *State v. Rogers*, 2 *Har. & M.* (Md.) 198; *Murray v. Ridley*, 3 *Har. & M.* (Md.) 171; *State v. State Bank*, 6 *Gill & J.* (Md.) 226; *Smith v. State*, 5 *Gill* (Md.) 45; *Orem v. Wrightson*, 51 *Md.* 42, 34 *Am. Rep.* 286; *Green's Estate*, 4 *Md. Ch.* 349.

Judgments in Favor of the State have priority over judgments in favor of citizens. *Contee v. Chew*, 1 *Har. & J.* (Md.) 417.

3. *State v. Harris*, 2 *Bailey L.* (S. Car.) 598; *Klinck v. Keckley*, 2 *Hill Eq.* (S. Car.) 250; *Baxter v. Baxter*, 23 *S. Car.* 114; *Commissioners of Public Accounts v. Greenwood*, 1 *Desaus.* (S. Car.) 450. See also *Leake v. Ferguson*, 2 *Gratt.* (Va.) 419.

4. **Statutes.** — See, for example: *Florida*. — *Rev. Stat.* 1892, § 1909. *Georgia*. — 2 *Code* 1895, § 3424. *Kansas*. — *Gen. Stat.* 1889, § 2864. *Maine*. — *Rev. Stat.*, c. 66, § 1, p. 555. *Montana*. — *Comp. Stat.*, § 273. *North Carolina*. — *Code* 1883, § 1416. *Ohio*. — *Rev. Stat.* (Giauque's ed.), § 6070. *Rhode Island*. — *Gen. Laws*, 1896, p. 730, § 16.

South Carolina. — *Gen. Stat.* 1882, § 1926. *Vermont*. — *Rev. Laws* 1880, § 2190. *Washington*. — *Hill's Anno. Stat.*, § 1075.

Waiver of Priority. — The fact that the state took a mortgage security for its claim does not constitute a waiver of its preference. *Lenoir v. Winn*, 4 *Desaus.* (S. Car.) 65, 6 *Am. Dec.* 597.

5. *Brightly's Purd. Dig.* 1885, p. 525, § 94.

Judgment Recovered by State. — But when the state has recovered a judgment against the decedent, her claim ranks with other judgments recovered against the decedent. *Ramsey's Appeal*, 4 *Watts* (Pa.) 71.

6. **What Constitute Public Debts.** — *State v. Harris*, 2 *Bailey L.* (S. Car.) 598; *Klinck v. Keckley*, 2 *Hill Eq.* (S. Car.) 250; *Commissioners of Public Accounts v. Greenwood*, 1 *Desaus.* (S. Car.) 450; *Nimmo v. Com.*, 4 *Hen. & M.* (Va.) 57, 4 *Am. Dec.* 488. See also *Leake v. Ferguson*, 2 *Gratt.* (Va.) 420.

7. **Corporations — Stocks Owned by State.** — In *State Bank v. Gibbs*, 3 *McCord L.* (S. Car.) 377, it was held that a debt due to the Bank of the State of South Carolina, the stock of which was owned exclusively by the state, was not entitled to a preference as a debt due to the "public." See also *Central Bank v. Little*, 11 *Ga.* 346; *Mahone v. Central Bank*, 17 *Ga.* 121; *Robinson v. Darien Bank*, 18 *Ga.* 97; *Fields v. Wheatley*, 1 *Sneed* (Tenn.) 351. See, however, *State v. Dickson*, 38 *Ga.* 171, in which a debt due to the Western & Atlantic Railroad, which was owned by the state, was held to be entitled to a preference as a debt due to the "public." The report of the case is obscure, and does not show whether the railroad property was owned by the state by virtue of its ownership of corporate stock or not, and no reference is made to the case of the Central Bank *v. Little*, 11 *Ga.* 346.

Reasons for Doctrine. — In *U. S. Bank v. Planter's Bank*, 9 *Wheat.* (U. S.) 907, *Marshall, C. J.*, in speaking of the status of a banking corporation in which the state was a stockholder, said: "When a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to

such corporations in the same manner as debts due to the state.¹

Debts Due to Counties. — A debt due to a county is not entitled to a preference as a debt due the public.²

Taxes. — In some jurisdictions the preference in favor of the state is only given to rates and taxes assessed against the decedent in his lifetime.³ This preference in favor of taxes does not extend to taxes assessed after the death of the decedent,⁴ and it has been held that a statutory provision preferring taxes due the state does not include taxes due a county;⁵ nor a claim of a county for taxes collected by the decedent, a collector of taxes, and not accounted for.⁶ And it has also been held that a preference given to taxes does not include an assessment for a public improvement.⁷

(c) **Extent of Preference.** — It has been held that a preference given by statute to debts "due to the public" applied only to cases where the decedent was indebted to a citizen and to the public in equal degree.⁸ And a debt due to the state is generally held to be subject to all specific liens upon the property of the decedent.⁹

(d) **Debts Due the United States.** — The statutes of the United States expressly provide that debts due the United States shall be first paid from the estate of a decedent,¹⁰ and a number of the states expressly grant preferences to such debts, though not as a general rule in preference to all other debts;¹¹ but, irrespective of the class in which debts due to the United States are placed by the statutes of the several states, the federal statute is controlling upon the states, and will give to such debts a preference even as against express enactments by the legislatures of the states.¹²

a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."

1. Power to Prefer Debt Due Corporation Owned by State. — *Central Bank v. Little*, 11 Ga. 346.

2. Debt Due County. — *Hargrove v. Lilly*, 69 Ga. 326.

Judgment in Favor of Commission of Poor. — In *Klinck v. Keckley*, 2 Hill Eq. (S. Car.) 250, the court expressed doubt as to whether such a judgment was entitled to a preference as a debt due the public.

In the same case the court left undecided the question whether such a judgment was a debt due the public, as being unnecessary to a decision of the case.

Surety on County Treasurer's Bond. — However, a debt due by a decedent as surety on the bond of a county treasurer has been held a debt due the public. *Baxter v. Baxter*, 23 S. Car. 114.

3. See the various statutes.

Debts Constituting Liens. — In a number of states, while no special provision is made for the payment of taxes, yet debts constituting liens on the property of the estate are preferred, and this provision would, undoubtedly, include taxes.

4. Taxes Assessed After Death of Decedent. — *Pryor v. Davis*, 109 Ala. 117.

5. County Taxes. — *Hargrove v. Lilly*, 69 Ga. 326.

6. Taxes Collected but Not Accounted For. — *Hargrove v. Lilly*, 69 Ga. 326; *Spilman v. Payne*, 84 Va. 435.

7. Assessments. — In *Matter of Hun*, 7 Misc. Rep. (N. Y. Supreme Ct.) 409, affirmed in 80 Hun (N. Y.) 605, it was held, under 4 Rev. Stat. (8th ed.), p. 2560, § 27, providing that the executor shall pay the "debts" of his de-

cedent in the following order, "(2) taxes" assessed against the deceased, that an assessment for a street improvement was not entitled to a preference.

8. Klinck v. Keckley, 2 Hill Eq. (S. Car.) 250.

9. Inferior to Liens. — A debt due the public cannot take precedence of the lien of a citizen secured by a mortgage, judgment or execution — so far as the proceeds of the property covered by such lien are concerned. *Commissioners of Public Accounts v. Greenwood*, 1 Desaus. (S. Car.) 450; *Klinck v. Keckley*, 2 Hill Eq. (S. Car.) 250; *Rutledge v. Hazlehurst*, 1 McCord Eq. (S. Car.) 466; *Brown v. Gilliland*, 3 Desaus. (S. Car.) 539; *Haynsworth v. Frierson*, 11 Rich. L. (S. Car.) 476; *Fields v. Wheatley*, 1 Sneed (Tenn.) 351.

10. U. S. Rev. Stat. (1878), § 3466.

Foreign Contracts. — The United States is not deprived of its priority by the circumstance that the contract was made in a foreign country with a person resident abroad. *Harrison v. Sterry*, 5 Cranch (U. S.) 289.

11. See the various local statutes.

12. Classification by Federal Statute Controlling. — *U. S. v. Duncan*, 4 McLean (U. S.) 607; *U. S. v. Backus*, 6 McLean (U. S.) 443; *Postmaster-Gen. v. Robbins*, 1 Ware (U. S.) 165; *U. S. v. Hahn*, 37 Mo. App. 580; *Com. v. Lewis*, 6 Binn. (Pa.) 269.

In *U. S. v. Fisher*, 2 Cranch (U. S.) 396, Marshall, C. J., in speaking of a statute of the federal government preferring debts due the federal government in case of insolvents, said: "The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. * * * This claim of priority on the part of the United States will, it has been said, interfere with the right of the

(10) *Simple Contract Liabilities* — (a) *In General.* — At common law the last class of debts to be paid were the debts arising out of simple contracts; this class included all contracts, either express or implied, written or unwritten, the evidence of which was merely oral or in writing, and not under seal nor of record.¹

(b) *Liquidated Demands and Open Accounts.* — In *Georgia* liquidated demands and open accounts are placed in different classes. A liquidated demand is a demand certain and fixed, either by agreement of the parties or by operation of law, and need not necessarily be in writing;² and the certainty of the amount need not be contemporaneous with the agreement out of which the liability resulted.³ By "open accounts" are meant those debts which are

state sovereignties respecting the dignity of debts. * * * But this is an objection to the Constitution itself. The mischief suggested * * * is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends."

Subject to Liens. — In *Brent v. Washington Bank*, 10 Pet. (U. S.) 596, it was held that the priority given debts due the United States did not override specific liens on the property of the decedent, such as the lien of a bank under its charter, on the stock of a stockholder, for indebtedness due the bank. As said by Baldwin, J., the "preference is in the appropriation of the debtor's estate." See also *U. S. v. Hahn*, 37 Mo. App. 580.

Expenses of Administration, also, have priority over the debts due the United States, as the preference in favor of the latter only extends to the net proceeds of the property of the deceased. *U. S. v. Eggleston*, 4 Sawy. (U. S.) 199; *U. S. v. Hunter*, 5 Mason (U. S.) 231, *per* Story, J.; *U. S. v. Hahn*, 37 Mo. App. 580.

Funeral Expenses. — Debts due the United States have also been held inferior to claims for the funeral expenses of the decedent, which are a charge upon the estate of the decedent rather than a debt of the decedent. *Postmaster-Gen. v. Robbins*, 1 Ware (U. S.) 165; *U. S. v. Eggleston*, 4 Sawy. (U. S.) 199; *U. S. v. Hahn*, 37 Mo. App. 580.

Widow's Allowance. — The debts due the United States do not have priority over the allowance to the widow, which, in its nature, is analogous to the right of dower. *Postmaster-Gen. v. Robbins*, 1 Ware (U. S.) 165; *U. S. v. Hahn*, 37 Mo. App. 580. See the title ALLOWANCES, vol. 2, p. 156.

Partnership — Priority as to Individual Debt of Partner. — The priority of the United States does not reach the property of a deceased partner in partnership effects so as to require the payment of his individual debt to the government, in preference to partnership debts. *U. S. v. Duncan*, 4 McLean (U. S.) 607. See also *U. S. v. Hack*, 8 Pet. (U. S.) 271.

Priority over Expenses of Last Illness. — The claim against an estate for the expenses of the last illness is a debt due from the decedent, and must stand in point of privilege after debts due the United States, though placed by the legislature of the state ahead of such debts. *Postmaster-Gen. v. Robbins*, 1 Ware (U. S.) 165; *U. S. v. Eggleston*, 4 Sawy. (U. S.) 199.

Payment Without Notice of Claim of United States. — If the administrator or executor pay

away the assets of his estate in discharge of other debts of the decedent before notice of the claim of the United States, it is not a devastavit so as to render him personally liable for such debts. *U. S. v. Ricketts*, 2 Cranch (C. C.) 553; *U. S. v. Eggleston*, 4 Sawy. (U. S.) 199. See also *U. S. v. Fisher*, 2 Cranch (U. S.) 390, *per* Marshall, C. J.

Ex Post Facto Law. — Priority may be extended to debts contracted prior to the passage of the Preference Act, as well as afterwards. *Com. v. Lewis*, 6 Binn. (Pa.) 266.

1. Promissory Note. — *Harbison v. Giles*, 1 Bay (S. Car.) 275.

Breaches of Trust constitute simple contract debts. *Vernon v. Vawdry*, 2 Atk. 119; *Adey v. Arnold*, 15 Eng. L. & Eq. 268; *Richardson v. Jenkins*, 17 Jur. 446; *Green v. Brooks*, 25 Ark. 318; *Rolain v. Darby*, 1 McCord Eq. (S. Car.) 472; *Mason v. Man*, 3 Desaus. (S. Car.) 116.

Implied Contract. — Where property not belonging to the estate is sold by the administrator, his liability for the price received is a simple contract debt. *Bateman v. Latham*, 3 Jones Eq. (56 N. Car.) 35.

Replevying Judgment — Claim of Surety. — Where several judgments are rendered against co-obligors, and a replevy bond is executed in discharge of one of the judgments, the claim of a surety on the replevy bond against the co-obligors arising out of his payment of the bond is merely a simple contract claim, and not a claim of record. *Justices v. Lee*, 1 T. B. Mon. (Ky.) 247.

Sheriff's Sale — Failure of Title — Claim of Purchasers. — Under a statute giving the purchasers at a sheriff's sale the right to recover the price from the judgment debtors, on failure of title, the purchaser is not substituted to the right of the judgment creditor, but his claim is merely a simple contract claim. *Laws v. Thompson*, 4 Jones L. (49 N. Car.) 104.

Dilapidations. — Simple contract debts, however, rank before the liability of the estate of an incumbent for dilapidations. *Bryan v. Clay*, 1 El. & Bl. 38, 72 E. C. L. 38.

2. Liquidated Demands — Definition. — *Nisbet v. Lawson*, 1 Ga. 275; *Hargroves v. Cooke*, 15 Ga. 322; *Cornett v. Fain*, 33 Ga. 219. See also *Mitchell v. Addison*, 20 Ga. 53; *Roberts v. Prior*, 20 Ga. 561.

Need Not Be Evidenced by Writing. — *Anderson v. State*, 2 Ga. 370.

3. An agreement to deliver one-fifth of a future crop creates a liquidated demand. *Bartee v. Andrews*, 18 Ga. 407.

Entry in Account Book. — The entry by a factor

subject to future adjustment, and which may be reduced or modified by proof.¹

(11) *Priority Dependent on Exhibiting or Filing Claims* — (a) *In General.* — In some of the states claims against the estate are given a preference according to the time they are filed against the estate, or exhibited to the executor or administrator.² This classification generally applies to all claims when priority of payment is sought from the general assets of the estate,³ but where a lien alone is sought to be enforced, and no allowance for a deficiency is asked, it has been held that the right of the lienholder to enforce his lien is not affected by his failure to exhibit his claim for classification.⁴

(b) *Exhibition and Filing — What Necessary.* — Where the statute provides the manner in which claims shall be exhibited for classification, a strict compliance with the statute is necessary. The same liberality is not extended to exhibitions for the purpose of classification, as is extended to exhibitions for the purpose of avoiding the statute of non-claim;⁵ but it has been held in *Iowa*, under a statute placing in the third class claims "filed" within six months, that the presentation to and approval of a claim by the administrator were sufficient to entitle it to rank in the third class.⁶ The executor or admin-

istrator to the credit of the principal of the value of the property consigned, and a subsequent sale of the property for cash, will render the claim for the proceeds a liquidated demand. *McNulty v. Pruden*, 62 Ga. 139.

But an account on the books of a firm in the handwriting of a deceased partner, stating his individual indebtedness to the firm, is not an account "settled" and "liquidated" (Rev. Code, c. 46, § 21), the books never having been settled. *Furman v. Moore*, 64 N. Car. 358.

1. *Open Accounts.* — *Nisbet v. Lawson*, 1 Ga. 275.

A *Written Guaranty* to pay the future indebtedness of another on open account is not liquidated. *Hargroves v. Cooke*, 15 Ga. 322.

A *Claim for Money Collected by the Decedent as an Attorney* ranks with "bonds or other obligations," and not with "open accounts." *Smith v. Ellington*, 14 Ga. 379.

In *Southern Star Copper Lightning Rod Co. v. Cleghorn*, 59 Ga. 782, the court said: "Prior to the code, the rank of a claim against a deceased attorney at law for money collected in his lifetime was on a par with bonds or other obligations. We think it has not been advanced."

Meaning of Term "Obligation." — In *Hargroves v. Cooke*, 15 Ga. 321, it was held that though the term "obligation" strictly imports a sealed instrument, still, as used in the statute classifying together bonds and other obligations, it means an instrument in writing by which a party is bound in law irrespective of whether it is under seal or not.

2. *Exhibiting Claims.* — See, for example:

Arkansas. — Dig. 1894 (S. & H.), c. 1, § 109.

Iowa. — McClain's Code, § 3622 *et seq.*

Kansas. — Gen. Stat. 1889, § 2864.

Missouri. — Rev. Stat. 1889, § 183, p. 156.

Oklahoma. — Stat. 1893, § 1430.

Texas. — 1 Sayles's Civ. Stat., art. 2037.

Wyoming. — Rev. Stat. 1887, § 2132.

3. *Judgments are included under the term "demands."* *State Bank v. Tutt*, 44 Mo. 366.

In *Keith v. Parks*, 31 Ark. 664, it was also held that a judgment recovered in the lifetime of a decedent would lose its priority unless presented within a year.

4. *Mortgage Lien Not Affected by Non-Exhibition of Claim.* — *Tucker v. Wells*, 111 Mo. 399.

Judgment Lien. — *Peters v. Holliday*, 40 Mo. 544. See, however, *Buchanan v. Wagnon*, 62 Tex. 375, wherein it was held under a statute classifying in the third class claims secured by mortgages or other liens to the extent of the property subject to the lien, and in the fourth class claims exhibited within a year, that where a claim secured by mortgage is not presented within a year it loses, as against claims presented within a year, its right to satisfaction from the property subject to the lien; and *Converse v. Sorley*, 39 Tex. 515, as to necessity to present a judgment enforcing vendor's lien. See also *infra*, this title, *Presentation of Claims*; subd. *What Claims Must Be Presented*.

5. *Strict Compliance with Statute Required.* — *Madison County Bank v. Suman*, 79 Mo. 527.

Exhibition of a claim to the administrator, with a view solely to a compromise, is not a sufficient exhibition for classification. *Pfeiffer v. Suss*, 73 Mo. 245.

Notice in Writing Essential. — Under *Wagner's Stat.*, p. 102, § 5 *et seq.*, placing in the fifth class claims exhibited within one year, and providing that claims "may" be exhibited by serving notice in writing on the administrator or executor, unless the claim is proved up, notice in writing must be given; knowledge on the part of the executor of the existence of the claim is insufficient to entitle the claim to rank as an exhibited claim. *Spaulding v. Suss*, 4 Mo. App. 541.

Institution of Suit and Service of Summons are sufficient compliance with a statute requiring the exhibition to be in "writing, stating the amount and nature of the claim, with a copy of the instrument or account upon which the claim is founded," provided a copy of the instrument or account accompanies the petition and writ, and is delivered to the administrator. *Madison County Bank v. Suman*, 79 Mo. 527; *Tevis v. Tevis*, 23 Mo. 256.

6. *Filing — Presentation and Approval Sufficient.* — *In re Wonn's Estate*, 80 Iowa 750; *Granger, J., dissenting*.

Notice of Filing Claim Not Necessary. — Service upon the administrator of notice that the claim

istrator cannot waive a compliance with the statutory requirements.¹ Nor can the probate court, in the absence of statutory authority, relieve a claimant from the result of his failure to file his claim for classification.²

Notice to Present Claim. — Unless required by statute, it is not necessary that notice be given by the executor or administrator of his appointment, to start running the time within which claims must be exhibited for classification.³

Burden of Proof as to Exhibition. — And the burden of proof is upon the claimant to show that his claim was exhibited within the required time.⁴

(12) **Secured Claims.** — The personal representative of the decedent takes the property of the estate subject to all existing liens, and therefore a lienholder, as such, irrespective of the character of the debt secured by his lien, may be entitled to a preference to the extent of his lien.⁵ But in some juris-

was filed is not necessary. *Phelps v. Greenbaum*, 87 Iowa 347.

Establishment of Claim Not Necessary. — A claim filed within the six months is entitled to rank in the third class, though it is not proved within such time. *Chandler v. Hockett*, 12 Iowa 269; *Noble v. Morrey*, 19 Iowa 509; *Goodrich v. Conrad*, 24 Iowa 254.

1. **Executor Cannot Waive Requirements as to Exhibition.** — *Spaulding v. Suss*, 4 Mo. App. 541.

2. **Authority of Court to Grant Relief.** — *Burckhardt v. Helfrich*, 77 Mo. 376.

Under the *Iowa Rev.* 1860, § 2404-5, classifying in the third class claims filed within six months, and in the fourth class claims filed within a year and a half, and forever barring claims not filed within one and one-half years, unless peculiar circumstances entitle the claimant to equitable relief, the judgment of the court below placing in the third class a claim entitled to such equitable relief was affirmed by an equally divided court. *Brewster v. Kendrick*, 17 Iowa 479.

3. **Time Within Which Claims Must Be Exhibited.** — *Jones v. Davis*, 37 Mo. App. 69, wherein it was held, under *Rev. Stat. Mo.*, § 184, placing in the fifth class claims exhibited within a year after the granting of the letters of administration on the estate, that claims must be filed within the year after the granting of letters, without regard to notice of the grant of such letters. See also *Wiggins v. Lovering*, 9 Mo. 262; *Madison County Bank v. Suman*, 79 Mo. 527. See, however, *Spaulding v. Suss*, 4 Mo. App. 543.

The fact that no distribution of the assets of the estate had been made will not entitle claims filed after the expiration of the statutory time to rank with claims filed within such time. *Burckhardt v. Helfrich*, 77 Mo. 376.

4. **Burden of Proof as to Time of Exhibition.** — *Madison County Bank v. Suman*, 79 Mo. 527.

5. **Secured Claims.** — *Wade's Appeal*, 29 Pa. St. 328.

Vendor's Lien. — *Jefferson v. Edrington*, 53 Ark. 545; *Marc's Succession*, 29 La. Ann. 412; *Forstall's Succession*, 39 La. Ann. 1052; *Rogers's Succession*, 41 La. Ann. 400; *Edmonson v. Phillips*, 73 Mo. 57; *Walker v. Kerr*, 7 Tex. Civ. App. 498.

Purchase money notes taken in a sale effected after the right of a vendor to a lien was abolished by statute are not entitled to any preference. *Jones v. Janes*, 56 Ga. 325.

Factor's Lien. — *Martin v. Curd*, 1 Bush (Ky.) 327.

Attorney's Lien. — *Turwin v. Gibson*, 3 Atk' 720.

Judgment Lien. — *Peters v. Holliday*, 40 Mo. 544; *Patterson's Estate*, 1 Ashm. (Pa.) 336; *Bryan's Estate*, 4 Phila. (Pa.) 228; *Spellisy's Estate*, 174 Pa. St. 628.

Execution Lien. — Under *Ala. Code*, § 2897, authorizing the levy after a defendant's death of an execution issued during his lifetime, an execution issued against a defendant in his lifetime is a preferred claim against the property subject to levy. *Hullett v. Hood*, 109 Ala. 345. See also *Dodge v. Mack*, 22 Ill. 93.

Mechanic's Lien. — *Foster v. Stone*, 20 Pick. (Mass.) 542; *Miller's Appeal*, 122 Pa. St. 95. See, however, *Severance v. Hammatt*, 28 Me. 511, wherein it was held (Wells, J., *dissenting*), that the holder of a mechanic's lien was not entitled to any preference over general creditors.

In *Hoff's Appeal*, 102 Pa. St. 218, it was held that *Purd. Dig.* 1028, pl. 21, providing that a mechanic's lien shall not constitute a lien except from the filing of the claim, a claim filed after the death of the decedent created no lien entitling the lien claimant to a preference. But see *Foster v. Stone*, 20 Pick. (Mass.) 542.

Mortgages — California. — *Murray's Estate*, 18 Cal. 686.

Georgia. — *Rust v. Billingslea*, 44 Ga. 306.
Kentucky. — *Payne v. Johnson*, 95 Ky. 175.
Louisiana. — *Money v. Cosse*, 20 La. Ann. 418.
Maryland. — *Hammond v. Hammond*, 2 Bland (Md.) 374.

Pennsylvania. — *Tubbs's Estate*, 161 Pa. St. 252.

South Carolina. — *Edwards v. Sanders*, 6 S. Car. 316.

Tennessee. — *Fields v. Wheatley*, 1 Sneed (Tenn.) 351; *Winton v. Eldridge*, 3 Head (Tenn.) 361.

Vermont. — *Allen v. Mower*, 17 Vt. 61.

Unrecorded Mortgage. — Under *Act May 20, 1715*, providing that no mortgage shall pass any estate unless recorded, an unrecorded mortgage creates no lien on the estate as against general creditors. *Nice's Appeal*, 54 Pa. St. 200. See, however, *Kirkpatrick v. Caldwell*, 32 Ind. 299.

Chattel Mortgage. — *Jewett v. Hurrell*, 121 Ind. 404.

Pledge. — A creditor holding an insurance policy on a decedent's life as collateral security is entitled to the full payment of his claim from the proceeds of the policy collected by the administrator, though the estate is insolvent. *Brown v. Trottner*, 11 Ohio Cir. Ct. Rep. 498.

dictions, before he is entitled to prove his debt against the estate, he must either first enforce his lien and prove for the balance only,¹ or he must surrender his security for the benefit of the other creditors;² however, in others the lien creditor is permitted to prove his whole claim against the estate without an abandonment of his lien, or a resort in the first instance to the property covered by his lien.³

Mortgages — Statutory Preference. — The statutes of a number of the states classify mortgages with judgments, and direct their payment in the order of their date.⁴ And it is generally held that the effect of these statutes is not to give a priority to mortgages as mortgages, but only as to the administration of the particular parts of the estate as affected by the liens of such mortgages, and after the lien is exhausted the grade of the demand must be determined by the nature of the debt or of the instrument which the mortgage was given to secure.⁵

Necessity of Possession. — But in case of a chattel mortgage, possession of the chattels is essential to the validity of the lien, as against general creditors of the estate. For by the death of the mortgagor his personal estate in possession passes into the custody of the law for administration, and the mortgagor has no right to undertake to administer any part of it for the satisfaction of his own debt. *Kater v. Steinruck*, 40 Pa. St. 501; *Heft's Appeal*, (Pa. 1887) 9 Atl. Rep. 87.

But in *Summer v. McKee*, 89 Ill. 127, where the mortgagor in a chattel mortgage died before the note secured thereby had matured, and the mortgagee failed to take possession at its maturity, and the widow relinquished her claim to the articles mentioned in the appraisalment of her specific allowance, and in lieu thereof elected to take all the articles of personalty inventoried and appraised, including the goods mortgaged, as a creditor of the estate, it was held that she took them subject to the lien of the mortgage.

And in *Collins's Appeal*, 107 Pa. St. 590, 52 Am. Rep. 479, it was held that the principle as to necessity of possession did not apply in favor of a decedent's general creditors in the case of a pledge of an intangible interest, incapable of delivery or or manual occupancy, or of an expectancy to come into existence after the contract of pledge is made, and when the personal effort of the pledgor is necessary both to its subsequent existence and its actual maintenance.

Extent of Preference. — In *Wentworth v. S. A. Woods Mach. Co.*, 163 Mass. 28, it was held that a mortgagee could not require the administrator to pay the balance due on the purchase price of the chattel mortgaged, and thereby secure a preference over other creditors to the extent of such payment. See also *Jefferson v. Edrington*, 53 Ark. 545.

1. *Greenwood v. Taylor*, 1 Russ. & M. 185; *Hammond v. Hammond*, 2 Bland (Md.) 347; *Macgill v. Hyatt*, 80 Md. 253; *Haverhill Loan, etc., Assoc. v. Cronin*, 4 Allen (Mass.) 141; *Middlesex Bank v. Minot*, 4 Met. (Mass.) 325; *Amory v. Francis*, 16 Mass. 311; *Bristol County Sav. Bank v. Woodward*, 137 Mass. 412; *Matter of McCune*, 76 Mo. 200; *Creedy v. Pearce*, 69 N. Car. 67; *Moore v. Dunn*, 92 N. Car. 63.

Surety's Estate. — And as against the insolvent estate of a surety, the amount of the origi-

inal claim cannot be proved when it has been partly discharged by the principal, but only the portion undischarged. *Charlotte First Nat. Bank v. Alexander*, 85 N. Car. 352.

Security Furnished by Third Persons. — Where, however, the collateral security was furnished by a third person not primarily liable for the debt, the creditor is not required to exhaust such security, but may prove against the estate for his whole claim, because, if the security is first applied to the reduction of the debt, there is *eo instanti* created a new debt of equal amount in favor of the surety whose property is thus expended. *Bristol County Sav. Bank v. Woodward*, 137 Mass. 412.

2. *Amory v. Francis*, 16 Mass. 308.

Waiver of Lien. — Where a mortgage creditor has his whole claim allowed against the estate and receives a dividend upon the whole, he waives his lien. *Hooker v. Olmstead*, 6 Pick. (Mass.) 481.

Mere presentation of the claim, however, is not a waiver of the mortgage lien. *Drew v. McDaniel*, 60 N. H. 480.

In *Nickerson v. Chase*, 90 Me. 296, it was held that a mortgagee waives the security afforded by the chattel mortgage by presenting his entire claim against the estate, and making oath that he had no security therefor.

Allowance by Mistake — Relief. — When the whole claim is allowed by mistake, the court may relieve the mortgage creditor from the effect of such allowance as a waiver of his lien. *Towle v. Bannister*, 16 Pick. (Mass.) 255.

3. *Mason v. Bogg*, 2 Myl. & C. 443; *Erle v. Lane*, 22 Colo. 273; *Furness v. Union Nat. Bank*, 147 Ill. 570; *Hight v. Taylor*, 97 Ind. 392; *Moses v. Ranlet*, 2 N. H. 488; *Fish's Estate*, 16 Phila. (Pa.) 373; *Kittera's Estate*, 17 Pa. St. 416; *West v. Rutland Bank*, 19 Vt. 403.

Conversion of Collateral Security into Money — Claim for Balance Only Provable. — Where, however, the security has been converted into money, it operates as payment, and the creditor can only prove for the balance of his claim. *West v. Rutland Bank*, 19 Vt. 403. See also *Charlotte First Nat. Bank v. Alexander*, 85 N. Car. 352; *Erle v. Lane*, 22 Colo. 273; *Wheat v. Dingle*, 32 S. Car. 473. See, however, *Furness v. Union Nat. Bank*, 147 Ill. 570.

4. See the local statutes.

5. *Indiana.* — *Rogers v. State*, 6 Ind. 31; *Kirkpatrick v. Caldwell*, 32 Ind. 299; *La Plante v. Convery*, 98 Ind. 500.

(13) *Partnership Debts* — **General Rule.** — The general rule that partnership assets are to be first applied in payment of partnership debts, and the individual assets of the partners in payment of their individual debts, applies equally in the distribution of the estate of a deceased partner, thereby giving partnership debts priority over individual debts in the distribution of partnership assets, and individual debts a corresponding right in the distribution of individual assets,¹ and this latter is so especially when there is a partnership fund.² A distinction has been made, so as to allow partnership creditors to share equally with individual creditors in the individual assets of the deceased partner, where there is neither a partnership fund nor a solvent surviving partner.³ In *Georgia* it is held that where a judgment had been recovered against the deceased on a partnership debt, it is entitled to share in the individual assets.⁴

Minority Rule. — Some courts, however, following the equitable doctrine that partnership debts are joint and several, refuse, in the distribution of the indi-

South Carolina. — *Kinard v. Young*, 2 Rich. Eq. (S. Car.) 258; *Piester v. Piester*, 22 S. Car. 139, 53 Am. Rep. 711; *Wheat v. Dingle*, 32 S. Car. 473. But see *Edwards v. Sanders*, 6 S. Car. 316.

Texas. — *Kiolbassa v. Raley*, 1 Tex. Civ. App. 165; *Walker v. Kerr*, 7 Tex. Civ. App. 498.

In *Mullins v. Yarborough*, 44 Tex. 14, it was held that Pasch. Dig., art. 5706, providing that payment of a debt secured by special lien may be ordered out of the general assets, does not authorize the payment of a mortgage on the homestead, as the homestead forms no part of the estate to which the creditors may resort.

Georgia. — In *Moore v. Dortch*, 2 Ga. Dec. 84, however, it was held that under a statute placing in one class "judgments, mortgages, and executions (the eldest first)," a mortgage was entitled to the priority, irrespective of its specific lien.

1. Partnership — General Rule — England. — *Ridgway v. Clare*, 19 Beav. 111; *Lodge v. Prichard*, 1 De G. J. & S. 610; *Croft v. Pyke*, 3 P. Wms. 182; *Gray v. Chiswell*, 9 Ves. Jr. 118.

Canada. — *Baker v. Dawbarn*, 19 Grant's Ch. (U.C.) 113.

Georgia. — *Toombs v. Hill*, 28 Ga. 371; *Bagwell v. Bagwell*, 72 Ga. 92 (Code, § 1918). In *Cleghorn v. Insurance Bank*, 9 Ga. 319, the rule was considered and questioned. See also *Baker v. Wimpee*, 19 Ga. 87.

Illinois. — *Ladd v. Griswold*, 9 Ill. 25, 46 Am. Dec. 443; *Moline Water Power, etc., Co. v. Webster*, 26 Ill. 234; *Pahlman v. Graves*, 26 Ill. 495; *People v. Lott*, 36 Ill. 447; *Rainey v. Nance*, 54 Ill. 29; *Doggett v. Dill*, 108 Ill. 560, 48 Am. Rep. 565.

Indiana. — *Weyer v. Thornburgh*, 15 Ind. 124; *Bond v. Nave*, 62 Ind. 505.

Louisiana. — *Morgan v. His Creditors*, 8 Martin N. S. (La.) 599, 20 Am. Dec. 262.

Maryland. — *McCulloh v. Dashiell*, 1 Har. & G. (Md.) 97, 18 Am. Dec. 271; *Simmons v. Tongue*, 3 Bland (Md.) 341.

Mississippi. — *Arnold v. Hamer*, Freem. (Miss.) 509; *Oakey v. Rabb*, Freem. (Miss.) 546.

Missouri. — *Level v. Farris*, 24 Mo. App. 445. See also *Hundley v. Farris*, 103 Mo. 78, 23 Am. St. Rep. 863.

New York. — *Murray v. Murray*, 5 Johns. Ch. (N. Y.) 68; *Wilder v. Keeler*, 3 Paige (N.

Y.) 167, 23 Am. Dec. 781; *Egberts v. Wood*, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; *Payne v. Matthews*, 6 Paige (N. Y.) 19, 29 Am. Dec. 738; *Kirby v. Schoonmaker*, 3 Barb. (N. Y.) 46, 49 Am. Dec. 160; *Stewart's Case*, 4 Abb. Pr. (N. Y. Surrogate Ct.) 408; *Matter of Potter*, 5 Dem. (N. Y.) 108.

Ohio. — *In re Robb's Estate*, 5 Ohio N. P. 52.

Tennessee. — *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *Fowlkes v. Bowers*, 11 Lea (Tenn.) 144; *Cowan v. Gill*, 11 Lea (Tenn.) 674.

But if, after the dissolution of the partnership, the deceased had executed as an individual the note of the firm given in liquidation of a firm debt, the holder of the note may file it against the estate and participate in a distribution of the individual assets. *Fowlkes v. Bowers*, 11 Lea (Tenn.) 144.

For a general discussion of the priority of firm and individual creditors, see the titles INSOLVENCY AND BANKRUPTCY; PARTNERSHIP.

Lien Acquired by Partnership Creditor. — Where a partnership creditor has acquired a lien upon the individual assets of the deceased partner, his claim has priority over individual creditors to the extent of his lien. *Straus v. Kerngood*, 21 Gratt. (Va.) 584; *Bardwell v. Perry*, 19 Vr. 292, 47 Am. Dec. 687; *Rainey v. Nance*, 54 Ill. 29.

A Claim of the Surviving Partner for Reimbursement on account of indebtedness of the deceased partner to the firm and the payment of the firm debts is, it has been held, entitled to share in the individual assets of the deceased partner equally with the individual creditors of such partner. *Payne v. Matthews*, 6 Paige (N. Y.) 19, 29 Am. Dec. 738. See, however, *Kirby v. Carpenter*, 7 Barb. (N. Y.) 375, disapproving the above case.

2. Existence of Partnership Fund. — *Smith v. Mallory*, 24 Ala. 628; *Bridge v. McCullough*, 27 Ala. 661; *Charles v. Eshleman*, 5 Colo. 107.

3. Nonexistence of Partnership Fund — Insolvency of Survivor. — *Ex p. Hayden*, 1 Bro. C. C. 454; *Ex p. Pinkerton*, 6 Ves. Jr. 814, note a; *Emanuel v. Bird*, 19 Ala. 596, 54 Am. Dec. 200; *Sperry's Estate*, 1 Ashm. (Pa.) 347; *Payne v. Matthews*, 6 Paige (N. Y.) 19, 29 Am. Dec. 738.

4. Judgment Against Partner on Firm Debt. — *Dennis v. Green*, 20 Ga. 386. See also *Cleghorn v. Insurance Bank*, 9 Ga. 319; *Baker v. Wimpee*, 19 Ga. 87.

vidual estate of a deceased partner, to recognize any distinction between the partnership and the individual debts of the deceased partner;¹ still they accord to partnership debts priority in the distribution of the partnership assets.² The *Kentucky* rule is, that when the joint creditors have exhausted the joint assets, they are not entitled to anything further until the separate creditors have been paid the same proportion of their demands. But after that they share in the separate assets with the separate creditors *pro rata*.³

(14) *Widow's Allowance*. — The statutory allowance out of the estate of a decedent for the temporary maintenance of his widow and family has in most states preference over the claims of general creditors, and in many states over all specific liens except the vendor's lien for purchase money.⁴

3. Conflict of Laws. — When a decedent domiciled in one state or country leaves assets in another state or country, and the laws of the two states or countries are different in regard to the order in which the debts of the decedent shall be paid, the question arises as to which law shall govern in the administration of such estate; and the general rule, as laid down almost unanimously by the courts of the United States, is that the debts are to be paid according to their respective dignity as regulated by the law of the country where the representative acts and from which he derives his authority; that is, the law of the country where the funds for distribution are found, governs,⁵ and not the law of the place of the

1. *Connecticut*. — *Camp v. Grant*, 21 Conn. 41, 54 Am. Dec. 321.

Massachusetts. — *Sparhawk v. Russell*, 10 Met. (Mass.) 305; *Wilby v. Phinney*, 15 Mass. 116.

This rule has, however, been changed in *Massachusetts* by Gen. Stat., c. 99, § 18. *Bush v. Clark*, 127 Mass. 111.

Ohio. — *Grosvenor v. Austin*, 6 Ohio 103, 25 Am. Dec. 743.

Rhode Island. — *Pearce v. Cooke*, 13 R. I. 184 (by statute).

South Carolina. — In *Hutzler v. Phillips*, 26 S. Car. 136, 4 Am. St. Rep. 687, the court reviews the cases in that state, and decides that where there is no lien in favor of the separate creditors, social creditors, after exhausting social assets, are entitled to share *pari passu* in the separate estate of the partners.

Virginia. — In *Morris v. Morris*, 4 Gratt. (Va.) 293, the question was left undetermined. But it was held that if a partnership creditor is not entitled to share the separate estate of his debtor with the separate creditors, yet the debtor partner having, by his will, subjected his real estate to the payment of his debts, the partnership creditor is entitled to share with the separate creditors in that fund.

In a very recent case in this state it was held that social assets are applicable first to social debts, and if insufficient, the social creditors come in as general creditors *pro rata* with separate creditors of the same class upon the separate estate of the deceased partner. *Pettyjohn v. Woodruff*, 86 Va. 478. *Fauntleroy, J.*, in speaking for the court, said: "This principle has the sanction of the deliberate and unanimous decision of this court in *Ashby v. Porter*, 26 Gratt. (Va.) 465, and an implicit legislative adoption of section 2855, Code of 1887, taken word for word from section 13, chapter 144, Code of 1849, with the construction which it had received by this court, and that construction has been followed and

reaffirmed by this court in the case of *Robinson v. Allen*, 85 Va. 729."

Statute Making Partnership Debts "Joint and Several" — **Effect.** — Under Rev. Stat. *Missouri* 1879, § 658, making "joint" debts "joint and several," partnership and individual creditors are entitled to share equally in the distribution of the estate of a deceased partner. *Hundley v. Farris*, (Mo. 1890) 13 S. W. Rep. 392. See also *Dahlgren v. Duncan*, 7 Smed. & M. (Miss.) 280; *Hassell v. Griffin*, 2 Jones Eq. (55 N. Car.) 117; *Ashby v. Porter*, 26 Gratt. (Va.) 455.

2. *Bardwell v. Perry*, 19 Vt. 292, 47 Am. Dec. 687. See the preceding note.

3. *Kentucky*. — *Fayette Nat. Bank v. Kenney*, 79 Ky. 133; *Spratt v. Richmond First Nat. Bank*, 84 Ky. 85; *Whitehead v. Chadwell*, 2 Duv. (Ky.) 432.

Pennsylvania. — In *Bell v. Newman*, 5 S. & R. (Pa.) 78, the court laid down the rule that separate creditors should receive as much out of the separate property as joint creditors receive from the portion of such partner in the joint property, and then the balance of the separate estate should be divided among them *pro rata*. But see *Black's Appeal*, 44 Pa. St. 503.

For a General Discussion of the priority between individual and firm creditors, see the titles *INSOLVENCY AND BANKRUPTCY*; *PARTNERSHIP*.

4. For a full discussion of this subject, see the title *ALLOWANCES*, vol. 2, p. 156.

5. *Lex Rei Sitæ Governs* — *England*. — In *re Kloebe*, 28 Ch. Div. 175.

United States. — *Union Bank v. Smith*, 4 Cranch (C. C.) 21; *Harrison v. Sterry*, 5 Cranch (U. S.) 289, *per Marshall, C. J.*

Louisiana. — *Olivier v. Townes*, 2 Martin N. S. (La.) 99.

Maryland. — *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 224, 3 Am. Dec. 535.

Massachusetts. — *Dawes v. Head*, 3 Pick. (Mass.) 128, *per Parker, C. J.*

contract,¹ nor the law of the place of the decedent's domicil.²

4. Preference by Executor or Administrator — (a) **IN GENERAL** — The executor or administrator must pay the debts of his decedent in the order of their rank, and his payment of an inferior debt with notice of a superior debt renders him liable to the superior creditor as for a *devastavit*; ³ but except as to judgments and decrees, as to which the personal representative was bound to take notice, payment of an inferior debt before notice of the superior debt is good.⁴ And the recovery of a judgment by a simple contract creditor attaching on the assets of the estate will defeat the priority of debts of superior dignity, of which the executor or administrator did not have notice in time to protect himself against the recovery of such judgment;⁵ and payment of simple contract debts while there are outstanding contingent liabilities on specialties may be made.⁶ A covenant or bond, however, for the

New Hampshire. — *Goodall v. Marshall*, 11 N. H. 88, 35 Am. Dec. 472.

South Carolina. — *Dial v. Gary*, 14 S. Car. 579, 37 Am. Rep. 737.

See the title **PRIVATE INTERNATIONAL LAW**.

Reasons for Doctrine. — "The ground on which the assets are to be collected by the authority and administered according to the law of the country in which they happen to be at the decedent's death is the claim which its citizens have to the protection and assistance of the government in the prosecution of their rights." *Miller's Estate*, 3 Rawle (Pa.) 319, 24 Am. Dec. 345.

Application of Principle. — The decedent, domiciled at Norfolk, Va., there contracted a debt by bond to T., and was also indebted on simple contract to the Union Bank of Georgetown, D. C., and died in Bedford, Pa., leaving assets in Georgetown. By the law of Virginia bond debts were given priority over simple contract debts; but by the law of Maryland, which was in force in the district, no such priority was given to bond debts. It was held that the order in which the debts of the decedent were to be paid from the assets in Georgetown was to be governed by the law of Maryland, and not by the law of Virginia. *Smith v. Union Bank*, 5 Pet. (U. S.) 518.

1. Lex Loci Contractus. — *Pardo v. Bingham*, L. R. 6 Eq. 485; *Union Bank v. Smith*, 4 Cranch (C. C.) 21; *Harrison v. Sterry*, 5 Cranch (U. S.) 299.

2. Lex Domicilii. — *Union Bank v. Smith*, 4 Cranch (C. C.) 21. See, however, *Johnson v. Jackson*, 56 Ga. 326, 21 Am. Rep. 285; *Wilson v. Dunsany*, 18 Beav. 293; *Thorne v. Watkins*, 2 Ves. 35.

3. Devastavit by Payment of Inferior Debt. — *Robson v. Francis*, 1 Rolle, 405; *Robinson v. Tonge*, 3 P. Wms. 400; *Searle v. Lane*, 2 Vern. 37; *Feagan v. Kendall*, 43 Ala. 628; *Pinneo v. Goodspeed*, 22 Ill. App. 50; *Webster v. Hammond*, 3 Har. & M. (Md.) 131; *Coltraine v. Spurgin*, 9 Ired. L. (31 N. Car.) 54; *Swift v. Miles*, 2 Rich. Eq. (S. Car.) 147.

Good Faith of Executor Immaterial. — The fact that the executor in paying the inferior debt acted through an honest mistake will not prevent him from being liable. *Moye v. Albritton*, 7 Ired. Eq. (42 N. Car.) 62.

Estoppel to Claim Preference. — A creditor, by accepting a *pro rata* share with inferior creditors without protest and giving a receipt in full

for his claim, cannot assert that his debt was entitled to a preference over such other creditors so as to charge the executor. *Miller v. Harrison*, 34 N. J. Eq. 374.

Subrogation. — Where the personal representative pays out money to a creditor, without legal authority, but the creditor is entitled to a *pro rata* share of such money, the personal representative is entitled to be subrogated to the creditor's rights, and to a credit to the amount of such creditor's *pro rata* share. *Walker v. Kerr*, 7 Tex. Civ. App. 498.

4. Payment of Simple Contract Debt Without Notice of Specialty. — *Hawkins v. Day*, AmbL. 162; *Bellinson v. Wender*, Wick. 468; *Matter of Le Geyt*, 3 De G. J. & S. 570; *Brooking v. Jennings*, 1 Mod. 174; *Davis v. Smith*, 5 Ga. 292, 48 Am. Dec. 279; *Roundtree v. Sawyer*, 4 Dev. L. (15 N. Car.) 44; *Mayo v. Bentley*, 4 Call (Va.) 528. See, however, *Greenwood v. Brudnish*, Pre. Ch. 534.

Payment of Debt Due Citizen Before Notice of Debt Due United States. — *U. S. v. Ricketts*, 2 Cranch (C. C.) 553.

Co-executors — Notice to One — Effect. — Notice of a specialty debt to one executor, who conceals it from his co-executor, will not affect the latter so as to render him liable to the specialty creditor in case of the payment of an inferior debt. *Hawkins v. Day*, AmbL. 162.

5. Judgment Confessed on Simple Contract Without Notice of Specialty. — *Mayo v. Bentley*, 4 Call (Va.) 528.

A Judgment Quando, however, does not attach on the assets of the estate, and therefore the executor is not authorized in paying such a judgment after notice of an outstanding specialty. *Roundtree v. Sawyer*, 4 Dev. L. (15 N. Car.) 44. See also *Lidderdale v. Robinson*, 2 Brock. (U. S.) 159; *Dancy v. Pope*, 68 N. Car. 147.

6. Payment of Simple Debt Before Breach of Bond. — *Hawkins v. Day*, AmbL. 160; *Henderson v. Gilchrist*, 17 Jur. 570; *Norman v. Baldry*, 6 Sim. 621.

Covenants Not Broken — Warranty. — *Davis v. Smith*, 5 Ga. 292, 48 Am. Dec. 279.

Covenant by Assignee of Lease for Payment of Rent. — *Collins v. Crouch*, 13 Q. B. 542, 66 E. C. L. 542.

Covenant for Payment of Annuities. — Equity will not enjoin the payment of simple contract debts because there are outstanding covenants for the payment of annuities not in arrear. *Read v. Blunt*, 5 Sim. 567.

payment of a fixed sum at a future date is not a contingent liability, and provision for its payment must be made before simple contract creditors are paid.¹

b. DEBTS OF EQUAL DEGREE. — Among debts, however, of equal degree it was the privilege of the executor or administrator to pay which he preferred, and if there were not sufficient assets to pay all, he committed no legal injury to any one.² This privilege was taken from him by the bringing of an action at law or the commencing of a suit in equity by the equal creditors, after which the executor could make no voluntary payments to other equal creditors;³ but at any time before final judgment he could confess judgment to another creditor of the same class so as to give priority to such judgment over the judgment subsequently recovered in the action pending at the time of his confession of judgment.⁴

c. JUDGMENTS AND DECREES AGAINST EXECUTOR OR ADMINISTRATOR. — Judgments or decrees, recovered against executors or administrators, were payable in the order of their dates, thus creditors of the same class could by diligence secure priority over each other;⁵ the judgment or decree, however, must be final in order to deprive the executor of the right to prefer such other creditors by confession of judgment.⁶

1. *Mayo v. Bentley*, 4 Call (Va.) 528.

A Covenant by a Surety for the payment of a debt at a future day is not a contingent but an actual existing debt, and must be provided for before simple contract creditors are paid. *Atkinson v. Grey*, 1 Sm. & G. 577.

2. **Debts of Equal Degree.** — *Hepworth v. Heslop*, 6 Hare 561; *Green v. Allen*, 45 Ga. 205; *Gregg v. Com.*, 9 Dana (Ky.) 343; *M'Kay v. Green*, 3 Johns. Ch. (N. Y.) 56; *Schmitz v. Langhaar*, 88 N. Y. 511; *Coltraine v. Spurgin*, 9 Ired. L. (31 N. Car.) 52.

Waiver of Right to Prefer. — An executor, by procuring an injunction restraining creditors from levying upon the property of the estate until the priority of their claims shall be determined, waives his right to prefer creditors. *Fouche v. Harison*, 78 Ga. 359.

3. *Phillips v. Echard*, Cro. Jac. 8; *Parker v. Dee*, 3 Swanst. 531, note; *Gregg v. Com.*, 9 Dana (Ky.) 343; *Schmitz v. Langhaar*, 88 N. Y. 511; *Coltraine v. Spurgin*, 9 Ired. L. (31 N. Car.) 52.

Suit in Equity. — Commencing suit in equity has the same effect as an action at law in depriving the executor of the right to prefer debts of equal degree. *Barnawell v. Smith*, 5 Jones Eq. (58 N. Car.) 168; *Bright v. Woodward*, 1 Vern. 369. See, however, *Darston v. Lord Orford*, Pre. Ch. 188.

The Discontinuance of an Action commenced by equal creditors revives the privilege of the executor to pay equal creditors. *Coltraine v. Spurgin*, 9 Ired. L. (31 N. Car.) 52.

4. *Goodfellow v. Burchett*, 2 Vern. 299; *Waring v. Danvers*, 1 P. Wms. 295; *Vibart v. Coles*, 24 Q. B. Div. 364; *Ruggles v. Sherman*, 14 Johns. (N. Y.) 446.

Co-executors. — Confession of judgment should be by all. *Lepard v. Vernon*, 2 Ves. & B. 51.

Dilatory Pleas by Executor for Purpose of Delay. — The executor may delay by dilatory pleas a creditor suing on a bond, and subsequently confess judgment in favor of a creditor by bond, not due at the time of the interposition of the dilatory pleas. *Mayo v. Bentley*, 4 Call (Va.) 528.

Equity Will Not Restrain an Executor from giving a preference to one creditor by confess-

ing judgment pending an action by another equal creditor. *Wilson v. Wilson*, 1 Cranch (C. C.) 255. See, however, *Barker v. Dumaesque*, 2 Atk. 119.

Suit to Administer Assets. — A decree for the administration of the assets of a decedent, however, deprives the executor of all right to prefer creditors. *Irby v. Irby*, 24 Beav. 525; *George v. George*, 35 Beav. 350; *Mitchelson v. Piper*, 8 Sim. 64; *Nunn v. Barlow*, 1 Sim. & S. 588. Otherwise, however, before decree. *In re Radcliffe*, 7 Ch. Div. 733; *Maltby v. Russell*, 2 Sim. & S. 227.

5. **Priority Between Debtors of Same Class Acquired by Diligence.** — *Ashley v. Pocock*, 3 Atk. 208; *In re Williams*, L. R. 15 Eq. 270; *Dolland v. Johnson*, 18 Jur. 767; *Wilson v. Wilson*, 1 Cranch (C. C.) 255; *Dupree v. Adkins*, 43 Ga. 475; *Green v. Allen*, 45 Ga. 205; *Mapes v. Coffin*, 5 Paige (N. Y.) 296.

Judgments Quando. — The creditor who first proceeds on his judgment *quando* and fixes the executor with assets is to be first paid without regard to the time when the judgments *quando* were recovered. *McLean v. Leach*, 68 N. Car. 95.

But where none of the creditors by judgments *quando* fix the administrator with assets, the judgments are to be paid according to the dates of their recovery. *Dancy v. Pope*, 68 N. Car. 152; *Henderson v. Burton*, 3 Ired. Eq. (38 N. Car.) 259.

Registering Judgment. — Act 23 & 24 Vict., c. 38, § 3, does not require judgments recovered against executors or administrators to be registered, but applies only to judgments recovered against the decedent. *In re Williams*, 15 L. R. Eq. 270; *Jennings v. Rigby*, 33 Beav. 198; *Gaunt v. Taylor*, 3 M. & G. 886, 42 E. C. L. 461.

A Decree against an administrator or executor has the same effect as a judgment. *Bank of England v. Morice*, 4 Bro. P. C. 287; *Paxton v. Douglas*, 8 Ves. Jr. 520; *Abbis v. Winter*, 3 Swanst. 578, note.

6. *Smith v. Eyles*, 2 Atk. 385; *Allison v. Davidson*, 1 Dev. & B. Eq. (21 N. Car.) 46; *Maltby v. Russell*, 2 Sim. & S. 227.

Finality of Decree. — A decree for account

d. RIGHT TO PREFER EQUAL CREDITORS ABOLISHED BY STATUTE. — In practically all the jurisdictions the common-law right of the executor to prefer creditors of equal degree has been taken away by statute, and the assets must be ratably distributed amongst them.¹ And a creditor cannot by any act after the death of the decedent secure priority over other creditors of equal degree.²

5. Retainer — *a.* BY EXECUTOR OR ADMINISTRATOR — (1) *In General.* — An executor or administrator, at common law, has the right, as against equal creditors, to retain or withhold from the assets of the estate sufficient assets to pay claims held by himself against the estate.³ The reason generally assigned for allowing an executor or administrator to retain is that he cannot, without an apparent absurdity, commence a suit against himself to recover that which is due to him in his private capacity; but having the whole personal estate in his hands, so much as is sufficient to answer his own demands is by operation of law applied to that particular purpose, otherwise an executor or administrator holding a claim against the estate would be in a worse position than other creditors.⁴

creates no preference, nor does it prevent the executor from paying subsequent judgments. *Perry v. Phelps*, 10 Ves. Jr. 34. See also *Waring v. Danvers*, 1 P. Wms. 295.

1. Ratable Distribution of Assets Among Creditors of Equal Degree — *Canada.* — *Joseph v. McLeod*, New Bruns. Rep. Trin. Term, 1833.

Illinois. — *Dunlap v. McGhee*, 98 Ill. 287; *People v. Phelps*, 78 Ill. 149; *Armstrong v. Cooper*, 11 Ill. 561.

Iowa. — *Hart v. Jewett*, 11 Iowa 276.

Mississippi. — *Bass v. Heard*, 33 Miss. 131; *Burruss v. Fisher*, 23 Miss. 228; *Gay v. Lemle*, 32 Miss. 309.

New York. — *Home Ins. Co. v. Lyon*, 3 Dem. (N. Y.) 69; *St. John's Estate*, *Tuch* (N. Y.) 126; *Mount v. Mitchell*, 31 N. Y. 356.

North Carolina. — *Moore v. Byers*, 65 N. Car. 240.

Pennsylvania. — *Ritter's Estate*, 11 Phila. (Pa.) 12; *Prevost v. Nicholls*, 4 Yeates (Pa.) 479.

In *Cook v. Woodard*, 5 Dem. (N. Y.) 97, it was held that upon the distribution of the proceeds arising from the sale of a decedent's realty, made under *New York Code Civ. Proc.*, c. 18, tit. 5, "debts not yet due" at the time of the first decree are entitled, under § 2793, subd. 7, to equality in payment with those established by and recited in such decree.

2. *Boyce v. Escoffie*, 2 La. Ann. 872; *Harkins's Succession*, 2 La. Ann. 923; *St. John's Estate*, *Tuck* (N. Y.) 126; *Bosler v. Exchange Bank*, 4 Pa. St. 32, 45 Am. Dec. 665; *Leiper v. Levis*, 15 S. & R. (Pa.) 108; *Turner v. Hauser*, 1 Watts (Pa.) 423; *Patterson's Estate*, 1 Ashm. (Pa.) 336; *Strouse v. Lawrence*, 160 Pa. St. 421.

A Judgment Recovered Against Executors ranks no higher than the demand on which it was recovered. *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Dupree v. Adkins*, 43 Ga. 475; *Green v. Allen*, 45 Ga. 205; *Carter v. Penn*, 79 Ga. 747; *Scott v. Ramsay*, 1 Binn. (Pa.) 221; *Wootering v. Stewart*, 2 Yeates (Pa.) 483; *Fraser v. City Council*, 23 S. Car. 373.

A judgment against executors, though conclusive as to the validity of the claim on which it is based, does not determine the rank of the claim. *Fraser v. City Council*, 23 S. Car. 373.

3. Retainer — *England.* — *Adams v. Gale*, 2 Atk. 106; *Robinson v. Cumming*, 2 Atk. 411;

Middleton v. Poole, 2 Colly. 246; *Burge v. Brutton*, 2 Hare 373; *Potter v. Fowler*, 6 L. J. N. S. Ch. 273; *Wilson v. Coxwell*, 23 Ch. Div. 764; *Nunn v. Barlow*, 1 Sim. & S. 588; *Winter v. Hicks*, Tambl. 475; *Jacomb v. Harwood*, 2 Ves. 265; *Franks v. Cooper*, 4 Ves. Jr. 763.

United States. — *Page v. Lloyd*, 5 Pet. (U. S.) 304.

Alabama. — *Kirksey v. Kirksey*, 41 Ala. 626; *Milam v. Ragland*, 19 Ala. 85; *Hearrin v. Savage*, 16 Ala. 286.

Florida. — *Sealey v. Thomas*, 6 Fla. 25.

Kentucky. — *Saunders v. Saunders*, 2 Litt. (Ky.) 314; *Buckner v. Morris*, 2 J. J. Marsh. (Ky.) 121.

Maryland. — *State v. Reigart*, 1 Gill (Md.) 1, 39 Am. Dec. 628.

Mississippi. — *Fort v. Battle*, 13 Smed. & M. (Miss.) 133.

Missouri. — *Nelson v. Russell*, 15 Mo. 356.

New York. — *Rogers v. Hosack*, 18 Wend. (N. Y.) 319; *Decker v. Miller*, 2 Paige (N. Y.) 149.

North Carolina. — *Chesson v. Chesson*, 8 Ired. Eq. (43 N. Car.) 141; *White v. Griffin*, 2 Jones L. (47 N. Car.) 3.

Pennsylvania. — *Sims v. Chew*, 15 S. & R. (Pa.) 197.

Virginia. — *Shores v. Wares*, 1 Rob. (Va.) 1.

4. Reason for Doctrine of Retainer — *England.* — *In re Illidge*, 24 Ch. Div. 659, 27 Ch. Div. 481; *In re Baker*, 44 Ch. Div. 272; *Solley v. Gower*, 2 Vern. 61; *Chapman v. Turner*, 11 Vin. Abr. 73.

United States. — *Page v. Lloyd*, 5 Pet. (U. S.) 311.

Florida. — *Sanderson v. Sanderson*, 17 Fla. 847.

New York. — *Rogers v. Rogers*, 3 Wend. (N. Y.) 503, 20 Am. Dec. 716.

Pennsylvania. — *Ex p. Meason*, 5 Binn. (Pa.) 167.

Rhode Island. — *Perkins v. Se Ipsam*, 11 R. I. 270.

Tennessee. — *Shields v. Alsup*, 5 Lea (Tenn.) 519.

"The whole doctrine of retainer is based on the principle of advantage or benefit to the executor or administrator given him as compensation for the legal disability to sue for his

(2) *What Classes of Executors or Administrators May Retain.*—All classes of executors or administrators legally appointed may retain.¹ And it is immaterial whether the executor or administrator is sole executor or administrator or acts jointly with others;² but where the assets are insufficient to pay their claims in full co-executors can only retain *pro rata* shares.³

debt." *Harrison v. Henderson*, 7 Heisk. (Tenn.) 330.

In *Talbot v. Frere*, 9 Ch. Div. 570, Jessel, M. R., said: "The principle is, and always has been, one of preference, not of retainer. * * * An executor had a right to prefer one creditor to another as amongst creditors of equal degree. * * * It followed, therefore, that if he was a creditor he had a right to prefer himself to another creditor of equal degree, and this was called retainer, because he had the money in his own hands; but it was in reality the exercise of the right of preference in his own favor."

"*In Æquali Jure Potior Est Conditiō Possidentis.*"—Mr. Fonblanque, in his treatise on Equity, book iv., pt. 2, c. 2, § 2, note *m*, places the right of the executor or administrator to retain on the above maxim. See also *Wentworth's Off. of Exec.* 142.

Right of Retainer a Privilege—Effect as Payment.—The right of retainer is a privilege given the executor for his protection, and his claim is only discharged by the exercise of this right, and not by the mere receipt of assets as executor. *Page v. Lloyd*, 5 Pet. (U. S.) 304; *Ross v. Wharton*, 10 Verg. (Tenn.) 192; *Harrison v. Henderson*, 7 Heisk. (Tenn.) 315. See also *Davis v. Milligan*, 88 Ala. 523. *Compare* *Dorchester v. Webb*, Cro. Car. 373; *Kimball v. Moody*, 27 Ala. 130; *Miller v. Irby*, 63 Ala. 477; *Chaffin v. Hanes*, 4 Dev. L. (15 N. Car.) 103; *Thomas v. Chamberlain*, 39 Ohio St. 112; *Sebring v. Keith*, 2 Hill L. (S. Car.) 340; *Smith v. Watkins*, 8 Humph. (Tenn.) 341.

Where an administratrix receives personal assets more than sufficient to pay her claim against the estate, which she retained *in specie* for more than six years, the payment and extinguishment of her claim will be presumed, and she cannot claim against the estate in case such assets subsequently prove worthless. *Glenn v. Glenn*, 41 Ala. 571. *Compare* *Kimball v. Moody*, 27 Ala. 130.

Landlord Appointed Administrator of Tenant.—Where a landlord, appointed administrator of the deceased tenant, has procured the allowance of his claim for rent, he may retain the amount of his claim for rent from the proceeds of the specific assets on which his claim for rent was alien. *Kern v. Noble*, 57 Ill. App. 27.

Retainer Must Be Exercised in Satisfaction of the Debt of Highest Dignity.—Where a foreign administrator holds claims, both by specialty and by simple contract, and the assets of the estate received by him are insufficient to satisfy both claims, he cannot apply the assets in payment of his simple contract claims, and claim against the administrator appointed in England as a specialty creditor, so as to defeat the latter's right of retainer for a simple contract debt, but will be required to exercise his right of retainer in satisfaction of the specialty debt. *Johnson v. Ward*, 2 L. J. Ch. 137.

Acceptance by Executrix for Debt—Effect.—In *Bowerbank v. Monteiro*, 4 Taunt. 844, it was held that the fact that an executrix gave an acceptance for a debt due from her testator, taking an engagement from the drawer to renew the bill, until sufficient assets were received from the estate of the testator, did not deprive her of the right to retain for a superior debt.

1. An Administrator De Bonis Non May Retain.—*Weeks v. Gore*, 3 P. Wms. 184, note *b*.

An Administrator Durante Minori Estate may retain for a debt due to himself, *Roskelley v. Godolphin*, T. Raym. 483, Hob. 250; and also for a debt due to the infant during whose minority the administration was granted, *Franks v. Cooper*, 4 Ves. Jr. 764.

Administrator Durante Dementia.—And where administration is granted to another for the use of a lunatic, the administrator may retain for a debt due the lunatic. *Franks v. Cooper*, 4 Ves. Jr. 763.

An Executor of an Executor may retain for a debt due from the first testator to himself, *Hopton v. Dryden*, Pre. Ch. 179; *Croft v. Pyke*, 3 P. Wms. 183; *Thomson v. Grant*, 1 Russ. 540, note *a*; and for a debt due to his decedent, *Thomson v. Grant*, 1 Russ. 540, note *a*.

The right of an executor of an executor to retain for a debt due his testator from the original testator must be restricted to retainer from assets which came into the actual possession or under the actual control of his decedent, or which were paid into court during his lifetime. *In re Compton*, 30 Ch. Div. 15, *restricting* *Wilson v. Coxwell*, 23 Ch. Div. 764.

Executor of Co-executor.—An executor of a co-executor cannot retain for a debt due from the original testator, as the surviving co-executor became sole executor by survivorship. *Hopton v. Dryden*, Pre. Ch. 179.

But where the deceased co-executor had claimed the right of retainer without actually exercising it, his executor may retain therefor. *Wilson v. Coxwell*, 23 Ch. Div. 764.

Executor of Administrator.—In *Weeks v. Gore*, 3 P. Wms. 184, note *b*, it was held that the executor of an administrator, in accounting for the assets of the estate of the intestate received by his testator, could deduct a debt owing by the intestate to his testator, who died without actually exercising his right of retainer for such debt.

An Administrator of an Executor may also retain. *Burge v. Brutton*, 7 Jur. 988.

2. Co-executors May Retain.—*Crowder v. Stewart*, 16 Ch. Div. 368; *Kent v. Pickering*, 6 L. J. N. S. Ch. 375; *Jacomb v. Harwood*, 2 Ves. 265; *State v. Reigart*, 1 Gill (Md.) 1, 39 Am. Dec. 628; *Decker v. Miller*, 2 Paige (N. Y.) 149.

3. Retainer Pro Rata Amongst Co-executors or Co-administrators.—*Chapman v. Turner*, 9 Mod. 268.

Executors De Son Tort. — The right of retainer was given only to executors or administrators legally appointed and qualified, and an executor *de son tort* could not retain.¹

Executor Renouncing Probate. — Nor could an executor who had renounced probate of the will retain.²

(3) *Extent of Right of Retainer.* — The right of retainer only places the executor or administrator in the position he would be if he were permitted to bring an action, and accords him only that preference which he might give to a creditor or which a vigilant creditor might obtain, and no other or greater preference, and therefore he cannot retain as against a debt of superior dignity, but only as against creditors holding claims of equal or inferior dignity to his own.³

(4) *Out of What Assets Right May Be Exercised* — (a) **Specific Property.** — Specific chattels are not to be retained by the executor or administrator in satisfaction of his debt, but they should be converted into money;⁴ but of course he may claim and hold as his own any specific chattel held by the decedent, but which belonged to him, and which he could have recovered in detinue from the decedent.⁵

(b) **Retainer from Equitable Assets.** — The courts of equity, though they followed the law in the administration of legal assets, applied in the administration of equitable assets the maxim that equality is equity, and denied to executors the right to retain from equitable assets, and applied them ratably

1. Executor De Son Tort Cannot Retain — *England.* — Ayre *v.* Ayre, 1 Ch. Ca. 33; Coulter's Case, 5 Coke 30; Prince *v.* Rowson, 1 Mod. 208; Baker *v.* Berisford, 1 Sid. 76; Vaughan *v.* Browne, 2 Stra. 1106; Alexander *v.* Lane, Yelv. 137; Picard *v.* Brown, 6 T. R. 550.

Maryland. — Glenn *v.* Smith, 2 Gill & J. (Md.) 493, 20 Am. Dec. 452.

Massachusetts. — Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494.

New Hampshire. — Brown *v.* Leavitt, 26 N. H. 493.

North Carolina. — Turner *v.* Child, 1 Dev. L. (12 N. Car.) 331, 17 Am. Dec. 555.

South Carolina. — Kinard *v.* Young, 2 Rich. Eq. (S. Car.) 247; Cook *v.* Sanders, 15 Rich L. (S. Car.) 63, 94 Am. Dec. 139; Leach *v.* House, 1 Bailey L. (S. Car.) 42.

Tennessee. — Partee *v.* Caughran, 9 Verg. (Tenn.) 460; Sharp *v.* Caldwell, 7 Humph. (Tenn.) 415; Hutchinson *v.* Fulghum, 4 Heisk. (Tenn.) 550.

Virginia. — Shields *v.* Anderson, 3 Leigh (Va.) 729.

Cannot Retain Even as Against Inferior Debts. — Curtis *v.* Vernon, 3 T. R. 587, *affirmed* 2 H. Bl. 18, *cited in* Brown *v.* Leavitt, 26 N. H. 495.

A Subsequent Grant of Letters of Administration, however, will legitimate all intermediate acts and justify a retainer. Vaughan *v.* Browne, 2 Stra. 1106. See also Whitehead *v.* Sampson, Freem. 265; Williamson *v.* Norwich, Styles 337; Kinard *v.* Young, 2 Rich. Eq. (S. Car.) 252.

Rule Based on Public Policy. — "The rule of the common law which refuses to allow executors *de son tort* to retain for their own debts until the other creditors are paid is based upon sound public policy. To allow it would tend to encourage creditors to strive who should first take possession of the goods of the deceased, and would allow a creditor to take advantage

of his own wrongful act by paying himself first." Baumgartner *v.* Haas, 68 Md. 37.

Rule Followed in Equity. — The common-law rule that an executor *de son tort* cannot retain is followed in equity also. Baumgartner *v.* Haas, 68 Md. 32.

A Creditor of a Succession who secures possession of the price for which land of the succession was sold cannot satisfy his claim therefrom. McGinnis's Succession, 18 La. Ann. 268.

A Mortgage Creditor of a Succession, having a first mortgage on the land sold, may, on a purchase by himself, retain from the price the amount of his lien; but not a creditor with an inferior mortgage. Triche's Succession, 29 La. Ann. 384.

2. An Executor Who Has Renounced Probate of the will cannot retain out of the assets in his hand. Smith *v.* North, 13 Jur. 998.

3. Cannot Retain as Against Superior Debt — *England.* — Chandos *v.* Talbot, Sel. Ch. Ca. 24; Talbot *v.* Frere, 9 Ch. Div. 570; Ferguson *v.* Gibson, L. R. 14 Eq. 379; Walters *v.* Walters, 18 Ch. Div. 186; Wilson *v.* Coxwell, 23 Ch. Div. 764.

United States. — Page *v.* Lloyd, 5 Pet. (U. S.) 304.

New Jersey. — Dolman *v.* Cook, 14 N. J. Eq. 56.

Pennsylvania. — *Ex p.* Meason, 5 Binn. (Pa.) 167.

Virginia. — Cookus *v.* Peyton, 1 Gratt. (Va.) 432.

4. Retainer of Specific Chattels. — Smith *v.* Bakes, 20 Beav. 568; Kimball *v.* Moody, 27 Ala. 130; Lindsay *v.* Lindsay, 1 Desaus. (S. Car.) 150; Harrison *v.* Henderson, 7 Heisk. (Tenn.) 331. See, however, Smith *v.* Watkins, 8 Humph. (Tenn.) 331; Glenn *v.* Glenn, 41 Ala. 571.

5. Saunders *v.* Saunders, 2 Litt. (Ky.) 323.

to the payment of all debts, including debts owing to executors or administrators.¹

(5) *For What Debts Retainer May Be Exercised*.—(a) **Character of Debt**.—An executor may retain for all legal claims held by him against the estate,² irrespective of whether they are held by him severally or jointly with another.³ and though the claims were such that they could have been enforced only in equity.⁴

Claims Barred by Limitations.—And though there are decisions to the contrary,⁵ the weight of authority seems to be that the executor or administrator may retain from the personal assets for a claim which was barred by the statute of limitations during the testator's life.⁶

1. No Right to Retain from Equitable Assets—*England*.—Anonymous, 2 Ch. Ca. 54; *In re Poole*, 6 Ch. Div. 739; *Talbot v. Frere*, 9 Ch. Div. 568; *Walters v. Walters*, 18 Ch. Div. 182; *In re Illidge*, 24 Ch. Div. 654; *Davidson v. Illidge*, 27 Ch. Div. 478; *In re Baker*, 44 Ch. Div. 262; *Bain v. Sadler*, L. R. 12 Eq. 570; *Dingman v. Croome*, 41 L. T. 672; *Bailey v. Ploughman*, Mosely 95; *Hopton v. Dryden*, Pre. Ch. 179.

New Jersey.—*Dolman v. Cook*, 14 N. J. Eq. 56.

Tennessee.—*Harrison v. Henderson*, 7 Heisk. (Tenn.) 315.

See, however, *Hall v. Macdonald*, 14 Sim. 1.

Retainer from Legal Assets—Effect on Right to Share in Equitable Assets.—Where an executor has retained part of his debt from the legal assets, he will not be allowed to share in the equitable assets until the other creditors have received a proportionate share. *Bain v. Sadler*, L. R. 12 Eq. 570.

For a discussion as to what constitutes equitable assets, see the title EXECUTORS AND ADMINISTRATORS.

2. Breach of Contract.—He may retain for damages for breach of pecuniary contract. *Loane v. Casey*, 2 W. Bl. 965; *Plumer v. Marchant*, 3 Burr. 1380; *In re Compton*, 30 Ch. Div. 15.

Claims as Surety for Decedent.—An executor paying a debt of the decedent for which he was surety may retain. *Boyd v. Brooks*, 34 Beav. 7, affirmed 34 L. J. Ch. 605; *Bathurst v. De la Zouch*, 2 Dick. 460; *Ferguson v. Gibson*, L. R. 14 Eq. 379; *Wildes v. Dudlow*, L. R. 19 Eq. 198; *Milan v. Ragland*, 19 Ala. 85. See, however, *Bathurst v. De Latouche*, 34 Beav. 9, note; and *Gregg v. Com.*, 9 Dana (Ky.) 343, wherein it was held that an executor paying the bond debt on which he was surety, after suit commenced by another bond creditor could not retain as against the latter.

A surety for the decedent when appointed cannot retain unless he has paid the debt. *In re Harrison*, 32 Ch. Div. 395; *Ferguson v. Gibson*, L. R. 14 Eq. 379. Compare *In re Allen*, (1896) 2 Ch. 345; *In re Giles*, (1896) 1 Ch. 956.

Partnership Debt—Administrator of Partner.—Where partnership debts are made joint and several, the administrator of a deceased partner may retain from the individual assets of the estate for a firm debt. *White v. Griffin*, 2 Jones L. (47 N. Car.) 3; *Hassell v. Griffin*, 2 Jones Eq. (55 N. Car.) 117.

Claim Assigned to Administrator.—An administrator may retain for a claim on a note assigned to him after death of the decedent but

before grant of letters of administration. *Reynolds v. Putney*, 1 Hawks (8 N. Car.) 318.

But he cannot retain for a debt proved by the creditor under a decree in a creditor's suit and subsequently bequeathed to the executor by the creditor. *Jones v. Evans*, 2 Ch. Div. 420.

Indebtedness of Executor to Estate—Effect.—Where the executor is indebted also to the estate he is required to offset such indebtedness against his claim against the estate, and is permitted to retain for the balance merely. *Terhune v. Oldis*, 44 N. J. Eq. 146.

Tort.—For a claim for damages founded upon tort, however, the executor cannot retain. *Loane v. Casey*, 2 W. Bl. 968.

Expenses of Administration.—Under a plea of *plene administravit* an administrator may prove the expenses of administration, and show that he retained money to that amount. *Gillies v. Smither*, 2 Stark. 528, 3 E. C. L. 517.

3. Retainer for Debt Owned Jointly by Executor and Another.—*Crowder v. Stewart*, 16 Ch. Div. 368; *Burge v. Brutton*, 2 Hare 373; *In re Hubback*, 29 Ch. Div. 934; *Hosack v. Rogers*, 6 Paige (N. Y.) 415.

4. Retainer for Claim Ascertainable Only by Account in Equity.—*In re Morris's Estate*, L. R. 10 Ch. 68. See, however, *De Tastet v. Shaw*, 1 B. & Ald. 664.

Claim of Wife Against Husband.—Where a wife is appointed administratrix of her husband's estate she may retain for money loaned her husband. *In re May*, 45 Ch. Div. 499; *State v. Reigart*, 1 Gill (Md.) 1, 39 Am. Dec. 628.

5. Claims Barred by Limitations—May Not Retain.—*Rogers v. Rogers*, 3 Wend. (N. Y.) 503, 20 Am. Dec. 716; *Williams v. Williams*, 15 Lea (Tenn.) 438; *Byrn v. Fleming*, 3 Head (Tenn.) 662; *Batson v. Murrell*, 10 Humph. (Tenn.) 301, 51 Am. Dec. 707; *Wharton v. Marberry*, 3 Sneed (Tenn.) 603.

6. May Retain.—*Clinton v. Brophy*, 10 Ir. Eq. Rep. 139; *Sharman v. Rudd*, 4 Jur. N. S. 527; *Coates v. Coates*, 10 Jur. N. S. 532; *Hill v. Walker*, 4 Kay & J. 166; *In re Rowson*, 29 Ch. Div. 362; *Hopkinson v. Leach*, Madd. Pr. (2d ed.) 583; *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Knight v. Godbolt*, 7 Ala. 304; *Payne v. Pusey*, 8 Bush (Ky.) 564.

Proceeds of Realty.—The executor cannot retain out of the proceeds of realty for a debt barred by the statute of limitations. *Dring v. Greetham*, 23 L. J. Ch. 156.

For a Claim Barred After the Death of the Decedent, the executor may retain. *State v. Reigart*, 1 Gill (Md.) 32, 39 Am. Dec. 628.

Statute of Frauds. — The executor may retain for a claim based on a contract within the statute of frauds, where the statute does not make the contract void, but merely provides that no action shall be maintained upon it;¹ the contrary, however, is held in *England*.²

(b) **Character in Which Claim Is Owing to Executor.** — The right of the executor or administrator to retain is not affected by the character in which the debt is payable to him; wherever the right to receive and the right to pay unite in the executor or administrator, the right to retain exists.³

(6) **Time Within Which Right Must Be Exercised.** — The right of retainer may be exercised after a decree in a creditor's suit for the administration of the assets of the estate,⁴ and even after the money has been paid into court under an order in such a suit.⁵ It seems, however, that an executor cannot retain, as against a receiver appointed by the court, from assets which he did not have in hand at the time of the appointment of the receiver.⁶

b. **RETAINER BY HEIR OR DEVISEE.** — Simple contract creditors could not at common law recover a judgment against the heir at law or a devisee, or acquire amongst themselves any preference in the distribution of the proceeds of the realty descended or devised, and therefore heirs at law or devisees who were merely simple contract creditors could not retain from the proceeds of

Special Statute as to Actions Against Executors — Effect. — In *Tennessee* it is held that the executor must exercise his right of retainer within the time in which creditors are barred from suing an administrator or executor as such, as the executor is required to plead such statute in suits by creditors. *Shields v. Alsup*, 5 Lea (Tenn.) 522; *Williams v. Williams*, 15 Lea (Tenn.) 438; *Byrn v. Fleming*, 3 Head (Tenn.) 663.

1. **Claim Within Statute of Frauds — Contract Not to Be Performed Within a Year.** — *Berry v. Graddy*, 1 Metc. (Ky.) 553.

2. *In re Rowson*, 29 Ch. Div. 358, wherein the court, though recognizing the right to retain for a debt barred by the statute of limitations, refused to extend the principle to claims within the statute of frauds, and held that an executrix could not retain for a claim based on a verbal contract in consideration of marriage.

3. **For a Claim Payable to an Executor as Trustee** retainer may be exercised. *Farley v. Briant*, 3 Ad. & El. 839, 30 E. C. L. 239; *Fox v. Garrett*, 28 Beav. 16; *Plumer v. Marchant*, 3 Burr. 1380; *Crowder v. Stewart*, 16 Ch. Div. 368; *Sander v. Heathfield*, L. R. 19 Eq. 21; *Cockroft v. Black*, 2 P. Wms. 298; *Croft v. Pyke*, 3 P. Wms. 183; *Miller v. Irby*, 63 Ala. 484; *Hosack v. Rogers*, 6 Paige (N. Y.) 415.

Co-trustees. — An executor may retain for a debt due to him as one of several co-trustees. *In re Hubback*, 29 Ch. Div. 934.

The Administrator of a Sole Trustee on whom the trust devolves may retain for a debt due from his intestate to the trust estate. *Sander v. Heathfield*, L. R. 19 Eq. 21.

A Cestui que Trust may retain for a debt payable to his trustee. *Ferguson v. Gibson*, L. R. 14 Eq. 379; *Loomes v. Stotherd*, 1 Sim. & S. 458; *Roskelley v. Godolphin*, T. Raym. 483; *Cockroft v. Black*, 2 P. Wms. 299; *Loane v. Casey*, 2 W. Bl. 965; *Marriott v. Thompson*, Willes 186; *Franks v. Cooper*, 4 Ves. Jr. 763. See, however, *Hill v. Underwood*, 2 P. Wms. 299, note; and *Thompson v. Thompson*, 9 Price 464, wherein the right of the *cestui que trust* to

retain the trust fund was denied, on the ground that the *corpus* of the trust was to be paid to the trustees.

An Executor Both of a Creditor and a Debtor may retain for a debt due from one estate to the other. *Wynch v. Grant*, 18 Jur. 1010; *Thomas v. Chamberlain*, 39 Ohio St. 112; *Morrow v. Peyton*, 8 Leigh (Va.) 54; *Green v. Thompson*, 84 Va. 376.

And also an administrator both of creditor and of debtor. *Fox v. Garrett*, 28 Beav. 16.

The Administrator of an Executor may also retain from the assets in the executor's hands belonging to his testator's estate for a debt due from such estate to the executor. *Thompson v. Cooper*, 13 L. J. N. S. Ch. 416.

4. **Retainer After Decree for Administration of Assets.** — *Middleton v. Poole*, 2 Colly. 246; *Ex p. Campbell*, 16 Ch. Div. 198; *Sharman v. Rudd*, 4 Jur. N. S. 527.

Assets Received After Administration Decree. — And he may retain from assets coming into his hands after such a decree. *Thornton v. Stokill*, 1 Jur. N. S. 751; *Nunn v. Barlow*, 1 Sim. & S. 588.

And also from assets paid into court by a debtor of the estate after such decree. *Richmond v. White*, 12 Ch. Div. 361.

Creditor's Suit Instituted by Executor. — And it is immaterial that the executor was the plaintiff in such a suit. *Ex p. Campbell*, 16 Ch. Div. 198.

After a Perfected Accounting, however, by the executor the court will not open the account to permit the executor to assert his right of retainer. *Cowper v. Cowper*, 2 P. Wms. 733.

5. *Tipping v. Power*, 6 Jur. 434; *Chissum v. Dewes*, 5 Russ. 29; *Langton v. Higgs*, 5 Sim. 228; *Hall v. Macdonald*, 14 Sim. 1; *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Hosack v. Rogers*, 6 Paige (N. Y.) 426.

6. **Receivership.** — *In re Birt*, 22 Ch. Div. 604; *Davenport v. Moss*, 14 L. T. N. S. 133; *Wickens v. Townshend*, 1 Russ. & M. 361. See, however, *Hosack v. Rogers*, 6 Paige (N. Y.) 425.

the realty;¹ but specialty or judgment creditors could by vigilance secure preferences as amongst themselves, and therefore heirs at law and devisees who were specialty or judgment creditors were entitled to retain from the proceeds of the realty, because they were under a similar disability to that of an executor so far as actions against themselves were concerned.²

c. **STATUTORY LIMITATIONS.** — In the *United States* the right of retainer has been, to a very large extent, abolished, or restricted by the statutory regulations for the establishment of claims against the estates of decedents and for the order in which they shall be paid. In some states it has been held that the right of retainer as known at common law has been abolished,³ and in a number of the other states it has been held that the statute providing for the *pro rata* distribution of the assets of the decedent among creditors of the same class restricted the right of retainer to a *pro rata* share with other creditors.⁴ In *England* it is held that the Hindes Palmer Act, 32 and 33 Vict., c. 46, which abolishes the distinction between specialty and simple contract debts, and provides that they shall be paid ratably in the administration of assets, did not affect the right of retainer.⁵

III. PRESENTATION OF CLAIMS — 1. In General. — In order to facilitate the speedy settlement of the estates of decedents, and to relieve executors or administrators from the hardship of the common-law rule holding them personally liable for outstanding debts of which they had no notice, in case they distribute the estate to legatees or distributees, there are special statutes, some of which forever bar claims not presented within a specified time after the publication of the grant of letters of administration, whereas others relieve the representative from liability as regards assets of the estate administered upon, after a specified time and before notice of the outstanding claim.⁶

2. What Claims Must Be Presented — a. IN GENERAL. — The statutes requiring all claims or demands of creditors of the estate to be presented to the executor or administrator, or to the probate court, necessitate as a general rule the presentation of all claims affecting the distribution of the estate,⁷ and

1. *In re Illidge*, 27 Ch. Div. 478, 24 Ch. Div. 654.

2. *In re Illidge*, 27 Ch. Div. 478; *Hopton v. Dryden*, Pre. Ch. 179; *Loomes v. Stotherd*, 1 Sim. & S. 458; *Solley v. Gower*, 2 Vern. 61, *quære*.

3. **Statutes.** — In *Nelson v. Russell*, 15 Mo. 356, it was held that the right of retainer was abolished by the statutory regulation for the presentment of claims by executors or administrators. See also *Paschall v. Hailman*, 9 Ill. 288; *Matter of Gardner*, 5 Redf. (N. Y.) 14.

In *Underhill v. Newburger*, 4 Redf. (N. Y.) 499, it was held that the right to retain was abolished so far as retainer before allowance of the claim by the surrogate court was concerned.

4. *Smith v. Bryant*, 60 Ala. 235; *Shortridge v. Easley*, 10 Ala. 520; *Payne v. Pusey*, 8 Bush (Ky.) 564; *Berry v. Graddy*, 1 Metc. (Ky.) 553; *Kinnan v. Wight*, 39 N. J. Eq. 501; *Ex p. Meason*, 5 Binn. (Pa.) 167; *Lenoir v. Winn*, 4 Deaus. (S. Car.) 70, 6 Am. Dec. 597.

5. *In re Illidge*, 27 Ch. Div. 478.

Retroactive Effect of Act. — A statute abolishing the right of retainer does not affect the right of an executor who had assumed his trust prior to the passage of the act. *Rogers v. Hosack*, 18 Wend. (N. Y.) 319.

6. See the local statutes.

7. **What Claims Must Be Presented.** — *McDowell v. Jones*, 58 Ala. 25; *Ray v. Thompson*, 43 Ala. 454; *Walker v. Byers*, 14 Ark. 246;

Gray v. Palmer, 9 Cal. 616; *Hood v. Hood*, 80 Ky. 39; *Showers v. Robinson*, 43 Mich. 508. See also *CLAIM*, vol. 6, p. 101.

A claim by remaindermen against a decedent for dissipating goods in which she had only a life estate must be presented and proved like any other claim against her estate. *Quicksall v. Chew*, (N. J. 1897) 38 Atl. Rep. 442.

A Claim for Wages must be presented. *Grant v. Grant*, 63 Conn. 530.

A Claim by a Tenant in Common for Rents collected by a co-tenant must be presented. *McKneely v. Terry*, 61 Ark. 527. See also *Rose v. England*, 51 Tex. 617; *Roddy v. Harrell*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1064.

Equitable Claims have been declared not to be within the statutes requiring presentation or filing of claims against decedents' estates. *Linn County v. Day*, 16 Iowa 158; *Page v. Whidden*, 59 N. H. 507; *Brown v. Summer*, 31 Vt. 671; *Sparhawk v. Buell*, 9 Vt. 74; *Heaton v. Thatcher*, 59 Fed. Rep. 731 (decided under *Vermont* statutes).

On the other hand, there are authorities which hold that the requirement extends to equitable as well as legal claims. *Yniestra v. Tarleton*, 67 Ala. 126; *Walker v. Byers*, 14 Ark. 246; *Rowan v. Kirkpatrick*, 14 Ill. 1; *Lovell v. Nelson*, 11 Allen (Mass.) 101, 87 Am. Dec. 706; *Williams v. Conrad*, 11 Humph. (Penn.) 412. But see *Ray v. Thompson*, 43 Ala. 454, 94 Am. Dec. 606.

A Claim for Breach of Agreement for Testa-

apply to claims by corporations as well as claims by individuals,¹ and to claims contracted out of the state as well as claims contracted within the state.²

Claim for Specific Property. — The legal owner of specific property, however, is not required to present his claim thereto.³

b. JUDGMENTS — (1) *In General.* — A judgment recovered against the decedent in his lifetime is treated like any other debt which the decedent may have contracted so far as its payment from the general assets of the estate is concerned, and must be presented or filed with the probate court.⁴

(2) *Judgments Constituting Liens.* — But where the judgment constitutes a lien on property of the estate, it may in some states be enforced to the extent of the property subject to the lien, without presentation;⁵ in other states, however, judgments must be presented, even to protect the lien.⁶

c. CLAIMS ON WHICH ACTIONS WERE PENDING. — The statutes generally provide for the revival against the personal representatives, of actions pending against the decedent at the time of his death, and it is generally held that the revival of such actions dispenses with the necessity of presenting the claim on which the action was based, to the personal representatives or to the probate court.⁷

mentary Provision must be presented. *Carroll v. Swift*, 10 Ind. App. 170.

Claims Arising on Contracts. — Where the statute merely requires claims arising on contracts (Cal. Code. Civ. Proc., §§ 1493, 1498) to be presented before an action can be brought upon the claim, it is not necessary, of course, to present claims based on a tort. *Hardin v. Sinclair*, 115 Cal. 460.

1. Claims by Corporations are included in a statute requiring "creditors" to assert their claims. *State v. Crutcher*, 2 Swan (Tenn.) 511.

2. Debts Contracted out of the State are also within the statute unless expressly excepted. *Jones v. Drewry*, 72 Ala. 311.

3. A Claimant of Specific Property is not a "creditor," and therefore is not required to present his claim to the administrator. *Smith v. Gilham*, 80 Ala. 296; *Gunter v. Jones*, 9 Cal. 643. See also *Gillett v. Hickling*, 16 Ill. App. 392.

A Claim for Property Pledged need not be presented. *Reiter v. Rothschild*, (Cal. 1893) 33 Pac. Rep. 849. But see *Cone v. Dunham*, 59 Conn. 145, wherein it was held that the buyer of corporate stock, the title to the stock remaining in the seller, must, on the death of the seller, present his claim to the administrator of the seller.

4. Judgments—Presentation or Filing Necessary — *Alabama.* — *Ready v. Thompson*, 4 Stew. & P. (Ala.) 52; *Thrash v. Suwwalt*, 5 Ala. 13; *Jones v. Lightfoot*, 10 Ala. 17; *Harrison v. Jones*, 33 Ala. 258; *Ray v. Thompson*, 43 Ala. 434. 94 Am. Dec. 696.

Arkansas. — *Keith v. Parks*, 31 Ark. 664.

California. — *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26.

Illinois. — *Welch v. Wallace*, 8 Ill. 490; *Paschall v. Hailman*, 9 Ill. 285; *Turney v. Gates*, 12 Ill. 141; *Clingman v. Hopkie*, 78 Ill. 152; *Winslow v. Leland*, 128 Ill. 304.

Iowa. — *Bayless v. Powers*, 62 Iowa 601.

Kansas. — *Scroggs v. Tutt*, 20 Kan. 271, 23 Kan. 181.

Mississippi. — *Robertson v. Demoss*, 23 Miss. 298.

Missouri. — *Bryan v. Mundy*, 14 Mo. 458; *Carondelet v. Desnoyer*, 27 Mo. 37; *Gibson v.*

Vaughan, 61 Mo. 418; *Ewing v. Taylor*, 70 Mo. 394; *Wernse v. McPike*, 100 Mo. 476.

Texas. — *Cunningham v. Taylor*, 20 Tex. 129; *Birdwell v. Kauffmann*, 25 Tex. 189; *Converse v. Sorley*, 39 Tex. 515; *Jenkins v. Cain*, 72 Tex. 88.

A Judgment Is a Claim within the meaning of a statute requiring the presentation of all claims against a decedent's estate. *Ready v. Thompson*, 4 Stew. & P. (Ala.) 52.

Judgment Recovered Against the Administrator, however, need not be presented to him. *Matter of Brennan*, 65 Cal. 517.

5. Judgments Constituting Liens. — *O'Doherty v. Toole*, (Arizona 1887) 15 Pac. Rep. 28; *Baldwin v. Tuttle*, 23 Iowa 66; *Boyd v. Collins*, 70 Iowa 296, *distinguishing* *Bayless v. Powers*, 62 Iowa 601; *Peters v. Holliday*, 40 Mo. 544; *Knott v. Shaw*, 5 Oregon 482; *Cole v. Robertson*, 6 Tex. 356, 55 Am. Dec. 784. See also *infra*, this section, *Secured Claims*.

Execution Levied on the Homestead creates no lien, and therefore the judgment must be presented to the administrator. *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26.

6. Ready v. Thompson, 4 Stew. & P. (Ala.) 52; *Keith v. Parks*, 31 Ark. 664; *Union Bank v. Powell*, 3 Fla. 195, 52 Am. Dec. 367.

7. Claims, the Subject of Pending Actions—Presentation to Probate Court Dispensed With. — *Clodfelter v. Hulett*, 92 Ind. 426; *Holland v. Holland*, 131 Ind. 196; *O'Donnell v. Hermann*, 42 Iowa 60; *Berkey v. Judd*, 27 Minn. 475.

In *Schlutter v. Dahling*, 100 Iowa 515, it was held that Iowa Code, § 2421, providing that claims upon which actions are pending in the district court need to be presented, did not prevent the running of the statute where the suit is not revived against the representative, but is dismissed as to him, before the expiration of the time for the presentation of claims.

Presentation to Representative Dispensed With — *Alabama.* — *Garrow v. Carpenter*, 1 Port. (Ala.) 359, *limiting* *Bigger v. Hutchings*, 2 Stew. (Ala.) 447; *Malone v. Hundley*, 52 Ala. 147.

Arkansas. — *State Bank v. Tucker*, 15 Ark. 39; *McCoy v. Jackson*, 21 Ark. 472.

Time of Revivor and Identity of Claim. — The action must be revived, however, within the time for the presentation of claims,¹ and must have been on the specific claim, and not for another purpose.²

d. DEBTS INCURRED BY REPRESENTATIVE. — The statutes of non-claim only require the presentation of demands arising out of contracts or transactions with the decedent, and do not apply to demands arising out of contracts, express or implied, with the executor or administrator.³

c. CLAIMS AGAINST A DECEASED FIDUCIARY — (1) *In General.* — Claims against a deceased fiduciary in favor of the trust estate, arising out of his management of the trust estate, must be presented.⁴

(2) *Following Trust Funds.* — Trust funds, however, may be followed in the hands of the representative, so long as the trust property or money can be traced, without the necessity of a presentation of a claim therefor.⁵

California. — Page's Estate, Myr. Prob. (Cal.) 61.

Florida. — *Ellison v. Allen*, 8 Fla. 206; *Anderson v. Agnew*, 38 Fla. 30.

New York. — *Tindal v. Jones*, 11 Abb. Pr. (N. Y. Supreme Ct.) 258; *Lennen v. Wood*, 16 How. Pr. (N. Y. Supreme Ct.) 285; *Benedict v. Caffé*, 3 Duer (N. Y.) 669. See, however, *McCann v. Bradley*, 15 How. Pr. (N. Y. Supreme Ct.) 79.

Washington. — *Megrath v. Gilmore*, 15 Wash. 558.

Where the Revivor Is Invalid because the *scire facias* is void for not describing the claim or the court in which the action was pending, it is insufficient to dispense with a presentation. *Waddill v. John*, 57 Ala. 93.

And when the *scire facias* to revive a suit is subsequently abandoned the service of the writ is not a sufficient presentation of the claim. *Pipkin v. Hewlett*, 17 Ala. 291.

Action Pending in Foreign State. — A statute dispensing with the presentation of a claim on which an action is pending does not apply to actions pending in a foreign state. *Commercial Bank v. Slater*, 21 Minn. 172.

The *California Code of Civ. Proc.*, § 1502, expressly requires the presentation to the personal representative of a claim on which an action was pending at the time of the decedent's death. *Derby v. Jackman*, 89 Cal. 1.

1. *Travis v. Tartt*, 8 Ala. 574; *Bush v. Adams*, 22 Fla. 177.

2. *Fern v. Leuthold*, 39 Minn. 212.

3. **Claims Founded on Acts of Representatives.** — *People v. Olvera*, 43 Cal. 492; *Savery v. Sypher*, 39 Iowa 675; *Wakeman v. Paulmier*, 39 N. J. L. 340; *Brown v. Porter*, 7 Humph. (Tenn.) 373; *McLaughlin v. Winner*, 63 Wis. 120, 53 Am. Rep. 273.

Debts Incurred under Testamentary Provisions need not be presented. *Perry v. Field*, 40 Ark. 175.

A Claim for Family Expenses incurred under a will, is not required to be presented as a "debt against the estate," under *Alabama Code*, § 2064. *Prince v. Prince*, 47 Ala. 283.

Material Furnished Executor. — In *Coburn v. Harris*, 58 Md. 87, it was held that a claim for building materials furnished an executor, under a contract entered into with the decedent, which were used to complete a wall which the decedent was under contract to build, need not be presented.

Funeral Expenses are expenses of administra-

tion and need not be presented. *Dampier v. St. Paul Trust Co.*, 46 Minn. 526.

The statutes of *Texas* (1 Sayles's Civ. Stat., § 2016) expressly require claims for funeral expenses to be presented within ninety days.

The Claim of a Purchaser at an Administration Sale to be reimbursed on account of failure of title, it has been held, must be presented. *Stults v. Forst*, 135 Ind. 297. See, however, *Giddings v. Heiskill*, 44 Tex. 386.

4. **Guardian and Ward.** — The claim of the ward against the estate of the deceased guardian for a settlement of the guardianship must be presented. *Rhodes v. Hannah*, 66 Ala. 215; *Connelly v. Weatherly*, 33 Ark. 658; *Padgett v. State*, 45 Ark. 495; *Nichols v. Shearon*, 49 Ark. 76; *Gillespie v. Winn*, 65 Cal. 429; *Spicer v. Hockman*, 72 Ind. 120; *Bemis v. Bemis*, 13 Gray (Mass.) 559.

Administrator. — And a claim by the distributees against the estate of the administrator, on account of his indebtedness to the estate of which he was administrator, must also be presented. *Taylor v. Robinson*, 69 Ala. 269; *Patterson v. McCann*, 39 Ark. 577; *Purcell v. Carter*, 45 Ark. 299.

Executor. — The same is true of claims against the estate of an executor in favor of the estate, *Halleck's Estate*, Myr. Prob. (Cal.) 46; or in favor of creditors on account of a devastavit, *Matter of Halleck*, 49 Cal. 111; *Sargent v. Kimball*, 37 Vt. 320.

Trustee. — And also as to the indebtedness of a trustee to the trust estate. *Hill v. State*, 23 Ark. 604. See also *Gunter v. Janes*, 9 Cal. 643; *McGrath v. Carroll*, 110 Cal. 79; *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *Sharpstein v. Friedlander*, 54 Cal. 58; *Johnson v. Ames*, 11 Pick. (Mass.) 173.

5. **Following Trust Funds** — *United States.* — *Trecothick v. Austin*, 4 Mason (U. S.) 16.

California. — *People v. Houghtaling*, 7 Cal. 348; *Gunter v. Janes*, 9 Cal. 643; *Gray v. Palmer*, 9 Cal. 616; *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *Sharpstein v. Friedlander*, 54 Cal. 58; *McGrath v. Carroll*, 110 Cal. 79; *Tyler v. Mayre*, (Cal. 1891) 27 Pac. Rep. 160; *Gillespie v. Winn*, 65 Cal. 429.

Colorado. — *Central City First Nat. Bank v. Hummel*, 14 Colo. 259, 20 Am. St. Rep. 257.

Massachusetts. — *Johnson v. Ames*, 11 Pick. (Mass.) 173.

New Jersey. — *Smith v. Combs*, 49 N. J. Eq. 420.

Texas. — *Vandever v. Freeman*, 20 Tex. 333.

f. CLAIMS AGAINST DECEASED PARTNER. — It is generally held that a creditor of a firm must present his claim against the estate of the deceased partner, within the time allowed for the presentation of general claims.¹

g. WIDOW'S AWARD OR ALLOWANCE. — A widow's award or allowance, although in one sense a demand against the estate of the deceased husband, is not such a demand as is required by the statute of non-claim to be exhibited against his estate;² her claim, however, may of course be lost by laches in making application therefor.³

h. CONTINGENT CLAIMS — (1) *Necessity for Presentation* — **Statutes Requiring Presentation.** — The statutes of some of the states expressly require contingent claims to be presented to the executor or administrator under penalty of being barred, though the claim has not been rendered due or absolute by the happening of the contingency within the time limited for presentation.⁴

Presentation Not Required. — In nearly all the states, however, the holder of a contingent claim is either given a certain time after his claim becomes absolute within which to present the same,⁵ or the statutes merely require creditors to present their "claims" and "demands" against the estate without any express provision as to contingent claims, and under such statutes the holder of a contingent claim is not required to file the same before it becomes absolute;⁶ and in *Minnesota* it has been held that contingent claims need not

Wisconsin. — *Biron v. Scott*, 80 Wis. 206.

See generally the title TRUSTS AND TRUSTEES.

Reasons for Doctrine. — In *Roach v. Caraffa*, 85 Cal. 436, Fox, J., said the *cestui qui trust* "is seeking his own property only — not to enforce a claim against the estate and property of the decedent."

1. **Claims Against Deceased Partner.** — *Fillyau v. Laverty*, 3 Fla. 72; *Nagle v. Ball*, 71 Miss. 330.

However, where the liability of the deceased partner is contingent on the insolvency of the surviving partner, the claim is not required to be presented against the deceased's partner's estate during the solvency of the surviving partner, provided contingent claims are not required to be presented. *Pendleton v. Phelps*, 4 Day (Conn.) 476. See also *Gleason v. White*, 34 Cal. 258; *Hoyt v. Bonnett*, 50 N. Y. 538.

Surviving Partner — Claim Against. — Presentation against the estate of the deceased partner is not necessary for the enforcement of the claim against the surviving partners. *Corson v. Berson*, 86 Cal. 433.

Claim of Surviving Partner. — The surviving partner is not required to present a claim against the partnership, arising out of partnership transactions, to enable him to assert the same in the settlement of the partnership affairs, but must do so if he desires to assert it against the individual estate of the deceased partner. *Matter of Kahn*, 18 Mo. App. 426.

2. *Miller v. Miller*, 82 Ill. 463.

3. See the title ALLOWANCES, vol. 2, p. 163.

4. **States Requiring Presentation of Contingent Claims.** — See, for instance:

Arizona. — Rev. Stat. 1887, § 1110.

California. — Code Civ. Proc., § 1493.

Montana. — Comp. Stat., § 150.

New Hampshire. — *Walker v. Cheever*, 39 N. H. 420.

Utah. — Comp. Laws, § 4123.

In *Verdier v. Roach*, 96 Cal. 467, it was held, under the *California* statute, providing that "all claims arising upon contracts, whether the same be due, not due, or contingent, must be

presented" within the time limited in the notice, that a claim on an indemnity covenant in a lease must be presented within the time limited in the notice, though the covenant was not damaged until after the expiration of the time. See also *Maddock v. Russell*, 109 Cal. 417; *Janin v. Browne*, 59 Cal. 37.

Under the *California* Stat. of 1851, § 130, contingent claims were not required nor could they be presented until they became absolute. *Pico v. De La Guerra*, 18 Cal. 422. See also *Gleason v. White*, 34 Cal. 258.

5. **Contingent Claims Not Required to Be Presented** — The *Alabama* Code of 1886, § 2081, authorizing the presentation of claims within a certain time after they have "accrued," does not require the presentation of contingent claims until after the happening of the contingency. *Jones v. Lightfoot*, 10 Ala. 17. See also *McDowell v. Jones*, 58 Ala. 25; *Oswald v. Pillsbury*, 61 Minn. 520; *C. & J. Michel Brewing Co. v. Wightman*, (Wis. 1897) 73 N. W. Rep. 316.

6. **Contingent Claims Not Requiring Presentation** — *United States.* — *Payson v. Haddock*, 8 Biss. (U. S.) 293.

Arkansas. — *Walker v. Byers*, 14 Ark. 246; *Hendricks v. Keese*, 32 Ark. 714.

Florida. — *May v. Vann*, 15 Fla. 553.

Illinois. — *Dugger v. Oglesby*, 99 Ill. 405; *Suppiger v. Gruaz*, 137 Ill. 216; *Dunnigan v. Stevens*, 19 Ill. App. 310.

Indiana. — *Blair v. Allen*, 55 Ind. 409.

Iowa. — *Wickham v. Hull*, (Iowa 1897) 71 N. W. Rep. 352; *Security F. Ins. Co. v. Hansen*, (Iowa 1897) 73 N. W. Rep. 596.

Massachusetts. — *Harding v. Smith*, 11 Pick. (Mass.) 478; *Bullard v. Moor*, 158 Mass. 418.

Mississippi. — *Harris v. Hutcheson*, 65 Miss. 9; *Jones v. Carrollton Bank*, 71 Miss. 1023; *Robinet v. Starling*, 72 Miss. 652.

Missouri. — *Morgan v. Gibson*, 42 Mo. App. 234; *State v. Tittmann*, 134 Mo. 162.

Tennessee. — *Caplinger v. Vaden*, 5 Humph. (Tenn.) 629.

Wisconsin. — *Mann v. Everts*, 64 Wis. 372;

necessarily be presented under a statute providing that they "may" be presented.¹

(2) *What Constitute Contingent Claims*—(a) *In General*.—A contingent claim is a claim depending upon a contingency; that is, on the happening of an event which may never happen, which makes it, therefore, wholly uncertain whether there will ever be a liability.²

Logan v. Dixon, 73 Wis. 533; *Blakely v. Smock*, (Wis. 1897) 71 N. W. Rep. 1052.

See, however, *Supplee v. Sayre*, 51 Hun (N. Y.) 30, wherein it was held, under *New York Rev. Stat.*, c. 6, part 2, art. 2, § 34, requiring all persons to present their claims, that a surety must present against the state of his principal his claim for indemnification before he has paid or been compelled to pay the debt. See also *Bradley v. Burwell*, 3 Den. (N. Y.) 261; and also *Stone v. Clarke*, 40 Ill. 411.

Happening of Contingency—Effect.—After the happening of the contingency the claim must be presented as an absolute claim, and not as a contingent claim. *Lytle v. Bond*, 39 Vt. 388.

1. *Minnesota Gen. Stat.*, c. 53, §§ 43-49; *McKeen v. Waldron*, 25 Minn. 466; *Hantzsch v. Massolt*, 61 Minn. 361; *Oswald v. Pillsbury*, 61 Minn. 520.

2. **Definition of Contingent Claims.**—*Fretwell v. McLemore*, 52 Ala. 124; *Farris v. Stoutz*, 78 Ala. 130; *Halleck's Estate*, Myr. Prob. (Cal.) 46; *Greene v. Dyer*, 32 Me. 460; *Ames v. Ames*, 128 Mass. 277; *Stichter v. Cox*, (Neb. 1897) 72 N. W. Rep. 848; *Sargent v. Kimball*, 37 Vt. 320; *Austin v. Saveland*, 77 Wis. 108.

Illustrations.—**Claims for Indemnity** are contingent until the person entitled to be indemnified has been damaged. *Stone v. Clarke*, 40 Ill. 411; *Harding v. Smith*, 11 Pick. (Mass.) 478; *Bullard v. Moor*, 158 Mass. 418; *Jones v. Carrollton Bank*, 71 Miss. 1023.

In *Neil v. Cunningham*, 2 Port. (Ala.) 171, it was held that the claim of a sheriff against the estate of his deputy for a default of his deputy was contingent until he had been charged or had answered for the same.

Liability of Indorser.—**Before Maturity** of the note the liability of the indorser is contingent. *Cockrill v. Hobson*, 16 Ala. 391; *Dunnigan v. Stevens*, 19 Ill. App. 310. See also *Meriden Steam Mill Lumber Co. v. Guy*, 40 Conn. 163.

Waiver of Presentment—Effect.—When, however, the indorser has waived presentment, his liability is absolute, instead of contingent. *Dunnigan v. Stevens*, 122 Ill. 396, 3 Am. St. Rep. 496.

Claim Dependent upon a Person Reaching a Certain Age.—A covenant to convey land upon a certain person reaching a certain age is contingent until the person reaches the specified age. *Pinkston v. Huie*, 9 Ala. 252.

Warranty of Title.—A claim for damages for breach of such a warranty is contingent until the property has been recovered from the buyer by a person holding a paramount title. *Payson v. Haddock*, 8 Biss. (U. S.) 293; *Walker v. Byers*, 14 Ark. 246; *Dugger v. Oglesby*, 99 Ill. 405; *Blair v. Allen*, 55 Ind. 409; *Hall v. Martin*, 46 N. H. 337; *Caplinger v. Vaden*, 5 Humph. (Tenn.) 629.

Liability on Replevin Bond is contingent until the determination of the replevin action. *Suppiger v. Gruaz*, 137 Ill. 216.

Liability as Garnishee.—A right acquired by garnishment creates a mere liability against the garnishee before judgment on the garnishment, and therefore the claim of the garnishing creditor need not before judgment be filed against the estate of the garnishee. *Harris v. Hutcheson*, 65 Miss. 9.

Assumption of Mortgage.—A claim by the mortgagee against the vendee on his assumption of a mortgage on the land conveyed is contingent until foreclosure of the mortgage. *Terhune v. White*, 34 N. J. Eq. 98.

Where the vendee executes a bond to the mortgagee to pay the mortgage assumed, no claim for a deficiency can be made unless the claim is presented. *Mutual Ben. L. Ins. Co. v. Howell*, 32 N. J. Eq. 146.

Deceased Partner's Liability.—When the liability of the estate of a deceased partner for partnership indebtedness is dependent on the insolvency of the surviving partner, a claim therefor as against the estate is contingent during the solvency of the surviving partner. *Pendleton v. Phelps*, 4 Day (Conn.) 476. See also *Hoyt v. Bonnett*, 50 N. Y. 538. See, however, *Nagle v. Ball*, 71 Miss. 330.

The Claim of a Surviving Partner against the estate of the deceased partner for contribution has been held contingent until the business of the firm is settled. *Logan v. Dixon*, 73 Wis. 533.

Lease Providing for Payment of Taxes and Insurance—Claim of Co-lessee for Contribution.—When a lease requires the lessees to pay taxes assessed on the property and to keep the property insured, a claim by one of the lessees against the estate of his co-lessee for contribution for insurance premiums paid after the death of the co-lessee and for payment of taxes assessed after his death is contingent. *Oswald v. Pillsbury*, 61 Minn. 520.

Payment of Taxes, etc., under Authority in Mortgage.—Expenditures for the payment of taxes and insurance on mortgaged property made by the mortgagor under authority given in the mortgage, when the charges for taxes and insurance accrued subsequent to the presentation of the mortgage claim to the estate, form proper charges against the estate without further presentation. *Humboldt Sav., etc., Soc. v. Burnham*, 111 Cal. 343; *German Sav., etc., Soc. v. Hutchinson*, 68 Cal. 52.

Stockholders' Liability for the debts of the corporation to the extent of the unpaid subscription is contingent until the assets of the corporation are distributed, being dependent upon the insolvency of the corporation. *Hospes v. Northwestern Mfg., etc., Co.*, 48 Minn. 174, 31 Am. St. Rep. 637; *Wickham v. Hull*, (Iowa 1897) 71 N. W. Rep. 352; *Rebinett v. Starling*, 72 Miss. 652; *National German-American Bank v. Tapley*, (Minn. 1894) 57 N. W. Rep. 1065; *Garesche v. Lewis*, 15 Mo. App. 565. Compare *Davidson v. Rankin*, 34 Cal. 503;

Essential that Contingency Might Never Happen. — It is essential that the event be one which may never happen, and thus a claim dependent as to time of payment, merely on the death of a person, is not a contingent claim, as death is an event which is sure to happen.¹

Uncertainty of Claim. — Uncertainty as to the amount of the claim will not render it contingent;² but the uncertainty must be one as to the absolute liability itself.³

Effect of Conditions on Part of Claimant. — The fact that there are conditions to be performed by the claimant before he can enforce the claim will not render it contingent,⁴ for as soon as the right of the claimant to demand, though in the future, certainly exists, the claim ceases to be contingent.⁵

(b) **Claims Arising out of Contract of Suretyship** — *aa. CLAIMS AGAINST SURETIES.* — The liability of a surety on a contract for the mere payment of money is not contingent,⁶ but his liability on a penal bond for the performance of certain duties by his principal is contingent until the condition of the bond is broken.⁷

bb. CLAIMS IN FAVOR OF SURETIES. — The claim of a surety against the estate of his principal for indemnification is contingent, until payment by the surety;⁸

Snydacker v. Swan Land, etc., Co., 154 Ill. 220; *State v. Probate Ct.*, 66 Minn. 246. See also the title STOCKHOLDERS.

Contingent Fee. — A claim for attorney fees which were contingent upon recovery is a contingent claim. *Morgan v. Gibson*, 42 Mo. App. 234; *Burton v. Lockert*, 9 Ark. 412.

1. **Claim Dependent on Death Is Not a Contingent Claim.** — *Farris v. Stoutz*, 78 Ala. 130.

2. *Greene v. Dyer*, 32 Me. 460.

3. *Jemison v. Blowers*, 5 Barb. (N. Y.) 692; *Austin v. Saveland*, 77 Wis. 108.

Enforcement of Claim Dependent on Reformation of Instrument. — The fact that the enforcement of the claim is dependent on the reformation of a deed does not render it contingent. *Jones v. Lightfoot*, 10 Ala. 17.

A Note Secured by Mortgage is not a contingent claim as against the estate of the maker. *Osmon v. Oakland Circuit Judge*, 107 Mich. 27.

4. *Painter v. Smith*, 2 Root (Conn.) 142.

A Note, the Payment of Which Is Contingent upon the performance of some act on the part of the payee, must nevertheless be presented like any other claim against an estate, although it is not due at the time that the final settlement of the estate is made. The *Indiana* statutes provide fully for such a contingency. *Cincinnati, etc., R. Co. v. Heaston*, 43 Ind. 172. See also *Stults v. Forst*, 135 Ind. 297.

Contract to Convey Land. — A claim for damages for breach of a contract to convey land becomes absolute on payment of the purchase price, and does not remain contingent until a demand for a conveyance. The distinction is made between an "accrued claim" and the accrual of the cause of action. *King v. Mosely*, 5 Ala. 610.

5. *McDowell v. Jones*, 58 Ala. 33.

The Liability of an Executor to Creditors of the Estate arising out of a devastavit is not contingent upon the estate of the testator being insolvent, and in the event of the death of the executor before the estate of his testator is settled, the claims of such creditors must be presented against his estate. *Matter of Halleck*, 49 Cal. 111.

The Personal Liability of an Administrator to

creditors of the estate after settlement of his account and order by the probate court for payment of creditors becomes absolute, and the claims of creditors against him personally are no longer contingent. *Sargent v. Kimball*, 37 Vt. 320.

6. **Liability of Surety.** — *Dunnigan v. Stevens*, 122 Ill. 396, 3 Am. St. Rep. 496. See also *Freeman v. State*, 18 Ind. 484; *Ratcliff v. Leunig*, 30 Ind. 289.

In *Ratcliff v. Leunig*, 30 Ind. 289, it was held that a claim against a surety on a note must be filed against his estate, in case the maker dies insolvent, before it is ascertained what portion of the note will be paid from the estate of the maker.

7. **Penal Bond.** — *Mann v. Everts*, 64 Wis. 372.

Administration Bond. — *Palmer v. Pollock*, 26 Minn. 433.

Guardian's Bond. — *McWilliams v. Norfleet*, 60 Miss. 987; *McKeen v. Waldron*, 25 Minn. 466; *Hantzsch v. Massolt*, 61 Minn. 361.

On Guardian's Bond — Death of Ward — Effect. — And on the death of a ward the liability of the surety on the guardian's bond then becomes an "accrued" claim. *Glass v. Woolf*, 82 Ala. 281.

Liability as Surety on Administration Bond — After Devastavit. — Immediately after a devastavit by the administrator the liability of the surety becomes absolute, and does not remain contingent until the amount of the devastavit has been judicially ascertained, and such claims are within the operation of the statute of non-claim. *McDowell v. Jones*, 58 Ala. 25; *Page v. Bartlett*, 101 Ala. 193; *Fretwell v. McLemore*, 52 Ala. 124; *Foster v. Holland*, 56 Ala. 474; *Taylor v. Robinson*, 69 Ala. 269; *Owens v. Corbitt*, 57 Ala. 92; *Pratt v. Northam*, 5 Mason (U. S.) 95; *Hooper v. Bryant*, 3 Yerg. (Tenn.) 1.

In *Atherton v. Fullam*, 55 Vt. 388, however, it was held that the liability of a surety on an administration bond did not become "absolute," nor had the claim against the surety "accrued," until after the final judgment against the administrator settling his account.

8. **Surety's Claim for Reimbursement.** — *Neil v. Cunningham*, 2 Port. (Ala.) 171; *M'Broom v.*

and so, also, is the claim of a surety against his co-surety for contribution.¹

Discharge of Principal's Representative as to Creditor Not Discharge as to Surety. — And therefore when contingent claims are not required to be presented, the discharge of the personal representative of a principal, by failure of the creditor to present his claim, from direct liability to the creditor, does not discharge him from his collateral liability to a surety.²

Surety Discharged as to Creditor, Not So as to Co-surety. — So, also, the discharge of the direct liability of a surety to the creditor does not discharge his estate from liability to a co-surety for contribution.³

i. PUBLIC DEBTS — (1) *Debts Due the United States.* — The statutes of the several states in regard to the presentation of claims have as a rule no application to claims due the United States, either as a bar to the claims or as affects their enforcement in the federal courts.⁴ But where the United States is compelled to come into a state court to enforce its rights, it must come in as any other suitor; and where the presentation of the claim to the executor or administrator is a prerequisite to the right to sue thereon, the United States must comply with such requirement.⁵

(2) *Debts Due the States.* — But it is generally held that claims due the states must be presented;⁶ there are, however, decisions to the contrary.⁷

Taxes. — The decisions as to whether claims for taxes are barred unless presented, are also conflicting. It seems that the majority of the courts hold that they need not be presented under statutes requiring the presentation of claims or demands against the estate;⁸ other jurisdictions, however, require such claims to be presented.⁹

Governor, 6 Port. (Ala.) 43; Marshall v. Hudson, 9 Yerg. (Tenn.) 57; Reeves v. Pulliam, 7 Baxt. (Tenn.) 119; Ewing v. Maury, 3 Lea (Tenn.) 381; Webster v. Lawson, 73 Wis. 561. See, however, Supplee v. Sayre, 51 Hun (N. Y.) 30; Bradley v. Burwell, 3 Den. (N. Y.) 261. See generally the title CONTRIBUTION AND EXONERATION, vol. 7, p. 347.

1. **Surety's Claims for Contribution.** — May v. Vann, 15 Fla. 553; Gibson v. Mitchell, 16 Fla. 519; Maxey v. Carter, 10 Yerg. (Tenn.) 521; Reeves v. Pulliam, 7 Baxt. (Tenn.) 119; Ernst v. Nau, 63 Wis. 134. See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 332.

2. Marshall v. Hudson, 9 Yerg. (Tenn.) 57; Reeves v. Pulliam, 7 Baxt. (Tenn.) 119.

3. Maxey v. Carter, 10 Yerg. (Tenn.) 521; Reeves v. Pulliam, 7 Baxt. (Tenn.) 119.

4. **Debts Due United States.** — U. S. v. Hoar, 2 Mason (U. S.) 311. See also U. S. v. Williams, 5 McLean (U. S.) 133; Gaussen v. U. S., 97 U. S. 585; Booth v. U. S., 11 Gill & J. (Md.) 373. See also the title LIMITATION OF ACTIONS.

In U. S. v. Backus, 6 McLean (U. S.) 445, the court said: "The exclusive jurisdiction given to the Probate Court, in the settlement of decedents' estates, cannot affect the claims of the government, however it may bear on private claims. The mode of proceeding in the Probate Court, and the time given for the settlement of accounts, cannot regulate the claims of the government, nor affect the remedies given to it under its own laws. The demand in this case has been adjusted by the accounting department, under the laws of Congress, and there can be no obligation to present the account for adjustment to the Probate Court of Michigan. Such a rule of procedure would subject the action of the federal government to the regulation of a state government."

5. U. S. v. Hailey, 2 Idaho 26. See the title UNITED STATES.

6. **Debts Due the State.** — Hill v. State, 23 Ark. 604; State v. Edwards, 11 Ind. App. 226; State v. Crutcher, 2 Swan (Tenn.) 504; Padgett v. State, 45 Ark. 495, which was an action by the state on a guardian's bond for the use of the ward.

Claim Due Bank Owned by State. — Claims due a bank which is entirely owned by the state must be presented like the claims of ordinary creditors, as such bank is a mere corporation and not invested with the attributes of sovereignty. State Bank v. Gibson, 6 Ala. 814.

7. Parmilee v. McNutt, 1 Smed. & M. (Miss.) 179; U. S. v. Hoar, 2 Mason (U. S.) 311.

8. **Taxes.** — Claims for taxes need not be filed. Henderson v. Whiting, 56 Ind. 131; Findley v. Taylor, 97 Iowa 420; Bonaparte v. State, 63 Md. 465; Gager v. Prout, 48 Ohio St. 89.

In Missouri the statutes expressly require the payment of debts due the state without their presentation to the probate court for allowance. State v. Tittmann, 103 Mo. 553.

9. Jefferson's Estate, 35 Minn. 215.

Claim for Municipal Taxes are included in a statute requiring all "demands" against a decedent's estate to be verified. Gay v. Louisville, 93 Ky. 349.

Taxes Assessed Pending Administration are expenses of administration, and need not be presented as a "claim" against the estate. People v. Olvera, 43 Cal. 492. See, however, Henderson v. Whiting, 56 Ind. 131.

Assessments. — In Hancock v. Whittemore, 50 Cal. 522, it is held that an assessment for a street improvement made after the death of the decedent was not a "claim" against his estate so as to require its presentation.

j. **UNLIQUIDATED DEMANDS.** — It is generally held that claims for unliquidated demands are included in the statutes requiring claims and demands against a decedent's estate to be presented, irrespective of whether the demand is one arising out of contract,¹ or out of a tort committed by the decedent;² in *Texas*, however, claims for unliquidated demands are not required to be presented.³

Only Claims Arising out of Contract. — And in some states the claims to be presented are limited to those arising out of contracts; therefore in such states claims for damages for a tort need not be presented.⁴

k. **DEBTS NOT DUE.** — The statutes of a great number of the states either expressly require claims not due to be presented before maturity, or make provision for the allowance of such claims. In the latter case as well as the former, claims not due are required to be presented.⁵

Under Statutes Requiring All Claims to Be Presented. — In other states the statutes merely require all claims or demands to be presented, and it is generally held that such statutes also include and require the presentation of all claims running to certain maturity, though not yet payable.⁶

l. **SECURED CLAIMS** — (1) *In General.* — The liens existing on the property of a decedent at the time of his death are not affected by his death, and

1. Unliquidated Demands Arising out of Contract. — *Fretwell v. McLemore*, 52 Ala. 140; *Whitlock's Estate*, Tuck. (N. Y.) 491, *affirmed* 58 Barb. (N. Y.) 529. See, however, *Bullion v. Campbell*, 27 Tex. 653.

Damages for Breach of Covenant. — *Hartman v. Lee*, 30 Ind. 281; *Boothby v. Boothby*, 76 Me. 17.

Breach of Covenant of Seizin. — A claim for breach of the covenant of seizin must be presented to the administrator of the covenantor. *McDonald v. McElroy*, 60 Cal. 485.

Claims Against the Estate of a Deceased Administrator for a devastavit must be presented. *Patterson v. McCann*, 39 Ark. 577; *Purcell v. Carter*, 45 Ark. 299.

Trustee. — Claims against the estate of a deceased trustee must also be presented. *Hill v. State*, 23 Ark. 604.

Accounting by Guardian. — A claim by a ward against the estate of his deceased guardian for an accounting must be presented. *Rhodes v. Hannah*, 66 Ala. 215; *Connelly v. Weatherly*, 33 Ark. 658; *Smith v. Smithson*, 48 Ark. 261; *Padgett v. State*, 45 Ark. 495; *Nichols v. Shearon*, 49 Ark. 75.

Claim for Partnership Accounting. — A claim by representatives of a deceased partner against the estate of another partner whose decease took place earlier must be presented or is barred by the statute of non-claim. *Morgan v. Morgan*, 68 Ala. 80.

2. Personal Injuries. — *Eustace v. Jahns*, 38 Cal. 3; *Simpson v. Gafney*, 66 N. H. 261.

3. Texas — "Claim for Money." — In Texas it is held that 1 *Sayles's Civ. Stat.*, § 2015, requiring "claims for money" to be presented, does not require the presentation of claims for unliquidated demands, whether they arise out of contract (*Merle v. Andrews*, 4 Tex. 200; *Garrett v. Gaines*, 6 Tex. 435; *Robinson v. McDonald*, 11 Tex. 385, 62 Am. Dec. 480; *Evans v. Hardeman*, 15 Tex. 480; *Bullion v. Campbell*, 27 Tex. 653; *McGar v. Nixon*, 36 Tex. 289; *King v. Cassidy*, 36 Tex. 531), or out of tort. *Ferrill v. Mooney*, 33 Tex. 219.

4. Hardin v. Sin Claire, 115 Cal. 460; Min-

nesota Stat. 1894, § 4509; *Comstock v. Matthews*, 55 Minn. 111.

5. Statutes Expressly Requiring Claims Not Due to Be Presented. — *Janin v. Browne*, 59 Cal. 37; *Pico v. De La Guerra*, 18 Cal. 422; *Matter of Swain*, 67 Cal. 637; *Cincinnati, etc., R. Co. v. Heaston*, 43 Ind. 172; *Maddox v. Maddox*, 97 Ind. 537; *Austin v. Saveland*, 77 Wis. 108.

Statutory Provisions for Allowance of Claims Not Due — Effect. — *Dunnigan v. Stevens*, 122 Ill. 396, 3 Am. St. Rep. 496; *Suppiger v. Gruaz*, 137 Ill. 216; *Pratt v. Lamson*, 128 Mass. 528; *Hicks v. Jamison*, 10 Mo. App. 35; *Garesché v. Lewis*, 15 Mo. App. 565; *Hoyt v. Bonnett*, 58 Barb. (N. Y.) 529, *affirming* Tuck. (N. Y.) 491; *Austin v. Saveland*, 77 Wis. 108. See also *Bennett v. Dawson*, 18 Ark. 334.

Date of Maturity Uncertain. — In *Tenny v. Lasley*, 80 Mo. 668, it was held that a note payable after the death of a third person need not be presented.

6. Morgan v. Hamlet, 113 U. S. 449; *Walker v. Byers*, 14 Ark. 246; *Bennett v. Dawson*, 18 Ark. 334.

"All Debts and Demands." — A statute requiring the presentation of all debts and demands against the estate requires the presentation of debts not due. *Fillyau v. Lavery*, 3 Fla. 72. See, however, *Sampson v. Sampson*, 63 Me. 328, wherein it was held that the *Maine* statute, Laws 1872, c. 85, § 14 *et seq.*, did not require the presentation of claims not due. In this case a dictum by Mellen, C. J., in *Webber v. Webber*, 6 Me. 127, that claims not due should be presented, was *disapproved*.

Accrued Claim. — A claim which will certainly become due is an "accrued" claim within the meaning of the Code of *Alabama*, § 2597, requiring claims to be presented within a certain time after they have accrued, and such a claim must be presented though it does not mature within the time specified for presentation. *Farris v. Stoutz*, 78 Ala. 130. See also *King v. Mosely*, 5 Ala. 610, wherein a distinction is made between an accrued claim and the accrual of the cause of action on a claim.

it is generally held that the statutes requiring the presentation of claims and demands against a decedent's estate do not prevent the enforcement of specific liens without presentation.¹

View that Presentation Is Necessary. — There are decisions, however, which require claims secured by liens to be presented, unless the legal title is in the lienor.²

(2) *Claims Secured by Mortgage* — (a) **In General.** — By the great weight of authority a mortgagee may enforce his lien without presentation of his claim. The theory of these decisions seems to be, that only the equity of redemption in the mortgaged premises is assets of the estate, and that the statute of non-claim bars the remedy merely and does not discharge the debt.³

1. Enforcement of Liens Without Presentation.

— *George v. George*, 67 Ala. 192; *Powell v. Macon*, 40 Ark. 541; *Richardson v. Hickman*, 32 Ark. 406; *Barber v. Peay*, 31 Ark. 392; *Hurlbert v. Brigham*, 56 Vt. 368.

Vendor's Lien Enforceable Without Presentation.

— *Mahone v. Haddock*, 44 Ala. 92; *Flinn v. Barber*, 61 Ala. 530.

In *Arkansas* a vendor's lien is held enforceable without presentation when reserved by title bond or on the face of the deed. *Hall v. Denckla*, 28 Ark. 506; *Nicholls v. Gee*, 30 Ark. 135; *Allen v. Smith*, 29 Ark. 74. But not the mere equitable lien of the vendor, no lien being reserved on the face of the deed. *Linthicum v. Tapscott*, 28 Ark. 267.

In *Texas* a claim secured by a vendor's lien must in all cases be presented, or it will be barred and the lien lost. *Robertson v. Paul*, 16 Tex. 472.

Forfeiture for Nonpayment — Enforceable Without Presentation. — In *California* it is held that the vendor may bring ejectment to enforce a forfeiture for nonpayment of the purchase price without presentation of his claim to the administrator of the vendee. *Kerns v. Dean*, 77 Cal. 555, 65 Cal. 416.

Judgment Foreclosing Vendor's Lien. — The assignee of such a judgment must, however, present his claim to the administrator of the vendee, as he does not hold the legal title to the land. *Jenkins v. Cain*, 72 Tex. 88, *distinguishing* *Robertson v. Paul*, 16 Tex. 472.

Mechanic's Lien. — In *Fish v. De Laray*, 8 S. Dak. 320, *citing* 5 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 213, it was held that a claim secured by a mechanic's lien need not be presented to entitle the claimant to enforce the mechanic's lien.

Lien of Pledgee. — A pledgee's lien has been held enforceable without presentation. *Wright v. Ross*, 36 Cal. 414; *Matter of Kibbe*, 57 Cal. 407; *Matter of Galland*, 92 Cal. 293; *Whitmore v. San Francisco Sav. Union*, 50 Cal. 145; *Hurlbert v. Brigham*, 56 Vt. 368.

An Attorney May Retain from Funds Collected for the decedent for his services without presentation of his claim to commissioners. *Hurlbert v. Brigham*, 56 Vt. 368.

Building and Loan Association's Lien. — The *California* Code of Civ. Proc., § 1500, authorizing the holder of a lien to enforce the same when recovery against the other assets of the estate is waived, applies to the enforcement of the lien of a building and loan association for dues and penalties. *Mechanics' Bldg., etc., Assoc. v. King*, 83 Cal. 440.

2. **Presentation Necessary.** — *Linthicum v. Tapscott*, 28 Ark. 267; *McKneely v. Terry*, 61

Ark. 527, wherein the above case is *cited with approval*. See, however, *Allen v. Smith*, 29 Ark. 74.

Logger's Lien. — The provision of the *Washington* statutes, that no claim holder shall sue the executor without presentation of his claim (2 *Ballinger's Wash. Codes & Stat.* 1897, § 6235), requires the presentation of the claim of a laborer having a logger's lien before enforcement of the lien. *Casey v. Ault*, 4 Wash. 167; *Munholland v. Ault*, 4 Wash. 170, note.

3. **Mortgage Lien Not Affected by Nonpresentation** — *Alabama*. — *Doe v. McLoskey*, 1 Ala. 709; *Inge v. Boardman*, 2 Ala. 331; *Smith v. Gillam*, 80 Ala. 296.

Arkansas. — *Pope v. Boyd*, 22 Ark. 535; *Haskill v. Sevier*, 25 Ark. 152; *Hall v. Denckla*, 28 Ark. 506; *Simms v. Richardson*, 32 Ark. 297; *McClure v. Owens*, 32 Ark. 443.

Colorado. — *Reid v. Sullivan*, 20 Colo. 498; *Sullivan v. Sheets*, 22 Colo. 153; *Townsend v. Thompson*, (Colo. 1897) 51 Pac. Rep. 433.

Illinois. — *Mulvey v. Johnson*, 90 Ill. 457; *Kittredge v. Nicholes*, 162 Ill. 410, *affirming* 60 Ill. App. 604; *Waughop v. Bartlett*, 165 Ill. 124, *affirming* 61 Ill. App. 252; *Roberts v. Flatt*, 142 Ill. 485.

Indiana. — *Cole v. McMickle*, 30 Ind. 94; *McCallam v. Pleasants*, 67 Ind. 542; *La Plante v. Convery*, 98 Ind. 499.

Iowa. — *Allen v. Moer*, 16 Iowa 307; *Moore v. Ellsworth*, 22 Iowa 299.

Kansas. — *Crooker v. Pearson*, 41 Kan. 410; *Andrews v. Morse*, 51 Kan. 30, *citing* 5 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 213.

Michigan. — *Willard v. Van Leeuwen*, 56 Mich. 15.

Minnesota. — *Hill v. Townley*, 45 Minn. 167.

Mississippi. — *Miller v. Helm*, 2 Smed. & M. (Miss.) 687; *Miller v. Jefferson College*, 5 Smed. & M. (Miss.) 651; *Jefferson College v. Dickson*, *Freem.* (Miss.) 474.

Missouri. — *Tucker v. Wells*, 111 Mo. 399.

New Jersey. — *Mutual Ben. L. Ins. Co. v. Howell*, 32 N. J. Eq. 146.

Ohio. — *Gary v. May*, 16 Ohio 66; *Fisher v. Mossman*, 11 Ohio St. 42.

Oregon. — *Verdier v. Bigne*, 16 Oregon 208; *Teel v. Winston*, 22 Oregon 489, *citing* 5 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 213.

Pennsylvania. — *Ross's Estate*, 9 Pa. St. 17.

South Dakota. — *Kelsey v. Welch*, 8 S. Dak. 255.

Vermont. — *Putnam v. Russell*, 17 Vt. 54, 42 Am. Dec. 478; *Pelton v. Johnson*, 52 Vt. 138.

Washington. — *Reed v. Miller*, 1 Wash. 426; *Scammon v. Ward*, 1 Wash. 179.

Wisconsin. — *Edgerton v. Schneider*, 26 Wis. 385.

Doctrine that Lien Lost by Failure to Present. — In some states, however, it is held that the mortgage lien is lost by failure to present the claim. These decisions are generally based on the principle that the mortgage creates merely a lien on the property, the property still remaining a fund for distribution among creditors.¹

See also *Mutual Ben. L. Ins. Co. v. Howell*, 32 N. J. Eq. 146.

Mortgagee Out of Possession. — There is no distinction between a mortgagee out of possession and one in possession. *Inge v. Boardman*, 2 Ala. 331.

Mortgage Lien Acquired by Subrogation. — The rule of the text holds even when the mortgage lien is acquired under the right of subrogation by a surety, who has paid the mortgage. *Smith v. Gillam*, 80 Ala. 296, *overruling Watson v. Rose*, 51 Ala. 292. See also *Kelsey v. Welch*, 8 S. Dak. 255.

Chattel Mortgage. — The rule applies equally to chattel mortgages. *Purdin v. Archer*, 4 S. Dak. 54.

Equity of Redemption. — The owner of an equity of redemption is not required to present his claim against the estate of the owner of the legal title. *Locke v. Palmer*, 26 Ala. 312.

1. *California.* — *Ellissen v. Halleck*, 6 Cal. 386; *Willis v. Farley*, 24 Cal. 490; *Ellis v. Polhemus*, 27 Cal. 350; *Pitte v. Shipley*, 46 Cal. 154; *Harp v. Calahan*, 46 Cal. 222; *Marsh v. Dooley*, 52 Cal. 232. Compare *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740; *Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140.

Florida. — *Bush v. Adams*, 22 Fla. 177.

Texas. — *Buchanan v. Wagnon*, 62 Tex. 375; *Graham v. Vining*, 2 Tex. 433, 1 Tex. 639; *Danzev v. Swinney*, 7 Tex. 625; *Duty v. Graham*, 12 Tex. 427, 62 Am. Dec. 534; *Robertson v. Paul*, 16 Tex. 472; *Cannon v. McDaniel*, 46 Tex. 303. Compare *Cole v. Robertson*, 6 Tex. 356, 55 Am. Dec. 784.

See also *Lafon v. Phillips*, 2 Martin N. S. (La.) 225.

Statutory Charge — California. — Code Civ. Proc., § 1500, expressly allows the mortgage lien to be enforced without a prior presentation of the mortgage debt, if recourse against other property is expressly waived in the complaint. *Hibernia Sav., etc., Soc. v. Conlin*, 67 Cal. 178; *German Sav., etc., Soc. v. Fisher*, 92 Cal. 502; *Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393; *Hibernia Sav., etc., Soc. v. Wackenreuder*, 99 Cal. 503. See also *Hibernia Sav., etc., Soc. v. Hayes*, 56 Cal. 297.

And such statute authorizes the enforcement of the lien without presentation after the final settlement of the estate. *Dreyfuss v. Giles*, 79 Cal. 409. See also *Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393.

And also applies to a mortgage on which foreclosure proceedings were pending at the time of the decedent's death. *Hibernia Sav., etc., Soc. v. Wackenreuder*, 99 Cal. 503.

Sufficiency of Waiver of Recourse. — The mortgagee, however, must expressly waive recourse against the other assets, and a judgment of foreclosure will be reversed for failure to properly allege in the bill a waiver of recourse. *Sonoma County Bank v. Charles*, 86 Cal. 322.

In *Hibernia Sav., etc., Soc. v. Wackenreuder*, 99 Cal. 503, an express waiver of recourse

was held sufficient, though the bill also demanded a judgment for the amount due upon the notes secured by the mortgage.

Mortgage on Exempt Property — Homestead. — Where the mortgage is on exempt property (a homestead), which therefore cannot be subjected to the claims of other creditors, the mortgage may be enforced without presentation. *Schadt v. Hepe*, 45 Cal. 433.

The *California Code Civ. Proc.*, § 1475, expressly requires all liens on the homestead to be presented, and this section is not modified by section 1500, which authorizes the foreclosure of mortgage liens without presentation when all recourse against the other assets of the estate is waived. *Camp v. Grider*, 62 Cal. 20; *Bollinger v. Manning*, 79 Cal. 7; *Mechanics' Bldg., etc., Assoc. v. King*, 83 Cal. 440; *Hearn v. Kennedy*, 85 Cal. 55; *Rosenberg v. Ford*, 85 Cal. 610; *Perkins v. Onyett*, 86 Cal. 348; *Wise v. Williams*, 88 Cal. 30; *McGahey v. Forrest*, 109 Cal. 63; *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26; *Security Sav. Bank v. Connell*, 65 Cal. 574; *Dreyfuss v. Giles*, 79 Cal. 409; *German Sav., etc., Soc. v. Fisher*, 92 Cal. 502; *Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393.

Though the object of this statute is to preserve the homestead if possible, *Camp v. Grider*, 62 Cal. 20, still the fact that there were no other assets of the estate will not dispense with the necessity of presenting a mortgage upon the homestead. *Bollinger v. Manning*, 79 Cal. 7.

Mortgage on Property of Third Person. — A mortgage on property of a third person given to secure the debt of the decedent may be enforced without presentation of the claim against the decedent's estate. *Sichel v. Carrillo*, 42 Cal. 493.

Conveyance by Mortgagor — Effect. — Where the mortgagor, after execution of the mortgage, conveys the legal title to a third person, the mortgagee is not required to present his mortgage against the estate of the mortgagor. *Christy v. Dana*, 34 Cal. 553; *Richards v. Hutchinson*, 18 Nev. 215; *Mutual Ben. L. Ins. Co. v. Howell*, 32 N. J. Eq. 146.

A Mortgage Attaching When the Decedent Acquired Title is in no sense a claim against the decedent's estate, so as to require its presentation. *Ryan v. Holliday*, 110 Cal. 335.

And this is true though the decedent assumed payment of the mortgage. *Mutual Ben. L. Ins. Co. v. Howell*, 32 N. J. Eq. 146.

Mortgage to Secure Debt of Third Person. — Nor need a mortgage given to secure the debt of a third person be presented against the estate of the mortgagor. *Hibernia Sav., etc., Soc. v. Conlin*, 67 Cal. 178.

Collateral Security. — The pledgee of a note and mortgage as collateral security for a debt may retain the same until his debt is paid, though he failed to present his claim against the debtor's estate. *Wright v. Ross*, 36 Cal. 414. See also *Whitmore v. San Francisco Sav.*

(b) *Claim for Deficiency.* — If the mortgagee wishes to enforce against the general assets of the estate his claim in full or for a deficiency after foreclosure of his lien, he must, of course, present his claim.¹

(3) *Claims Secured by Deed of Trust with Power of Sale.* — As the power of sale contained in a deed of trust is not affected by the death of the grantor, it is not necessary for the enforcement of the debt by sale under the power that the debt secured by the deed be presented.²

m. CLAIMS OF EXECUTOR OR ADMINISTRATOR. — Except in the states where the statutes expressly require claims of an executor or administrator to be presented to the probate court for allowance or approval,³ the executor or administrator is not required to present his claim to himself or to the probate court, but may retain for his debt and prove the validity of his claim on final accounting.⁴

3. Manner of Presentation — *a. BY WHOM TO BE MADE.* — The presentation of a claim against a decedent's estate, to the executor or administrator, may be made by any person who has an interest in the claim, and a legal or equitable right to enforce it,⁵ or by his lawfully authorized

Union, 50 Cal. 145; *Matter of Kibbe*, 57 Cal. 407.

Death of Mortgage After Foreclosure Decree. — In *Cowell v. Buckelew*, 14 Cal. 640, it was held that after the death of the mortgagor a sale under foreclosure decree entered during his life was authorized. The question as to the necessity of presenting the claim to the representative of the mortgagor before sale was not considered.

Right of Heir to Demand Payment of Mortgage Not Presented. — The heir cannot compel the application of the personal assets of the estate to the satisfaction of a mortgage not presented. *Clark v. Davis*, 32 Mich. 154.

Presentation of Note Secured by Mortgage Sufficient. — The presentation of the note or debt secured by the mortgage is sufficient without presentation of the mortgage also. *Cannon v. McDaniel*, 46 Tex. 303. See also *Sonoma County Bank v. Charles*, 86 Cal. 322; *Danzey v. Swinney*, 7 Tex. 627; *Simpson v. Reily*, 31 Tex. 301.

1. Claim for Deficiency — California. — *Sichel v. Carrillo*, 42 Cal. 493.

Colorado. — *Reid v. Sullivan*, 20 Colo. 498.

Illinois. — *Mulvey v. Johnson*, 90 Ill. 457; *Roberts v. Flatt*, 142 Ill. 485.

Iowa. — *Colby v. King*, 67 Iowa 458.

Kansas. — *Andrews v. Morse*, 51 Kan. 30.

Michigan. — *Clark v. Davis*, 32 Mich. 154. *Willard v. Van Leeuwen*, 56 Mich. 15.

New Jersey. — *Mutual Ben. L. Ins. Co. v. Howell*, 32 N. J. Eq. 146.

South Dakota. — *Kelsey v. Welch*, 8 S. Dak. 255.

Vermont. — *Pelton v. Johnson*, 52 Vt. 138.

Washington. — *Scammon v. Ward*, 1 Wash. 179.

See, however, *Miller v. Helm*, 2 Smed. & M. Miss.) 687, wherein it is said that a debt of record is always in state of presentation. And also *Cole v. McMickle*, 30 Ind. 94; *La Plante v. Convery*, 98 Ind. 499.

2. Power of Sale. — *McClure v. Owens*, 32 Ark. 443; *Whitmore v. San Francisco*, etc., Sav. Union, 50 Cal. 145; *More v. Calkins*, 95 Cal. 435. See also *Pope v. Boyd*, 22 Ark. 535. See, however, *Robertson v. Paul*, 16 Tex. 472;

Blair v. Thorp, 33 Tex. 38; *McLane v. Paschal*, 47 Tex. 305.

3. Statutes Requiring Representative's Claims to Be Presented to Courts. — *Matter of Hildebrandt*, 92 Cal. 433; *Matter of Taylor*, 10 Cal. 482; *Millard v. Harris*, 119 Ill. 185; *Clark v. Tallman*, 68 Iowa 372; *Fenner v. Manchester*, 6 R. I. 140; *Puckett v. McCall*, 30 Tex. 457.

4. May Retain and Prove on Final Accounting. — *Sanderson v. Sanderson*, 17 Fla. 846; *Adams v. Adams*, 22 Vt. 50; *French v. Winsor*, 24 Vt. 408.

Same Person Administrator of Debtor and of Creditor. — Where the same person is administrator of the estates of both the creditor and the debtor, no formal presentation of the claim of the estate of the creditor against the estate of the debtor is necessary. *Thomas v. Chamberlain*, 39 Ohio St. 112.

Right of Retainer must be exercised within the time in which claims are required to be presented to the executor or administrator. *Shields v. Alsup*, 5 Lea (Tenn.) 508; *Williams v. Williams*, 15 Lea (Tenn.) 438. See generally, as to the right of retainer, *supra*, this title. *Order of Payment of Debts — Retainer.*

5. By Whom Presentation to Be Made. — *Boggs v. Branch Bank*, 10 Ala. 974; *McDowell v. Jones*, 58 Ala. 25; *Crosby's Estate*, 55 Cal. 574. *distinguishing Marsh v. Dooley*, 52 Cal. 232.

A Person Subrogated to the Right of a Creditor may file his claim directly against the estate. *Campau v. Miller*, 46 Mich. 148.

So May the Administrator of a Creditor's Estate. — *Feustmann v. Gott*, 65 Mich. 592.

Foreign Corporation Appointed Administrator. — A corporation created by the laws of the state of *Pennsylvania*, and authorized by its charter to administer upon the estates of decedents, may, as administrator, by its treasurer, make probate of a debt owing to it from the estate of a decedent in Delaware under the statute of the latter state. *Fidelity Ins., etc., Co. v. Niven*, 6 Houst. (Del.) 64.

The Pledgee of a Note and Mortgage may present the claim against the estate of the maker. *Ponce v. McElvy*, 47 Cal. 154. See *Marsh v. Dooley*, 52 Cal. 232, wherein it was held that the payee and legal owner of a note and mort.

agents.¹ A presentation, however, by a person having no interest in the claim, is a nullity and will not avoid the operation of the statute of non-claim.² Where a creditor has presented or filed his claim, it is not necessary that the claim be again presented or filed by a person subsequently acquiring the interest therein.³

b. TO WHOM MADE. — The presentation must be made to an executor or administrator having general powers and legally appointed and qualified.⁴

gage so long as it remained in his possession unassigned was the person to present the same, and on his failure to do so the claim is barred, though the equitable owner resides out of the state, and did not know of the death of the payor. *Compare Crosby's Estate*, 55 Cal. 574.

Claim for Services Rendered by Wife. — A claim against the estate of a decedent for services rendered by a wife while living with her husband is community property and should be presented by the husband; still, however, if such a claim, verified by the wife, is presented in her name by the husband, and is rejected, and suit is thereafter instituted, a judgment in favor of the husband and wife in an action subsequently brought by them will not be reversed for informality in the presentation. *Smith v. Furnish*, 70 Cal. 424.

1. Presentation by Agent. — *Marshall v. Perkins*, 72 Me. 343; *Douglass v. Folsom*, 22 Nev. 217.

Notice by a Notary Public to the administrator of the indorser of the protest and nonpayment of a note, and that he will be held for payment, is sufficient. *Hallett v. Branch Bank*, 12 Ala. 193. See also *Helm v. Smith*, 2 Smed. & M. (Miss.) 403.

2. Presentation by Stranger. — *Boggs v. Branch Bank*, 10 Ala. 974; *Thurston v. Holbrook*, 31 Vt. 354.

Administrator under Void Appointment. — A presentment by an administrator of the creditor's estate, whose appointment was void, against the estate of the debtor, is a nullity. *McDowell v. Jones*, 58 Ala. 35, wherein the court said: "We are, however, constrained to declare that appointment void — a mere nullity; and that the presentment made by Richards [the person whose appointment as administrator was void] was the act of a stranger, which may have given to the appellant notice of the existence of the claim, but did not and could not inform him of the further indispensable element of a presentment, that the estate of the intestate was looked to for payment."

Administrator Before Qualification. — Presentation by an administrator of the creditor before his qualification is a nullity. *Henry v. Roe*, 83 Tex. 446.

By Executor. — An executor, however, may present a claim due his testator before probate of the will. *Feustmann v. Gott*, 65 Mich. 592.

A Foreign Administrator cannot present a claim before taking out ancillary letters of administration. *Henry v. Roe*, 83 Tex. 446.

Vermont — Disallowance by Commissioners — Appeal. — In *Thurston v. Holbrook*, 31 Vt. 354, the claim was presented before the commissioners by a person who had no authority to so act, the claimant being a person *non compos mentis* and having no guardian, and the com-

missioners disallowed the claim and made their report accordingly to the probate court. The party who had acted before the commissioners was then appointed guardian for the claimant, and in that capacity appealed from the judgment of the commissioners to the county court. It was held that the appeal was a ratification of the presentation before the commissioners, and a motion to dismiss the cause in the county court for lack of jurisdiction was overruled.

3. Ryan v. Flanagan, 38 N. J. L. 161.

Sureties' Subrogation to Creditor's Right. — Where a claim has been filed by a creditor it is not necessary that sureties, who by payment of the claim are subrogated to the right of the creditor, file their claim, as they stand in the place of the creditor as to the steps already taken for the enforcement of the claim. *Brought v. Griffith*, 16 Iowa 26; *Fisher v. Columbia Bldg., etc., Assoc.*, 59 Mo. App. 430. See, however, *Marshall v. Perkins*, 72 Me. 343.

4. Presentation to an Executor Before Qualification has been held ineffectual. *Branch Bank v. Hallett*, 12 Ala. 671. See also *Cleveland v. Chandler*, 3 Stew. (Ala.) 489.

To Discharged Administrator. — An administrator after his discharge is *functus officio*, and a presentation to him after his discharge would be of no effect. *Gibson v. Mitchell*, 16 Fla. 519.

Administrator Pendente Lite. — A presentation to an administrator *pendente lite* is not authorized. *Houston v. Houston*, 3 Humph. (Tenn.) 652.

Administrator Ad Colligendum. — Under the Georgia statute of 1810, claims need not be presented to an administrator *ad colligendum* in order to save the bar of the statute of non-claim. *Erwin v. Branch Bank*, 14 Ala. 307.

Ancillary Administrator. — A presentation by a nonresident creditor to an ancillary administrator appointed in another state is insufficient as regards the distribution of the assets in the state in which primary administration was granted. *Turner v. Risor*, 54 Ark. 33.

To Agent — Attorney for Estate. — Where the statute directs that claims should be presented to the executor or administrator, a presentation to the attorney employed to transact the legal business of the estate is insufficient. *Roddan v. Doane*, 92 Cal. 557; *Douglass v. Folsom*, 21 Nev. 441; *Rawson v. Knight*, 71 Me. 99; *Hardy v. Ames*, 47 Barb. (N. Y.) 413; *Genet v. Binsse*, 3 Daly (N. Y.) 239. But a presentation to an attorney authorized by the administrator to receive the claim has been held sufficient. *Wells v. Miller*, 45 Ill. 33.

Sufficiency of Attorney's Authority to Receive Claims. — See *Douglass v. Folsom*, 21 Nev. 441. See also *Douglass v. Folsom*, 22 Nev. 217.

Personal Presentation Not Required. — The

Where there are several executors or administrators, a presentation to one is sufficient;¹ and where the claim has been once presented to an executor or administrator regularly qualified, it is not necessary in case of a change in the administration to again present the claim to the executor or administrator subsequently qualifying or appointed.²

c. SUFFICIENCY OF PRESENTATION — (1) *In General*. — The statutory requirements as to the manner in which claims shall be presented or exhibited to the executor or administrator, though generally considered mandatory, are strictly construed, being in derogation of the common law, and are not to be extended by implication unless the implication is clear and unmistakable;³ but where the requirements are express they must be strictly complied with.⁴ Where the statute merely requires claims to be presented or exhibited, no particular form of presentation or exhibition is necessary;⁵ and the design of the statute being to bring claims to the knowledge of the executor or administrator, any form which brings the nature and amount of the claim to his notice, and that the estate is looked to for payment, is generally held sufficient.⁶

Presentation in Writing. — In some jurisdictions it is held that claims must be presented in writing,⁷ while in other jurisdictions it is held that claims need

presentation need not, however, be personal, but the claim may be left for the executor or administrator in case of his absence from the place designated for the presentation of claims. *Bollinger v. Manning*, 79 Cal. 7; *Cowgill v. Dinwiddie*, 98 Cal. 481; *Roddan v. Doane*, 92 Cal. 555; *Rawson v. Knight*, 71 Me. 99; *Dot glass v. Folsom*, 21 Nev. 441.

Administrator Whose Letters Are Voidable. — A presentation to an administrator whose letters are voidable merely is sufficient. *Floyd v. Clayton*, 67 Ala. 265.

1. Co-executors. — *Mardis v. Shackelford*, 4 Ala. 504; *Acre v. Ross*, 3 Stew. (Ala.) 288; *McHardy v. McHardy*, 7 Fla. 301; *Barnes v. Scott*, 29 Fla. 285; *Clark v. Parkville, etc.*, R. Co., 5 Kan. 654; *Dean v. Duffield*, 8 Tex. 235, 58 Am. Dec. 108.

2. Change in Administration. — *Floyd v. Clayton*, 67 Ala. 265; *McHardy v. McHardy*, 7 Fla. 301.

But in *Badger v. Kelly*, 10 Ala. 944, the presentation of a note to an administrator, within eighteen months after the grant of administration, which was subsequently defeated on the ground of lunacy, was held not to withdraw a suit afterwards instituted for the amount of an account included in the note from the operation of the statute of non-claim.

3. Statutory Requirements Strictly Construed. — *Millett v. Millett*, 72 Me. 117, wherein it was held that Stat. 1872, c. 85, requiring claims to be presented in writing, did not require that the claim be signed by the claimant.

4. Express Requirements Must Be Complied With. — In *Thurmond v. Sanders*, 21 Ark. 255, it was held, under a statute requiring a claimant in the exhibition of his claim for allowance, to set forth each item distinctly, that the fact that the claim arose out of transactions of such a complicated nature as not to admit of a specification of the particular claims was not an excuse for failure to comply with its statute. See also *Roethlisberger v. Caspari*, 12 Mo. App. 514.

5. Form of Presentation. — *Mead's Appeal*, 46 Conn. 417; *Fillyau v. Laverty*, 3 Fla. 72.

Presentation by Letter. — In *Gansevoort v. Nelson*, 6 Hill (N. Y.) 389, it was held that a presentation by letter was sufficient, the court stating that a personal interview between the claimant and the executor was not necessary.

6. Posey v. Decatur Bank, 12 Ala. 802; *Hallett v. Branch Bank*, 12 Ala. 193; *Pollard v. Scears*, 28 Ala. 484, 65 Am. Dec. 364; *Frazier v. Praytor*, 36 Ala. 691; *Flinn v. Shackelford*, 42 Ala. 202; *Smith v. Fellows*, 58 Ala. 467; *Ayer v. Chadwick*, 66 N. H. 385.

Request for Indulgence. — The fact that an executor, when shown an execution against his testator, applied for an indulgence, sufficiently shows a presentation. *Harrison v. Jones*, 33 Ala. 258; *Puckett v. James*, 2 Humph. (Tenn.) 565.

Exhibition for Purpose of Compromise. — In *Pfeiffer v. Suss*, 73 Mo. 245, it was held that an exhibition of a claim for the purpose of a compromise was insufficient, but that it should be exhibited with a view to procuring an allowance.

Recovery for More than Claim Presented. — In *Field v. Field*, 77 N. Y. 294, the claimant was allowed to recover for more than the amount of the claim presented. See also *Russell v. Pratt*, 7 Pa. Co. Ct. Rep. 662.

Necessity to Prove Claim. — The creditor is not required to prove his claim when presented. *Jones v. Pharr*, 3 Ala. 283; *Posey v. Decatur Bank*, 12 Ala. 814.

7. Presentation in Writing Necessary — Statute Requiring "Exhibition" of Claim. — *Matter of Morton*, 7 Misc. Rep. (N. Y. Surrogate Ct.) 343; *King v. Todd*, 27 Abb. N. Cas. (N. Y. C. Pl.) 149, 21 Civ. Pro. Rep. (N. Y.) 114. See also *Cruikshank v. Cruikshank*, 9 How. Pr. (N. Y. Supreme Ct.) 350, and *Pike v. Thorp*, 44 Conn. 450, wherein it was held that merely mentioning to an administrator the approximate amount of a claim, and showing him a bill of items for a portion thereof, was not a sufficient presentation.

In some states the statute expressly requires the claim to be exhibited in writing. *Millett v.*

not be presented in writing, unless expressly required by statute.¹

Description of Claim. — And even if the claim is required to be presented in writing, it is only necessary to describe it with sufficient accuracy to distinguish it from other claims of similar character.² The claim should be presented as based upon the instrument which at the time imposes the liability upon the estate; for instance, it has been held that when a note executed by the decedent has been extinguished by a new obligation executed by him, the claim should be presented as based upon the new obligation and not as based upon the note.³

Proof of Presentation. — An executor's acknowledgment of the due presentation of a claim, though made after the lapse of the time for presenting claims, is evidence of its due presentation,⁴ not only against the personal representatives, but also against others interested in the property sought to be subjected to the payment of the claim.⁵ The burden of proving a presentation is upon the claimant.⁶

(2) *Institution of Suit as a Presentation* — (a) **In General.** — It is generally held that the institution of a suit against the executor or administrator is a sufficient presentation of the claim of the plaintiff to take it out of the statute of non-claim.⁷ In *New Jersey*, however, under a statute requiring claims to

Millett, 72 Me. 117; *Roethlisberger v. Caspari*, 12 Mo. App. 514.

Claims on Open Account. — In *Smith v. Fellows*, 58 Ala. 467, it was held that claims on open account should be presented in writing. See also *Bigger v. Hutchings*, 2 Stew. (Ala.) 445.

1. **Presentation in Writing Not Necessary.** — *Tebbetts v. Tilton*, 31 N. H. 273; *Little v. Little*, 36 N. H. 224; *Ayer v. Chadwick*, 66 N. H. 385.

2. **Sufficiency of Description of Claim.** — *Bibb v. Mitchell*, 58 Ala. 657; *White v. Brown*, 19 Conn. 577; *Hammett v. Starkweather*, 47 Conn. 439; *Corr's Appeal*, 62 Conn. 403; *Schlee v. Darrow*, 65 Mich. 362; *Link Wine Co. v. Caspari*, 11 Mo. App. 382; *Trigg v. Moore*, 10 Tex. 197.

Claim for Services Rendered. — A statement of a claim for services rendered, showing the total number of days of service and wages per day, and stating the total sum with amount paid and balance due, is sufficient. *Duncan v. Thomas*, 81 Cal. 56. See also *Fisher v. Filon*, 90 Hun (N. Y.) 605, 35 N. Y. Supp. 283.

The Presentation of a Copy of the Contract evidencing the claim is sufficient. *Posey v. Decatur Bank*, 12 Ala. 802; *Stubbs v. Beene*, 37 Ala. 627; *Flinn v. Shackleford*, 42 Ala. 202; *Mathes v. Jackson*, 7 N. H. 259. See also *Tebbetts v. Tilton*, 31 N. H. 273.

The Balance Struck upon an Account may be presented as a claim against the estate without specifying the particular items. *Matter of Swain*, 67 Cal. 637. It is otherwise, however, when required by statute. *Thurmond v. Sanders*, 21 Ark. 255. See also *Roethlisberger v. Caspari*, 12 Mo. App. 514.

Insufficient Descriptions. — See *Fratt v. Hunt*, 108 Cal. 288.

Under *Missouri Rev. Stat.*, § 198, requiring the written notice of a claim to contain a copy of the "account" on which it is founded, it was held that the items should be set out in detail and not merely a statement of the balance given. *Roethlisberger v. Caspari*, 12 Mo. App. 514.

Presentation of a claim as a simple money demand is insufficient as a presentation of a claim arising out of the claimant's right as beneficiary of an express trust, but the facts constituting the trust should be set forth. *McGrath v. Carroll*, 110 Cal. 79. See also *Lathrop v. Bampton*, 31 Cal. 24, 89 Am. Dec. 141.

3. *Matter of Sullenberger*, 72 Cal. 549.

4. **Proof of Presentation.** — *Pharis v. Leachman*, 20 Ala. 662; *Grimball v. Mastin*, 77 Ala. 553.

Resignation of Executor — Effect. — Nor does the subsequent resignation of the executor affect the admissibility of his previous acknowledgment. *Grimball v. Mastin*, 77 Ala. 553; *Starke v. Keenan*, 5 Ala. 590.

Payment on Claim as Evidence of Presentation. — A payment on a claim made by an executor after the time limited for presentation of claims is admissible in evidence to show a due presentation. *Pharis v. Leachman*, 20 Ala. 662.

Rejection by Executor — Proof of Signature. — Unless there is proof of the signature of the executor to the rejection of a claim, the rejection is inadmissible to prove a presentation. *Chico Bank v. Spect*, (Cal. 1886) 11 Pac. Rep. 740.

5. *Pharis v. Leachman*, 20 Ala. 662.

Judgment Against Representative. — A judgment recovered against an executor or administrator is, as against the heirs or devisees, in a suit to subject land to the payment of the judgment, evidence of the presentation of the claim on which the judgment was recovered. *Darrington v. Borland*, 3 Port. (Ala.) 10.

6. **Burden of Proof.** — *Evans v. Norris*, 1 Ala. 511.

7. **Institution of Suit Sufficient Presentation.** — *Hunley v. Shuford*, 11 Ala. 203; *Fillyau v. Laverty*, 3 Fla. 72; *Ellison v. Allen*, 8 Fla. 206; *Stuart v. Carr*, 6 Gill (Md.) 430; *Smith v. Smith*, 3 How. (Miss.) 216; *Tevis v. Tevis*, 23 Mo. 256; *Madison County Bank v. Suman*, 79 Mo. 527.

In *Minnesota* every claim proper to be allowed by commissioners which is not presented for allowance within the time limited by the probate court for that purpose is barred unless

be presented in writing specifying the amount claimed, and the particulars of the claim, and that the claim shall be sworn to, or the presentation shall be of no effect, the contrary is held.¹

(b) **Revival of Suit.** — The revival of a suit pending against the decedent at the time of his death, is held to constitute a sufficient presentation.² And the statutes in some of the states expressly provide that the revival of a suit against the executor or administrator is a sufficient exhibition or presentation.³

(3) **Knowledge of Personal Representative.** — In some states it is held that knowledge on the part of the executor or administrator of the existence of a claim against the estate, irrespective of the source of his knowledge, will dispense with the necessity of an actual presentation of the claim, on the ground that the object of the requirement for presentation is merely to enable the executor or administrator to ascertain the true financial condition of the estate.⁴ Whereas in other states such knowledge is held insufficient to dispense with the necessity for a presentation, on the ground that the purpose of the statute in requiring a presentation to the executor or administrator is not only to give him notice of the claim, but also to inform him that the estate is looked to for payment.⁵

within Gen. Stat. 1878, c. 53, § 16, by reason of the pendency of an action upon it against the decedent at the time of his death. But to bring it within this section the specific claim must be in litigation at the time of the debtor's death; it is not enough that an action for another purpose was pending against him. *Fern v. Leuthold*, 39 Minn. 212.

In *Hunley v. Shuford*, 11 Ala. 203, Collier, C. J., said: "By the writ, with the indorsement thereon, the defendant [the executor] is informed of the nature of the demand, and that the plaintiff insists upon its payment. He could not be more effectually advertised of both these facts if the claim was formally presented to him and payment demanded."

Nonsuit — Effect. — The revival of the suit is a sufficient presentation though the plaintiff is subsequently nonsuited. *McCoy v. Jackson*, 21 Ark. 472; *Garrow v. Carpenter*, 1 Port. (Ala.) 350.

Voluntary Nonsuit. — But when the plaintiff voluntarily submits to a nonsuit, it has been held that the institution of the suit is not a sufficient presentation. *Dilbone v. Moorer*, 14 Ala. 426; *Bigger v. Hutchings*, 2 Stew. (Ala.) 447.

It seems, however, that it would be otherwise when the plaintiff submits to a nonsuit under a ruling which prevents his recovery on the case as presented. *Dilbone v. Moorer*, 14 Ala. 426.

Dismissal. — And where the suit was dismissed its institution was held a sufficient presentation. *Ruth v. Davenport*, 22 Civ. Pro. Rep. (N. Y. Supreme Ct.) 121.

Vacation of Default Judgment — Effect. — The taking of a default judgment against an administrator, which is subsequently vacated for insufficiency of the service of summons, is not a presentation. *Boggs v. Branch Bank*, 10 Ala. 970.

Appearance — Effect. — Where the service of summons upon the administrator is invalid, his appearance, after the time limited for the exhibition of demands, is ineffectual. *Madison County Bank v. Suman*, 79 Mo. 527.

Want of Jurisdiction — Effect. — The institu-

tion of an action against the administrator, in a court without jurisdiction, is not an exhibition of the demand. *Wernse v. McPike*, 100 Mo. 476, 86 Mo. 565.

1. *Newbold v. Fenimore*, 53 N. J. L. 307.

Foreclosure Suit. — In *Mutual Ben. L. Ins. Co. v. Howell*, 32 N. J. Eq. 146, it was held that a suit for the foreclosure of a mortgage, in which a deficiency decree was asked, was not a presentation of the claim for the deficiency.

And Filing an Unverified Bill in the chancery court for discovery of trust funds and to follow them into lands mentioned in the bill against the executrix is not a sufficient presentation, under an order of limitation by the orphans' court, to entitle the complainants to share in the assets of the estate along with the creditors who made due presentation of their claims, notwithstanding the bill was filed before the time limitation of the order expired, and the defendant's answer, which was not filed until after the expiration of such time, admitted the estate's liability for a portion of the claim. *Robins v. Arnold*, 42 N. J. Eq. 511.

2. See *supra*, this section *What Claims Must Be Presented — Claims on Which Actions Were Pending*.

3. **Statutes.** — *McCoy v. Jackson*, 21 Ark. 472; *Eddins v. Graddy*, 28 Ark. 500; *O'Donnell v. Hermann*, 42 Iowa 60; *Kothman v. Skaggs*, 29 Kan. 5.

4. **Knowledge of Claim.** — *Helm v. Smith*, 2 Smed. & M. (Miss.) 403; *Miller v. Helm*, 2 Smed. & M. (Miss.) 687; *Gordon v. Gibbs*, 3 Smed. & M. (Miss.) 473; *Miller v. Jefferson College*, 5 Smed. & M. (Miss.) 651; *Ellis v. Carlisle*, 8 Smed. & M. (Miss.) 552; *Brown v. Hill*, 27 Miss. 44; *Branch of State Bank v. Rhew*, 37 Miss. 110; *Perry v. West*, 40 Miss. 233. See also *Little v. Little*, 36 N. H. 224; *Brown v. Brown*, 56 Conn. 249, 7 Am. St. Rep. 307, 58 Conn. 85.

5. **Knowledge Insufficient** — *Alabama*. — *Bigger v. Hutchings*, 2 Stew. (Ala.) 448; *Jones v. Lightfoot*, 10 Ala. 17; *Boggs v. Branch Bank*, 10 Ala. 976; *Hallett v. Branch Bank*, 12 Ala. 193, *per Ormond, J.*; *Pipkin v. Hewlett*,

(4) *Where Claim of Record.* — The fact that a claim against an estate is of record does not dispense with the necessity for presentation.¹ But in *Mississippi*, where knowledge on the part of the executor or administrator of the existence of the claim dispenses with the necessity for presentation, it is held that the constructive notice arising from the record also dispenses with the necessity for presentation.²

(5) *Presentation by Filing Claim* — (a) *In General.* — In some of the states the claimant may, as a substitute for presenting the claim to the executor or administrator, file the claim in the probate court;³ and in others, is required in the first instance to present the claim to such court.⁴

Statement of Claim. — In presenting claims against the estate, to the probate court, or by filing the claim in the office of the probate judge, no formal complaint is necessary. All that is required is that the statement show the nature and amount of the claim with sufficient precision to bar another action, and show also a *prima facie* right to recover.⁵ It is necessary, however, that the

17 Ala. 291; *Clark v. Washington*, 44 Ala. 291; *Owens v. Corbitt*, 57 Ala. 92.

California. — *Pico v. De La Guerra*, 18 Cal. 422.

Florida. — *Bush v. Adams*, 22 Fla. 191.

Missouri. — *Pfeiffer v. Suss*, 73 Mo. 252; *Madison County Bank v. Suman*, 79 Mo. 533.

New York. — *Livingston v. Gardner*, 4 Redf. (N. Y.) 516, note; *Cruikshank v. Cruikshank*, 9 How. Pr. (N. Y. Supreme Ct.) 350; *Matter of Morton*, 7 Misc. Rep. (N. Y. Surrogate Ct.) 343.

Reasons for Doctrine. — In *Jones v. Lightfoot*, 10 Ala. 17, Ormond, J., said: "The plain and obvious design of the statute was to enable distributees and legatees to demand a distribution of the estate at the expiration of eighteen months from the grant of letters, unless it was necessary for the executor or administrator to retain it longer in his hands for the purpose of paying debts. To justify him in so doing he must be furnished with the evidence that claims exist against the estate, and will be enforced. This evidence the statute requires, to be a presentment of the claim, and in our opinion nothing short of an actual presentment will satisfy its demand."

And in *McDowell v. Jones*, 58 Ala. 35, Breckell, C. J., said: "The presentment made by Richards was the act of a stranger, which may have given to the appellant [administrator] notice of the existence of the claim, but did not and could not inform him of the further indispensable element of a presentment, that the estate of the intestate was looked to for payment."

1. **Judgments Against Decedent.** — *Matter of Morton*, 7 Misc. Rep. (N. Y. Surrogate Ct.) 343.

Mortgage. — *Sonoma County Bank v. Charles*, 86 Cal. 322; *Bush v. Adams*, 22 Fla. 191. See also cases cited *supra*, this section, *What Claims Must Be Presented*, requiring the presentation of secured claims.

2. *Gordon v. Gibbs*, 3 Smed. & M. (Miss.) 473; *Miller v. Jefferson College*, 5 Smed. & M. (Miss.) 651. And see *Wernse v. McPike*, 100 Mo. 476; *Berkey v. Judd*, 27 Minn. 475.

3. **Presentation by Filing Claim.** — *Walker v. Wigginton*, 50 Ala. 579; *Ransom v. Quarles*, 16 Ala. 437; *Halfman v. Ellison*, 51 Ala. 543; *Thornton v. More*, 61 Ala. 347; *Agnew v. Walden*, 84 Ala. 502; *Floyd v. Clayton*, 67 Ala. 265; *Barbero v. Thurman*, 49 Ill. 283.

4. See *Fern v. Leuthold*, 39 Minn. 212.

5. **Statement of Claim** — *Indiana.* — *Hannum v. Curtis*, 13 Ind. 206; *Ginn v. Collins*, 43 Ind. 271; *Post v. Pedrick*, 52 Ind. 490; *Dodds v. Dodds*, 57 Ind. 293; *Hileman v. Hileman*, 85 Ind. 1; *Stricker v. Barnes*, 122 Ind. 348; *Lockwood v. Robbins*, 125 Ind. 398; *Wolfe v. Wilsey*, 2 Ind. App. 549; *Culver v. Yundt*, 112 Ind. 401; *Doan v. Dow*, 8 Ind. App. 324; *Parrett v. Palmer*, 8 Ind. App. 356.

Kansas. — *Hayner v. Trott*, 46 Kan. 70.

Missouri. — *Wood v. Land*, 35 Mo. App. 381.

Claim for Services Rendered Decedent. — *Taggart v. Tevanny*, 1 Ind. App. 339; *Stewart v. Small*, 11 Ind. App. 100.

Copy of Claim. — Filing a verified copy of the instrument on which the claim is based is sufficient.

Alabama. — *Rowdon v. Young*, 12 Ala. 234; *Rutherford v. Branch Bank*, 14 Ala. 92; *Flinn v. Shackelford*, 42 Ala. 202; *Erwin v. McGuire*, 44 Ala. 499; *Agnew v. Walden*, 84 Ala. 502.

Indiana. — *Crabb v. Atwood*, 10 Ind. 322; *Pulley v. Perfect*, 30 Ind. 379; *Hathaway v. Roll*, 81 Ind. 567; *Price v. Jones*, 105 Ind. 543, 55 Am. Rep. 230.

Iowa. — *Baker v. Chittuck*, 4 Greene (Iowa) 480; *Brought v. Griffith*, 16 Iowa 26.

Setting Forth Credits. — Under a statute requiring the statement of claims to set forth the credits to which the estate is entitled, it is sufficient to state the credits in gross. *Miller v. Eldridge*, 126 Ind. 461.

Insufficient Description of Claim. — *Bibb v. Mitchell*, 58 Ala. 657.

Prima Facie Liability of the estate must be shown. *Walker v. Heller*, 104 Ind. 327; *Windell v. Hudson*, 102 Ind. 521; *Culver v. Yundt*, 112 Ind. 401; *Thomas v. Merry*, 113 Ind. 83; *Worley v. Hineman*, (Ind. App. 1892) 29 N. E. Rep. 570; *Cooper v. Griffin*, 13 Ind. App. 212; *Pickrell v. Hiatt*, 81 Iowa 537.

Consideration. — The statement of claim must show a consideration. *Windell v. Hudson*, 102 Ind. 521.

Amendment of Claim — **Substitution of Different Claim.** — After the expiration of the time for filing claims against an estate, it is error to allow an amendment to a claim filed, by which a different claim is substituted, though for the same amount. *Dickey v. Dickey*, 8 Colo. App.

claim be filed in the name of the legal or equitable owner,¹ and that the name of the claimant,² as well as the name of the decedent, should be accurately stated.³

(b) **What Constitutes Filing.** — The delivery of the claim to the clerk of the probate court,⁴ or to the probate judge, is a sufficient filing or presentation to the probate court;⁵ and the claim may be filed in vacation, as well as in term time.⁶

Notice of Filing Claim — Necessity For. — No notice of the filing of a claim need be given the administrator or executor in order that the filing of the claim shall constitute a sufficient exhibition of the claim to prevent the bar of the statute of nonclaim.⁷

4. Time of Presentation — a. IN GENERAL. — The time within which claims must be exhibited to the executor or administrator or presented to the probate court is fixed by the statutes of the several states;⁸ and even in the absence of statute they must be presented within a reasonable time.⁹

141. See also *Matter of Sullenberger*, 72 Cal. 549.

1. Claim Must Be Filed in Name of Legal or Equitable Owner. — *Cook v. Davis*, 12 Ala. 551; *Blankenship v. Nimmo*, 50 Ala. 506; *Marsh v. Dooley*, 52 Cal. 232; *Crosby's Estate*, 55 Cal. 574; *Dorsey v. Burns*, 5 Mo. 334; *Ex p. Hanks*, *Dudley Eq. (S. Car.)* 231; *Westfield v. Westfield*, 13 S. Car. 482.

Partners. — All the acting resident partners must join in the probate of a claim due the firm, under a statute requiring the "person holding the debt" to make probate, though it seems otherwise as to secret or nonresident partners. *Gregory v. Bailey*, 4 Harr. (Del.) 256.

Uniting Uninterested Person. — The fact that an uninterested person is united with the real claimant in the presentation of a claim filed is immaterial. *Perkins v. Berry*, 103 N. Car. 131.

A Note Indorsed in Blank may, however, be probated in the name of any one consenting. *Whitford v. Herting*, 60 Ill. App. 413.

Changing Name of Claimant. — In *McCall v. Lee*, 120 Ill. 261, it was held that the court may allow an amendment by substituting the name of the real party in interest after the expiration of the time for filing claims.

2. Must State Claimant's Christian Name. — *Cooper v. Griffin*, 13 Ind. App. 212, wherein it was held that a statement merely giving the initials of the claimant's name was insufficient. See also *Bascom v. Toner*, 5 Ind. App. 229.

3. Misnomer of Decedent in Filing Claim. — Filing a claim against the estate of "Ethelwood Halfman," will not operate as a presentation of a claim against the estate of *Ethelbert Halfman*. *Halfman v. Ellison*, 51 Ala. 543.

Omission of Administrator's Name — Effect. — It has been held that the omission of the name of the administrator from the statement, which was instead made out in the name of the estate of the decedent, is not a fatal defect where the claim is filed and docketed by the clerk properly entitled. *Taggart v. Tevanny*, 1 Ind. App. 339; *Jefferson's Estate*, 35 Minn. 215; *Coots v. Morgan*, 24 Mo. 522. See, however, *Wells v. Wells*, 71 Ind. 509.

4. Delivery to Clerk of Probate Court Sufficient. — *Erwin v. McGuire*, 44 Ala. 499.

The Omission of the Clerk to File the Claim will not prevent the presentation to him for the

purpose of filing from operating as a sufficient filing. *Rutherford v. Branch Bank*, 14 Ala. 92. See also *Gaffney v. Williamson*, 12 Ala. 628.

5. Erwin v. McGuire, 44 Ala. 499.

Dropping Claim from Docket. — And it has been held that though the claim was dropped from the docket by inadvertence, it was sufficiently exhibited to prevent the bar of the statute of nonclaim. *Barbero v. Thurman*, 49 Ill. 283. See also *McCall v. Lee*, 120 Ill. 261.

6. Filing in Vacation. — *Wallace v. Gatchell*, 106 Ill. 315.

The Withdrawal of a Claim from the File for the purpose of enforcing it against a third person is not an abandonment of the claim. *Stamps v. Bell*, 2 Baxt. (Tenn.) 170; *Braught v. Griffith*, 16 Iowa 26. Compare *Morse v. Clark*, 10 Colo. 216.

7. People v. White, 11 Ill. 341; *Barbero v. Thurman*, 49 Ill. 284; *Wallace v. Gatchell*, 106 Ill. 315; *Phoenix Ins. Co. v. Guderyahn*, 20 Ill. App. 161.

Notice for Allowance. — Notice, however, must be given the personal representative before the claim can be allowed. *Propst v. Meadows*, 13 Ill. 157. See the title PROBATE AND ADMINISTRATION, ENCYC. OF PL. AND PR.

8. See the local statutes.

Time Dependent on Value of Estate. — In *Patterson v. Schmidt*, 111 Cal. 457, under the Code Civ. Proc., §§ 1490-1491, fixing the time for presentation of claims according to the value of the estate, which was to be specified in the notice for presentation, it was held that the determination of the executor as to the value of the estate was not binding upon the creditor, if the estate in fact exceeded the value placed thereon by the executor.

What Law Governs. — The time within which claims must be presented is fixed by the law in force when publication is made. *Robertson v. Demoss*, 23 Miss. 298. See also *Wilkinson v. Barringer*, 23 Miss. 319; *McGooney v. State*, 20 Ohio 93.

In *Holmes v. Lusk*, 78 Ky. 548, it was held that *Kentucky Gen. Stat.*, c. 39, § 53, disallowing interest on claims unless demand was made within one year, did not apply where the administrator had qualified before the law took effect.

9. O'Mulcahey v. Gragg, 45 Minn. 112.

b. RUNNING OF TIME — (1) In General. — As a general rule the time begins to run from the publication of the notice to creditors to present their claims;¹ or from the date of the order of the court, directing the publication of notice for the presentation of claims;² or from the publication of the notice of the grant of letters of administration;³ though in some jurisdictions it runs from the time that the letters of administration were granted.⁴ In *Indiana* claims are required to be presented within a specified time before final settlement of the estate.⁵

Immature and Contingent Claims. — Again, in a number of the states, in the case of claims immature or contingent at the time of the decedent's death, the time is computed from the accrual of the claim.⁶

(2) *Exceptions and Interruptions — (a) In General.* — The statute of non-claim, as a general rule, runs in all cases and under all circumstances, unless it is otherwise provided by statute,⁷ and where the statute contains no exceptions in favor of persons under disability, either of nonage or otherwise, they are not excepted from the operation of the statute, but their claims must be presented within the same time that claims of persons not under disability are required to be presented.⁸ In some jurisdictions, however, exceptions are

1. Time Runs from Notice to Present Claims. — *Pratt v. Houghtaling*, 45 Mich. 457.

Claims Not Due. — All claims, whether due or not due, stand upon the same footing as to the time of presentation. *Matter of Swain*, 67 Cal. 637.

Presentation Before Notice is, however, sufficient, and the claim need not be again presented after the publication of notice. *Ricketson v. Richardson*, 19 Cal. 330; *Janin v. Browne*, 59 Cal. 37; *McCann v. Pennie*, 100 Cal. 547; *Russell v. Lane*, 1 Barb. (N. Y.) 519; *Johnson v. Corbett*, 11 Paige (N. Y.) 265.

2. From Date of Order of Court for Presentation of Claims. — *Wooden v. Cowles*, 11 Conn. 292.

3. From Publication of Notice of Grant of Letters. — In *Henderson v. Ilsley*, 11 Smed. & M. (Miss.) 9, 49 Am. Dec. 41, it was held that the time for presentation of claims did not begin to run until after the expiration of the sixty days required by law for the publication of notice of the grant of letters. See also *Spaulding v. Suss*, 4 Mo. App. 544.

Notice by Special Administrator. — The special administrator not being authorized to allow claims against the estate, a notice by him of his appointment does not start running the time within which claims must be presented. *Pickering v. Weiting*, 47 Iowa 242.

4. From Grant of Letters of Administration. — *Morgan v. Hamlet*, 113 U. S. 449; *Thrash v. Sumwalt*, 5 Ala. 13; *Cawthorne v. Weisinger*, 6 Ala. 714; *Montgomery Bank v. Plannett*, 37 Ala. 222; *McHenry v. Wells*, 28 Ala. 451; *People v. White*, 11 Ill. 341; *Shepard v. Rhodes*, 60 Ill. 301; *Gookin v. Sanborn*, 3 N. H. 491; *Graham v. Vining*, 1 Tex. 669.

Exclusion of Day on Which Letters Were Granted. — The day on which letters of administration are granted must be excluded in computing the time within which claims must be presented. *Allen v. Elliott*, 67 Ala. 432. See the title TIME (COMPUTATION OF).

Before Administration Granted. — The time does not begin to run before administration has been granted. *McCustian v. Ramey*, 33 Ark. 141; *Hanf v. Whittington*, 42 Ark. 491; *Word v. West*, 38 Ark. 243; *Sorrels v. Trantam*, 48 Ark. 386; *Polk v. Allen*, 19 Mo. 467; *McKinzie v. Hill*, 51 Mo. 303, 11 Am. Rep. 450.

In *Cowles's Estate*, (Conn. 1892) 23 Atl. Rep. 829, it was held, under a statute requiring claims accruing after the death of the decedent to be presented within four months after their accrual, that the time did not begin to run until after the grant of administration.

5. Final Settlement. — Under Rev. Stat. *Indiana* 1881, § 2310, requiring claims to be filed at least thirty days before final settlement of the estate, the term "final settlement" means the presentation by the executor or administrator of the account for final settlement. *Roberts v. Spencer*, 112 Ind. 81. See also *Schrichte v. Stites*, 127 Ind. 472.

In *Bledsoe v. Beiler*, 66 Tex. 437, it was held that Rev. Stat., art. 2035, prohibiting the filing of claims after an order for final distribution, impliedly authorizes their presentation at any time before such order.

6. Dependent on Accrual of Claim. — *King v. Mosely*, 5 Ala. 610; *Allen v. Byers*, 12 Ark. 593; *Burton v. Lockhart*, 9 Ark. 412; *Baker v. Brown*, 18 Ill. 91; *Cobb v. Kempton*, 154 Mass. 266; *John Hancock L. Ins. Co. v. Hanna*, (Mich. 1895) 65 N. W. Rep. 758. See, however, *Bennett v. Dawson*, 15 Ark. 412.

Contingent Claims — United States. — *Payson v. Hadduck*, 8 Biss. (U. S.) 293.

Alabama. — *Neil v. Cunningham*, 2 Port. (Ala.) 171; *Hooks v. Branch Bank*, 8 Ala. 580; *Jones v. Lightfoot*, 10 Ala. 17; *Pinkston v. Huie*, 9 Ala. 252; *Farris v. Stoutz*, 78 Ala. 130.

California. — *Gleason v. White*, 34 Cal. 258.

Missouri. — *Miller v. Woodward*, 8 Mo. 169; *Finney v. State*, 9 Mo. 227; *Chambers v. Smith*, 23 Mo. 174; *Burton v. Rutherford*, 49 Mo. 255.

Wisconsin. — *Logan v. Dixon*, 73 Wis. 533; *Webster v. Lawson*, 73 Wis. 561.

7. *Thrash v. Sumwalt*, 5 Ala. 13; *Branch Bank v. Hawkins*, 12 Ala. 755; *Branch Bank v. Donelson*, 12 Ala. 741.

Fraud will not prevent the running of the statute. *Yniestra v. Tarleton*, 67 Ala. 126; *Morgan v. Morgan*, 68 Ala. 80; *Taylor v. Robinson*, 69 Ala. 269.

8. Persons under Disability — Infants. — *Morgan v. Hamlet*, 113 U. S. 449; *Hill v. State*, 23 Ark. 614; *Nichols v. Shearon*, 49 Ark. 75; *Connelly v. Weatherly*, 33 Ark. 658; *Smith v.*

made in favor of infants and persons under disability, and they are allowed a specified time after removal of the disability to present their claims.¹ Unless an exception is made in the statute in favor of nonresident creditors, they must present their claims within the same time that resident creditors are required to do so.² In some jurisdictions, however, the statutes contain special provisions in regard to nonresident creditors.³

When Equitable Claims Are Required to Be Presented, the statute also runs against claims by *cestuis que trustent* unless they are expressly exempted from the operation of the statute.⁴

(b) **Interruptions.** — The statute of non-claim, after it has once started to run, as a general rule continues to do so unless provision is made for its interruption by the statute, and the running of the statute has been held not to be interrupted either by the removal or absence of the executor or administrator from the state,⁵ nor by his death, presentation in such cases being authorized by filing the claim with the probate court;⁶ it would be otherwise, however, when presentation to the representative alone was authorized.⁷ The running of the statute is not interrupted by the death of the creditor,⁸ but

Smithson, 48 Ark. 261; Padgett v. State, 45 Ark. 495; Baker v. Bean, 74 Me. 17; Hall v. Bumstead, 20 Pick. (Mass.) 2; Foster v. Maxey, 6 Yerg. (Tenn.) 224; Jones v. Reynolds, 5 Baxt. (Tenn.) 644; Williams v. Conrad, 11 Humph. (Tenn.) 412. See, however, People v. Brooks, 22 Ill. App. 594.

Lunatics. — Rowell v. Patterson, 76 Me. 196.
1. Appointment of Guardian for Infant Creditor — Effect on Exception. — Where an exception is made in favor of infant creditors the fact that a guardian has been appointed for the infant does not take him out of the exception. Burford v. Steele, 80 Ala. 147. See also Moore v. Wallis, 18 Ala. 458.

2. Nonresident Creditors. — Erwin v. Turner, 6 Ark. 14; Turner v. Risor, 54 Ark. 33.

3. Absence of Creditor from State. — Under the California Act Feb. 7, 1860, § 130, providing that when it shall be made to appear by affidavit of the claimant "to the satisfaction" of the executor, administrator, or probate court, that the claimant had no knowledge of the notice to present claims, by reason of his absence from the state, his claim may be presented at any time before final distribution, the officers named have no right to arbitrarily say that they are not satisfied, and to therefore reject a claim. Cullerton v. Mead, 22 Cal. 95.

"Beyond the Seas" — Meaning of Term. — A person in California, being within the national limits of the United States, is not "beyond the seas," within the meaning of such phrase in an Illinois statute, limiting the time for the presentation of claims. Mason v. Johnson, 24 Ill. 160, 76 Am. Dec. 740. See the title BEYOND THE SEAS, vol. 4, p. 12.

"Out of the State." — A nonresident creditor, after commencement of an action against the executor, which was dismissed, ceases to be a creditor "out of the state" (2 R. S., § 178, p. 289), and is no longer entitled to the benefit of the statute. Yoast v. Willis, 9 Ind. 538.

Nonresident Creditors — Who Are. — The question whether a creditor is or is not a resident creditor is determined by his residence at the time of the grant of letters of administration on the debtor's estate, and his subsequent removal into the state will not take him out of the statutory exception in favor of nonresident

creditors. Humbard v. Smith, 10 Yerg. (Tenn.) 249. See also Cullerton v. Mead, 22 Cal. 95.

Partnership. — Claims due a partnership, one member of which is a nonresident, must be presented within the time limited for the presentation of claims by residents. Allen v. Farrington, 2 Sneed (Tenn.) 526.

But where the resident member assigns, prior to the debtor's death, his interest in the debt due the firm to the nonresident members, they may present the claim within the time limited for the presentation of claims by nonresidents. Bailey v. Brooks, 11 Heisk. (Tenn.) 6.

4. Claims by Cestuis Qui Trustent. — Rowan v. Kirkpatrick, 14 Ill. 1. See *supra*, this section, *What Claims Must Be Presented*.

5. Absence of Executor from the State. — Branch Bank v. Donelson, 12 Ala. 741; Lowe v. Jones, 15 Ala. 545; Douglass v. Folsom, 21 Nev. 441.

In Walker v. Cheever, 39 N. H. 420, it was held that though the temporary absence of the executor from the state would not toll the running of the statute, yet it was stated that his permanent absence would do so.

6. Death of Representative. — Lowe v. Jones, 15 Ala. 545; Pipkin v. Hewlett, 17 Ala. 291; People v. White, 11 Ill. 341.

Resignation of Administrator. — In Massachusetts it is held, under Pub. Stat., c. 197, § 12, allowing action to be brought only within two years after the grant of letters of administration, that on the resignation of the administrator *de bonis non*, the creditor has the full two years period after the appointment of the latter within which to bring his action. Eddy v. Adams, 145 Mass. 489. See also Hemenway v. Gates, 5 Pick. (Mass.) 321.

Revocation of Letters of Administration. — And the grant of letters testamentary upon subsequent discovery of a will, will not prevent the statute from running from the time of the original grant of letters of administration. Shepard v. Rhodes, 60 Ill. 301.

7. Walker v. Byers, 14 Ark. 246.

8. Death of Creditor. — Beasley v. Waugh, 51 Ala. 156; Glass v. Woolf, 82 Ala. 281; Morrow v. Barker, (Cal. 1897) 51 Pac. Rep. 12;

the statute, being in effect a statute of limitations, is generally held, on the principles of international law, not to have run in a state which seceded from the Union, and as against residents of a non-seceding state, during the period of the civil war.¹

(3) *Extension of Time*. — Though the court cannot, in the absence of statutory authority, extend the time for the presentation of claims,² yet in some jurisdictions the court is authorized to extend the time so limited, for good cause shown.³ The determination of the question whether good cause for such extension exists is, in a measure, a matter within the sound discretion of the court.⁴ The extension may be made after the expiration of the time originally limited;⁵ but the other conditions imposed by the statute as to the granting of an extension of time must be complied with.⁶

5. Notice for Presentation of Claims — Necessity for Notice. — In most jurisdictions the executor or administrator is required to publish a notice requiring the creditors of the estate to present their claims within a specified time. And it is generally held essential that such notice be given in order that the

Hill v. Mixer, 5 Allen (Mass.) 27; Nelson v. Haerle, 26 Mo. App. 1.

1. Period of Civil War. — Grace v. Martin, 47 Ala. 135; Mays v. Rogers, 37 Ark. 159; Williamson v. McCray, 33 Ark. 470; Worthington v. De Bardlekin, 33 Ark. 651. See also Dwight v. Overton, 35 Tex. 390.

Non-seceding State. — But the statute was not suspended during such period in a non-seceding state, as between citizens of such state. McKinzie v. Hill, 51 Mo. 303, 11 Am. Rep. 450. See also Richardson v. Harrison, 36 Mo. 96.

Presentation for Classification. — But in Standifer v. Hubbard, 39 Tex. 417, it was held that a statute for the presentation of claims for classification, providing for the postponement of claims not presented, was not a "statute of limitation" (Tex. Const. 1869, art. 12, § 43), and therefore was not suspended by the constitution as between citizens of Texas. See also Ryan v. Flint, 30 Tex. 383; Pace v. Holaman, 31 Tex. 158; Davidson v. Peticolas, 34 Tex. 34.

2. Statutory Authority Necessary. — In Johnston v. Superior Ct., 105 Cal. 666, it was held that Code of Civ. Proc., § 1490, providing that notice to creditors to present their claims shall be published as often as the court shall direct and that the court may direct additional notice to be given, did not authorize the court, after the publication of notice, to direct additional notice to be given, and thereby extend the time for the presentation of claims.

3. Extension for Good Cause. — Smith v. Grady, 68 Wis. 215; Mills's Estate, 34 Minn. 296; State v. Probate Ct., 67 Minn. 51.

Creditor Who Has Failed to Present His Claim. — A creditor whose claim has been presented to the commissioners without his authority and been disallowed is still a creditor who has failed to present his claim (R. L. Vt., § 2122) so as to authorize the renewal of the commission on application of such creditor. Whitcomb v. Davenport, 63 Vt. 656.

4. Mills's Estate. 34 Minn. 296; Smith v. Grady, 68 Wis. 215. But in Massachusetts Mut. L. Ins. Co. v. Elliot, 24 Minn. 134, it was held that Gen. Stat., c. 53, § 58, providing that on application of a creditor who has failed to present his claim, the court "may" for good

cause shown renew the commission and allow further time for examination of the claim, made it mandatory upon the court to renew the commission for good cause shown. See also Heavenrich v. Nichols, (Mich. 1897) 71 N. W. Rep. 852.

Laches of the Claimant will authorize a refusal to extend the time. Massachusetts Mut. L. Ins. Co. v. Elliot, 24 Minn. 134; St. Croix Boom Corp. v. Brown, 47 Minn. 281; State v. Probate Ct., 42 Minn. 54.

Mandamus will not lie to review the action of the court in refusing an extension of time, his action being discretionary. People v. Probate Judge, 16 Mich. 204.

Writ of Error. — The decision of the circuit court, affirming an order of the probate court extending a commission on claims, is not a final order so as to render it reviewable by writ of error. Churchill v. Burt, 32 Mich. 490.

5. Extension After Expiration of Time Originally Limited. — In Tredway v. Allen, 20 Wis. 475, it was held, under a statute authorizing the court to extend the time for presentation of claims, that the extension could be made on application, made after the time originally limited.

6. Time of Application. — Under Wisconsin Rev. Stat., c. 101, § 7, providing for the extension of time for the presentation of a particular claim on application by the claimant within a specified time after the expiration of the time originally limited, the application of the claimant must be made within the specified time. Tredway v. Allen, 20 Wis. 475. See also Sleeper v. Gould, 53 Vt. 111. But where an extension for the presentation of all claims was authorized at the time, the fact that the order provided merely for the examination of a particular claim, though irregular, will not render it void. Tredway v. Allen, 20 Wis. 475.

Payment of Costs as Condition. — The Michigan statute (How. Ann. Stat., § 5894), authorizing the opening of a decedent's estate to allow a claim to be filed, provided all costs and charges in the probate court shall be paid by the claimant, does not require the payment of cost on appeal to the circuit court. Shepherd v. Shepherd, (Mich. 1895) 65 N. W. Rep. 580.

failure to present claims shall operate as a bar;¹ the contrary, however, has been held under a statute requiring claims to be presented within a certain time after the appointment of the executor or administrator, though the statute also directed notice of his appointment to be given.²

Sufficiency of Notice. — The notice should be ample and full in its terms,³ and should properly state the time within which claims are to be presented; though it has been held sufficient where the time within which claims must be presented is fixed by statute, to state that they must be presented "within the time prescribed by law."⁴ And the notice should, when required by statute, state the place at which the claims are to be presented.⁵

Publication of Notice. — The notice must be published in the manner and for the length of time required by the statute, or as specified in the order for publication.⁶

6. Excuses for Failure to Present Claims — *a. IN GENERAL.* — As a general rule, a creditor of an estate will not be relieved from the result of his failure to

1. Notice to Present Claims Essential — *Delaware.* — *Bradley v. Kent*, 7 Houst. (Del.) 372.

Florida. — *Fillyau v. Laverty*, 3 Fla. 72.

Maryland. — *Steuart v. Carr*, 6 Gill (Md.) 430.

Michigan. — *Pratt v. Houghtaling*, 45 Mich. 459.

Mississippi. — *Henderson v. Ilsley*, 11 Smed. & M. (Miss.) 9, 49 Am. Dec. 41.

Missouri. — *Hawkins v. Ridenhour*, 13 Mo. 125; *Spaulding v. Suss*, 4 Mo. App. 541.

New York. — *Tucker v. Tucker*, 4 Abb. App. Dec. (N. Y.) 428; *Whitmore v. Foose*, 1 Den. (N. Y.) 159.

North Carolina. — *Gilliam v. Willey*, 1 Jones Eq. (54 N. Car.) 128; *Lee v. Patrick*, 9 Ired. L. (31 N. Car.) 135.

Wisconsin. — *Gardner v. Callaghan*, 61 Wis. 91.

Burden of Proof. — The burden is upon the executor to show that notice was given creditors to present their claims. *Gilliam v. Willey*, 1 Jones Eq. (54 N. Car.) 128.

2. Exception. — *Hooper v. Bryant*, 3 Verg. (Tenn.) 1. See also *People v. White*, 11 Ill. 341; *Pea v. Waggoner*, 5 Hayw. (Tenn.) 1; *Graham v. Vining*, 1 Tex. 669; *McDougald v. Hadley*, 1 Tex. 490.

In *Alabama*, where claims are required to be presented within a specified time after the appointment of the executor or administrator, and the executor is required to give notice of his appointment, it has been held that the failure to give notice of his appointment would not prevent claims from being barred by failure to present the same. *Thrash v. Sumwalt*, 5 Ala. 13; *Cawthorne v. Weisinger*, 6 Ala. 714; *Montgomery Bank v. Plannett*, 37 Ala. 222; *Acre v. Ross*, 3 Stew. (Ala.) 288.

3. Sufficiency of Notice. — *Ellison v. Allen*, 8 Fla. 206.

Notice of Appointment of Administrator. — A notice directing persons having claims against the estate to present the same within a specified time, and signed by the administrator as such, has been held a sufficient notice of his appointment. *Gilbert v. Little*, 2 Ohio St. 156.

Signature by Representative. — In *Roberts v. Spencer*, 112 Ind. 81, it was held that the notice need not be signed by the representative; signature by the clerk of the court being sufficient.

4. Designation of Time for Presentment. — *Fillyau v. Laverty*, 3 Fla. 105; *Ellison v. Allen*, 8 Fla. 206; *May v. Vann*, 15 Fla. 553.

5. Designation of Place for Presentment. — Under *Nevada* Gen. Stat., § 2797, requiring the executor to give notice to creditors to present their claims at his residence or place of business to be specified in the notice, the notice need not state whether the place designated is the residence or place of business of the executor. *Douglass v. Folsom*, 21 Nev. 441.

Office of Attorney for Estate. — In *Bollinger v. Manning*, 79 Cal. 7, it was held under Code of Civil Procedure, § 1490, requiring the notice to direct the presentation of claims at the place of residence or of business of the executor or administrator to be specified in the notice, that a notice directing claims to be presented at the office of the attorney for the estate was sufficient, though the executor had a place of business in the same town.

In *Hoyt v. Bonnett*, 58 Barb. (N. Y.) 529, it was held that the executor might select a place for the presentation of claims, and the designation of it in the notice makes it his residence for the purpose of the statute. See, however, *Murray v. Smith*, 9 Bosw. (N. Y.) 689.

6. Publication of Notice. — *Wise v. Williams*, 88 Cal. 30; *Bush v. Adams*, 25 Fla. 809; *Dolbeer v. Casey*, 19 Barb. (N. Y.) 149; *Lee v. Patrick*, 9 Ired. L. (31 N. Car.) 135.

Publication Before Order for Publication is invalid, and cannot be considered in determining whether the notice was published for a sufficient time. *Wise v. Williams*, 88 Cal. 30.

Order for Publication. — The order for publication of notice need not specify the number of times of publication, unless a greater number than the minimum specified by statute is required. *Hensley v. Superior Ct.*, 111 Cal. 541.

Proof of Publication. — The affidavit of publication is only *prima facie* evidence of the facts stated therein, and may be contradicted by the files of the paper in which the notice was published, showing that the notice was not published for the statutory time. *Wise v. Williams*, 88 Cal. 30.

And a decree for distribution of the estate establishing due notice to creditors is not conclusive. *Wise v. Williams*, 88 Cal. 30.

present his claim, irrespective of the reasons for such failure,¹ and it has been held that neither assurances on the part of the representative that the creditor's claim is good,² nor his promise to pay the claim when sufficient assets are received, will excuse a failure to present the claim.³

Doctrine that Knowledge of Claim Dispenses with Presentation. — In some jurisdictions, however, knowledge on the part of the representative of the existence of a claim dispenses with the necessity of a presentation.⁴

b. PROVISION IN WILL FOR PAYMENT OF DEBTS. — A provision in a will expressly charging the testator's personalty and realty with the payment of debts has been held to create an express trust in favor of creditors and to dispense with the necessity for a presentation of their claims.⁵

c. BOND BY RESIDUARY LEGATEE. — And it seems that when a bond is given by the executor as residuary legatee, for the payment of debts, the debts need not be presented.⁶

1. Expectation of Legacy. — The fact that a creditor expected to receive, in satisfaction of his claim, a legacy from the estate, will not excuse his failure to present his claim. *Gordon v. Ballentine*, 50 Ala. 99.

Absence of Executor. — The absence of the executor from the place appointed for the presentation of claims will not excuse the creditor from the necessity of procuring an allowance of his claim. *Metz v. People*, 6 Colo. App. 57.

Appeal Pending from Probate of Will. — In *Cone v. Dunham*, 59 Conn. 145, it was held that the pendency of an appeal from the probate of a will did not excuse creditors from the result of their failure to present their claims within the required time.

Setting Aside Will. — The fact that the probate of the will was subsequently set aside will not relieve a creditor from the effect of his failure to present his claim to the executors appointed in the will. *Delaplane v. Smith*, 38 Ohio St. 413.

Claim of Administrator — Mistake. — In *Williamson v. Anthony*, 47 Mo. 299, where an administrator in good faith presented his claim to the probate court in due season, and the court allowed the same without the appointment of a person to defend the claim as required by the statutes, though the allowance was perhaps void, the presentation was still held sufficient.

Fraud of Decedent. — In *Sugar River Bank v. Fairbank*, 49 N. H. 131, it was held that where the presentation of a claim was prevented by the fraudulent concealment of the claim by the decedent, a suit in equity would lie for satisfaction from the assets in the hands of the heirs and distributees.

Extension of Time of Payment. — In *North v. Walker*, 66 Mo. 453, it was held that where the executor has contracted for an extension of the time of payment of a note executed by his testator, the creditor is excused from exhibiting and making application for the allowance of the note, within the time to which the payment was extended.

Delay Benefiting Estate. — In *Croninger v. Marthen*, 83 Ky. 662, it was held, under *Kentucky* Gen. Stat., art. 2, § 53, providing that no interest shall be allowed on a claim against a decedent's estate unless the claim be verified and demanded within a year of his appointment, that where a claimant is induced by

the executor, who was the only other creditor, to postpone the payment of his claim to enable it to be paid without a sale of land, interest was allowable on the claim. See also *McWilliams's Appeal*, 117 Pa. St. 111.

2. Assurances that Claim Is Good. — *Lewis v. Champion*, 40 N. J. Eq. 59.

3. Promise to Pay. — *Lewis v. Champion*, 40 N. J. Eq. 59.

In *Pike v. Thorp*, 44 Conn. 450, the fact that an executor replied, when told by a claimant that he had a claim against the estate for "about" a certain sum, that he was going to pay up all the bills but could not do so then, was held not to dispense with a presentation of the claim to the executor.

4. Perry v. West, 40 Miss. 233. See *supra*, this section, *Manner of Presentation* — *Knowledge of Personal Representative*.

Administrator's Application for Indulgence as a Presentation. — In *Harrison v. Jones*, 33 Ala. 258, it was held that presentation of a claim was sufficiently established by proof that execution on a judgment recovered against the intestate during his lifetime was placed in the hands of the sheriff, and that the administrator, upon seeing the execution, applied to the creditor for indulgence, which was granted to him.

5. Testamentary Provision for Payment of Debts. — *Abbay v. Hill*, 64 Miss. 340; *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15; *Carrington v. Manning*, 13 Ala. 611; *Gwin v. Nettles*, (Miss. 1895) 18 So. Rep. 798.

Sufficiency of Provision. — A general provision for the payment of debts is not, however, sufficient to raise such a trust, but the will must clearly show that such was the intention of the testator. *Steele v. Steele*, 64 Ala. 459, 38 Am. Rep. 15; *Collamore v. Wilder*, 19 Kan. 67; *Gwin v. Nettles*, (Miss. 1895) 18 So. Rep. 798.

Nor will a direction that certain property be sold for the payment of debts be sufficient. *Carrington v. Manning*, 13 Ala. 611.

In *Carrington v. Manning*, 13 Ala. 611, *Collier, C. J.*, said: "Would it not be unjust to raise a trust which would render inoperative the statutes of nonclaim and limitations, from the mere fact that the will made the lands primarily liable for the payment of the testator's debt, when he never could have contemplated such a consequence?"

6. Bond by Residuary Legatee. — *Wheeler v. Hatheway*, 58 Mich. 77.

d. ADMINISTRATION INDEPENDENT OF COURT. — When the estate is administered independently of the county court, it has been held unnecessary to present the claim for allowance.¹

e. STATUTORY PROVISIONS — Peculiar Circumstances. — In *Iowa* the statute relieves a creditor, failing to present his claim, from the result of his failure, when "peculiar circumstances" exist entitling him to equitable relief. The question as to whether such circumstances exist must be determined by the circumstances of each particular case.²

Effect of Negligence — Settlement of Estate. — Negligence on the part of the claimant is fatal to his right to claim relief under such statute;³ and the final settlement of the estate might be a controlling circumstance for denying such relief.⁴

Sufficiency of Circumstances — How Determined. — The question whether the circumstances are sufficient to entitle the claimant to relief is to be determined by the court sitting in equity.⁵

Burden of Proof. — And the burden is upon the claimant to show the existence of such circumstances as will entitle him to such relief.⁶

Quantum of Proof. — And it has been said that the creditor will be held to strict proof of such circumstances.⁷

7. Waiver of Presentation. — Though the executor or administrator may under certain statutes waive a formal presentation of a claim,⁸ still where

1. Administration Independent of Court. — *Smyth v. Caswell*, 65 Tex. 379. See also *Pleasants v. Davidson*, 34 Tex. 460.

2. Peculiar Circumstances. — In the following cases peculiar circumstances entitling the creditor to equitable relief were held to exist: *Lamm v. Sooy*, 79 Iowa 593; *Orcutt v. Hanson*, 70 Iowa 604; *Pettus v. Farrell*, 59 Iowa 296; *Wile v. Wright*, 32 Iowa 451; *Johnston v. Johnston*, 36 Iowa 608; *Ingham v. Dudley*, 60 Iowa 16; *Brewster v. Kendrick*, 17 Iowa 479.

Claim Dependent on Outcome of Litigation. — The fact that the creditor's claim was dependent on the outcome of certain litigation pending during the time limited for presentation of his claim may entitle him to relief. *Sankey v. Cook*, 82 Iowa 125. See also *Senat v. Findley*, 51 Iowa 20.

Assurances by Representation that the claim would be paid may constitute such circumstances as to entitle the claimant to relief from his failure to prove his claim within the required time. *Baldwin v. Dougherty*, 39 Iowa 50. See also *Burroughs v. McLain*, 37 Iowa 189; *Ury v. Bush*, 85 Iowa 698; *Orcutt v. Hanson*, 70 Iowa 604; *Brayley v. Ross*, 33 Iowa 505. See, however, *Colby v. King*, 67 Iowa 458; *Davis v. Shawhan*, 34 Iowa 91; *Preston v. Day*, 19 Iowa 127.

Nonresidence of Creditor and ignorance of the death of the decedent may entitle the creditor to relief when the estate is solvent and unsettled at the time his claim is filed. *McCormack v. Cook*, 11 Iowa 267.

3. Negligence of Claimant. — *Willcox v. Jackson*, 51 Iowa 296; *Pearson v. Christman*, 93 Iowa 703; *Ferrall v. Irvine*, 12 Iowa 52; *Lacey v. Loughridge*, 51 Iowa 629; *Brownell v. Williams*, 54 Iowa 353; *Clark v. Tallman*, 68 Iowa 372; *Hazlett v. Burge*, 22 Iowa 531; *Phelps v. Thompson*, 48 Iowa 641; *Schlutter v. Dahling*, 100 Iowa 515.

In *Cory v. Gillespie*, 94 Iowa 347, it was held that a creditor was not entitled to relief if he merely mailed a statement of his claim to the

executor, and, though he received no reply from the executor, took no further steps until the claim was barred.

Negligence of Creditor's Attorney, however, may constitute sufficient reason for granting the creditor relief. *Wilcox v. Jackson*, 57 Iowa 278.

Incorrect Legal Advice. — The fact that a non-resident creditor was incorrectly advised by a lawyer of another state as to the time within which her claim should be filed, does not entitle her to relief. *Roaf v. Knight*, 77 Iowa 506.

4. Final Settlement — Effect. — *Shomo v. Bissell*, 20 Iowa 68.

5. Question for Court. — *Lamm v. Sooy*, 79 Iowa 593.

New Hampshire — "Culpable Neglect" **Question of Fact.** — In *Powers v. Holt*, 62 N. H. 625, it was held, under Gen. Laws N. H., c. 198, § 22, providing a remedy for persons having claims against an estate, who have failed to present them within the time limited by law, where they have not been guilty of "culpable neglect," that the question of culpable neglect is one of fact to be determined at the trial term.

6. Willcox v. Jackson, 51 Iowa 296.

7. Shomo v. Bissell, 20 Iowa 68.

8. Waiver of Formal Presentation. — *Grimes v. Bush*, 16 Ark. 647; *Grimes v. Booth*, 19 Ark. 224; *Kinnan v. Wight*, 39 N. J. Eq. 501; *Cheeseman v. Kyle*, 15 Ohio St. 15. See, however, *Spaulding v. Suss*, 4 Mo. App. 541, where it was held that an executor could not waive the provision of *Wagner Stat.* 102, § 5, requiring creditors to exhibit their claims in writing; and also *Hicks v. Jamison*, 10 Mo. App. 35.

Contest of Claim. — Where the administrator appears and contests a claim in the probate court, he waives the objection that the claim was not presented before suit. *Leake v. Sutherland*, 25 Ark. 219.

General Denial. — And by filing a general denial he waives the failure to present the claim for allowance. *Daykin v. Emery*, 10 Ohio Cir. Ct. Rep. 652, 1 Ohio Cir. Dec. 121.

the effect of the failure to present the claim extinguishes the liability of the estate for its payment, the executor or administrator is without authority to waive a non-presentation of the claim, such statutes being for the benefit of the estate, and not of the administrator or executor.¹

8. Verification of Claims — *a. IN GENERAL.* — The statutes of nearly all the states require claims against the estate of a decedent to be verified by affidavit, either in order that the claims may be properly exhibited to the executor or administrator, or presented to the court for allowance, or in order that an action may be instituted thereon against the executor or administrator. Such statutory requirement is generally held imperative,² and cannot be waived by the executor or administrator.³

Verification Only Prerequisite to Costs. — In some jurisdictions, however, the verification of the claim is merely a prerequisite to the right of the claimant to recover costs in an action on the claim.⁴

Necessary Only When Required by Representative. — And in other jurisdictions verification is only necessary when required by the personal representative.⁵

Effect of Failure to Authenticate — Amendment. — When the authentication of a claim is a prerequisite to the right of action against the administrator or executor, the failure to authenticate may be taken advantage of at any time before trial and final judgment;⁶ but a claimant should be permitted by amendment to perfect his affidavit, if insufficient, provided the time has not elapsed for the presentation and verification of claims.⁷

1. Executor Cannot Waive Presentation when Failure to Present Bars Claim — *Alabama.* — *Branch Bank v. Hawkins*, 12 Ala. 755; *Grimball v. Mastin*, 77 Ala. 553.

California. — *Harp v. Callahan*, 46 Cal. 222.

Illinois. — *Millard v. Harris*, 119 Ill. 190; *Hapke v. People*, 29 Ill. App. 546.

Mississippi. — *Nagle v. Ball*, 71 Miss. 330.

Tennessee. — *Byrn v. Fleming*, 3 Head (Tenn.) 658; *Pea v. Waggoner*, 5 Hayw. (Tenn.) 1; *Brown v. Porter*, 7 Humph. (Tenn.) 373.

Texas. — *Converse v. Sorley*, 39 Tex. 515.

See, however, *Williams v. Maitland*, 1 Ired. Eq. (36 N. Car.) 92.

In *Boggs v. Branch Bank*, 10 Ala. 974, Ormond, J., said that the statute was evidently designed to provide a perfect bar for the benefit of creditors or distributees.

In *Guard v. Hale*, 64 Ala. 479, however, it was held, under Code 1876, § 2574, providing that if objections to a claim are not filed within twelve months after the declaration of insolvency the claim must be allowed without further proof, that after the lapse of the specified time an objection that a claim filed was not presented within eighteen months as required by the statute of nonclaim could not be raised.

2. Statute Requiring Verification Is Imperative — *Arkansas.* — *Green v. Brooks*, 25 Ark. 318; *Saunders v. Rudd*, 21 Ark. 519; *Ryan v. Lemon*, 7 Ark. 78; *State Bank v. Walker*, 14 Ark. 234; *Alter v. Kinsworthy*, 30 Ark. 756.

California. — *Perkins v. Onyett*, 86 Cal. 348; *Pico v. De La Guerra*, 18 Cal. 422.

Indiana. — *Worley v. Hineman*, (Ind. App. 1892) 29 N. E. Rep. 570.

Kansas. — *Clawson v. McCune*, 20 Kan. 337.

Kentucky. — *Rogers v. Mitchell*, 1 Metc. (Ky.) 22; *Curry v. Bryant*, 7 Bush (Ky.) 301.

New Mexico. — *Clancey v. Clancey*, 7 N. Mex. 405.

South Carolina. — *Brown v. Brown*, 45 S. Car. 408.

Verification After Commencement of Action. — Where the verification of the claim is a prerequisite to the right to bring an action thereon, an affidavit made after the commencement of the action is insufficient. *Green v. Brooks*, 25 Ark. 318; *Ross v. Hine*, 48 Ark. 304; *Alter v. Kinsworthy*, 30 Ark. 756.

Additional Statement of Claim — Necessity for Verification. — When a claim properly verified has been filed, it is not necessary that an additional statement, filed in open court with leave of court, be also verified. *Taggart v. Tevanny*, 1 Ind. App. 339.

3. Waiver of Verification. — *Walker v. Byers*, 14 Ark. 246; *Alter v. Kinsworthy*, 30 Ark. 756; *Ross v. Hine*, 48 Ark. 304.

4. Smith v. Denman, 48 Ind. 65.

In *Mississippi* it is held that Rev. Code, p. 53, § 90, providing that executors shall not pay claims against the estate unless verified by affidavit, is intended merely for the benefit of the executor, and that the want of an affidavit does not affect the claimant's right to sue. *Campbell v. Young*, 3 How. (Miss.) 301; *Smith v. Smith*, 3 How. (Miss.) 216.

5. Kinnan v. Wight, 39 N. J. Eq. 501; *Russell v. Lane*, 1 Barb. (N. Y.) 519; *N. Y. Code Civ. Proc.*, § 2718.

6. At What Time Failure to Authenticate Available. — *Alter v. Kinsworthy*, 30 Ark. 756; *Walker v. Byers*, 14 Ark. 246; *Beirne v. Imboden*, 14 Ark. 237; *Ryan v. Lemon*, 7 Ark. 78; *Purcell v. Carter*, 45 Ark. 299; *Ross v. Hine*, 48 Ark. 304; *Macoleta v. Packard*, 14 Cal. 178.

Waiver of Defect by Failure to Object. — In *Brown v. Sullivan*, 3 Ind. App. 211, it was held that an affidavit, though defective, would be held sufficient on appeal when no objection was made thereto in the court below.

7. P. & M. Bank v. Smith, 14 Ala. 416.

b. WHAT CLAIMS MUST BE VERIFIED. — As a general rule all claims and demands which can be asserted against the estate are required to be authenticated.¹

Claims on Which Actions Were Pending. — The statutes requiring demands against the estates of decedents to be verified by affidavit have been held applicable to a claimant who had commenced his action, but had not recovered judgment before the death of the defendant,² though in some jurisdictions an exception is made as regards claims on which suits were pending at the death of the decedent, and the renewal of the suit is authorized without the necessity of the claim being authenticated by affidavit.³

c. BY WHOM VERIFIED — **Personal Verification Required.** — It has been held, in the absence of any statutory provision authorizing the verification of claims by agents, that the affidavit must be made by the claimant himself.⁴

By Agent. — In most jurisdictions, however, the statutes now provide that the affidavit may be made by an agent of the claimant, where he had the management and transaction of the business out of which the demand originated, or had the means of knowing personally the facts required to be sworn to.⁵

Affidavit Need Not Disclose that Affiant Is Agent. — It has been held that an affidavit by the agent or attorney of the claimant need not disclose the fact that the affiant is acting as agent or attorney.⁶

1. What Claims Must Be Verified. — *Brasher v. Lyle*, 13 Ala. 524; *Walker v. Byers*, 14 Ark. 246.

Judgments recovered against a decedent must be verified as demands against the estate. *Curry v. Bryant*, 7 Bush (Ky.) 301. See also *Bayless v. Powers*, 62 Iowa 601; *Scroggs v. Tutt*, 20 Kan. 271; *Converse v. Sorley*, 39 Tex. 515. See, however, *Goodrich v. Fritz*, 9 Ark. 440.

In California judgments were exempted from the provision requiring the verification of claims. *Cullerton v. Mead*, 22 Cal. 95.

Claim of Surety for Reimbursement. — The claim of a surety on the note of a decedent to be reimbursed for money paid thereon should be verified as a claim for money on account; a verification of the note is insufficient. *Nutall v. Brannin*, 5 Bush (Ky.) 11.

Claims Not Due — **"Justly Due."** — Claims not due must be verified though the statute requires affiant to state that the claim is "justly due" (Rev. Stat., § 195). The words "justly due" do not necessarily mean justly due and presently payable, but merely that it is a just indebtedness. *Cassatt v. Vogel*, 12 Mo. App. 323.

Mortgage Claims. — For the same reason that it is not necessary for a mortgage creditor to present his claim before filing a bill to foreclose, he is not required to authenticate his claim by affidavit before filing a bill to foreclose. *Simms v. Richardson*, 32 Ark. 297; *Pope v. Boyd*, 22 Ark. 535; *Hall v. Denckla*, 28 Ark. 506; *Nicholls v. Gee*, 30 Ark. 135; *McClure v. Owens*, 32 Ark. 443.

The *Texas* statute (Pasch. Dig., art. 1095) requiring "claims for money" to be verified does not apply to a mortgage. *Simpson v. Reily*, 31 Tex. 298.

Vendor's Lien. — And the same is true as regards the claim of a vendor to enforce his lien for the purchase-price. *Allen v. Smith*, 29 Ark. 74. See, however, *Converse v. Sorley*, 39 Tex. 515.

Claims Due Commonwealth. — Nor does the statute requiring claims against the decedent's estate to be verified by affidavit apply to claims by the commonwealth. *Arnold v. Com.*, 80 Ky. 135. See, however, *Gay v. Louisville*, 93 Ky. 349.

Demands Created by the Administrator need not be verified by the affidavit of the creditor; the statute applies only to demands created by the decedent. *Berry v. Graddy*, 1 Metc. (Ky.) 553.

2. Claims on Which Actions Were Pending. — *Matthews v. Jones*, 2 Metc. (Ky.) 254; *Worthley v. Hammond*, 13 Bush (Ky.) 510.

3. Walker v. Byers, 14 Ark. 246.

Death of Defendant Pending Appeal. — Where the defendant dies pending an appeal, the action is one pending at the death of the defendant (Ark. Dig., c. 4, § 88), and the judgment when received need not be authenticated by affidavit. *Goodrich v. Fritz*, 9 Ark. 440.

4. Verification by Agent Unauthorized. — *Beirne v. Imboden*, 14 Ark. 237; *Marshall v. Green*, 24 Ark. 410; *Macoleta v. Packard*, 14 Cal. 178; *McWhorter v. Donald*, 39 Miss. 779, 80 Am. Dec. 97; *Williams v. Purdy*, 6 Paige (N. Y.) 166; *Zachary v. Chambers*, 1 Oregon 321. See, however, *Hansell v. Gregg*, 7 Tex. 223; *McIntosh v. Greenwood*, 15 Tex. 116.

Claims Owned by Minor. — The next friend of a minor may authenticate a claim by him. *Reed v. Ryburn*, 23 Ark. 47.

5. Agent Cognizant of the Facts. — *P. & M. Bank v. Smith*, 14 Ala. 416; *Erwin v. McGuire*, 44 Ala. 499; *Mason v. Bull*, 26 Ark. 164; *Perkins v. Onyett*, 86 Cal. 348; *Davis v. Brown*, 91 Cal. 603; *Hanna v. Fisher*, 95 Ind. 383; *Howard v. Leavell*, 10 Bush (Ky.) 481; *Peter v. King*, 13 Mo. 143; *Heath v. Garrett*, 46 Tex. 23.

6. Affidavit Not Showing Affiant to Be Agent. — *Hanna v. Fisher*, 95 Ind. 383; *Heath v. Garrett*, 46 Tex. 23.

In *Shelton v. Berry*, 19 Tex. 154, 70 Am. Dec. 326, it was held that an administrator rejecting a claim verified by the agent of the

Verification where Debt Due to Several. — Where the claim is due to a number of persons in severalty the verification should be by the oaths of all;¹ but it seems, however, that a debt due to persons jointly may be verified by the oath of one only.²

Verification by Corporation. — In the case of a claim due to a corporation the statutes generally provide that the verification shall be made by certain officers of the corporation.³

Verification by Assignor. — In some jurisdictions where a claim against a decedent's estate is assigned after the death of the decedent, both the assignor and the assignee are required to join in the verification.⁴

d. BEFORE WHOM VERIFIED. — Unless the statute expressly designates the officer before whom the oath in verification of a claim shall be made, it may be made before any officer authorized to administer oaths.⁵

e. SUFFICIENCY OF AFFIDAVIT. — The affidavit must show that the demand of the claimant is a just and subsisting demand.⁶

The Exact Language of the Statute Need Not Be Used in the affidavit, a substantial compliance with the statute being sufficient.⁷

claimant, for failure of the affidavit to disclose the source of affiant's knowledge and the fact of his agency, must place his rejection on that ground.

1. Verification by Claimants in Severalty. — *Cecil v. Rose*, 17 Md. 92.

2. Where Debt Is Joint. — *Ashley v. Gunton*, 15 Ark. 415. See also *Beirne v. Imboden*, 14 Ark. 237; *Walker v. Byers*, 14 Ark. 247; *Cecil v. Rose*, 17 Md. 93.

Claims Due Partners. — In *Gregory v. Bailey*, 4 Harr. (Del.) 256, it was held, under a statute requiring "the person holding the debt" (Dig. 226) to make probate, that a claim due a partnership should be verified by all the active members of the firm, though it seems that a dormant partner or one residing out of the state need not join in the verification.

3. Verification by Corporation. — *State v. Collins*, 16 Ark. 32.

By Corporation Acting as Administrator. — A statute authorizing the verification of a claim "due" to a corporation to be made by certain officers of the corporation authorizes the verification of a claim due a corporation as administrator to be made by such officers. *Fidelity Ins., etc., Co. v. Niven*, 6 Houst. (Del.) 64.

4. Stone v. Kaufman, 25 Ark. 186.

Verification by Assignor of Equitable Interest Unnecessary. — Under *Mans. Ark. Dig.*, §§ 102, 106, providing that if a claim against a decedent's estate is assigned after the death of the decedent, it shall be verified by both the assignor and the assignee, it is not necessary that the assignor of the equitable interest in the claim join in the verification. *Winningham v. Holloway*, 51 Ark. 385.

Death of Assignor. — And where both parties to a judgment are dead a claim thereon may be verified by the person to whom it has been assigned. *Winningham v. Holloway*, 51 Ark. 385.

5. Clerk of Circuit Court. — In *Lafferty v. Lafferty*, 10 Ark. 268, it was held that the clerk of the circuit court, who had general power to administer oaths, had authority to take affidavits to verify claims, though such officers were excluded from those enumerated

by the statute requiring the verification of claims as having power to take the affidavits.

A Commissioner of a Federal Court has no authority to take the affidavit. *Winder v. Hendricks*, 56 Cal. 464.

Commissioner of Deeds — Verification in Foreign State. — A commissioner of deeds for *Arkansas* residing in another state may take affidavits to authenticate claims against a decedent's estate which is being administered in *Arkansas*. *Stone v. Kaufman*, 25 Ark. 186; *Smith v. Van Gilder*, 26 Ark. 527. See also *Greenwood v. Woodward*, 18 Tex. 1; *Hailey v. McGee*, 19 Tex. 107.

Justice of Peace of Foreign State. — Where the affidavit is taken before the justice of the peace of a foreign state, his official character must be authenticated. *Alter v. Kinsworthy*, 30 Ark. 756.

6. Negating Payment. — In *Lay v. Clark*,¹ 31 Ala. 409, the court said that while it may not be necessary, unless required by statute, to negative expressly the payment of the demand, still, under a statute requiring claims to be "verified," the affidavit must show that the claim is a just and subsisting demand; an affidavit to an account merely stating that the account is a correct inventory of the goods purchased by deceased from the affiant was held insufficient.

7. Substantial Compliance with Statute Sufficient. — *Smith v. Van Gilder*, 26 Ark. 527; *State v. Collins*, 16 Ark. 32; *Story v. Story*, 32 Ind. 137; *Smith v. Denman*, 48 Ind. 65; *Lenk Wine Co. v. Caspari*, 11 Mo. App. 382; *Merchants' Bank v. Ward*, 45 Mo. 310; *Crosby v. McWille*, 11 Tex. 94.

Use of Word "Claimant" Instead of "Affiant." — Under the *California Code Civ. Proc.*, § 1494, requiring the affiant to state that there are no offsets to the knowledge of "affiant," where the affidavit is made by the claimant the use of the word "claimant" instead of "affiant" will not render the affidavit insufficient. *Davis v. Browning*, 91 Cal. 603. See also *Warren v. McGill*, 103 Cal. 153. But where the affidavit is made by the agent of the claimant, and recites that there are no offsets to the knowledge of the "claimant" instead of to

All Material Allegations Must Appear. — Yet it is necessary that all the material allegations required by the statute, or their equivalent, be incorporated in the affidavit.¹

Oral Affidavit. — Where the affidavit is required for the allowance of the claim by the court it has been held that it may be made *ore tenus*.²

Must Be Made After Death of Testator or Intestate. — The affidavit must be made after the death of the decedent; an affidavit made during his lifetime is of no effect.³

Must Be on Affiant's Own Knowledge. — The affidavit should be made from the affiant's own knowledge; an affidavit that the claim is just and true as affiant verily believes, has been held insufficient.⁴ The affidavit need not, however, expressly show that the affiant speaks from his own knowledge, or show the source of his knowledge.⁵

A Mistake in the Name of the Decedent will, as in the statement of a claim, render the affidavit defective.⁶

Signature by Affiant. — Where the jurat is properly authenticated it has been held that the failure of the affiant to sign the affidavit is not a fatal defect, provided his signature is not expressly required by a statute or a rule of court.⁷

9. Effect of Failure to Present Claim — *a.* IN GENERAL — Provisions of Several

the knowledge of the "affiant," it is insufficient. *Perkins v. Onyett*, 86 Cal. 348.

"**Justly Due and Owning**" has been held the equivalent of "justly due and wholly unpaid." *Taggart v. Tevanny*, 1 Ind. App. 339.

Clerical Omissions. — In *Hall v. Superior Ct.*, 69 Cal. 79, it was held that an affidavit stating that the amount of the claim, "to wit, the sum of four hundred, is justly due," was not fatally defective on account of the omission of the word "dollars;" the amount of the claim having been stated in the body of the claim to be four hundred dollars.

1. Omission of Material Allegations. — *Cecil v. Rose*, 17 Md. 92; *Matter of Clapsaddle*, 4 Misc. Rep. (N. Y. Surrogate Ct.) 355; *Walters v. Prestidge*, 30 Tex. 65.

Omission of Word "Offsets," etc. — Under the *Texas* statute (Pasch. Dig. 1309, 1310), requiring the affidavit to state that all legal payments, credits, and offsets have been allowed, an affidavit alleging merely that all payments and credits have been allowed is insufficient. *Gillmore v. Dunson*, 35 Tex. 435. See also *Walters v. Prestidge*, 30 Tex. 65. See, however, *Crosby v. McWillie*, 11 Tex. 94.

Discount. — Under a statute requiring the affidavit to state that there is no set-off or discount against the demand, an affidavit alleging merely that there is no set-off and that the demand is justly due and wholly unpaid is insufficient. *Trabue v. Harris*, 1 Metc. (Ky.) 597.

But in *Taggart v. Tevanny*, 1 Ind. App. 339, it was held, under the *Indiana* statute (Elliot's Supp. Ind., § 385) requiring the affidavit to state that the sum claimed is justly due and wholly unpaid, "after deducting all credits, set-offs, and deductions," that an affidavit stating that the account "is correct, that no payments have been made thereon except the credits thereon given, that there are no set-offs against the same to her [affiant's] knowledge, that the balance shown in said account * * * is now justly due and owing," was sufficient.

2. Affidavit Ore Tenus. — *Kincheloe v. Gorman*, 29 Mo. 421; *Merchants, etc., Ins. Co. v.*

Linchey, 3 Mo. App. 588; *Overly v. Overly*, 1 Metc. (Ky.) 117; *Million v. Ohnsorg*, 10 Mo. App. 432.

3. Verification in Lifetime of Decedent. — In *Wilkerson v. Gordon*, 48 Ark. 360, *Cockrill, C. J.*, said: "The requirement of the statute for authenticating claims against the estates of deceased persons is not fulfilled by an affidavit made at some period in the lifetime of the decedent, to the effect that he was justly indebted to the affiant in a sum stated, and that nothing had been paid or delivered toward the satisfaction of the demand. Such an affidavit might be true when made, but not true if applied to the facts existing at the date of the debtor's death."

4. Affidavit on Belief. — *Trabue v. Harris*, 1 Metc. (Ky.) 597. See, however, *Story v. Story*, 32 Ind. 137.

5. Need Not State that Affiant's Oath Is of His Own Knowledge. — In *Sherley v. Sherley*, (Ky. 1891) 17 S. W. Rep. 628, it was held that an affidavit that the claim was just and true was sufficient. In this case *Holt, C. J.*, said: "Undoubtedly the witness must speak from his own knowledge; but if he says the claim is just and correct, this is equivalent to saying that he knows it is so." See also *Keesee v. Beckwith*, 32 Tex. 731.

Kentucky Stat., § 3870, expressly requires the affidavit to state the reasons why the affiant believes the claim to be just, and an affidavit which fails to do so is insufficient. *Dewhurst v. Shepherd*, (Ky. 1897) 43 S. W. Rep. 253.

6. Mistake in Decedent's Name. — *Beene v. Collengerger*, 38 Ala. 647, wherein an affidavit describing the claim as a just claim, as charged against the estate of Jesse Beene instead of Benjamin Beene, was held insufficient.

7. When Signing by Affiant Not Necessary. — *Mahan v. Owen*, 23 Ark. 347, *following Gill v. Ward*, 23 Ark. 16; *Shelton v. Berry*, 19 Tex. 154, 70 Am. Dec. 326; *Alford v. Cochrane*, 7 Tex. 485. *Compare Lanier v. Taylor*, (Tex. Civ. App. 1897) 41 S. W. Rep. 516.

Statutes Stated. — The effect of a failure to present a claim to the executor or administrator is to be determined by the statutes of the several states. In some jurisdictions the effect of a noncompliance with the statute is an absolute extinguishment of the debt,¹ while in others only the recovery of the debt against the estate is prevented;² and in others again it is a prerequisite to the right of the claimant to bring an action thereon against the executor or administrator.³ Under some statutes, the only effect is to relieve the executor or administrator from liability to the creditor in regard to assets administered previous to the presentation of the claim.⁴ And under some enactments the failure to present the claim merely deprives the creditor of the right to share in the assets of the estate inventoried or accounted for previous to the time the claim is presented, or limits his right to a recovery to such assets as come into the hands of the administrator after the expiration of the time.⁵

What Property Regarded as New Assets. — As a general rule no property can be

1. Debt Extinguished. — In *Gookin v. Sanborn*, 3 N. H. 491, it was held, under a statute providing that the "demand shall be extinguished and the creditor totally barred from recovering the same," that sureties on an administrator's bond were in no way liable to a creditor who failed to present his claim on account of a devastavit by the administrator, though the creditor recovered a judgment on the claim against the administrator.

2. Bars Recovery Against Estate. — In *Doe v. McLoskey*, 1 Ala. 708, it was held, under a statute providing that claims not presented shall be "forever barred from a recovery," that the failure to present a claim secured by mortgage would not prevent the enforcement of the mortgage.

In *Whitmore v. San Francisco Sav. Union*, 50 Cal. 145, it was held, under a statute providing that claims not presented "shall be barred forever," that the failure to present a claim did not operate as an extinguishment of the debt as payment would have done, and that a creditor holding collateral securities for a debt which he had failed to present would not be required to surrender such securities to the estate, without payment of his claim. See also *Sichel v. Carrillo*, 42 Cal. 493, wherein the failure to present a note against the estate of the maker was held not to release or discharge a mortgage by a third person given to secure the payment of the note.

A creditor of an estate who has failed to present his claim is not subrogated to the rights of a surety under a mortgage given by the decedent for his indemnity. *Watson v. Rose*, 51 Ala. 292.

3. Prerequisite to Action. — *McDonald v. McElroy*, 60 Cal. 484; *Eustace v. Jahns*, 38 Cal. 23; *Cowgill v. Dinwiddie*, 98 Cal. 481; *Dodson v. Nevitt*, 5 Mont. 518; *Zachary v. Chambers*, 1 Oregon 321.

In Iowa claims for less than twenty-five dollars must be presented to the executor or administrator before suit can be brought thereon. *Galloway v. Trout*, 2 Greene (Iowa) 595.

4. For Benefit of Administrator as to Assets Administered Upon. — *Yerby v. Matthews*, 26 Ga. 549; *Grey v. Lewis*, 79 Ky. 453; *Hantzsch v. Massolt*, 61 Minn. 361; *Dodson v. Sevars*, 52 N. J. Eq. 611; *Baggott v. Boulger*, 2 Duer (N. Y.) 160; *O'Connor v. Gifford*, 6 Dem. (N. Y.) 71; *Mallard v. Patterson*, 108 N. Car. 255;

Cooper v. Cherry, 8 Jones L. (53 N. Car.) 323; *Morris v. Syme*, 88 N. Car. 453; *Rogers v. Grant*, 88 N. Car. 440.

Where the executor pleads such statute he will be held to strict proof that he advertised as required by the statute for creditors to present their claims within the time specified. *Gilliam v. Willey*, 1 Jones Eq. (54 N. Car.) 128.

5. Property Not Inventoried — Recovery Against Barred. — *Thorn v. Watson*, 10 Ill. 26; *Judy v. Kelley*, 11 Ill. 211; *People v. White*, 11 Ill. 341; *Rowan v. Kirkpatrick*, 14 Ill. 1; *Sloo v. Pool*, 15 Ill. 47; *Stillman v. Young*, 16 Ill. 318; *Tillson v. Ward*, 46 Ill. App. 179; *Wingate v. Pool*, 25 Ill. 118; *Russell v. Hubbard*, 59 Ill. 335; *Shephard v. Rhodes*, 60 Ill. 301; *Shepard v. National Bank*, 67 Ill. 292.

Claims not presented are entitled to share in assets subsequently inventoried. *Wilding v. Rhein*, 12 Ill. App. 384; *Blanchard v. Williamson*, 70 Ill. 647.

Property "Accounted For." — In *Durston v. Pollock*, 91 Iowa 668, it was held that when a resident of Illinois died, leaving lands in Iowa which were separately devised, his executor, by probating the will in Iowa so as to give effect to the devise, "accounted for" the lands so as to place them beyond the reach of creditors who had not filed their claims within the required time.

Ancillary Administration. — Where a creditor resident in the state in which primary administration was granted fails to file his claim within the time required by statute, it has been held that he will be barred from enforcing his claim against property in another state. *Durston v. Pollock*, 91 Iowa 668.

Time of Discovery. — It is not necessary that property not inventoried or accounted for be discovered before a judgment can be rendered against the administrator; but the creditor is entitled to a special judgment, payable out of assets thereafter to be inventoried, corresponding to the common-law judgment *quando acciderint*. *Bradford v. Jones*, 17 Ill. 93; *Russell v. Hubbard*, 59 Ill. 335; *Shepard v. National Bank*, 67 Ill. 292; *Darling v. McDonald*, 101 Ill. 370; *Stone v. Clarke*, 40 Ill. 411; *Peacock v. Haven*, 22 Ill. 23.

By Whom Discovered. — Nor is it material that the creditor should himself have discovered the assets. *Shepard v. National Bank*, 67 Ill. 292.

considered new assets which has been in the hands and under the control of the administrator, though it may have assumed or been converted into a new form.¹

b. CLAIM NOT PRESENTED AS OFFSET. — The question whether a claim not presented within the time designated by statute can be used by the creditor as a set-off in an action against him by the executor or administrator of the decedent, depends, of course, upon the penalty imposed by the statutes of the several states upon the failure to present the claim.

Claim Not Available as Set-off. — It has been held, under statutes providing that claims not filed shall be forever barred, that claims not filed are not available as set-offs.² In some states the statutes expressly provide that the creditor shall be barred from setting off the claim unless it is filed.³

Available as Set-off. — In most jurisdictions, however, if the creditor does not care to make a substantive claim against the estate, but simply desires to use his claim as a protection against any claim which the estate may set up against him, he may wait until sued by the estate, and then file his claim in set-off.⁴

Claims Must Be Mutual. — A creditor of the estate, however, cannot set off a claim due to him from the estate, against his indebtedness to the administrator arising out of transactions between himself and the administrator in the management of the estate, as the debts are not mutual.⁵

c. EFFECT ON LIABILITY OF THIRD PERSONS. — Where, in addition to the liability on the part of the estate of the decedent, there is also a liability to the creditor on the part of some other person, the failure of the creditor to present the claim against the estate will not relieve such third person from his liability for the payment of the debt.⁶

1. New Assets. — *Stearns v. Stearns*, 1 Pick. (Mass.) 157; *Fay v. Taylor*, 2 Gray (Mass.) 160; *Sturtevant v. Sturtevant*, 4 Allen (Mass.) 122; *Veazie v. Marrett*, 6 Allen (Mass.) 372; *Chenery v. Webster*, 8 Allen (Mass.) 76; *Bradford v. Forbes*, 9 Allen (Mass.) 365; *Alden v. Stebbins*, 99 Mass. 616; *Robinson v. Hodge*, 117 Mass. 222.

2. Claim Not Presented Cannot Be Set Off. — *Parker v. Daughtry*, 111 Ala. 529; *Patrick v. Petty*, 83 Ala. 420; *Shelton v. St. Clair*, 64 Ala. 565; *Walker v. Tyson*, 52 Ala. 593; *Bell v. Andrews*, 34 Ala. 538; *Murdock v. Rousseau*, 32 Ala. 611; *Walker v. Byers*, 19 Ark. 323; *Jones v. Jones*, 21 N. H. 219; *Ewing v. Griswold*, 43 Vt. 400; *Soule v. Benton*, 44 Vt. 309; *White v. Fitzgerald*, 19 Wis. 480.

3. Special Statutes. — Wis. Rev. Stat., § 3844; *Carpenter v. Murphey*, 57 Wis. 541; *Portz v. Schantz*, 70 Wis. 497; *How. Stat. Mich.*, § 5888; *Quinn v. McGovern*, 97 Mich. 114; *Minn. Laws 1889*, c. 46, § 113.

In *Gerditzen v. Cockrell*, 52 Minn. 501, the defendant was permitted to file a counterclaim in an action by an administrator after a final order of distribution had been made.

4. Failure to Present Claim Does Not Affect Right to Set-off — *Connecticut.* — *Berrigan v. Pearsall*, 46 Conn. 274.

Illinois. — *Peacock v. Haven*, 22 Ill. 23.

Iowa. — *Ware v. Howley*, 68 Iowa 633.

Maine. — *Rogers v. Rogers*, 67 Me. 456.

Massachusetts. — *Bigelow v. Folger*, 2 Met. (Mass.) 255; *Knapp v. Lee*, 3 Pick. (Mass.) 460; *M'Donald v. Webster*, 2 Mass. 498. Compare *Lovell v. Nelson*, 11 Allen (Mass.) 102, 87 Am. Dec. 706.

Missouri. — *Stiles v. Smith*, 55 Mo. 363; *Lay v. Mechanics' Bank*, 61 Mo. 72.

Oklahoma. — *Murphy v. Colton*, 4 Okla. 181.

Reasons of Doctrine. — In *Stiles v. Smith*, 55 Mo. 363, *Wagner, J.*, in discussing *Wagner's Statutes*, p. 102, § 2, which provides that all demands against the estate not exhibited within two years shall be forever barred, said: "The statute applies to and contemplates cases where the creditor is the actor, and himself moves in the matter of getting the allowance. There he must proceed within a certain time or be forever barred. But a person may well have a demand against an estate, and knowing that he is also indebted to the estate, neglect to prove up the same, supposing that the amounts are about equal, and that when he is proceeded against he can plead his demand as a set-off, and thus determine the whole matter in one suit. If in such a case the administrator should wait till after two years had expired before instituting such an action, it was certainly never designed or intended that the creditor should be deprived of a just or lawful claim."

5. Mutuality of Debt Essential. — In *Harris v. Taylor*, 53 Conn. 500, it was held that when the defendant occupied under the plaintiff as administrator land belonging to the estate he could not set off a debt due him from the estate against the claim of the plaintiff for rent. See also *Nichols v. Dayton*, 34 Conn. 65.

6. Liability of Third Person Not Affected. — *Sichel v. Carrillo*, 42 Cal. 493.

Surety Not Discharged. — A surety on a claim due from the estate of a decedent is not dis-

d. WHO MAY TAKE ADVANTAGE OF FAILURE TO PRESENT CLAIM. — The failure of a creditor to present his claim may be taken advantage of not only by the executor or administrator, but also by the heirs, devisees, and distributees, or by other creditors of the estate.¹

e. UPON JURISDICTION OF FEDERAL COURTS. — The statutes of the several states requiring claims against a decedent's estate to be presented to the executor or administrator, or to the probate court for allowance, and prohibiting the bringing of actions against the executor or administrator, do not prevent a nonresident creditor from suing the executor or administrator in the federal courts;² but after a nonresident creditor has recovered judgment in the federal court, where the state statute places the whole estate of a decedent in the hands of the probate court for distribution among creditors, execution cannot issue from the federal court, but the judgment creditor must proceed under the procedure of the state statute to secure payment of his judgment.³

IV. DETERMINATION AND ENFORCEMENT OF CLAIMS — 1. Common-law System.

— At common law, claims against the estates of decedents were determined and enforced, when not voluntarily paid, by actions in courts of general jurisdiction brought by each creditor against the executor or administrator. And where these remedies were inadequate, and it was desirable to have a discovery of assets or a ratable distribution of assets among creditors, resort was had to a court of equity, which possessed an inherent jurisdiction for administering the assets of a testator or intestate, originating in the inefficiency of the ordinary tribunals.⁴

2. American System. — In the *United States*, however, to facilitate the

charged by the failure of the creditor to present his claim against the estate of the decedent. *M'Broom v. Governor*, 6 Port. (Ala.) 32; *Minter v. Branch Bank*, 23 Ala. 762, 58 Am. Dec. 315; *Hooks v. Branch Bank*, 8 Ala. 580; *Ashby v. Johnston*, 23 Ark. 163, 79 Am. Dec. 102; *Padgett v. State*, 45 Ark. 495; *Smith v. Smithson*, 48 Ark. 261; *Bull v. Coe*, 77 Cal. 54; *Los Angeles County v. Lankershim*, 100 Cal. 525; *Johnson v. Planters' Bank*, 4 Smed. & M. (Miss.) 171, 43 Am. Dec. 480; *Cohea v. Sinking Fund Com'rs*, 7 Smed. & M. (Miss.) 441; *Nashville Bank v. Campbell*, 7 Yerg. (Tenn.) 353; *Reeves v. Pulliam*, 7 Baxt. (Tenn.) 119; *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57.

In *Illinois*, however, it has been held necessary, under the statute of 1869, to present the claim against the estate of the principal in order to save the remedy against the surety. *Curry v. Mack*, 90 Ill. 606; *Tipton v. Carrigan*, 10 Ill. App. 318; *Huddleston v. Francis*, 124 Ill. 195, *affirming* 26 Ill. App. 224. Compare *House v. School Trustees*, 83 Ill. 368.

Nor does the failure to present the claim release one surety from liability to contribution to another who paid the debt. *Evans v. Evans*, 16 Ala. 465; *Hathaway v. Davis*, 33 Cal. 161.

Guarantor Not Discharged. — *Borchsenius v. Canutus*, 100 Ill. 82.

1. Heir May Take Advantage of Statute. — *Farris v. Stoutz*, 78 Ala. 130; *Thrash v. Sumwalt*, 5 Ala. 13; *People v. Brooks*, 22 Ill. App. 594; *Hill v. Townley*, 45 Minn. 167; *Hill v. Nichols*, 47 Minn. 382; *Selover v. Coe*, 63 N. Y. 438; *Peck v. Wheaton*, Mart. & Y. (Tenn.) 353; *Graham v. Vining*, 2 Tex. 433; *Gaston v. Boyd*, 52 Tex. 282.

Devisees, also. *May v. Parham*, 68 Ala. 253; *Farris v. Stoutz*, 78 Ala. 130.

Creditors. — And it seems that creditors even may take advantage of the failure of another creditor to present his claim. *M'Broom v. Governor*, 6 Port. (Ala.) 32.

2. Jurisdiction of Federal Court Not Affected. — *Hartman v. Fishbeck*, 18 Fed. Rep. 291; *Union Bank v. Vaiden*, 18 How. (U. S.) 503; *Payne v. Hook*, 7 Wall. (U. S.) 425; *Green v. Creighton*, 23 How. (U. S.) 90; *Heaton v. Thatcher*, 59 Fed. Rep. 731; *Rio Grande Co. v. Gomila*, 132 U. S. 478, *Lawrence v. Nelson*, 143 U. S. 215.

3. Williams v. Benedict, 8 How. (U. S.) 107, wherein *Grier, J.*, said: "The jurisdiction of [the probate court] has attached to the assets; they are *in gremio legis*. And if the marshal were permitted to seize them under an execution, it would not only cause manifest injustice to be done to the rights of others, but be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction." See also *Yonley v. Lavender*, 21 Wall. (U. S.) 276.

Execution Levied Prior to Decedent's Death. — Where, however, execution has been levied upon the property prior to the decedent's death, the probate laws of the state do not withdraw it from the operation of the execution, but the property remains in the custody of the federal court to be applied in satisfaction of the judgment. *Rio Grande Co. v. Gomila*, 132 U. S. 478.

4. Adams Eq. 250; Pharis v. Leachman, 20 Ala. 662. See also *ENCYC. OF PL. AND PR.*, titles *CREDITORS' BILLS*, vol. 5, p. 388; *EXECUTORS AND ADMINISTRATORS*, vol. 8, p. 650; *PROBATE AND ADMINISTRATION*.

speedy and equitable settlement of estates and for the protection of executors and administrators, the common-law system of determining and enforcing claims against the estate has been almost entirely abrogated by statutes vesting in special courts, known as probate courts, surrogate's courts, etc., jurisdiction to hear and determine the validity of claims against the estate in a summary manner, thus doing away with the technicalities of the common-law system and at the same time reserving to the parties the right of appeal from such tribunals to courts of general jurisdiction.¹

Allowance of Claims by Executors. — Under this system, after a claim has been duly presented to the executor or administrator he is authorized in a number of the jurisdictions to allow the same, if satisfied that it is a just and proper claim against the estate; the allowance by the executor or administrator, however, is not generally conclusive against the estate.²

Allowance with Approval of Probate Court. — In other jurisdictions the allowance of a claim by the executor or administrator must be approved by the probate court before it is payable from the assets of the estate;³ but even after a claim has been approved by the probate court its payment cannot, as a general rule, be enforced, without a further order of the court directing its payment.⁴

Allowance by Probate Court. — In still other jurisdictions the probate court or

1. See the cross-references given in the last note.

2. Allowance by Representative—Conclusiveness Against Estate. — In some jurisdictions the allowance of a claim by the executor or administrator is not conclusive against the estate. *Webster v. Le Compte*, 74 Md. 249; *Miller v. Dorsey*, 9 Md. 317; *Thomas v. Chamberlain*, 39 Ohio St. 121.

Whereas, in other jurisdictions it appears to be so in the absence of fraud on the part of the creditor. *Prudhomme's Succession*, 23 La. Ann. 228; *Richmond's Succession*, 35 La. Ann. 858; *Beeman's Succession*, 47 La. Ann. 1355.

It has been held that the administrator may, at any time before the distribution to claimants, make such an admission of the validity of a claim as will bind himself and all parties interested in the estate. *Wright v. Beirne*, 2 Dem. (N. Y.) 539.

Burden of Proof. — Where a claim has been allowed by the administrator, the burden of proof is upon a person objecting to its allowance. *Matter of Le Baron*, 67 How. Pr. (N. Y. Surrogate Ct.) 346.

What Constitutes Allowance—Failure to Reject. — The mere failure of an administrator to reject a claim within a reasonable time is not an allowance of the claim. *Schuetz v. Morrette*, 146 N. Y. 137, reversing 81 Hun (N. Y.) 518; *Cooper v. Felter*, 6 Lans. (N. Y.) 485; *In re Doran*, (Surrogate Ct.) 38 N. Y. Supp. 544. See, however, *Underhill v. Newburger*, 4 Redf. (N. Y.) 499; *Matter of Callahan*, 87 Hun (N. Y.) 210; *Lambert v. Craft*, 98 N. Y. 342; *Matter of Miller*, 2 Connolly (N. Y.) 134.

Enumerating a Claim in an Application for the sale of the property of the estate is an allowance of the claim. *Smock v. Bouse*, 1 Ohio Cir. Dec. 293; *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852.

Note by Executor. — The giving of a note by an executor in payment of a claim asserted against the estate is not an allowance of the claim. *Price v. McIver*, 25 Tex. 769, 78 Am. Dec. 558.

Payment of Part of a Claim without disputing the balance has been held an allowance of the claim. *Thomas v. Chamberlain*, 39 Ohio St. 112.

3. What Constitutes Approval by Probate Court. — In *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852, it was held that the granting of an application by an administrator for an order of sale for the payment of a debt set out in the application was an approval of the allowance.

Effect of Approval by Probate Court. — The approval by the probate judge of a claim allowed by the representative is generally said to have the force and effect of a judgment. *Tate v. Norton*, 94 U. S. 746; *Matter of Hidden*, 23 Cal. 362; *Snelling v. Kroger*, 89 Iowa 247; *Pitner v. Flanagan*, 17 Tex. 7; *Howard v. Battle*, 18 Tex. 673; *Lott v. Cloud*, 23 Tex. 254; *Mosely v. Gray*, 23 Tex. 496; *Moore v. Hillebrant*, 14 Tex. 312, 65 Am. Dec. 118, *Smith v. Downes*, 40 Tex. 57; *Baker v. Rust*, 37 Tex. 242.

In some jurisdictions it is held, however, that the allowance by the executor and the approval by the probate court is not conclusive, as against other creditors, of the validity of the claims. *Mouillera's Estate*, 14 Mont. 245. See also *Matter of Hidden*, 23 Cal. 362.

Interest. — In *Matter of Glenn*, 74 Cal. 567, it was held that a claim allowed by the executor and approved by the probate court bore interest from the date of its approval. See, however, *Selby's Estate*, Myr. Prob. (Cal.) 125.

4. Not Enforceable until Decree of Court. — *Magraw v. McGlynn*, 26 Cal. 420, wherein it was held that the allowance of a claim against an estate by the executors and the probate judge is a judgment in no other sense than a determination of the estate's indebtedness, and that before it passes into a final judgment so as to be enforceable against the executor there must be a decree of the probate court directing it to be paid.

In *Fickle v. Snapp*, 97 Ind. 293, 49 Am. Rep. 449, Elliott, C. J., said: "It is one thing to obtain an allowance, and another thing to obtain a direction for the payment of the claim."

the commissioners appointed by the court are given plenary jurisdiction over the allowance of claims in the first instance, and claims instead of being first exhibited to the executor or administrator are presented to the probate court or the commissioners for allowance.¹

Claims Rejected by Executor. — Again, in case a claim is disallowed by the executor, the probate court is given power in most jurisdictions to hear and determine the validity of the claim in a summary manner.²

Action Required to Establish Claim. — In other jurisdictions the creditor to establish a claim which has been rejected must bring an action against the executor or administrator in some court of general jurisdiction.³

Claims of Executors. — At common law executors and administrators were allowed to retain from the assets of the estate for claims due to them, and the validity of their claims was determined on their accounting or when raised in an action by another creditor under their plea of retainer and *plene administravit*.⁴ Or, in the absence of statutory provision, a bill in equity would lie by one executor or administrator against his co-executors or co-administrators, to recover a claim against the estate.⁵

The Right of Retainer Has Been Abrogated in a great number of jurisdictions by statute, and executors and administrators are required to present their claims to the probate court for approval.⁶

1. *Connecticut*. — *Shelton v. Hadlock*, 62 Conn. 143.

Illinois. — *Ward v. Durham*, 134 Ill. 195; *Cohen v. Menard*, 31 Ill. App. 503.

Indiana. — *Fickle v. Snapp*, 97 Ind. 289, 49 Am. Rep. 449.

Maine. — *Rogers v. Rogers*, 67 Me. 456.

Michigan. — *Shurbun v. Hooper*, 40 Mich. 503; *Kimball v. Cannon*, 59 Mich. 290.

Minnesota. — *Lewis v. Welch*, 47 Minn. 193.

Vermont. — *Powers v. Powers*, 57 Vt. 49; *Noyes v. Phillips*, 57 Vt. 229.

Wisconsin. — *Ashley v. Eggers*, 59 Wis. 563; *Sanborn v. Perry*, 86 Wis. 361.

Effect of Allowance by Probate Court. — The allowance of a claim by the probate court has also the effect of a judgment, and when not appealed from is binding on all persons interested in the estate. *Barber v. Bowen*, 47 Minn. 118; *Lewis v. Welch*, 47 Minn. 193.

2. **Power of Court when Claim Rejected.** — In *Bellows v. Cheek*, 20 Ark. 424, it was held if the administrator on presentation of a claim duly authenticated, without allowing or rejecting it, indorses thereon a reference of the matter to the probate court, the claim will be regarded as rejected and the creditor may apply to the probate court for its allowance. See also *Randolph v. Ward*, 29 Ark. 238.

3. **Actions to Establish Claim.** — *Miller v. Dorsey*, 9 Md. 317; *Bowie v. Ghiselin*, 30 Md. 557; *Hensel v. International Bldg., etc., Assoc.*, 85 Tex. 215; *Price v. McIver*, 25 Tex. 769, 78 Am. Dec. 558; *Swan v. House*, 50 Tex. 650.

Rejection by One of Several Administrators. — It is sufficient that a claim was presented to and rejected by one of several administrators to authorize the institution of a suit to establish it. *Dean v. Duffield*, 8 Tex. 235, 58 Am. Dec. 108.

4. **Retainer by Executor or Administrator.** — *Payne v. Pusey*, 8 Bush (Ky.) 564.

5. **Suits Between Co-executors or Co-administrators.** — *Petty v. Young*, 43 N. J. Eq. 658; *Baker v. Baker*, 3 Munf. (Va.) 222.

6. **Retainer Abrogated — Presentation to Probate Court Necessary** — *California*. — *Crosby's Estate*, 55 Cal. 574; *Matter of Hildebrandt*, 92 Cal. 433.

Indiana. — *Hubbard v. Hubbard*, 16 Ind. 25; *Wright v. Wright*, 72 Ind. 149; *Bentley v. Brown*, 123 Ind. 552.

Massachusetts. — *Newell v. West*, 149 Mass. 520.

Missouri. — *Link v. Link*, 48 Mo. App. 345.

New York. — *Underhill v. Newburger*, 4 Redf. (N. Y.) 499; *Matter of Gardner*, 5 Redf. (N. Y.) 14; *Burnett v. Noble*, 5 Redf. (N. Y.) 69; *Matter of Saunder*, 4 Misc. Rep. (N. Y. Surrogate Ct.) 28; *Matter of Ryder*, 59 Hun (N. Y.) 618, 38 N. Y. St. Rep. 29; *Kearney v. McKeon*, 85 N. Y. 136.

Oregon. — *In re Houck*, 23 Oregon 10.

Rhode Island. — *Fenner v. Manchester*, 6 R. I. 140.

Texas. — *Wright v. Pate*, (Tex. 1886) 1 S. W. Rep. 661.

Vermont. — *Riley v. McInlear*, 61 Vt. 254.

Washington. — *Wilkins v. Wilkins*, 1 Wash. 87.

In *Newell v. West*, 149 Mass. 520, it was held that *Massachusetts* Pub. Stat., c. 136, §§ 6, 7, requiring executors and administrators to file their claims in the probate court for determination, applied to a claim not filed by the administrator until after his resignation and the appointment of an administrator *de bonis non*.

The *Washington* statute (2 Bollinger's Codes & Stat. 1897, § 6233; Code 1881, § 1472) providing that where a claim is disallowed by the representative or the probate judge, the claimant must sue the executor or administrator, requires an administrator, where his claim is disallowed, to resign and sue as any other creditor. *Wilkins v. Wilkins*, 1 Wash. 87.

In *Riley v. McInlear*, 61 Vt. 254, it was held that *Vermont* Rev. Laws, § 2115, providing for the appointment of commissioners to examine claims against estates of decedents and

3. Submission to Arbitration. — The common-law authority of an executor or administrator to submit to arbitration claims against the estate is well established.¹ This subject is fully treated under another title.²

4. Limitation of Actions on Rejected Claims — *a. IN GENERAL.* — Where a claim against a decedent's estate has been presented to an executor or administrator and by him rejected, the statutes in a number of the states require the creditor to bring an action, within a short period of time, generally ranging from three months to one year, in some court of general jurisdiction, against the executor to establish the claim, under penalty of the claim being barred.³

Control General Statutes of Limitations. — Such statutes have been held to control the general statutes of limitations.⁴

b. CONSTRUCTION OF STATUTE. — These statutes are generally said to be of a highly penal character instead of being statutes of repose. They are therefore to be strictly construed, and in order to entitle an executor or administrator to the benefit thereof the statutes must in all their essentials be complied with.⁵

c. THE PRESENTATION — **Sufficiency of.** — In order that the rejection of a claim may set in motion the statute as to actions on rejected claims there must have been a valid presentation.⁶

By Whom Presentation Must Be Made. — The presentation of a claim rejected must also have been made by a person authorized to do so, in order that the rejection may be operative to set in motion the statute.⁷

d. THE REJECTION — (1) *In General* — **Must Be Unequivocal and Absolute.** — In order that the statute may be set running, it is necessary that the rejection should be unequivocal and absolute; and the rule is fairly deducible from the authorities, that whatever may be the language or declaration of the executor or administrator to the claimant, if he does or says anything from which the claimant may reasonably infer that the determination to reject the claim is not final, but that it will be further examined or considered, either upon the vouchers already submitted by the creditor or such as may be thereafter pre-

authorizing the allowance of claims in favor of executors and administrators, and providing that claims not presented to commissioners shall be barred, preclude an executor, unless his claim was presented to and allowed by the commissioners, from obtaining credit therefor on his final accounting.

1. See the title **ARBITRATION AND AWARD**, vol. 2, p. 628.

2. See the title **EXECUTORS AND ADMINISTRATORS**.

3. See the statutes of the several states.

4. **General Statute of Limitations Controlled by Special Statute.** — In *Robbins v. Coffing*, 52 Conn. 118, it was held that where a claim not barred by the general statute of limitations is presented to and rejected by the administrator, the creditor has the full four months provided by the special statute for the commencement of actions on rejected claims, within which to commence his action, though in the meantime the claim would have been barred by the general statute of limitations. See also *Continental L. Ins. Co. v. Barber*, 50 Conn. 570; *Bradley v. Vail*, 48 Conn. 375. See, however, *Reynolds v. Collins*, 3 Hill (N. Y.) 36.

5. **Statute Strictly Construed.** — *Hoyt v. Bonnett*, 50 N. Y. 538; *Broderick v. Smith*, 3 Lans. (N. Y.) 26; *Elliot v. Cronk*, 13 Wend. (N. Y.) 39; *Kidd v. Chapman*, 2 Barb. Ch. (N. Y.) 422; *Calanan v. McClure*, 47 Barb. (N. Y.) 211; *Van Saun v. Farley*, 4 Daly (N. Y.) 167.

6. **Valid Presentation Essential.** — In *Coburn v. Harris*, 53 Md. 367, it was held that the presentation to the administrator must have been in the form contemplated by the statute in order that the rejection should start running the limitation as to an action against the administrator.

Claim Defectively Authenticated. — And it seems that where the authentication of a claim against the estate is fatally defective, the rejection of the claim does not set in motion the statute as to actions on rejected claims. *Crosby v. McWillie*, 11 Tex. 95.

Sufficiency of Presentation of Judgment. — In *Gaston v. McKnight*, 43 Tex. 619, it was held that the presentation of an abstract of a judgment which showed its date, amount, rate of interest, and the names of the parties, and was duly authenticated, was a sufficient presentation to put in operation the limitation of actions as to rejected claims.

7. **Presentation by Unauthorized Person.** — In *Henry v. Roe*, 83 Tex. 446, it was held that where a foreign executrix presents a claim against a decedent's estate before taking out ancillary letters of administration, the rejection of the claim so presented does not start running the statute of limitations against actions on rejected claims, as the foreign executrix had, at the time of the presentation of the claim, no authority to present the same. See also *Turner v. Ellicott*, 9 Md. 52.

sented, the claim is not rejected within the meaning of the statute.¹

Ground of Rejection. — The rejection must also be upon the ground that the debt or some part of it is not legally or equitably due.²

Rejection in Part. — It is not necessary, however, that the entire claim be rejected, in order that the statute may be set in motion as to rejected items in the claim.³ And it has been held that the allowance of only a portion of the claim was a sufficient rejection of the balance.⁴

Rejection After Allowance. — Where a claim has been allowed by the executor or administrator, he cannot afterwards reject the claim so as to set in motion the statute of limitations as to actions on rejected claims.⁵

(2) *By Whom Rejection May Be Made.* — For the purpose of setting in motion the statute of limitations against actions on rejected claims, the rejection may be made by one of several co-executors or co-administrators.⁶

The Attorney for the Estate has not, however, power to allow or reject claims, as the allowance or rejection of claims is an official act which must be performed by the executor or administrator.⁷ Still, however, he may perform the ministerial act of notifying the claimant that the claim has been rejected.⁸

(3) *Notice of Rejection.* — It is necessary in order to set the statute in

1. **Rejection Must Be Unequivocal and Final.** — *Cowgill v. Dinwiddie*, 98 Cal. 481; *Bradley v. Vail*, 48 Conn. 375; *Hoyt v. Bonnett*, 50 N. Y. 538; *Matter of Miller*, 2 Connoly (N. Y.) 134; *Kidd v. Chapman*, 2 Barb. Ch. (N. Y.) 414; *Barsalou v. Wright*, 4 Bradf. (N. Y.) 164; *Reynolds v. Collins*, 3 Hill (N. Y.) 36; *Calanan v. McClure*, 47 Barb. (N. Y.) 206.

Rejection of a claim is not shown by the fact that the executor said on presentation of the claim that he knew nothing about the justice of the demand, and that he had not looked into the affairs of the estate. *Elliot v. Cronk*, 13 Wend. (N. Y.) 39.

Qualified Rejection. — In *Hoyt v. Bonnett*, 50 N. Y. 538, reversing 58 Barb. (N. Y.) 529, a written notice served upon the defendant stating that as at present advised the executors declined to pay the claim, but further stating that as the executors had no other means of information they would be greatly obliged if the claimant would furnish them with a bill of particulars, was held not to be a sufficiently unequivocal rejection of the claim to start running the statute.

Non-Action upon Claim. — The failure of the executor or administrator to act upon or allow the claim will not start the statute running, but an actual rejection is necessary. *Ukiah Bank v. Shoemaker*, 67 Cal. 147; *Steward v. Hinkel*, 72 Cal. 187; *Bradley v. Vail*, 48 Conn. 385; *Kidd v. Chapman*, 2 Barb. Ch. (N. Y.) 414.

In *Steward v. Hinkel*, 72 Cal. 187, it was held that *California Code Civ. Proc.*, § 1496, providing that the neglect of an executor or administrator to indorse his allowance or rejection of the claim for ten days after its presentation may be deemed by the claimant a rejection after the tenth day, merely rendered such failure a rejection for the purpose of enabling the claimant to sue to establish his claim, and did not render it a rejection for the purpose of starting in motion the special statute of limitations against actions on rejected claims.

The neglect to allow a claim, however, may constitute a sufficient rejection to enable the claimant to sue for its establishment. *Ukiah*

Bank v. Shoemaker, 67 Cal. 147; *Steward v. Hinkel*, 72 Cal. 187.

Refusal to Allow Claim. — Rejection of a claim is sufficiently shown by the fact that the executor, upon presentation, distinctly refused to allow the claim and told the creditor to consider it as rejected. *Harter v. Taggart*, 14 Ohio St. 122.

2. **Rejection Must Be upon the Ground that the Claim Is Not Owing from the Estate.** — *Kidd v. Chapman*, 2 Barb. Ch. (N. Y.) 414.

Rejection for Failure to Indorse Credits. — In *Willis v. Talbert*, (Tex. 1889) 11 S. W. Rep. 535, however, it was held that the rejection of a claim on the ground that proper credits had not been indorsed thereon was sufficient to put in operation the limitation of the statute.

3. *Wintermeyer v. Sherwood*, 77 Hun (N. Y.) 193.

4. **Allowance of Part of Claim as a Disallowance of Balance.** — In *Consolidated Nat. Bank v. Hayes*, 112 Cal. 75, it was held that where a claim for a certain sum with "accrued interest" was filed and an allowance for only the principal sum made, this was tantamount to a rejection of the claim for interest, so as to start the statute running. *Compare Walkerly v. Bacon*, 85 Cal. 137.

5. **Rejection After Allowance — Effect.** — *Thomas v. Chamberlain*, 39 Ohio St. 112.

It is different, however, with regard to the four-years statute of limitation provided by the *Ohio Rev. Stat.*, § 6113. *Stewart v. McLaughlin*, 47 Ohio St. 555.

6. **Rejection by One of Several Co-administrators.** — *Coburn v. Harris*, 53 Md. 372. See also *Dean v. Duffield*, 8 Tex. 235, 58 Am. Dec. 108, wherein a rejection by one of several co-administrators was held sufficient to authorize a suit to establish the claim.

7. **Attorney May Not Reject.** — *Cowgill v. Dinwiddie*, 98 Cal. 481. See also *Hardy v. Ames*, 47 Barb. (N. Y.) 413.

8. **Attorney May Notify of Rejection.** — *Cowgill v. Dinwiddie*, 98 Cal. 481; *Wintermeyer v. Sherwood*, 77 Hun (N. Y.) 193; *Selover v. Coe*, 63 N. Y. 438.

motion that notice of the rejection be given to the creditor.¹

c. NOTICE FOR PRESENTATION OF CLAIMS. — Where the statute requires the action on claims rejected by the executor or administrator, when presented "before or after" the publication of notice to creditors to present claims, to be brought within the specified time, the statute begins to run on rejection of a claim presented, though no prior notice to present claims had been given.²

f. SUSPENSION OF STATUTE. — It has been held that the statutes requiring actions on claims rejected by an executor or administrator to be brought within a specified time were not statutes of limitations, and therefore were not suspended by a statute providing generally for the suspension of statutes of limitations.³ The contrary, however, has also been held.⁴

g. WAIVER OF STATUTE. — An executor or administrator cannot waive the benefits of the statute requiring actions on rejected claims to be brought within a specified time, and therefore a rejected claim cannot be revived after the expiration of the specified time, by a second presentation and allowance.⁵

h. COMPUTATION OF TIME. — Where the statute requires the action to be brought within a specified time "after" rejection, the day of the rejection is excluded in computing the time.⁶

i. EFFECT OF STATUTORY BAR. — The statutes generally provide that the claim shall be forever barred unless the action is brought within the required time, and it is held that the statute operates as an absolute bar against the recovery of the claim either from the estate or from the heirs, distributees,

1. Notice of Rejection Essential. — In *Van Saun v. Farley*, 4 Daly (N. Y.) 167, Van Brunt, J., said: "The statute does not mean, by rejection, merely a mental emotion, but the action of the mind must be followed by some outward act by which the owner of the claim may be apprised of the result arrived at." See also *Bradley v. Vail*, 48 Conn. 385; *Steward v. Hinkel*, 72 Cal. 190; *Cowgill v. Dinwiddie*, 98 Cal. 481.

Notice to Attorney of Creditor. — In *Van Saun v. Farley*, 4 Daly (N. Y.) 165, it was held that notice to the attorney of the creditor employed to present the claim was not sufficient to set in motion the statute.

2. Notice for Presentation. — *Snell v. Dale*, 63 Hun (N. Y.) 626, 43 N. Y. St. Rep. 498; *Wintermeyer v. Sherwood*, 77 Hun (N. Y.) 196; *Field v. Field*, 77 N. Y. 294. See, however, *Salomon v. Heichel*, 4 Dem. (N. Y.) 176; *Broderrick v. Smith*, 3 Lans. (N. Y.) 26; *Clark v. Sexton*, 23 Wend. (N. Y.) 479.

3. Statute Not Suspended by Statute Suspending Statutes of Limitations. — In *Cotton v. Jones*, 37 Tex. 34, it was held that the statute requiring actions on rejected claims to be brought within ninety days was not properly a statute of limitations, and therefore Pasch. Dig., art. 1311, providing for the suspension of statutes of limitations during the time a defendant is absent from the state, did not apply. The court in this case said that the statute in regard to actions on rejected claims partook rather of the statutory provisions providing for new trials, appeals, etc. See also *Stanfield v. Neill*, 36 Tex. 688, wherein it was held that the Texas Constitution of 1869, suspending the statute of limitations during the period of the civil war, did not apply to the statute as to actions on rejected claims.

4. Contrary Doctrine. — In *Hayden v. Pierce*,

144 N. Y. 512, it was held that Code Civ. Proc., § 401, suspending the running of limitations where the defendant is absent from the state when the cause of action accrues, applied and suspended in such case the statute requiring actions on rejected claims to be brought within a specified time.

5. Renewed Presentation Does Not Revive Claim. — *Flynn v. Dieffendorf*, 51 Hun (N. Y.) 194; *Willis v. Talbert*, (Tex. 1889) 11 S. W. Rep. 535. See also *Yarborough v. Leggett*, 14 Tex. 677.

Effect of Renewed Presentation. — A renewed presentation, though within the statutory period for the commencement of the action, does not affect the running of the statute from the time of the first presentation. *Wintermeyer v. Sherwood*, 77 Hun (N. Y.) 197. See also *Gillespie v. Wright*, 93 Cal. 169.

Identity of Claim. — In *Morris v. Cude*, 57 Tex. 337, where a claimant, after the presentation and rejection of a claim based on a note executed by the decedent, erased the names of the indorsers upon the note and then again presented the claim, it was held that the two claims were identical.

In *Titus v. Poole*, 145 N. Y. 414, 60 Hun (N. Y.) 1, the claimant presented a claim against the decedent's estate as arising out of the decedent's fraud in the sale of a stock certificate, and subsequently, after the rejection of the claim as founded on the decedent's warranty of the value of the stock, it was held that the claims were identical and that the second presentation would not prevent the statute as to actions on rejected claims from running against the claim upon its rejection as first presented.

6. Computation of Time — Day of Rejection Excluded. — *Hunter v. Lanius*, 82 Tex. 677.

For a full discussion of the question of the computation of time, see the title TIME.

devisees, or legatees.¹

V. PROPERTY LIABLE FOR PAYMENT OF DEBTS — 1. In General. — As a general rule all the property of a decedent is liable for the payment of his debts, though at common law his real estate could not be reached by simple contract creditors. This exception, however, was done away with by statute at an early date, and now every species of property, both real and personal, tangible and intangible, is assets for the payment of all the decedent's debts.²

2. Property Primarily Liable. — The personal property of the decedent, however, still remains the primary fund for the payment of his debts, and a resort to the real estate cannot be had until the personal estate has been exhausted.³

3. Marshaling Assets. — Though creditors of the estate have the right to proceed against the entire estate of the decedent, irrespective of any testamentary provisions,⁴ yet the assets of the estate will be marshaled by a court of equity in order to preserve the rights of others interested in the estate, and as a general rule will be applied to the payment of debts in the following order: (1) personal estate, with the exception of specific bequests or such as is exempt; (2) the real estate, if any, appropriated by the will as a fund for the payment of debts; (3) the descended real estate, whether acquired before or after the execution of the will; (4) the land specifically devised.⁵

1. Statute an Absolute Bar. — *Zollickoffer v. Seth*, 44 Md. 359; *Coburn v. Harris*, 53 Md. 371; *Grange Union v. Burkhart*, 8 Oregon 51.

Heir Not Liable. — In *Selover v. Coe*, 63 N. Y. 438, it was held that the heir was not liable for claims barred by the failure of the claimant to sue within the specified time after the rejection of the claim by the executor or administrator.

2. See the title EXECUTORS AND ADMINISTRATORS.

3. Exhaustion of Personality Before Recourse to Realty — *United States*. — *Corbet v. Johnson*, 1 Brock. (U. S.) 77.

Alabama. — *Sharp v. Sharp*, 76 Ala. 312; *Hooper v. Hardie*, 80 Ala. 114; *Banks v. Speers*, 97 Ala. 560.

California. — *Stuart v. Allen*, 16 Cal. 473, 76 Am. Dec. 551.

Connecticut. — *Griswold v. Bigelow*, 6 Conn. 264.

Florida. — *Hays v. McNealy*, 16 Fla. 409.

Illinois. — *People v. Phelps*, 78 Ill. 147; *Hoffman v. Wilding*, 85 Ill. 453; *Young v. Wittenmyre*, 123 Ill. 303.

Indiana. — *Scott v. Morrison*, 5 Ind. 551; *Clarke v. Henshaw*, 30 Ind. 144; *Newcomer v. Wallace*, 30 Ind. 216.

Kentucky. — *Hall v. Sayre*, 10 B. Mon. (Ky.) 46.

Maryland. — *Hoye v. Brewer*, 3 Gill & J. (Md.) 153; *Wyse v. Smith*, 4 Gill & J. (Md.) 295; *Magruder v. Carroll*, 4 Md. 335; *Stevens v. Gregg*, 10 Gill & J. (Md.) 143; *Macgill v. Hyatt*, 80 Md. 253.

Mississippi. — *Stigler v. Porter*, 42 Miss. 449; *Foley v. McDonald*, 46 Miss. 238; *Anderson v. Newman*, 60 Miss. 532.

Missouri. — *Pearce v. Calhoun*, 59 Mo. 271.

New Hampshire. — *Tilton v. Tilton*, 41 N. H.

479.

New Jersey. — *Whitehead v. Gibbons*, 10 N. J. Eq. 230.

New York. — *Bloom v. Burdick*, 1 Hill (N. Y.) 130, 37 Am. Dec. 299; *Taylor v. Taylor*, 3 Bradf. (N. Y.) 54; *M'Kay v. Green*, 3 Johns.

Ch. (N. Y.) 56; *Topping's Estate*, 18 Civ. Pro. Rep. (N. Y. Surrogate Ct.) 115.

North Carolina. — *Blount v. Pritchard*, 88 N. Car. 445.

Pennsylvania. — *Walker's Estate*, 3 Rawle (Pa.) 229; *Ramsey's Appeal*, 4 Watts (Pa.) 71; *Risk's Appeal*, 110 Pa. St. 171.

Virginia. — *Garnett v. Macon*, 6 Call (Va.) 308; *Foster v. Crenshaw*, 3 Munf. (Va.) 514; *Elliott v. George*, 23 Gratt. (Va.) 780.

West Virginia. — *Laidley v. Kline*, 8 W. Va. 218.

See the title EXECUTORS AND ADMINISTRATORS.

4. *Magruder v. Carroll*, 4 Md. 335; *Hays v. Jackson*, 6 Mass. 151.

5. Order of Application of Assets — *England*. — *Tomkins v. Colthurst*, 1 Ch. Div. 626; *Pateron v. Scott*, 1 De G. M. & G. 531; *Farquharson v. Floyer*, 3 Ch. Div. 109.

Maryland. — *Alexander v. Worthington*, 5 Md. 471; *Goodburn v. Stevens*, 1 Md. Ch. 420.

Massachusetts. — *Hays v. Jackson*, 6 Mass. 149.

New Jersey. — *Whitehead v. Gibbons*, 10 N. J. Eq. 230; *Thomas v. Thomas*, 17 N. J. Eq. 356.

New York. — *Rogers v. Rogers*, 1 Paige (N. Y.) 188; *Rogers v. Rogers*, 3 Wend. (N. Y.) 503, 20 Am. Dec. 716; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312.

North Carolina. — *Elliott v. Posten*, 4 Jones Eq. (57 N. Car.) 433; *Wynns v. Burden*, 5 Jones Eq. (58 N. Car.) 377; *Robards v. Wortham*, 2 Dev. Eq. (17 N. Car.) 173, 22 Am. Dec. 738.

Pennsylvania. — *Pyott's Estate*, 160 Pa. St. 441.

South Carolina. — *Brown v. James*, 3 Strobb. Eq. (S. Car.) 24.

Vermont. — *Dunbar v. Dunbar*, 3 Vt. 472.

Virginia. — *Elliott v. Carter*, 9 Gratt. (Va.) 541.

See the title MARSHALING ASSETS.

Assumption of Mortgage. — When a mortgage is assumed by a purchaser of the land, the land is the primary fund for its payment. *Halsey v. Reed*, 9 Paige (N. Y.) 446.

VI. LIABILITY OF HEIR, DEVISEE, DISTRIBUTE, AND LEGATEE — 1. Common Law —*a. LIABILITY OF HEIR.* — At common law the heir was personally liable for the specialty debts of his decedent in which the heir was named. This liability, however, extended only to the value of the lands descended.¹ And the heir could be sued even though there was an executor with assets,² but he incurred no liability for the simple contract debts of his decedent, as payment of such debts was enforceable only from the personal estate of the decedent.³ And the liability of the heir for even the specialty debts of his decedent was terminated by his alienation of the land.⁴

b. LIABILITY OF DEVISEE. — The devisees, however, were in no way liable for the decedent's debts. The distinction between the liability of the heirs and of the devisees was based on the ground that the devisees took by purchase, whereas the heirs took by descent.⁵

c. LIABILITY OF DISTRIBUTE AND LEGATEE. — As the personal estate of the decedent passed to the executor or administrator, creditors of the estate could not enforce payment of the decedent's debts against the distributees or legatees even though they had secured from the executor or administrator assets of the estate, but the creditors in such a case were confined solely to their remedy against the executor or administrator.⁶

2. Statutory Modification. — To prevent the injustice of the common-law rule permitting a testator to devise his lands, without charging them with the

1. Liability of Heir to Extent of Lands Descended. — *Dyke v. Sweeting*, Willes 585; *Payson v. Haddock*, 8 Biss. (U. S.) 299; *Hays v. Jackson*, 6 Mass. 149; *Sauer v. Griffin*, 67 Mo. 654; *Ticknor v. Harris*, 14 N. H. 282, 40 Am. Dec. 186; *Hall v. Martin*, 46 N. H. 337; *New Jersey Ins. Co. v. Meeker*, 37 N. J. L. 295; *Whitaker v. Young*, 2 Cow. (N. Y.) 569. See also *Jefferson v. Morton*, 2 Saund. 7, note 4.

2. Davy v. Pepys, Plowd. 438, *Dyer* 81a, note 62; *Davies v. Churchman*, 3 Lev. 189; *Galton v. Hancock*, 2 Atk. 426.

In *Hutchinson v. Stiles*, 3 N. H. 404, it was held that the heir could only be sued in case there was no remedy against the executor or administrator.

3. Simple Contract Debts — Heir Not Liable. — *Washington v. Sasser*, 6 Ired. Eq. (41 N. Car.) 339. See *supra*, this title, *Property Liable for Payment of Debts*.

4. Alienation by Heir — Effect. — *People v. Brooks*, 123 Ill. 248; *Whitelsey v. Brohammer*, 31 Mo. 108; *Ticknor v. Harris*, 14 N. H. 282, 40 Am. Dec. 186; *New Jersey Ins. Co. v. Meeker*, 37 N. J. L. 295.

Alienation After Suit commenced against the heir would not relieve him from liability to the extent of the land alienated. *Whitelsey v. Brohammer*, 31 Mo. 108, *quoting with approval* *Coke* fol. 102b.

5. Devisee Not Liable for Decedent's Debts. — *Wilson v. Knubley*, 7 East 128; *Plasket v. Beeby*, 4 East 485; *Plunket v. Penson*, 2 Atk. 292; *People v. Brooks*, 123 Ill. 248; *Rogers v. Farrar*, 6 T. B. Mon. (Ky.) 421; *Hays v. Jackson*, 6 Mass. 149; *State v. Miller*, 18 Mo. App. 41; *State v. Pohl*, 30 Mo. App. 321; *Sauer v. Griffin*, 67 Mo. 654; *Ticknor v. Harris*, 14 N. H. 272, 40 Am. Dec. 186; *New Jersey Ins. Co. v. Meeker*, 37 N. J. L. 296.

In *Rogers v. Farrar*, 6 T. B. Mon. (Ky.) 422, *Owsley, J.*, said: "There is no principle of the common law which has been more uniformly recognized by elementary writers and

jurists than that which precludes a creditor of the testator from maintaining an action either against the devisee of lands or the legatee of chattels."

6. Legatee Not Liable. — *Rogers v. Farrar*, 6 T. B. Mon. (Ky.) 422; *State v. Miller*, 18 Mo. App. 41; *Hall v. Martin*, 46 N. H. 342.

In *Ticknor v. Harris*, 14 N. H. 272, 40 Am. Dec. 186, it was held that a statute giving creditors of a decedent a remedy against the heirs and devisees to the extent of the assets received by them gave no remedy against a legatee. See also *Rogers v. Farrar*, 6 T. B. Mon. (Ky.) 421.

Distributee — Not Liable. — In *Hall v. Martin*, 46 N. H. 346, *Perley, C. J.*, said: "It would not be easy to name any rule of the common law more thoroughly established or more familiar in practice than this, that every claim of a creditor on the personal estate of a deceased debtor must, in a suit at law, be made against the executor or administrator; and in the present inquiry it is not unimportant to bear in mind that this is not a mere rule of practice or of pleading affecting the remedy only; it is a rule which determines the ultimate rights of the parties entitled; one of those established rules of property which have become elementary and axiomatic in the common law. For, by the common law, when the distributee had received his share of the personal estate under a final decree closing the administration, his title to the property was absolute and subject to no claim of any creditor." In this case the court, though recognizing the principle that the legatee or distributee was not liable for the debts of the decedent, still held, under a statute making the personality as well as the realty descend to the heir, that he was liable for his decedent's debts, not only to the extent of the realty descended, but also to the extent of the personality. See, however, *People v. Brooks*, 123 Ill. 246; *Howes v. Bigelow*, 13 Mass. 384.

payment of his debts, the statute of 3 and 4 W. & M., c. 14, was passed, by which the lands in the hands of a devisee were made assets. This statute has generally been held not to be in force in the United States;¹ still in all the states of the Union real estate has been made assets for the payment of the decedent's debts, not only by proceedings in the probate court, but also in a great number of the jurisdictions, by a direct action against the heirs and devisees.²

VII. PERSONAL LIABILITY OF REPRESENTATIVE. — The personal liability of the executor or administrator for the debts of the decedent is fully treated in connection with the duties and liabilities of personal representatives, under another title.³

DEC. — See note 4.

DECAY. — "Decay" is defined to be a gradual failure of health, strength, soundness, prosperity; any species of excellence or perfection declined to a worse or less perfect state.⁵

DECEASE. (See *ante*, DEATH, and references there given; and see DIE.) — "Decease" is to depart from this life, to die.⁶

DECEDENT. (See *ante*, DEATH; and the title DEBTS OF DECEDENTS, and the references there given.) — The word "decedent" is defined to be a deceased person.⁷

1. *People v. Brooks*, 123 Ill. 249; *Sauer v. Griffin*, 67 Mo. 654. See, however, *Ticknor v. Harris*, 14 N. H. 283, 40 Am. Dec. 186; *Probate Judge v. Brooks*, 5 N. H. 84.

2. For a Full Discussion of the liability of heirs and distributees for the debts of their decedents, see the title SUCCESSION. And for the liability of devisees and legatees, see the titles LEGACIES AND DEVISES; WILLS.

3. See the title EXECUTORS AND ADMINISTRATORS.

4. **Abbreviation.** — See generally the title ABBREVIATIONS, vol. I, pp. 97, 99.

5. *Fisk v. Spring*, 25 Hun (N. Y.) 369, *quoting* Webster's Dict.

Decayed — Equivalent to Rotten. — *Decayed*, in the condemnation of a vessel, was held to be the equivalent of "rotten." The court said: "The word *decay*, in its appropriate sense, shows the true source of unsoundness or rottenness in the particular instance." *Steinmetz v. U. S.*, 2 S. & R. (Pa.) 293.

6. *Matter of Zeph*, 50 Hun (N. Y.) 524.

Deceased Person. — The *New York Code of*

Civil Procedure provided that upon the hearing upon the merits of a special proceeding, the person interested should not be examined as a witness on his own behalf against a representative of a *deceased* person, or a person deriving his title from, through, or under the deceased person, by assignment or otherwise, concerning a personal transaction between the witness and a *deceased* person. It was held that the words "*deceased* person," last used, applied to the person whose estate is involved in the proceeding, and not to any other *deceased* person. *Matter of De Baun*, 1 Connolly (N. Y.) 203. And see the title WITNESSES.

7. *Matter of Zeph*, 50 Hun 524, in which case it was held that the word *decedent*, as used in the Code of Civil Procedure of *New York* providing for the winding up of the estate of a *decedent*, was intended by the law as indicating one who has departed from this life, one who has died, and not as including civil death. *Avery v. Everett*, 36 Hun 6, 110 N. Y. 317. And see the title CIVIL DEATH, vol. 6, p. 64.

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